



# OFFICE OF THE PROCUREMENT OMBUDSMAN



2008-2009  
ANNUAL REPORT

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THE MINISTER OF PUBLIC WORKS AND GOVERNMENT SERVICES

Mr. Minister,

Pursuant to section 22.3(1) of the *Department of Public Works and Government Services Act*, it is an honour and a pleasure for me to submit this first-ever Report of the Procurement Ombudsman.

Yours sincerely



Shahid Minto  
Procurement Ombudsman

Ottawa, June 17th, 2009

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Shahid Minto MA, LL.B, CA,  
Procurement Ombudsman

## MESSAGE FROM THE PROCUREMENT OMBUDSMAN

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### Creating Trust

The position of the Procurement Ombudsman was created by amendments to the *Department of Public Works and Government Services Act* enacted pursuant to the *Federal Accountability Act*. I was appointed the Ombudsman Designate in September 2007 and my appointment as Procurement Ombudsman was confirmed in May 2008. At that time the Office of the Procurement Ombudsman became fully operational with the coming into force of the *Procurement Ombudsman Regulations*.

In 1977, I joined the Office of the Auditor General. I spent the next 28 years working in one of the most respected national audit offices in the world (and learning from four Auditors General). I was also privileged to be the first Chief Risk Officer in a federal department, mandated to ensure that all of the operations of Public Works and Government Services Canada were carried out in a fair and transparent manner.

*“The Government of Canada is committed to taking appropriate measures to promote fairness, openness and transparency in the bidding process for contracts with Her Majesty for the performance of work, the supply of goods or the rendering of services.”*

*– Financial Administration Act, s. 40.1*

The new role of Procurement Ombudsman gives me the opportunity to apply all of my professional training and experience to a uniquely challenging mandate, through which I see the very real possibility of establishing an office that will contribute to better procurement, better government and better value for all Canadians.

Over the years, procurement has become increasingly complex. There are more than 15 Acts of Parliament, a number of Regulations, and over 35 different policies related to procurement. There are also many key players involved, with various roles and responsibilities – including Treasury Board, operating and

program departments, the Department of Justice, and Public Works and Government Services Canada as a common service organization for contracting. The ultimate accountability for ensuring the integrity of the procurement process rests with the deputy heads of departments and agencies.

If departments and agencies don't have the necessary expertise or authority to enter into a specific contract – usually those of high risk or dollar value – then Public Works and Government Services Canada contracts on their behalf. It handles about 20% of the 300,000 contracts entered into by the federal government every year, on average, valued at approximately \$14 billion.

My Office will, in cooperation with other stakeholders, provide ideas to improve the federal procurement system. Starting with our commitment to smoothing out difficulties faced by suppliers and government officials whenever we can, we seek opportunities to reassure all stakeholders in federal procurement – suppliers, departments, central agencies, parliamentarians – that the procurement process is working as it should. Directed by the government's commitment to ensuring that procurement is fair, open and transparent, our business model provides a collegial and cooperative approach, to ensure the willing participation of all stakeholders in the ongoing search for excellence in public procurement.

When we all do our part successfully, the federal procurement system will work better for all stakeholders. Procurement will be faster, and better; there will be fewer complaints; it will be readily apparent that it is in fact fair, open and transparent; and Canadians will receive better value for money and better service delivery.

As soon as my office was created, suppliers started to contact us for assistance. Those contacts set the stage for the development of our organization, and have guided the work that is the subject of this Report.

Over the years, the Government has undertaken several reviews of procurement and developed recommendations to improve the system. Although some of these recommendations have been successfully implemented, many have failed to come to fruition. In fact, there are those who suggest that overall federal procurement is more cumbersome now than it was ten years ago. Few would argue that the system cannot and should not be improved.

The mandate given to my office has uniquely placed it to help the government achieve that improvement. We are not auditors required to focus on identifying and reporting on deficiencies. We are not a tribunal or court dealing with points of law and regulations and seeking to apportion responsibility.

The role of an ombudsman, in its broadest sense is to help.

The formal power of an ombudsman rests officially in the authority to investigate complaints of wrongdoing and review the practices of government institutions. At the same time, ombudsmen, having arrived at conclusions and apparent solutions to problems, generally lack the authority to make or enforce specific changes and improvements: they can only make recommendations. Some may see this as a weakness. For us, it has been a source of strength.

The real power – the true value added potential – of an ombudsman is to facilitate and assist communications between parties with issues to resolve, and to help the parties find solutions to problems. Results are achieved not by the application of mandatory enforcement, but through the power of persuasion.

The goal of this office is to use that power of persuasion to contribute to an ongoing process of change, so that all Canadians have confidence in the federal procurement system.

For us to succeed, we must work cooperatively with all stakeholders in the procurement environment. We must be seen by all concerned as credible independent agents of change. Professional in our approach and well-informed on procurement issues, we must show in every aspect of our work that we are strictly neutral – neither lobbyists for suppliers nor apologists for government. When we make recommendations, whether transactional or on a more systemic basis, it must be evident that we are proposing reasonable, well thought-out, doable and affordable solutions.

These are the principles that have shaped our standards, systems and processes for handling individual supplier concerns. To date, in almost every case, suppliers have been satisfied with the results of our interventions. That same satisfaction is demonstrated within the public service. Without exception, we have been well received in our dealings with departments. Deputy Ministers and central agencies in particular have been very supportive, and I want to take this opportunity to thank them.

We believe that this is because we have emphasized and demonstrated from the beginning our knowledge, professionalism and neutrality. We have made it clear that we are seeking solutions with long-term value and sustainability. We have created an atmosphere of trust.

Having created this positive environment, we believe that we have increased the likelihood that our recommendations will be broadly accepted. That being said, if we allow our actions to be guided only by the complaints we receive, we risk being too narrowly focused. If people see us dealing only with limited transactional problems, there will be an inevitable growth of reluctance to become involved as time progresses.



Instead, we have to be proactive. That is why since our inception we have placed major emphasis on outreach communications. My senior staff and I have crossed the country, speaking in particular with suppliers and public servants. We have emphasized that we are here to make things better: we see a broad consensus that change is possible, and that the key to success is cooperation.

Part of that cooperation – and one of the reasons why trust is so important to our success – is a willingness on the part of stakeholders to share with us what the real problems and issues are. From what we have heard and from our experience, we do not think the system is broken. We do believe there are several things in the system that need to be strengthened. The vast majority of government contracts do not result in any significant problems. I want to share with you what we have heard to date: it provides the context for the detailed information in this first report and helps to set the stage for the work we will be doing in the coming years.

Suppliers are telling us that in some cases:

- they have doubts about the contract award process: they are not certain that when the government has published its decision-making criteria and process for a specific procurement, those criteria will be applied in a consistent and fair manner, and that the government will in fact make the contract award based solely on those criteria;
- part of that distrust may come from the inconsistent way in which the government debriefs unsuccessful bidders. Those bidders often cannot find out, in terms that will be useful to them, why they did not win a contract;
- the government takes too long to pay its bills: slow payment can dissuade otherwise-competent suppliers from seeking government contracts;
- standing offers are a significant concern, particularly when their use is seen to reduce supplier access to government business;
- communications between suppliers and government authorities are inadequate – the right information is not being exchanged at the right time; and
- generally, suppliers are having difficulty finding relevant information on how to do business with the government.

Government authorities have an equally wide range of issues they would like to see resolved:

- there are not enough properly-trained people to do the job;
- those who are in place see the required processes as being excessively time-consuming and leaving little room for professional judgment or innovation;

- implementation of government rules is inconsistent from organization to organization, even within individual departments;
- efforts to streamline procurement processes through the introduction of automated working tools can be frustrated by the complexity of the “solutions;” and
- generally, there are simply too many rules to follow, and overemphasis on compliance with the rules is taking precedence over achieving real results.

As you will see in the body of this report, we have not been able to address all of these concerns in our first year of operation. But we hope to do so in the course of my five-year mandate, and this will be detailed in future reports.

Procurement is not an objective in itself. Rather, it is a means through which the government can achieve its policy objectives, and departments can achieve their operational objectives of delivering services to Canadians. The very nature of the procurement process is to be helpful and supportive. When it works well, programs achieve what they were designed to achieve and are delivered on time and within budget because the government is working with the best possible suppliers.

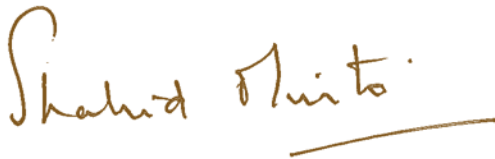
We should all be concerned about the capacity constraints faced by the government procurement community. We have met many qualified and competent public servants who are doing their best to provide Canadians with high-quality service, but who are being frustrated by the context in which they must work.

Also, nothing bothers me more than knowing that there are highly qualified suppliers in the market – large and small – who have simply given up on dealing with the government because of the perceived inefficiencies and perceived lack of fairness of the system.

But there are some very visible and welcome signs of improvements. The Auditor General noted in Chapter 3 of her December 2008 report on PWGSC’s contracting for professional services that 95% of contracts had been awarded in accordance with the rules designed to ensure fairness, openness and transparency. The Office of Small and Medium Enterprises (OSME), created to help small and medium enterprises do business with the government has gained a lot of respect in small supplier community. Senior management in all departments, especially Treasury Board Secretariat and Public Works and Government Services Canada, are making a lot of effort to reduce the plethora of rules and processes which have slowed down the procurement process.

As the Procurement Ombudsman, it is my job to help strengthen the trust and confidence of all Canadians in federal procurement. To do this, we will collaborate with the other organizations in the federal government that are also working to improve the system, to identify areas for improvement, to assess them carefully in collaboration with the supplier and government communities, identify effective practices and seek to develop workable and affordable improvements that can be implemented to the benefit of all stakeholders.

I and my staff are dedicated to that process of improvement. In this report and through the coming years, we are committed to showing you the results of that dedication.

A handwritten signature in black ink that reads "Shahid Minto". The signature is written in a cursive style and is positioned above a horizontal line.

**Shahid Minto** MA, LL.B, CA,  
Procurement Ombudsman

## FEDERAL ACCOUNTABILITY ACT

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The new position of Procurement Ombudsman was created by amendments to the *Department of Public Works and Government Services Act* enacted pursuant to the *Federal Accountability Act* which received Royal Assent on December 12, 2006. It is but one of several elements of the government's comprehensive plan to strengthen the fairness, openness and transparency of federal procurement. Others include:

- a legislated commitment to fairness, openness and transparency in the procurement process;
- including specific integrity provisions in contracts to preclude corruption, collusion, and the payment of contingency fees in the procurement process;
- introducing a Code of Conduct for Procurement;
- providing accreditation and training for procurement officers; and
- removing barriers to access for smaller vendors and vendors in all regions of Canada.

## PROCUREMENT OMBUDSMAN REGULATIONS

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While the *Federal Accountability Act* establishes the Procurement Ombudsman's authority and activities, the Regulations provide certain additional specifics as the manner by which that authority is exercised.

To develop the Regulations, Public Works and Government Services Canada engaged in a consultative process involving approximately 50 departments. Input from these departments was reflected in the development of the Regulations.

The Regulations were pre-published in *The Canada Gazette, Part I* on December 22, 2007, and at the request of industry associations the time frame for comments was extended to February 1, 2008.

A number of comments were received from industry associations, government departments and the Procurement Ombudsman Designate. The Regulations finally came into effect on May 5, 2008.

To know more about the Regulations we invite you to consult our website at the following address: [www.opo-boa.gc.ca](http://www.opo-boa.gc.ca).

## MANDATE

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The specific mandate of the Ombudsman, set out in s. 22.1(3) and 22.1(4) of the *Department of Public Works and Government Services Act*, is to:

“(a) review the practices of departments for acquiring materiel and services to assess their fairness, openness and transparency and make any appropriate recommendations to the relevant department for the improvement of those practices;

“(b) review any complaint respecting the compliance with any regulations made under the *Financial Administration Act* of the award of a contract for the acquisition of materiel or services by a department to which the Agreement, as defined in section 2 of the *Agreement on Internal Trade Implementation Act*, would apply if the value of the contract were not less than the amount referred to in article 502 of that Agreement;

“(c) review any complaint respecting the administration of a contract for the acquisition of materiel or services by a department; and

“(d) ensure that an alternative dispute resolution process is provided, on request of each party to such a contract.”

“The Procurement Ombudsman shall also perform any other duty or function respecting the practices of departments for acquiring materiel and services that may be assigned to the Procurement Ombudsman by order of the Governor in Council or the Minister.”

The *Federal Accountability Act* provided for the appointment of the Procurement Ombudsman, who operates at arm’s length from government to promote **fairness, openness and transparency** in federal procurement processes.

**FAIRNESS:** Providing equal treatment to all current and potential suppliers

**OPENNESS:** Providing to all potential suppliers the opportunity to submit bids for government procurement

**TRANSPARENCY:** Providing information to Canadians in a timely manner that facilitates public scrutiny of the decisions made and actions undertaken.

