



OFFICE OF THE PROCUREMENT OMBUDSMAN



2009-2010 ANNUAL REPORT

Office of the Procurement Ombudsman

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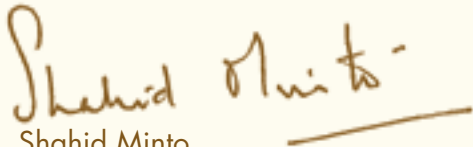
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MINISTER OF PUBLIC WORKS AND GOVERNMENT SERVICES

Dear 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 the Procurement Ombudsman Annual Report for the 2009–2010 fiscal year.

Yours sincerely,

A handwritten signature in dark ink, reading "Shahid Minto", with a horizontal line underneath the name.

Shahid Minto
Procurement