*“Applying the legislation that created us and the Regulations that guide us, we are here to work with all of the stakeholders in federal procurement, using whatever approach is best suited to the circumstances, to make federal procurement better for all stakeholders.”*

– Shahid Minto

*This is our inherent mandate: **we are here to help.***





SECTION 1  
THE FIRST STEPS

# BUILDING THE OFFICE

With Royal Assent given to the *Federal Accountability Act*, the government initiated two key, interlinked lines of activity: the search for the first Ombudsman, and the development of the *Procurement Ombudsman Regulations*.

The Government announced that it was seeking qualified candidates for the position of Ombudsman on February 22, 2007. A number of candidates came forward. Following interviews and a thorough review, on September 19 of that year Shahid Minto was appointed the Procurement Ombudsman Designate.

The term “designate” is important. By law the Ombudsman must carry out his mandate “...in accordance with the regulations...,” and at the time of the appointment those regulations were in the early stages of development by the government. That development process was completed soon thereafter: the *Regulations* came into effect on May 5, 2008. On May 15, 2008, Mr. Minto was officially appointed the Procurement Ombudsman by Order in Council.

The intervening months were used to start building the Office.

## PRINCIPLES

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The foundation of the Office rests on a core set of basic principles. The Office must be, and must be seen to be:

- **independent** – operating at arm’s length from government;
- **neutral** – neither a lobbyist for suppliers nor an apologist for the government; and
- **helpful** – seeking to improve procurement to the benefit of all stakeholders.

To achieve this, the Office must be:

- **knowledgeable** – about the workings of the Canadian market, government procurement legislation, policies and practices, and the issues and concerns that need to be addressed; and
- **responsive** – quick to act in a non-judgmental manner.



The objective is to be **part of the solution**:

- to seek to resolve individual concerns to the satisfaction of all involved; and
- to make balanced and useful recommendations to strengthen the fairness, openness and transparency of government procurement as a whole.

## ENSURING INDEPENDENCE

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In his appearance before the Standing Committee on Government Operations and Estimates on May 27, 2008, Mr. Minto emphasized the need for the Office to be clearly independent of government departments and agencies.

The Office was not set up as an Officer of Parliament or as a separate entity under the *Financial Administration Act*. The Ombudsman reports directly to the Minister of Public Works and Government Services, and the Office budget is part of the Public Works and Government Services Canada (PWGSC) appropriation. How then do we ensure that the Office operates, and is seen to operate – in this clearly independent manner?

A number of steps have been taken:

- a Memorandum of Understanding has been signed by the Ombudsman and the Deputy Minister of PWGSC to clearly identify the roles and responsibilities of the Office and the Department: it clearly recognizes and states the independence of the Ombudsman from the Department;
- the proposed budget for the Office was approved directly by the Treasury Board, separately from the departmental budgeting process;
- in order to conserve Office resources for operational work, the Office has negotiated service-level agreements with PWGSC for such core services as human resources, financial and information technology: these services are provided on a ‘fee for service’ basis, and the Office retains responsibility and accountability for all decisions;
- following consultations with the Department of Justice, the Office has retained its own legal advisor;
- the Office is responsible for its own internal audits and risk management;

**“In order to have credibility, you have to have independence”**

**– Shahid Minto**

- the Office is also responsible for its own communication services; and
- in what may be the most visible sign of independence for the supplier community, the Office moved in early spring 2009 to permanent accommodation in a commercial building – physically separate from PWGSC, but more importantly providing easy access to suppliers with issues to discuss.

## CORPORATE MANAGEMENT

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Having established that broad framework for and commitment to independence, we faced the daunting task of moving from essentially no staff, no facilities, no internal policies or practices and no supporting infrastructure to a fully-functioning organization.

Creating a new office is more than drawing an organization chart. It involves classifying new positions (including five executive positions) and recruiting staff; ensuring that we have adequate office facilities and security clearances; getting furniture, supplies and computers.

To this end, the Ombudsman recruited in the fall of 2007 a small group of five professional and support staff. By April 2008 the number had grown to 10, and as of March 31, 2009, the total staff complement was 22, organized into five operating units.

This structure was chosen to provide clear internal responsibilities and accountabilities. In particular, it emphasizes what are expected to be the three principal areas of activity: reviewing government procurement practices, responding to individual supplier inquiries, and providing Alternative Dispute Resolution (ADR) services.



**Shahid Minto**  
Procurement Ombudsman



**Oriana Trombetti,**  
Deputy Procurement Ombudsman



**Janet LaBelle,**  
Principal, Procurement  
Inquiries & Investigations



**Francine Brisebois,**  
Principal, Procurement  
Practices Review



**Janet Barrington,**  
Principal, Quality Assurance  
& Risk Management



**Isabelle Deslandes,**  
Director, Communications &  
Corporate Management

## CASE MANAGEMENT SYSTEM

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Using and managing information is key to the business activities of the Office. Accordingly, the Office required an automated Case Management System designed to house information needed for effective decision making and reporting.

Three options for fulfilling this requirement were considered and analyzed: the development of a custom solution, the purchase of a commercial off-the-shelf solution, and the purchase of the case management system developed by the Ombudsman of British Columbia. The third option was found to be the most effective solution. It presents the best value for money by taking advantage of a product already developed. The system has been in use for over ten years and has been successfully implemented in other Ombudsman offices in federal departments and agencies, such as the Department of National Defence and the Canada Revenue Agency.

The system is currently being modified to meet the specific requirements of the Office and will be ready for implementation in early Summer 2009. It will track information pertaining to all our business lines.

*“The focus of our business model is less on ‘did you follow the rules,’ and more on ‘did you do the right thing?’”*

**- Shahid Minto**

## THE BUSINESS MODEL

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The case management system is one tool that supports and informs our business model. Throughout, we emphasize the importance of continuous feedback from the supplier and government procurement communities – continuously seeking constructive commentary that permits us to improve all aspects of our operations.

We take a very broad approach to the subject matter of our **practice reviews**. A core element of our mandate, they are proactive and focused on the prevention of problems.

Practice reviews may be undertaken to examine a range of issues affecting multiple departments and suppliers – or have a direct focus on a single issue affecting one department. A review can also take the form of a research study that may identify effective practices and/or issues for a future review. Reviews may be:

- “one-off”: self-contained and independent;
- part of a series examining different aspects of a particular situation; or
- cyclical, designed to be updated on a regular basis to determine degrees of change.

Whatever the approach, our reviews always seek to emphasize finding the solutions to improve the fairness, openness and transparency of procurement.

We developed standard operating procedures for strategic planning and the selection of review topics, a process for review planning, a framework for the actual conduct of the reviews, a selection of report structures to be applied according to the subject matter of each review, and an approach to reporting the results of our work in the Annual Report.

One element of our approach needs to be highlighted. When we complete a practice review, we send it to the department(s) concerned for consideration and comment. When we have this feedback, we finalize the review and send it to the appropriate Minister(s) and to the Minister of Public Works and Government Services.

Details on our review activities are provided on page 32.

Our approach to **inquiries and investigations** is based on high standards of conduct, and clear criteria: our objective is to facilitate communications and provide practical remedies to address issues quickly and efficiently. From the outset, we encouraged suppliers to try to resolve any issues with the relevant Department. A formal investigation – the application of the formal process set out in the Act and Regulations – is undertaken only where we cannot assist in resolving issues through cooperation and dialogue.

The new case management system will record our work in this area, permitting us to analyze all contacts from suppliers and other stakeholders.

As prescribed in the *Department of Public Works and Governments Services Act*, the Office’s findings and recommendations concerning a complaint are provided to the complainant, the relevant Minister and the Minister of Public Works and Government Services.

Details on our inquiry and investigation activities are provided on page 60.

**Alternative dispute resolution** is expected to be a significant part of our work as more and more suppliers and departments become aware of this service. Having analyzed various possible options for the provision of effective dispute resolution processes, we selected our approaches, developed a process map, and established standards for the use and services of facilitators, mediators and arbitrators.

Details on our alternative dispute resolution work are provided on page 64.

We have paid particular attention to ensuring that we have strong and effective **quality assurance and risk management** measures in place. Our quality assurance function will ensure that our practice review reports and investigative activities and recommendations are based on sound factual evidence and meet the highest professional standards.

The extensive and detailed work we did in this area is reported on page 28.

## PROGRAM EVALUATION

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We are well on our way to having in place a comprehensive program evaluation framework to evaluate the effectiveness of the Office. Our goal is to have and use two objective and repeatable measures:

- the quality of our work, in and of itself, and
- the effect we have on the overall fairness, openness and transparency of federal procurement.

To that end, we developed a comprehensive evaluation framework. Presented to the Treasury Board Secretariat in November 2008, and subsequently accepted by the Secretariat, the framework was developed after a review of relevant documents on the Procurement Ombudsman and the Office, and after interviews with a number of key stakeholders/parties with an interest in the activities of the Office.

A number of elements pertaining to the operation of the Office will be assessed and measured.

Measuring our operational efficiency and effectiveness is not enough. We need to know whether through our recommendations we are succeeding in improving federal procurement in general. To that end, the Evaluation Framework also seeks to determine:

- the extent to which the fairness, openness and transparency of procurement has been enhanced as a result of our work;
- the extent to which the knowledge and confidence of suppliers and the procurement community has been enhanced, again as a result of our work; and
- the extent to which professionalism in the procurement community has been enhanced as a result of the Office.

## FORMATIVE AND SUMMATIVE EVALUATION

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In addition to giving us a basis for evaluating our work on an ongoing basis, the Program Evaluation Framework provides for two major milestones:

- a formative evaluation, to evaluate the extent to which our program has been implemented, and to ensure that we are proceeding according to our mandate and expectations, will be carried out in 2010; and
- a summative evaluation, to measure the extent to which we have achieved our intended objectives, results and outcomes, will be carried out in 2013.

The Framework will be fully in place in mid-2009. Our first formal reporting of performance against it will be in our Annual Report for 2009-2010.



# PROMOTING THE OFFICE

The first year of operation of a new function creates special challenges in communications.

## OUTREACH

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An essential first step for the Office was to make sure that all stakeholders were aware of its existence, and the services it provides.

Suppliers need to know that they can count on us to be receptive and sensitive to their inquiries and concerns, so that they will not hesitate to contact us. The government procurement community needs to know that we are professional and committed to improvement, so that we can work together in a spirit of cooperation. Supplier associations have to trust us to address their concerns from a truly independent and balanced perspective, and departments must know our principles, values and approaches, so that we can work together in an atmosphere of shared commitment to improvement.

*“I don’t think there’s a parliamentarian in the House who doesn’t welcome the opportunity to have these services of your office made available”*

*– Daryl Kramp, MP, Prince Edward-Hastings, Standing Committee  
on Government Operations and Estimates May 2008*

Our Communications and Corporate Management team is the focal point of our communications and outreach activities. During our first year of operation – starting well before the Regulations came into force – the team implemented a dynamic communications outreach initiative to introduce the Office.

As early as November 2007, we launched our toll-free number (1-866-734-5169). Almost immediately people started to call. By March 31, 2009, we had recorded 355 contacts by telephone and e-mail. Details on these contacts are reported on page 60.



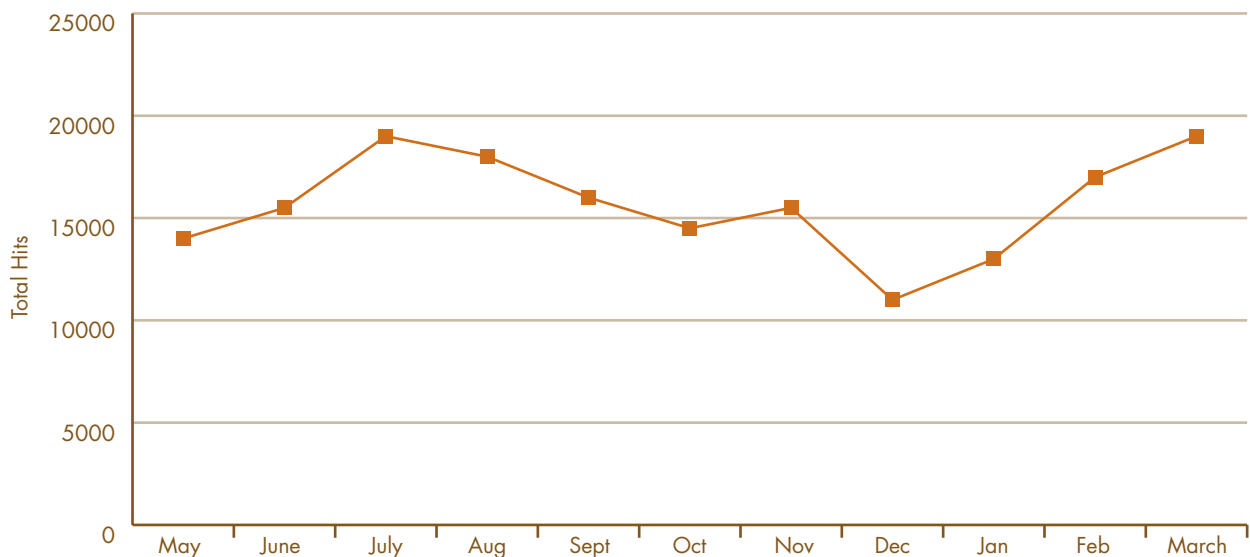
We also have an internet presence at [www.opo-boa.gc.ca](http://www.opo-boa.gc.ca). Our website came on line on May 15, 2008, and provides a permanent window to our activities and services. On it:

- we explain who we are and what we do, and we try to answer the questions we deal with most often;
- we highlight our toll-free telephone number, to make it easy for people to contact us; and
- we provide a link to the Regulations, so that suppliers can see how we operate, and what they can expect if they contact us.

As our Office evolves, the amount of information that Canadians can access through the website will grow. Specifically, our internal policies and procedures, annual reports, practice review reports, and summary information on our inquiries, investigations and alternative dispute resolution activities will be published on the site as they become available. As new insight on procurement practices emerges, we will publish and present success stories and lessons learned, and suggest ways in which both the government procurement and supplier communities can improve procurement practices and the overall effectiveness and efficiency of the procurement system.

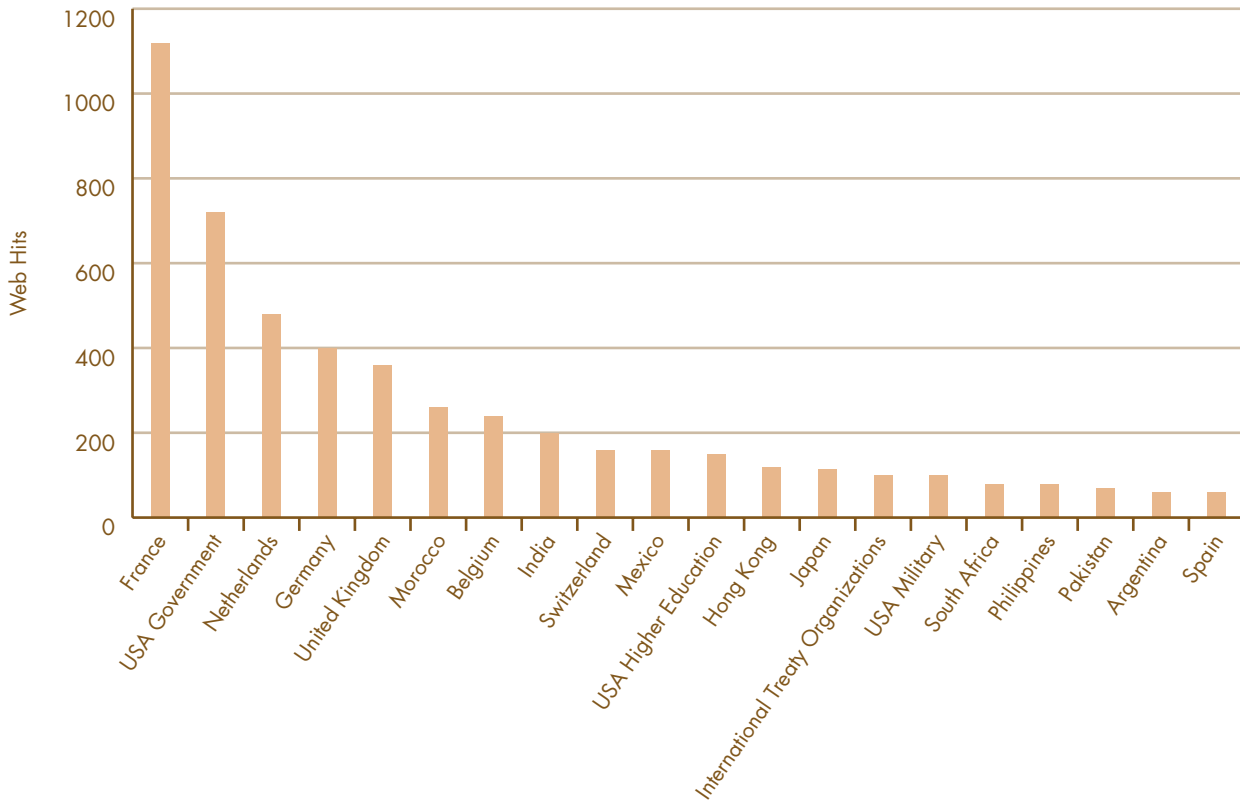
The degree of interest that people have in our work is evidenced by the number of visits to the site:

**OPO Website – Total Hits From May 2008 to March 2009**



For the same period of time (May 2008 to March 2009) the total number of visits from Canada was 85,331, with an average of 7,757 hits per month. The extent of international interest, shown in the chart below, is particularly obvious.

**OPO Website – Total Web Hits (May 2008 to March 2009)**  
Top 20 excluding Canada



We are pleased that so many people outside the government already know about us. In large part this is due to our efforts to make ourselves known, specifically:

- an article in *The Lawyers Weekly* in July 2008;
- an interview with the Ombudsman published in *Summit* magazine in September 2008;
- publication of public notices in major daily and weekly newspapers in all provinces and territories in July 2008;
- We have also made presentations across the country:
  - 2008 Public Sector Financial Leadership Conference: Maintaining the Momentum for Change (Ottawa, The Conference Board of Canada, May 2008);

- Association of Suppliers to the Federal Government (Ottawa, September 2008);
  - “Building Trust Together: The Public and Private Sector Experiences,” a symposium organized by Public Sector Integrity Canada (Ottawa, September 2008);
  - The Public Procurement Conference (January 2009);
  - Alberta Ombudsman Office (March 2009);
  - The Board of the Association of Consulting Engineers of Alberta (March 2009);
  - The Canadian Public Procurement Council in Calgary (March 2009);
  - Canadian Society of Association Executives (March 2009);
  - Procurement Lawyers of Ottawa (March 2009);
  - Association des manufacturiers et exportateurs du Québec (March 2009); and
  - Réseau des conseillers en management du Québec (March 2009).
- Our communication group developed a brochure describing the mission, vision and services of the Office.
    - This brochure was given wide distribution throughout the supplier community, including:
      - » Canadian Aboriginal and Minority Suppliers Council;
      - » Canadian Chamber of Commerce;
      - » Canadian Federation of Independent Business;
      - » Building Owners and Managers Association; and
      - » Canadian Youth Business Foundation.
    - copies of the brochure were provided to the constituency offices of all Members of Parliament in July 2008 and to the new Members elected in the Fall 2008 election; and
    - copies were also given to the regional offices and headquarters of the Office of Small and Medium Enterprises (OSME).

We have also made efforts to become known within the government. The Ombudsman has personally led our work in this area: by the end of the fiscal year he and the senior staff had:

- met with more than twenty-five deputy ministers and heads of agencies, to explain the mission, principles, values and planned approaches of the Office;

- met with senior officials of the Treasury Board Secretariat, the Office of the Auditor General and the Canadian International Trade Tribunal to confirm the distinct but complementary mandates of the other offices; and
- given presentations describing the vision and work of the Office to the federal community:
  - The Materiel Management Institute: the National Workshop in Ottawa in May 2008, and regional workshops: Winnipeg (September 2008); Halifax (November 2008); Vancouver (December 2008); and Toronto (February 2009);
  - National Defence – Materiel Group Management Committee (February 2008);
  - Small Agency Finance Action Group (November 2008);
  - Department of Foreign Affairs and International Trade Procurement Community Learning retreat (January 2009);
  - Federal Government Acquisition and Procurement Community of the Prairies (Alberta, March, 2009); and the Office of Small and Medium Enterprises (OSME), Public Works and Government Services Canada (January 2009); and
  - Department of Justice Commercial Lawyers Practice Group (February, 2009).

The Ombudsman and members of his senior staff have appeared before the Standing Senate Committee on National Finance (February 2008) and the House Standing Committee on Government Operations and Estimates (May 2008) to update members on the creation and evolution of the Office. We were encouraged by the positive and supportive reception of both of these committees. Both committees noted that we face significant challenges in pursuing our goal of strengthening the confidence of Canadians in federal procurement.

*“I certainly think the role of a procurement ombudsman is essential, first in guaranteeing transparency and second in being able to address complaints before they spiral out and we end up getting hit with costly lawsuits.”*

*– Charlie Angus, MP for Timmins-James Bay, Standing Committee on Government Operations and Estimates, May 2008*

Also, the Office is starting to be recognized worldwide for its expertise. We have met with representatives from the office of the Hearing Officers of the European Commission to share information. Also, the Global Fund to Fight AIDS, Tuberculosis and Malaria wrote to the Office for advice in the areas of

procurement, risk management and auditing in the summer of 2008. Based in Geneva, Switzerland, the Global Fund is one of the largest multinational financiers of international AIDS, Tuberculosis and Malaria programming. It has disbursed over \$5.5 billion to date, and half of these funds are spent on the procurement of commodities, including drugs. Canada, a leading donor to the Global Fund, contributes over \$150 million annually, and has played a key role since the inception of the Global Fund in 2001. The Office has assisted the Global Fund on several occasions in 2008-2009.

## WHAT WE HAVE HEARD

While making ourselves known we have also had the opportunity to listen. Everyone we have talked to has told us something, and that information – what we have heard – is the foundation for our work to improve federal procurement.

At a high level, we have heard the same message from suppliers and government: there is work to be done, and people are looking to us to act as facilitator for change. We have heard that our Office is looked upon as a neutral and independent body, and that stakeholders are willing to work with us in a spirit of mutual cooperation to make improvements.

We received comments from suppliers doing or seeking to do business with the federal government, who were frustrated by government processes and approaches. In seeking to assist them, our Office found that federal program managers were also frustrated by procurement processes that are complex and slow. Initial comments indicated that the federal procurement community feels shackled by rules that inhibit their ability to quickly and effectively provide their services. More specifically, we heard about issues and concerns falling in the broad categories set out in the table below:

Supplier Issues	Government Issues
<ul style="list-style-type: none"> <li>• Contract award process</li> <li>• Supplier debriefing</li> <li>• Delays in payment</li> <li>• Standing offers</li> <li>• Communication issues between suppliers and government authorities</li> <li>• Information on how to do business with the federal government</li> </ul>	<ul style="list-style-type: none"> <li>• Capacity</li> <li>• Time consuming processes</li> <li>• Inconsistency</li> <li>• Complexity of procurement tools</li> <li>• Too many rules</li> </ul>

# QUALITY ASSURANCE AND RISK MANAGEMENT

The Quality Assurance and Risk Management team ensures that the work carried out by the Office meets the highest standards of quality.

We divide our activities into two broad areas:

- quality assurance and risk management; and
- continuous improvement.

The team also provides leadership to ensure that the Office adheres to its Code of Values, Ethics and Professional Conduct. Being built on and complementary to the Code of Values and Ethics for the Public Service, our Code sets out requirements such as taking pride in each other's accomplishments, treating our colleagues and stakeholders with respect, and ensuring that diversity and quality of life are part of the Office culture.

## QUALITY ASSURANCE & RISK MANAGEMENT

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We are establishing a system to ensure that: quality is built into all of our processes; controls are in place to identify and respond to risks in a timely manner; responsibilities are clearly defined and communicated; and all staff members participate in continuous improvement.

In keeping with those principles, the policies and procedures that have been developed for each business line incorporate risk management and identify the quality required at each step of the process and specify when a quality review is to be conducted. Similarly, the tools developed to assist staff in their work, such as templates, checklists and reference materials, were designed to assure quality and manage risks on a continuous basis.

Our standards are also put into practice using peer reviews. Every plan and report produced by one of our business lines is reviewed by a colleague within the business unit or one of the senior staff of the Office, including the Ombudsman, Deputy Ombudsman and Principals/Directors.

At key points in our work, a member of the Quality Assurance and Risk Management team conducts a formal quality control review. These reviews are objective verifications that the work meets the specific criteria described in our policies and procedures, and will include considerations such as:

- whether sufficient and appropriate documentation is on file to support analysis, recommendations and decision making;

- that risk and legal issues have been addressed;
- that actions align with legislative requirements, professional standards, Office policies and procedures;
- whether matters requiring senior management attention have been properly identified; and
- that content, format, and presentation are consistent, accurate, complete and relevant;
- that the appropriate level of approval authority is being sought.

## CONTINUOUS IMPROVEMENT

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We have established the basis for an extensive and ongoing liaison program with government departments, central agencies, suppliers, academic institutions, and professional associations to ensure that we maintain a current awareness of procurement practices, risks, interests and concerns.

A program of research activities has also been initiated. We assess market and socio-economic developments, as well as legislative and policy trends that have or could have an influence on federal government procurement practices and the activities and interests of suppliers.

The results of our research are shared with the departments and within the Office to keep staff up-to date on trends and developments. Our research might also be used to support recommendations made in our procurement practice review reports. Publication of the practice review reports will be one of our key methods for sharing information widely, which in turn contributes to broadening the knowledge base of all stakeholders.

We note here that depending on the subject matter, our research work could evolve into a practice review.

Both our liaison and research activities will include national and international perspectives in order to identify and share effective practices, success stories and lessons learned.

The Quality Assurance and Risk Management team provides training, coaching and support to staff within the Office to ensure a current and balanced understanding of developments in the field of procurement.







SECTION 2  
GETTING DOWN TO WORK

# PRACTICE REVIEWS

In 2004, in a survey questionnaire reviewing government procurement, the Lastewka Task Force described procurement as follows:

“Procurement” is the process of acquiring goods, services and construction from third parties. The activities involve four phases:

- the pre-contractual phase, which includes activities related to requirement definition and procurement planning;
- the contracting phase, which includes all activities from bid solicitation to contract award;
- the contract administration phase, which includes activities such as issuing contract amendments, monitoring progress, following up on delivery, payment action; and
- the post-contractual phase, which includes file final action (e.g. client satisfaction, contractor agreement to final claim, final contract amendment, completion of financial audits, proof of delivery, return of performance bonds) and close-out (e.g. completeness and accuracy of file documentation and adherence to file presentation standards).

With this definition in mind, our Procurement Practices Review team uses a systematic, evidence-based approach to carry out independent, objective reviews of federal government procurement practices, including the application of procurement policies and the processes, tools and activities related to acquiring goods and services.

*“The foundation of government procurement is openness and best value, and everyone should have equal access. If any system or process impedes that, we will speak up about it and if required report it.”*

*– Shahid Minto before the Standing Senate Committee on National Finance, February 2008*

Selecting the topics for review is a complex task.

The issues raised by suppliers and government, set out in “What we have heard,” constituted our starting point for our first year of full operation. We carried out a scan of issues raised in or by the media, the Canadian International Trade Tribunal’s determinations, reports of the Auditor General and internal audit reports of various departments. We also sought advice from a number of government departments and supplier associations.

Under the leadership of the Deputy Ombudsman we listed and set possible priorities for a broad spectrum of issues, in categories such as:

- legislation, regulations and policy;
- delegated authorities;
- departmental governance / strategic planning;
- communications;
- contracting processes;
- contract auditing and reporting; and
- procurement / contracting staff.

We then assessed our list to identify:

- the issues identified by our office as posing the greatest risk to the fairness, openness and transparency of the federal procurement system; and
- the issues that would be of most common interest to suppliers, departments and parliamentarians.

Finally, recognizing that we are a new office, we examined some very pragmatic factors:

- the availability and experience of internal and external resources;
- our ability to complete reviews in a timely fashion; and
- the complexity of possible review topics.

This multi-layered process led us in our first year to undertake reviews in four areas:

- Procurement challenge and oversight
- Supplier debriefings
- Advance Contract Award Notices (ACANs) and
- Mandatory Standing Offers (MSOs)

Procurement practice reviews may also be initiated during the course of the year based on facts or emerging issues and concerns that were not known at the time of the yearly planning exercise. For example, in May 2008, the Office was contacted by a supplier who made several allegations about the Correctional Service Canada's (CSC) CORCAN Construction program.

Further to discussions with CSC senior management, it was agreed that CSC would engage a private firm to review the allegations and report findings.

This section presents summaries of all of these reviews. The complete reviews will be posted on our Website at [www.opo-boa.gc.ca](http://www.opo-boa.gc.ca).



## PROCUREMENT CHALLENGE AND OVERSIGHT

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According to the 2007 Purchasing Activity Report, departments and agencies of the Government of Canada spent \$14,257,457,000 on 339,401 contract awards for goods, services and construction needed to deliver programs to Canadians.

The Treasury Board (TB) Contracting Policy clearly states that departments and agencies, unless specifically excluded by an Order in Council, are responsible for ensuring that adequate control frameworks for due diligence and effective stewardship of public funds are in place and working. More specifically, the Policy encourages contracting authorities to establish and maintain a formal challenge mechanism for all contractual proposals and recognizes that this mechanism could range from a formal central review board to divisional or regional advisory groups, depending on the departmental organization and magnitude of contracting.

The procurement challenge and oversight function is a key component of the broader set of management controls that are used to ensure the sound management of government procurement. In many departments, the principles of fairness, openness and transparency in procurement are safeguarded through oversight, review and monitoring by a senior procurement review committee. Depending on the mandate given to this committee, it can play a role in ensuring that all departmental actions in respect of the procurement process, including selection of the procurement strategy (e.g. use of Advance Contract Award Notices (ACANs)), evaluation criteria, contractual disputes, supplier debriefing and vendor performance, are carried out in accordance with policy and legal requirements.

There are two main reasons why having an effective procurement challenge and oversight committee function is important. First, the committee has a role in assessing corporate risks, which includes ensuring that all procurement activity is compliant with the relevant laws, regulations, trade agreements and policies and fulfilling the government's commitment to fairness, openness and transparency in procurement. Second, for all contract spending from a financial perspective, the committee should ensure that the requirement is justified and represents good value for money on behalf of all Canadian citizens.

The objective of our review was to examine departmental practices related to the committee responsible for the procurement challenge and oversight function at the senior departmental level. Through our review, we also wanted to identify effective practices that could be shared among government departments.

Nine departments and agencies were selected for this review. Eight of these organizations are governed by the aforementioned TB policy requirements relevant to procurement and contracting. Canada Revenue Agency has unique authorities in its enabling legislation and therefore is not governed by these policies.

We focused our review on the organization of and processes used by the most senior committee responsible for the procurement challenge and oversight function within each department. We conducted interviews with senior departmental officials and examined supporting documentation such as the committee terms of reference and sample submissions reviewed by them for the period from April 1, 2007, to March 31, 2008.

The nine departments and agencies included in our review carry out the challenge and oversight function by means of a senior departmental committee or board in combination with other procurement controls and committees. We found the roles of these committees as well as their stage of development varied, and the way they conducted their business differed considerably. There are some essential characteristics that the Office of the Procurement Ombudsman (OPO) recommends be considered in the creation and operation of these departmental committees. These are set out later in this Executive Summary.

Our findings indicate that Agriculture and Agri-Food Canada (AAFC), Environment Canada (EC) and the Canada Revenue Agency (CRA) had well-established senior review committees governing the procurement challenge and oversight function. Further, they demonstrated the use of performance measures to assess their effectiveness and continuing efforts to improve the function within their respective organizations.

The Canadian Institutes of Health Research (CIHR), a much smaller agency, demonstrated a sound procurement management control framework, yet used an entirely different model appropriate for an agency of its size. In this model, the senior procurement review committee is responsible for providing direction and support for the development of CIHR's procurement framework. The review of procurement submissions at a transactional level is completed by the Manager of Procurement and procurement personnel, with transactions over \$1 million reviewed by the Chief Financial Officer.

Canadian International Development Agency (CIDA), Industry Canada (IC) and Public Works and Government Services Canada (PWGSC) were operating senior procurement review committees consistent with their existing mandates. Both IC and PWGSC were actively pursuing improvements to strengthen their senior review committees. PWGSC and CIDA have stated that they intend to use the results of the Office of the Procurement Ombudsman review to address areas requiring improvement and incorporate identified "best practices" into their procurement management and oversight frameworks.

Finally, the Department of Justice (DOJ) and Public Safety and Emergency Preparedness Canada (PSEPC), both at the early stages of establishing senior procurement review committees, appear to be on track to have a strong central procurement challenge and oversight function. At the time of our review, both had recently developed terms of reference for their review committees. DOJ has advised that shortly after the completion of our field work their senior review committee became fully operational. PSEPC's senior committee was to be fully operational in May 2009 upon completion of training of its members.

All nine organizations reviewed have established terms of reference for their senior procurement review committees. Of the eight committees that have responsibility for conducting individual procurement submission reviews, six conduct their reviews at the procurement planning stage. One of the committees conducts its reviews at various procurement stages from planning to pre-contract award, depending on potential risks, as determined by the Director of Contracting. One committee conducts its reviews at the pre-award stage. We consider the completion of reviews at the planning stage to be an effective practice that can help departments reduce procurement risks before publishing solicitation documents that reflect the government's intentions.

Our review revealed that the criteria for submitting procurements for review varies depending on the individual department's risk profile and the existence of other controls such as investment review committees, compliance control functions and internal audits. Common examples of review criteria include dollar thresholds, types of procurement (e.g. goods versus services, competitive versus sole source), risk factors such as changes in scope, potential for disputes and contract ratifications. It was noted that some departments defined their review criteria using terms such as "significant plans" or "significant ACANs." We believe that such criteria are unclear and should be supported by an explanation of the relevant risk factors.

We determined from our review that generally the committee membership comprised senior management and was multidisciplinary, with senior financial and legal representatives participating as regular members of most committees. By having such very senior departmental personnel on the committee, the departments ensure that procurement submissions undergo the type of scrutiny that only senior management personnel with experience and a department-wide perspective can bring.

Based on a detailed examination of information submitted to the senior procurement review committees in six of the nine departments, we concluded that, as a rule, the committees were provided with appropriate information for decision making. The six organizations require that a template/checklist be completed by the submitting branch or directorate to ensure the procurement submissions tabled for review address key departmental risk issues and are recommended by the submitting directorate or branch.

We did note specific procurement issues that can benefit from further attention by these committees to assist in the mitigation of procurement risks. From our review of sample procurement submissions, we observed that information on past vendor performance was not provided to the committee. In addition, in our review of committee meeting minutes and records of decisions, we did not observe records of discussions of past vendor performance during contract periods.

The terms of reference for CRA's senior procurement review committee states that the committee reviews reports from previous procurements to analyse vendor performance.

We also noted, that in cases where poor vendor performance has been confirmed, PWGSC's Vendor Performance Policy (currently under review) calls for reasonable measures to be taken to prevent future problems. The Policy further stipulates that bids received from vendors that are debarred or suspended from doing business due to poor performance will not be considered for evaluation. In our opinion, the senior procurement review committee should be provided with assurances that the terms of this or any similar vendor performance policies are being implemented. More specifically, the committee should be provided with assurances that procurement solicitation documents and evaluation procedures will ensure that the terms of any restrictions or conditions imposed on a vendor as a result of poor performance are being complied with for all suppliers responding to the solicitation.

Further, from the samples reviewed, only one of the procurement submissions that involved more than one department was duly signed off by the departments concerned. We believe that where multiple departments are involved in the procurement, it is important to consider whether the proposed procurement actions are supported by all departments involved.

We also observed that while most committees require that they review procurement submissions where the proposed procurement process includes the use of an Advance Contract Award Notice, some do not. We believe that such procurements pose a special risk and all departments should establish risk indicators based on materiality and complexity, and require that all procurements meeting the risk profile, especially those that use ACANs, be reviewed by the committee.

In conclusion, we are generally satisfied with the progress made to establish effective procurement oversight committees. Through their membership and activities, these committees are working to ensure the openness, fairness and transparency of the procurement system and thereby strengthening the confidence of Canadians in government procurement.



The following practices are viewed as effective means of increasing the confidence of Canadians in procurement by improving oversight in departments. OPO recommends that in the creation and operation of these committees certain essential characteristics be prevalent:

- Committees should have comprehensive and objective terms of reference.
- Committees should include members who are multidisciplinary and who understand the procurement process and have an appreciation of the risks involved.
- Departments should establish risk indicators based on materiality and complexity, and require that all procurements meeting the risk profile, especially those that use ACANs, be reviewed by the committee.
- Committees should conduct their reviews at the outset of the procurement process (planning stage).
- Information submitted to these committees should be sufficient so as to ensure sound and effective decision making.
- Procurement submissions involving more than one department should be duly signed off by the departments concerned.
- Committees should be provided with assurances that procurement solicitation documents and evaluation procedures will ensure that the terms of any restrictions or conditions imposed on a vendor as a result of poor performance are being complied with for all suppliers responding to the solicitation.
- Committees should have the means to ensure they are receiving all procurement submissions included in their mandate.
- Committees should monitor the results of their decisions.
- Committees should have the means to judge whether or not they are operating effectively.

Our review also gave us an opportunity to observe additional effective practices, which departments may find helpful in strengthening their own oversight function. Departments listed in parenthesis are those where we noted these practices:

- Updating the terms of reference on a regular basis ensures that information is always current. (AAFC, CIHR, CRA, EC, IC and PWGSC)
- The use of a procurement checklist/template ensures that submissions presented for review address key departmental risks. (AAFC, CIDA, CRA, EC, IC and PWGSC)

- A series of supplementary questions, such as those used by Agriculture and Agri-Food Canada, are useful to ensure that the submission is comprehensive and that officials presenting submissions have turned their minds to all considerations. These questions are in addition to what is provided in the procurement submission template.
- A streamlined review process for low risk procurement submissions is very important and incorporates sound risk management processes and appropriate use of resources. (CRA, EC and IC)
- The committee is supported through a computerized system that provides a tracking function to determine the status of the decisions it makes. (AAFC, CRA and EC)
- The committee has a means to “flag” contracts coming up for renewal to ensure renewal of contracts is not automatic, and options are exercised with due diligence. (AAFC, CIDA, CRA and EC)
- The committee measures whether through its actions there are improvements or deterioration in the procurement activity of the department or agency. (AAFC, CRA and EC)
- The committee tracks the stage in the procurement review process where the procurement submission is, in order to apprise clients of the status of their requirements. (CRA)

All departments and agencies involved in this review have been provided an opportunity to review this report and their comments have been taken into consideration in finalizing this chapter.

## SUPPLIER DEBRIEFINGS

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Debriefing is the process by which suppliers are given the results of the evaluation of their bid on competitive procurements. Information can be provided to a bidder by telephone, in writing or through a face-to-face meeting.

Information disclosure for debriefings is encouraged by a variety of legislative, regulatory and policy frameworks. Debriefings also make good business sense.

The *Financial Administration Act* (FAA) provides Treasury Board the power to set rules relating to the disclosure of basic information on government contracts valued in excess of \$10,000. The Treasury Board Contracting Policy states that debriefings should be provided to unsuccessful bidders, and it is specific in what can be disclosed. The North American Free Trade Agreement (NAFTA) and the World Trade Organization – Agreement on Government Procurement (WTO-AGP) include requirements in more general terms to disclose information to unsuccessful bidders. The *Access to Information Act* identifies what information cannot be disclosed to a third party, such as commercially confidential information.

All of these instruments promote fairness, openness and transparency in the procurement process.

Under government policy, debriefings should be provided to suppliers, upon request. Our consultations revealed that some suppliers are unaware they may request a debriefing and consequently they have not received one. Others who have received debriefings feel frustrated by a lack of what they consider relevant and adequate feedback. This may be because suppliers have not been made aware of the legal obligations and constraints that procurement personnel are working under, or because some of the requested information cannot be provided due to commercial confidentiality.

We reviewed the debriefing and disclosure practices of six government departments and agencies: the Canadian International Development Agency (CIDA), Citizenship and Immigration Canada (CIC), the Correctional Service of Canada (CSC), the Department of National Defence (DND), Indian and Northern Affairs Canada (INAC), and Public Works and Government Services Canada (PWGSC).

We note that procurement personnel have to take into consideration the various statutes and applicable departmental policies related to debriefing and information disclosure, which are not aligned, leading to differences in interpretation and application. This has contributed to the perception among suppliers that federal government procurement may not be being carried out in a fair, open and transparent manner and has eroded trust and confidence – the opposite of the government's objective.

We found that no mechanism exists in government to collect information, analyze, monitor, report and ensure continuous improvement in the process, so there is little statistical data on the number of debriefings and their effectiveness.

Our review indicates that there are no consistent standards across and within government departments for the content, nature and extent of debriefings. Procurement personnel do not have a “safe zone” (parameters as to what information can and cannot be disclosed) in which to operate. However, CIDA, INAC, and PWGSC have made significant efforts to inform bidders of their right to request a debriefing and have developed materials to guide their procurement personnel in this area. We also note that CIDA and PWGSC provide point specific disclosure standards to assist their procurement personnel in addressing the debriefing challenges; these are available on their respective departmental websites.

Some procurement personnel believe that detailed debriefings may provide grounds for legal actions and appeals so they tend to limit information they disclose to mitigate the risks of a formal complaint. This has contributed to the development of risk-averse behaviour in federal government procurement and exacerbates the frustration of both suppliers and procurement personnel.

Giving suppliers more consistent information, however, should reduce the number of challenges and complaints. The Organisation for Economic Co-operation and Development (OECD) noted in its 2007 report that the UK had been successful in this regard and that, “although the causality between the introduction of detailed debriefings and legal reviews cannot be proven, there has been a sharp decrease in the last decade in the number of reviews.”

Most procurement personnel recognize that it is beneficial for suppliers to receive a debriefing. However, most are also under the impression that these debriefings must be delivered through face-to-face meetings. One concern expressed to OPO was that publicizing the right to request a debriefing and delivering more-detailed debriefings may increase the demand for debriefings and place greater strain on procurement personnel at a time when the resources of the procurement community are severely stretched. While we understand the challenges, we wish to emphasize that capacity issues cannot override suppliers’ right to know why they were not successful and how to improve their future bids. We believe that these concerns can be addressed by departments and agencies establishing bid information disclosure standards and methodologies that create an understanding of what, when and how information is disclosed.

For the most part, specialized training in communication on how to give “bad news” to unsuccessful suppliers is not provided consistently across government. There is no evaluation done to ensure procurement personnel have the necessary skills and competencies to conduct debriefings. The quality of debriefings is

largely dependent on the perspective and experience of the procurement personnel involved. Inconsistent practices may lead to inconsistent messaging which can reinforce the perception that all suppliers are not being given information in an equal manner. This may contribute to the escalation into disagreement, confrontation and subsequent formal complaint.

The lack of awareness of the importance of debriefings may be a factor in procurement personnel's not informing bidders of their right to request a debriefing and failing to inform them of the outcome of a solicitation in a timely manner.

By definition, a competitive procurement process involves more than one bidder. Consequently, for each contract awarded to a successful bidder, there is usually at least one supplier that has "lost." There is, therefore, the inherent risk that one or more suppliers will be unhappy with the outcome of the process. This situation may discourage suppliers from competing for government contracts, the government itself loses – it faces significant challenges in attracting and retaining suppliers.

Debriefings benefit both the government and suppliers. A debriefing allows suppliers to judge how fairly they have been treated and increases their confidence that the procurement process has also been open and transparent. By acknowledging suppliers' investment of time, effort and resources, it may encourage them to do business with the government again. A debriefing could also improve their understanding of how to prepare a bid, and identify areas for improvement to increase their chances of success in winning future contracts.

In addition, through a debriefing, the government may obtain information from bidders as to how procurement practices could be improved in future.

An effective debriefing allows the government to improve its general communications with the supplier community, increasing the likelihood that contracts will be awarded in an atmosphere of cooperation and mutual respect. This should minimize the likelihood of delays and legal challenges and assist the government in meeting its program needs; it should also reduce the financial strain on suppliers and save money for taxpayers.

The UK Office of Government Commerce (OGC) has led the way in raising the debriefing bar. Its report acknowledges the fact that the rewards (benefits) outweigh the risks. The OGC analyzes the debriefing process and provides guidance, advice, tips and instructions to its procurement personnel with a view to establishing a reputation as a fair, open and ethical buyer.

Suppliers that have expended resources to bid on government procurement should have the right to know whether and why they were successful or not, and must know that they can request a debriefing to obtain that information. However,

to manage expectations, procurement personnel and suppliers should know what information they can expect to give and receive following a competitive procurement.

The government does not want to discourage suppliers from submitting bids. Quite the contrary – it wants to retain and increase its supplier base to ensure competition, which will result in lower costs, better quality goods, services and construction, and a greater assurance of value for money in the expenditure of public funds.

To achieve this, action is needed by departments and agencies to set in place standards to:

- inform suppliers of their right to request a debriefing and recourse mechanisms;
- develop consistent core principles and an approach (creating a “safe zone”) to ensure suppliers and procurement personnel have a clear understanding and expectation of what a debriefing will or will not include;
- establish clear instructions on options for delivering a debriefing, such as by telephone, in writing or face-to-face, and tailor the method to the complexity and materiality of the procurement; and
- ensure procurement personnel have the appropriate skills and are adequately trained.

PWGSC should develop a standard approach for debriefings. Once established, other departments and agencies may wish to adapt this for their own use based on their operational needs.

The Office of the Procurement Ombudsman firmly believes that the implementation of these recommendations will significantly enhance suppliers’ perception of fairness, openness and transparency and help to strengthen the trust and confidence of Canadians in the federal procurement process.

All departments and agencies involved in this review have been provided an opportunity to review this report and their comments have been taken into consideration in finalizing this chapter.

## ADVANCE CONTRACT AWARD NOTICES

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The contracting objectives of the government of Canada include the commitment to take measures to promote fairness, openness, and transparency in the bidding process when acquiring goods, services and construction.

According to the *Government Contracts Regulations* (GCRs), soliciting bids to select a supplier should be the norm. However, the GCRs permit entering into a contract without soliciting bids under four exceptions, generally described as: pressing emergency; estimated contract value under specified dollar thresholds; not in the public interest to solicit bids; and only one supplier capable of performing the contract.

Trade agreements also contain procurement obligations and include “limited tendering” provisions, where the government can enter into a contract without soliciting bids (e.g. to protect patents, copyrights or where there is an absence of competition for technical reasons).

Contracts awarded without soliciting bids are known as “directed contracts,” and these may be awarded with or without providing advance notice to the supplier community of the intention to award a contract to a pre-identified supplier. Directed contracts may pose risks to the fairness, openness, and transparency of the procurement process. Consequently, stringent controls and other measures should be prescribed to minimize and manage those risks.

An Advance Contract Award Notice (ACAN) policy was one of the measures introduced by Treasury Board (TB) to strengthen the transparency aspects of directed contracts. It is used when the government has reasonable assurance, but not complete certainty, that only one supplier can meet its requirement. The process associated with ACANs provides other potential suppliers, unknown to the government, an opportunity to demonstrate they are also capable of fulfilling the government’s requirement by submitting what is known as a Statement of Capabilities. If a Statement of Capabilities meets the requirements set out in the ACAN, the department or agency must proceed to a full solicitation process in order to award contract.

During the three-year period from January 2005 to December 2007, the ACAN process was used for approximately \$1.7 billion, or 4.3% of the total dollar value of government contracts over \$25,000 (the threshold for soliciting bids under the GCRs).

There are inherent risks, under the current framework, when awarding a directed contract by means of an ACAN. For instance, the publication period allows other potential suppliers time to submit a Statement of Capabilities. These periods should be reasonable, in keeping with the complexity and value of the requirement.

If suppliers are not provided sufficient time to prepare a measured response, it can have a negative impact on the fairness, openness and transparency of the process.

The TB Contracts Directive, which requires TB approval to enter into or amend certain contracts, has been separated into three categories which correspond with the risks associated with awarding a contract. At one end of the spectrum, where the contracting process is open to all potential suppliers, departments have the authority to award contracts up to their highest contracting limits – typically \$2 million for services. A lower contracting limit – typically \$400,000 for services – is assigned to contracts where a minimum of two bids has been sought. At the other end of the spectrum, where competition is truly either not possible (e.g. patents, copyrights) or not feasible (e.g. not in the public interest), the contract can be awarded without advance notice and, accordingly, departmental contracting authorities are limited to much lower dollar values – typically \$100,000 for services.

Since the TB Contracting Policy states that directed contracts awarded after publishing an ACAN are deemed to be competitive, procurement personnel can award contracts using the highest competitive contracting approval authorities without necessarily undergoing review by higher-level managers or committees. This can increase the risks to the Government, as senior management may not be involved in approving the use of ACANs.

The objectives of our review were to identify effective practices and areas for improvement of the fairness, openness, and transparency of ACANs. The focus of our review was to examine the consistency of departmental policies with TB policies and related guidelines and to examine departmental practices related to implementation and risk management, including reporting on activity levels and usage.

Our review covered ACANs issued from January 2005 to December 2007, and included the Canada Revenue Agency (CRA), the Department of Fisheries and Oceans (DFO), the Department of National Defence (DND), and Health Canada (HC). We also examined ACANs issued by Public Works and Government Services Canada (PWGSC) on behalf of these departments.

The four departments under review are governed by the aforementioned GCRs and TB policy requirements relating to procurement and contracting. CRA, however, has unique authorities derived from the Agency's enabling legislation – authorities that are separate and distinct from the authorities set out in the TB Contracts Directive, but with a similar structure in terms of how contracting authorities are applied to competitive and non-competitive procurement processes.



We found that most departmental policies are consistent with the TB Contracting Policy with respect to ACANs, with three notable differences.

According to TB, an ACAN is to be published for a period of not less than 15 calendar days. DND takes it one step further by requiring ACANs be published for a minimum of 22 days when the procurement is subject to the North American Free Trade Agreement (NAFTA) and World Trade Agreement Organization – Agreement on Government Procurement (WTO-AGP).

TB also states that, if no valid Statements of Capabilities are received during the 15-day publication period, the contract may be awarded to the pre-identified supplier. PWGSC not only meets the TB Contracting Policy requirement, its policy further states that when a Statement of Capabilities is received after the ACAN closing date but before the award of the contract, it must still be considered prior to proceeding with the contract award. PWGSC's policy is based on the fact that, if procurement personnel become aware of another potential supplier at any time before the award of a directed contract, the statement "only one supplier is capable of performing the contract" is no longer valid and proceeding with contract award contravenes the GCRs. The difference in the wording of the two policies is important, as in some cases many months can elapse between the closing date for an ACAN publication and the actual award of the contract due to the complexity of negotiations, for example.

These different approaches may have a negative impact on the perception of fairness, openness and transparency as the same supplier may be treated differently depending on whether the procurement is processed by PWGSC, DND or another department.

We recognize that there are attendant risks regarding the consideration and potential acceptance of a Statement of Capabilities up to contract award. However, we believe some of those risks could be mitigated, for example, by clearly stipulating in the ACAN that the government will consider Statements of Capabilities up to contract award.

However, there is an additional unresolved operational risk. Suppliers may ignore the closing date of the ACAN and delay the submission of their Statements of Capabilities until a much later date (but prior to contract award). This could prolong the process and cause significant delays in meeting operational requirements.

While we understand PWGSC's reluctance to advertize this practice, this may provide an unfair advantage to some, as all suppliers may not have equal knowledge of this extended period to submit Statements of Capabilities.

Finally, while TB only requires that the rejection of a Statement of Capabilities be reviewed by a different official, PWGSC and CRA require this review to be

carried out by an official at a higher level than the one who approved the publication of the ACAN. In our view this is a more effective practice which other departments may want to adopt, based on a risk assessment of their procurement process.

With regard to the practices related to the implementation of the ACAN process, we selected a judgmental sample of procurement files from the agency and departments subject to this review, where an ACAN was issued. Our review revealed that the majority of files were inadequately documented and many lacked support for invoking one of the GCR exceptions to soliciting bids, or using limited tendering provisions under the trade agreements.

The TB Contracting Policy and CRA's Contracts Directive stipulate that ACANs should not be published when the government is unable to accept a Statement of Capabilities from a potential supplier. We expected, as a good business practice, that most of the procurement files would include documentation to indicate that some form of market research had been conducted to ascertain if more than one supplier could fulfill the requirement and to substantiate the subsequent decision to publish an ACAN. However, we found that this was not the case.

We are particularly concerned by the significant number of cases where the documentation showed that the government was dealing with only one supplier because there was a pressing emergency, it was not in the public interest or because the supplier owned the intellectual property rights, and, by definition, the government was unable to accept Statements of Capabilities from potential suppliers.

Based upon our review of procurement files and our discussions with suppliers and public officials, it appears that the TB Contracting Policy stipulation that the ACAN be published for a minimum of 15 days is, for the most part, being implemented as a maximum. Our review shows a range of recent ACANs between \$32,000 and \$42 million, all of which were published for a 15-day period. We would have expected that some of the more complex requirements, which may require suppliers to consult with their affiliates in Canada or abroad or where two or more suppliers may wish to form a joint venture, would have been given more than a 15-day window of opportunity to respond.

Based on a PWGSC report on its use of ACANs when contracting for itself and on behalf of other government departments, there is very limited supplier participation in PWGSC's ACAN processes. Statements of Capabilities are received in about 7% of cases, of which, only half are accepted.

To date, we have not been made aware of any analysis that has been carried out to ascertain the reasons for this low rate of supplier participation and its effect on the fairness, openness and transparency of the ACAN process.

We noted instances where some procurement personnel started discussions and shared information with the pre-identified supplier before the closing of the ACAN publication period. In our opinion, this poses a risk that the supplier may start work, or incur costs preparing to start work, prior to contract award.

PWGSC informed us that the practice of negotiating with potential suppliers is not contrary to government guidelines and that suppliers clearly understand that these are preliminary negotiations and they are not to start work before being awarded a contract; if they do so it would be at their own risk. PWGSC has also stated that they are not aware of any situations where early negotiations created the risk of unfair advantage to potential suppliers.

In our view, commencing negotiations with a single supplier prior to the ACAN closing date raises questions about the fairness and openness of the process. Should a Statement of Capabilities be accepted and lead to a competitive process, there is a risk that all potential suppliers may not be privy to the same level of information at the same time. This practice would not be allowed during a traditional or electronic competitive process.

We fully support the view that the principles of fairness, openness and transparency and the objective of obtaining best value for Canadians are best served by open competition for government contracts. We also recognize that there are occasions when open competition is not feasible and a directed contract is the appropriate course of action.

The government recognizes that directed contracts pose risks. They could be perceived as a source of preferential treatment, diminished access to all suppliers, and challenges to achieving value for money in the expenditure of public funds. However, by assigning significantly higher contracting approval authorities to directed contracts awarded using the ACAN process – with potentially less oversight – the government has diluted a major control mechanism to mitigate those risks.

We believe that there is a need to rethink policy requirements related to ACANs, in conjunction with the several initiatives the government is currently working on to streamline procurement.

We recommend the following:

- PWGSC should develop effective practices for its own use, which other departments and agencies may wish to adapt for their use, based on their operational needs. The practices should be designed to:
  - reinforce compliance with government documentation standards, to support all phases of the procurement process;

- clarify that, although there is a minimum posting period for ACANs, the contracting authority should determine the individual posting period based on various risks associated with the requirement, including complexity and materiality; and
- since, from a contracting authority perspective ACANs are deemed to be competitive, provide guidance to procurement personnel that negotiations should not commence with the pre-identified supplier before the closing of the ACAN publication.
- PWGSC should undertake policy research related to the timeframes during which Statements of Capabilities can be received and assessed. PWGSC should attempt to find a viable solution to operational concerns resulting from the implementation of this policy, while maintaining the fairness of the ACAN process.
- Given there are three levels of contracting authority limits (the lowest contracting authority limit assigned to non-competitive contracts, a higher limit for traditional competitive contracts and finally the highest limit being assigned to electronic competitive contracts), TB may wish to examine the appropriate limits for directed contracts awarded using an ACAN, based upon risk considerations.
- As reported in the summary of the Procurement Practices Review on *Procurement Challenge and Oversight Function*, of the OPO's first Annual Report, 5 of 9 departments have their senior review committees approve procurements where contracts are to be directed using the ACAN process. We believe that such submissions pose a special risk, and we recommend that departments:
  - establish risk indicators based on materiality and complexity, so that all directed contracts using ACANs that meet the risk profile would have to be approved by the senior review committee responsible for the procurement challenge and oversight function.

Subsequent to the completion of our review, we were informed by CRA that they have published a new procurement procedures document that includes instructions to procurement personnel to use longer posting periods for ACANs when the requirement is of such scope or complexity as to require additional time for the preparation and submission of Statements of Capabilities.

The agency and the departments involved in this review have all been given an opportunity to review this report, and their comments have been taken into consideration in finalizing this chapter.

## MANDATORY STANDING OFFERS

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In Budget 2005, the Government announced measures to help lower federal government procurement costs by using the large size of the federal government to get the best possible price. Accordingly, it became mandatory for all government departments to use Standing Offers (SOs) or other methods of supply put in place by Public Works and Government Services Canada (PWGSC) to purchase common goods and services (“commodities”). In April 2005, Treasury Board (TB) revised its Contracting Policy to make the use of SOs mandatory for 10 commodities.

As a common service organization and the government’s main contracting arm, PWGSC then developed a policy to take a government-wide approach whereby departments are not to put their own SOs in place unless required under exceptional circumstances, as this would defeat long-term benefits and savings.

This review covered the period from April 2005 to August 2008. For calendar year 2007, the total volume of business through call-ups against SOs amounted to approximately \$1.5 billion. The 10 mandatory commodities accounted for 57% of this total. We limited the scope of our review to PWGSC as SOs for the mandatory commodities are put in place and managed by PWGSC alone. Given the overall complexities and characteristic of SOs, other methods of supply such as Supply Arrangements or multi-departmental instruments were not included in our review.

The main objective of this review was to identify effective practices and areas for improvement with respect to the fairness, openness and transparency of government procurement. In that regard, we focused on suppliers’ access and PWGSC’s reporting of departments’ usage of SOs. We were then able to formulate some initial impressions of mandatory SOs and to examine in greater detail the reporting and analysis used to support the management of three specific categories of commodities: Vehicles, Fuels and Human Resource Support Services (HRSS).

Mandatory SOs affect many industries with very different business environments. This office intends to examine, in future reviews, the effects of the SO method of supply on the fairness, openness and transparency of government procurement over a number of years.

An SO is an offer from a supplier to provide goods or services at prearranged prices, with set terms and conditions. Under this method, suppliers are normally provided with an estimate of the quantity expected to be purchased during a specific period of time. Departments fill their specific needs by issuing subsequent contracts (call-ups) against these SOs, and as a result, suppliers are not normally required to compete again to meet individual government requirements.

Benefits of the SO method of supply include lower administrative costs and less need for government to carry inventory. It also provides a consistent approach for both the government and suppliers to conduct business at a reasonable level of effort and cost.

A supplier not successful in obtaining a mandatory SO has limited opportunity for doing business directly with the government, until such time as a new Request for Standing Offer (RFSO) is competed. This calls into question the fairness and openness of extending the initial period of an SO by exercising options over a long period.

The U.S. government uses a method of supply called Multiple Award Schedules, which bears some similarity to SOs. While this method has its own limitations, most Schedules are continuously open, unlike SOs, so suppliers can qualify at any time. In addition, goods and services can be added at any time to ensure the government has access to the latest technology. In our view, further consideration should be given to adapting some of the best practices of other jurisdictions to Canada.

Standing Offers have been the subject of much concern in the supplier community. For example, the Business and Institutional Furniture Manufacturer's Association (BIFMA) felt that the consolidation of requirements has made it more difficult for suppliers to access federal government business and that the government is moving from an inclusive to an exclusive approach, putting businesses and particularly small and medium-sized enterprises (SMEs) at risk.

On the other hand, PWGSC maintains "that Standing Offers actually can reduce order consolidation in many cases since they make it easier to award many smaller projects to multiple suppliers."

PWGSC issued a Policy Notification, which states that the term of a mandatory SO should typically be one year in length and those optional extension years may be included if required. The Department informed us that "this statement is a recommendation, and not a directive." It has further stated that it does not have a fixed standard for the duration of an SO and that the period of each one is established on a case-by-case basis.

We found that the initial period of the SO method of supply was one year for two of the ten mandatory commodities. One used another method, and for the remaining seven, the period ranged from more than a year to nearly five years with an average of just over two years.

During our review, we were informed that the time required to put SOs in place is usually six to nine months because of process requirements and the limited number of resources available within PWGSC to manage the commodities.

We found that this is one of the reasons SOs are being put in place for longer periods. While we understand the issue of administrative convenience, longer periods reduce access to government contracts for suppliers and could limit opportunities for obtaining the latest technology, improving quality and achieving savings from price adjustments.

We noted that the SO database report provided by PWGSC to assess the period of the SOs contained several anomalies, which resulted in the exclusion of observations on extension periods from our review. These anomalies can have a significant impact on any analysis done using this database.

PWGSC informed us that this database is not the only source of analytical information used by commodity teams for decision making, and that the Department is working to improve the accuracy of the data captured in the system. To address the data accuracy issues identified, the Department is upgrading training for procurement personnel to reflect the importance of good record keeping and monitoring data received.

Given the importance of the need for accurate reports on the duration of standing offers for planning and monitoring, we encourage the Department to analyze the database to ensure its integrity. Meanwhile, users of the outputs from this system, especially senior decision makers, should be made aware of its shortcomings. If the Department relies on better sources of information for decision making, then a cost-benefit study should be undertaken to see if the expenditure involved in maintaining and upgrading it should be continued.

With respect to the three specific categories of commodities, we found that mandatory SOs for Vehicles are competed on a yearly basis, those for Fuels are renewed every two years, while those for HRSS are based on a four-year cycle.

In our view, when SOs are competed, all suppliers must have access to reliable information to price their bids accordingly and ensure the “optimal balance of overall benefits to the Crown and the Canadian people.” To achieve this balance and to support effective decision making in the management of this method of supply, solid analysis of the demand must be done by the Department.

We examined the process of recording call-ups for planning purposes. We considered the timeliness and quality of government reports on SOs.

The Contracting Policy recommends that call-ups against SOs be reported by all departments to PWGSC for consolidation. Some departments cannot readily provide this data as they do not have the appropriate automated reporting systems in place. PWGSC’s preparation of the annual report on government usage is therefore not finalized until eight to nine months after the end of the reporting period. In addition, we noted that PWGSC has been unable to match over 30% of the data supplied by government departments to any active SO,

leading us to question the reliability of the data and the effectiveness of the decisions made using these reports.

PWGSC informed us that “it has been working with client departments to develop an automated system, and hopes to eliminate this issue over the coming year.”

PWGSC requests regular call-up activity reports from suppliers, as a condition for maintaining an SO, to assist the Department in tracking usage and forecasting future demand. Suppliers have informed us that they incur additional costs to prepare and submit these reports. With regard to the three categories of commodities we reviewed, we noted that the commodity team for:

- Vehicles has its own tracking system (as PWGSC is the main department issuing call-ups) and has other sources of information available to it, so it does not make use of supplier-generated reports;
- Fuels has developed annual “Previous Buy Information Reports” for departments to track usage and has access to other sources of information, so it analyzes only supplier reports to identify unusual patterns not aligned with forecasts from departments; and
- HRSS has access to various usage reports, including those from suppliers, but does not analyze any of this information.

This means that suppliers prepare and submit reports that are being ignored for the most part.

Vehicles and Fuels have effective practices to plan, develop and manage their SOs. These commodity teams make effective use of their own internal reports, industry publications, and department and supplier consultations to keep track of usage and market trends in order to forecast demand. The same does not appear to be true for HRSS.

All three commodity teams have resource challenges to varying degrees. Vehicles has six full-time procurement specialists to manage eight SOs. Fuels has eight full-time employees – procurement specialists and administrative staff – to manage approximately 70 SOs. HRSS currently has only one junior procurement specialist to manage approximately 80 similar SOs.

Interviews with PWGSC procurement personnel indicated that extensive work can be involved in the preparation and management of standing offers. Staff have stated that given the funding and labour pressures found within the procurement sectors, renewal efforts of SOs are sometimes limited, and that in some instances, they are not renewed as often as the Department would like. This may lead to concerns over accessibility for suppliers to these instruments.



Subsequent to the completion of our review, we were informed by PWGSC that it is now in the process of replacing the HRSS standing offer with a new instrument. This instrument is being developed after extensive consultation through working groups with both client departments and the supplier industry. The Department is confident that this tool has greater functionality than the previous tool, in particular with respect to accessibility for suppliers. For example, while HRSS had a four-year term, this tool allows for frequent refreshes (every 15 months) of the named suppliers and prices.

## Recommendations

The procurement process should be driven by timely and accurate information in order to achieve the expected outcomes, efficiency and effectiveness. Implementation of the following recommendations should promote fairness, transparency and access for all suppliers, while improving practices that promote quality and innovation.

Based on our general observations related to the duration of SOs, we recommend that PWGSC:

- clarify its policy by establishing a set of key criteria to develop a standard for the duration of SOs that would strike a balance between government objectives and promote the principles of access, openness and fairness for suppliers;
- provide guidance and tools to assist its procurement personnel to implement the standard;
- once a standard is established, require that reasons for any deviation from the standard be fully documented and approved by a higher authority; and
- use current communications channels to inform the supplier community of its revised standard.

Based on our general observations related to the three specific categories, we recommend that PWGSC:

- take measures to improve the reliability of its SO database;
- work with departments to improve usage reporting information integrity and timeliness;
- analyze suppliers' reports when those reports are required to supplement other sources of information, and integrate the results into the decision-making process;
- eliminate unnecessary reporting requirements for mandatory SO suppliers;

- develop and document processes for consistency to make use of information in order to effectively manage mandatory SOs; and
- ensure that its commodity management teams have adequate resources to effectively carry out planning, development and management functions.

The Department was given an opportunity to comment on this report, and its comments have been taken into consideration in finalizing this chapter.

PWGSC has informed us that it agrees with the primary thrust of the report in that procurement authorities should consider, in addition to other factors, fair and timely access to competitive processes for suppliers, and it will revise instructions to procurement personnel to emphasize this objective.

## CORCAN

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The Office of the Procurement Ombudsman (OPO) was contacted in May of 2008 by a supplier who made several allegations about irregularities of contract award and contract administration in the CORCAN construction services program at Correctional Services Canada (CSC).

A special operating agency (SOA) within CSC, CORCAN is mandated to provide employment training and employability skills to offenders in federal correctional institutions in support of Government of Canada social policy.

One of CORCAN's five business lines is CORCAN Construction, which has operations throughout the country, including Kingston, Ontario, the site to which the allegations pertain. The total value of CORCAN Construction expenditures in Ontario for 2007-2008 was \$3.1 million.

CORCAN Construction employees and contract staff carry out and manage/oversee the various CORCAN Construction projects and the related training/employability elements. Contractors engaged by CORCAN Construction are required to supply skilled labour for offender training. In consideration for the supply of skilled construction labourers by the contractor, CORCAN pays the contractor at prescribed rates for construction trades plus a training charge. The construction projects provide inmates who assist in this work with training in order that they might acquire marketable skills to improve their future employment prospects.

The allegations concerned procurement issues related to the contractual arrangements put in place at the site in Ontario for the provision of construction services and offender training. These allegations involved:

- the misuse of supply arrangements (SAs) issued for the period of September 2006 to March 2008 (these SAs had a value of approximately \$1.3 million for 2007-2008);
- the solicitation and awarding of a business-to-business (B2B) alliance agreement for March 1, 2008 to March 31, 2009 (valued at \$2.3 million);
- the management weaknesses related to the use of the B2B agreement; and
- a potential conflict of interest in the operations and management of the B2B agreement.

The Procurement Ombudsman Regulations provide the Ombudsman with authority to review the procurement practices of departments in order to assess their fairness, openness and transparency and make recommendations for the improvement of those practices.

After making preliminary inquiries we decided to carry out a review of CORCAN contracting practices to examine the systems and practices related to the allegations.

The matter was then brought to the attention of CSC management, which expressed great concern about the allegations. It was agreed that CSC would engage a private sector firm to review the allegations and report its findings. OPO and CSC officials agreed to the following:

- The scope of the work and the review methodology would have to satisfy the needs of both CSC and OPO;
- CSC would present the report and related action plan to its audit committee;
- OPO would review the report and the supporting documentation it considered necessary; and
- OPO would disclose the significant observations in its annual report.

CSC commissioned a private firm to carry out the review, which was done in three phases. The report on the work done in the initial phase recommended three of the nine allegations for further review and determined the other six to be unfounded. Of these three, two relate to possible misuse of SAs, and one relates to the solicitation and implementation of the B2B agreement.

The second phase further examined the allegations and confirmed the misuse of SAs, issues with the solicitation and award process for the B2B agreement, problems with the use of the B2B agreement and a potential conflict of interest in the implementation of the B2B agreement.

The third phase reviewed the administration of the B2B agreement, and the report included recommendations for improving controls over the management of projects that would be conducted under such arrangements.

Based on our review of the file and the reports, we are of the opinion that there were significant flaws in the procurement practices, such as the:

- short bid solicitation period (three days – December 20–22, 2007);
- lack of an evaluation methodology in the bid solicitation;
- lack of appropriate controls to manage a known conflict of interest situation; and
- lack of required documentation in procurement files.

It also appears that the financial and contracting authorities were exceeded.

As a result, in our opinion, for the transactions under review, the fairness, openness and transparency of the contract award and administration processes have been seriously compromised.

We note that management acted in a responsible and prudent manner when OPO brought the matter to its attention.

Each allegation and review finding has been analyzed and addressed in a very detailed management action plan. The entire matter has been reported to the highest level and has been discussed by the Audit Committee. The action plan itemizes the policy, structural and operational changes that need to be made to prevent future breakdowns of internal control. We have been informed that CSC has dealt with the related Human Resources issues pertaining to potential conflict of interest.

From our review of the work done by the firm and the management action plan prepared by CSC management to address the review findings, we are satisfied that CSC management has adequately dealt with the specific allegations.

CSC has conducted further work and is satisfied that the issues arose from a breakdown in the system of internal controls and were administrative in nature and that there was no unlawful activity. CSC is also satisfied that no recovery action is required.

CORCAN had managed the B2B alliance agreement based upon the premise that it was not subject to the *Government Contracts Regulations (GCRs)* or the Treasury Board (TB) Contracting Policy. Following this review, CSC informed us of their conclusion that the GCRs and TB Contracting Policy do apply to this type of agreement, where goods and/or services are procured by CSC.

### OPO recommendations

- CSC review its other CORCAN construction contracts to ensure that a systemic problem affecting fairness, openness and transparency in the procurement process does not exist and that no delegated financial or procurement authorities have been breached;
- CSC assess the need for training in the area of procurement, including construction services, and devise an appropriate action plan;
- CSC review, in consultation with the Public Works and Government Services Canada and the Treasury Board Secretariat, the appropriateness and legality of the B2B procurement method, including issues pertaining to the application of the *Government Contracts Regulations*, TB policy, and delegated departmental authorities.

CSC agrees with the recommendations in this report. The detailed actions are included in the body of the report.

# PROCUREMENT INQUIRIES AND INVESTIGATIONS

**O**ur Procurement Inquiries and Investigations team is our day-to-day interface with the world and receives inquiries from the supplier and procurement communities, as well as from the general public. The team seeks the rapid resolution of any given situation and may launch a formal investigative process into complaints when warranted.

As noted earlier, our business model encourages suppliers to contact the relevant departments and try to resolve their issues directly before coming to the Office of the Procurement Ombudsman. Although our mandate provides us with the authority to carry out a simple or detailed investigation in response to a formal complaint, these investigations could take many months to complete. Our consultations with suppliers revealed that they are more interested in a speedy resolution to their issues than being drawn in a lengthy investigation process.

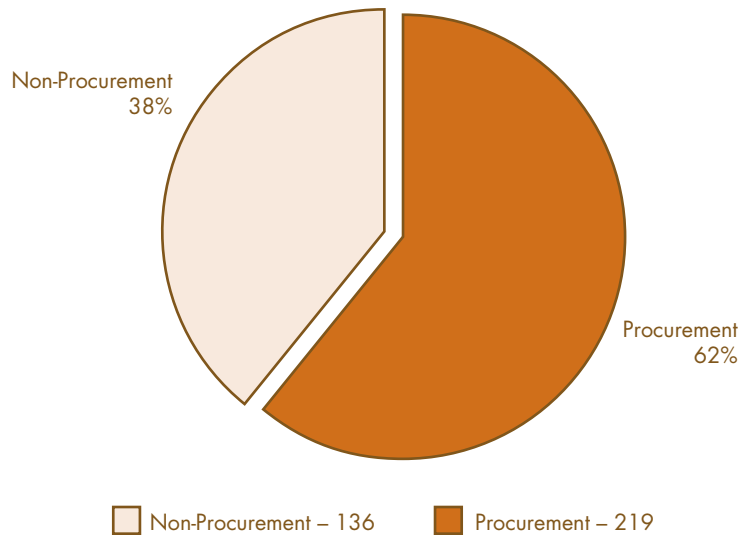
Under our business model, we encourage suppliers to discuss their issues with us and allow us the opportunity to find quick and acceptable solutions through informal means (such as making phone calls, sending emails or opening other lines of communication) before filing a formal complaint. This approach has resulted in positive results for all stakeholders and, over the long term, should improve relations between the government and its suppliers.

Since the Office became operational, we have been contacted 355 times. Of those initial contacts, more than one third were non-procurement related and outside of our mandate, such as taxation, pension and housing concerns. As we have learned in our discussions with other ombudsman offices, this is fairly typical.

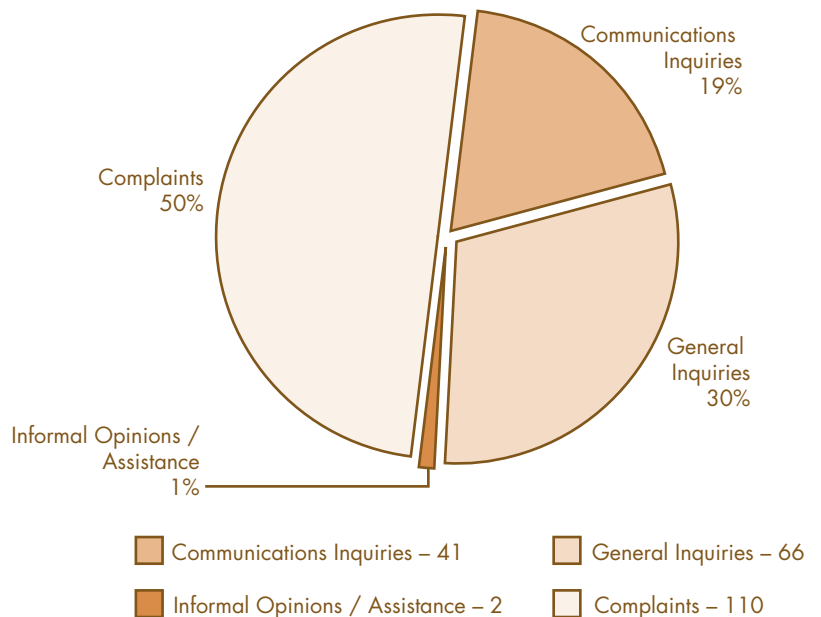
We have divided the procurement related inquiries into several general categories:

- communications inquiries: including requests for speaking engagements, interviews and procurement advertising newsletters;
- general inquiries: regarding our mandate, regulations, how to do business with the government, and where government information may be found (e.g. *Government Contract Regulations*, Code of Conduct for Procurement);
- informal opinions / assistance: including advice on issues such as bid rigging or processes for disclosing information appropriately; and
- complaints: regarding the award or administration of contracts.

### Procurement Related Inquiries vs Non-Procurement Related Inquiries



### Procurement Related Inquiries



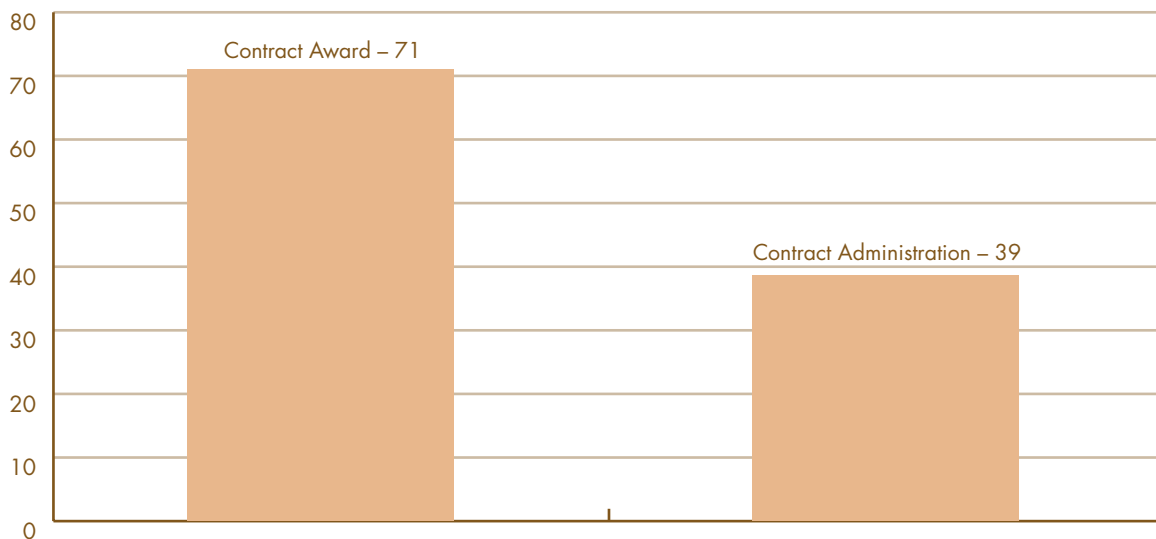
## COMPLAINTS

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We were not surprised that most of our contacts in our first year of operation were of a general informational nature. That being said, complaints dealing with procurement issues constitute our core activity and are vital to the task of improving federal government procurement.

In accordance with our mandate to investigate complaints, they have been divided into two broad categories: contract award – which includes all activities from bid solicitation to contract award; and contract administration – which includes activities such as contract amendments, monitoring progress, following up on delivery, payment actions, etc.

### Complaints



### 1. Contract award

Some of the complaints brought forward concern:

- security clearance process;
- solicitation process;
- debriefing;
- irrelevant mandatory requirements;
- cancellation of RFP for no apparent reason; and
- procurement strategy of standing offers.



## 2. Contract administration

Some of the complaints brought forward concern:

- late payments;
- no interest on late payments;
- subcontractor issues;
- standing offer extension;
- interpretation of terms and conditions (ADR); and
- termination for default.

We are pleased to report that of the 219 procurement related supplier contacts we received until March 31, 2009, the team has had to initiate only one formal investigation. At the time of writing this report, the investigation was not finalized.

We have been carefully analyzing the particular areas of procurement where the complaints seem to be originating. This information then is used as input for our future planning for practice reviews. This year, two of our reviews, Supplier Debriefings and Mandatory Standing Offers largely arose after concerns were raised by suppliers.

In our first year, a significant effort had to be put into explaining to suppliers and government officials the scope and limitations of our mandate relating to complaints. As the chart on page 61 illustrates, 38% of the time the issues raised by suppliers with the Office were on non-procurement matters. In each one of these instances the team conducted the required research and provided the suppliers information on the most appropriate place in government to address their inquiry. In the more serious cases the Procurement Ombudsman has written to the relevant Deputy Minister(s) and brought the matter to their attention.

Given the success of our collaborative approach, we intend to follow the same business model in the coming years. This approach is based upon dialogue and consensus, but does not mean that we will not use our formal authority to launch investigations. Stakeholders – suppliers or government departments – should not underestimate our willingness and determination to use all the authority provided by our mandate to ensure the fairness, openness and transparency in government procurement.

# ALTERNATIVE DISPUTE RESOLUTION SERVICES

Given the significant number of contracts in which the federal government is a party, disputes between the government and its contractors are inevitable. When disputes arise during the performance of a contract, they have immediate negative repercussions and distract contractors and government officials from what their focus should be: the completion of the contract on time and within budget. For the contractor, disputes represent increased costs and raise reputational risks. For the government, disputes represent risks to timely contract completion and quality of deliverables. It is in all parties' best interests to have disputes resolved quickly and efficiently.

Suppliers and government departments now have a new avenue of recourse and can seek the assistance of the Office of the Procurement Ombudsman to help them resolve their contractual disputes. The Office has a legislated mandate to ensure that an Alternative Dispute Resolution process is provided for disputes relating to the interpretation or application of the terms and conditions of a contract. Prior to the creation of this program, no such neutral and independent office existed in government.

Before providing an ADR process, we encourage the parties to try to resolve the issue themselves by redirecting the contractor to the concerned department, if it has an established process, to have the matter resolved there. Given our business model, it was important for us to know whether or not departments had pre-existing complaint resolution processes (which could include more formal dispute resolution services).

## Research Project

During the course of the year, the Office undertook a research project to better understand the concerns of both the supplier community and government officials on the issue of contract complaints handling and dispute resolution services. The research project also served to inform the manner in which our ADR services would be delivered.

Our research indicated that there is significant concern among suppliers about the method in which disputes were handled. Supplier associations indicated that their members lacked confidence in the dispute resolution processes of government departments. They were particularly concerned about the lack of separation of duties of those initially overseeing the contractual process and those adjudicating disputes, and some suppliers even indicated that they chose not to bring disputes forward. The reluctance of contractors to bring forward disputes is leading some departments to conclude that there is no need to improve these practices.

As part of our research project, we chose ten departments of varying size and budget and met with contracting and program officials to discuss the policies and practices of these departments. We discovered that even though contract dispute resolution is addressed in the Treasury Board Contracting Policy, departments are at varying degrees of implementation of complaint handling and dispute resolution policies and processes. Departments did indicate they were seriously committed to early resolution of complaints.

Managing complaints before they become very serious and spiral out of control is in the best interests of both suppliers and government. We are supportive of strengthening this capacity in government departments and will work with departments on this matter. Where it is weak or non-existent, or where parties so choose, we are available to provide ADR services.

*“...The Office of Procurement Ombudsman is positioned to provide an easily accessible point of contact within the federal infrastructure for resolution of procurement-related disputes or concerns.”*

*– Jeff Morrison, president of the Association of Canadian Engineering Companies*

## Our Services

Given the existing environment, we have strived to create ADR services that:

- are fair, open and transparent, applied in a consistent and professional manner, and timely;
- constitute effective and useful communication to educate both parties, so that they are working with the same information;
- recognize and address power imbalances;
- provide access to and flexibility of appropriate options to resolve conflicts at every stage of the dispute;
- result in resolutions that are equitable and fair, and that both sides will honor; and
- satisfy both parties that they have been appropriately engaged in the process and involved in the outcome.

We developed our ADR services with the significant assistance of the Department of Justice’s Dispute Prevention and Resolution services. The Department of Justice met with Office staff on several occasions in recent months and provided us with expert advice and information on the various mechanisms available to resolve disputes. With their guidance, we were able to select those dispute resolution

options that best meet the objectives and the needs of suppliers and the government. We have also developed policies, procedures and templates for our internal use.

Our ADR service is a confidential and voluntary process. In order to facilitate a fair and quick resolution of contractual disputes, we offer three options:

- *facilitation*: a neutral third person – usually a member of the Office – establishes communication between the parties and seeks to encourage a dialogue so that both sides move towards an understanding of each other’s position and a mutually acceptable outcome;
- *mediation*: a neutral third party (not a member of the Office) with substantial subject-matter knowledge provides assistance to both sides in an attempt to reach a mutually acceptable outcome; and
- *non-binding arbitration*: a neutral third person (not a member of the Office) hears both sides and renders a non-binding written decision on the dispute.

Both parties have to agree at the outset that they will participate in the process and share any associated costs. The parties can agree on the cost allocation between themselves. Also, each party will be responsible for its own expenses, such as those related to travel. There are no costs involved when a member of our office provides a facilitation service.

In accordance with the *Procurement Ombudsman Regulations*, once a request for ADR has been received in writing by the Office, we review the request and supporting information/documentation to determine if it is suitable for ADR. If it is, we seek the consent of the other party to the contract to participate in an ADR process.

If the other party agrees to proceed, we prepare a proposal for both parties that sets out the type of process best suited to their needs and our rationale for selecting it. The proposal also includes the conditions under which the ADR process will be carried out (e.g. scope, duration, location) and identifies any fees or expenses associated with a specific process, such as paying for the services of a mediator.

As of March 31, 2009, we have received only four requests for ADR services:

- one was withdrawn by the requestor before the office took any action;
- one was resolved through the use of facilitation;
- two are outstanding, pending further information.

To date, we have received some positive feedback on our efforts with respect to ADR. In a recent hearing of the Standing Committee on Government Operations and Estimates, which took place on February 26, 2009, a Vice-President of the Canadian Federation of Independent Business commented as follows:

“We have met with the Ombudsman a few times. We are feeling very optimistic about the role of the Ombudsman and what they might be able to achieve. [...] The dispute resolution process, for example, is one of the things that was always missing from the Public Works process and that’s going to be something they’re able to at least intervene.”

Over the coming year, we plan to increase our outreach efforts to make this service better known to contractors and federal government departments.



# LOOKING TO THE FUTURE

**A**s this report demonstrates, in our first year, a considerable amount of our attention and effort had to be given to building this new office in order to fulfill this unique mandate. With that work completed, in 2009-2010 we will be able to devote ourselves more fully to our core operational work.

In our annual report next year, we will be reporting on continuing outreach initiatives aimed at publicizing our existence and gaining recognition among all stakeholders of the potential value-added of our work. We will be presenting information about more procurement practice reviews, inquiries and investigations and about our work in dispute resolution. We are already consulting on our next series of practice reviews: in our discussions with supplier groups, government communities and others, we make it a regular practice to seek input on where we might direct our focus to greatest advantage.

In discussions to date with various stakeholders, we have noted interest in and concerns on emerging issues such as standing offers and supply arrangements, military procurement and the procurement aspect of the economic stimulus package. Another topic of concern is the bundling of government services, especially in the area of information technology, and the effect this practice has on the fairness and openness of the procurement process.

We are examining the feasibility of undertaking reviews to include some of the above-noted areas as well as others that will come to our attention during the planning exercise and later in the year.

In the next year, we expect to see and respond to more contacts from stakeholders seeking our assistance. This year's success in this area can largely be attributed to the trust and collaboration shown by the suppliers and government departments and agencies. In particular, the government's willingness to provide us full access to all documentation required to conduct our inquiries and investigations is greatly appreciated. We will ensure that this collaboration with the stakeholders continues and grows in order to resolve issues quickly and efficiently.

It is not enough for us to become involved after the fact. It is not enough for us to rely solely on our formal authority. It is not enough for us to make recommendations, and then let stakeholders react as they choose.

*For us to succeed, we need to be, we are and we will continue to be a clear, direct and obvious part of the solution. Applying the legislation that created us and the Regulations that guide us, we are here to work with all of the stakeholders in federal procurement, using whatever approach is best suited to the circumstances, to make federal procurement better for all stakeholders.*

*This is our inherent mandate:  
**we are here to help.***



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*The Office of the Procurement Ombudsman management team*

# ANNEX

## STATEMENT OF OPERATIONS

STATEMENT OF OPERATIONS AND NOTES – MARCH 31, 2009

### Statement of Operations

Expenses	2009
	Thousands of dollars
Salaries and employee benefits	1,790
Consulting services – external	96
Office removal and relocation	191
Operating expenses	132
Information and Communication	93
Materials and supplies	33
Paid to BC Ombudsman – Case management system	84
Corporate services paid to PWGSC (note 3)	413
Services from Audit Services Canada paid to PWGSC (note 3)	390
<b>Total</b>	<b>3,222</b>

The accompanying notes are an integral part of the statement of operations

### NOTES TO THE STATEMENT OF OPERATIONS FOR THE YEAR ENDED MARCH 31, 2009

#### 1. Authority and objective

The Office of the Procurement Ombudsman (OPO) was established by amendments to the *Public Works and Government Services Act*. OPO is an independent organization with a government-wide mandate, which is defined in the *Federal Accountability Act*. Its overall objective is to ensure the fairness, openness and transparency of government procurement.



## 2. Parliamentary authority

The funding approved by the Treasury Board for the operation of the Office of the Procurement Ombudsman is part of Public Works and Government Services Canada's (PWGSC's) A-base and consequently, the Office is subject to the legislative, regulatory, and policy frameworks that govern the Department. It is recognized, however, that it is implicit in the nature and purpose of the Office of the Procurement Ombudsman that it carries its mandate in an independent fashion, and be seen to do so, maintaining an arm's length relationship with PWGSC in its day-to-day operations.

## 3. Related party transactions

During the year, the Office paid PWGSC \$390 thousand for the services of Audit Services Canada. The Office also has a memorandum of understanding whereby PWGSC provides corporate services to the Office in the areas of finance, human resources and information technology. In 2009, the Office incurred expenses of \$413 thousand for these services, which are broken down as follows:

Corporate services provided by PWGSC	Amount paid in thousands of dollars
Finance	67
Human resources	137
Information technology	209
<b>Total</b>	<b>413</b>

## 4. Comparative figures

As this was the first year of operations, there are no comparative figures for the year ended in 2007–08.

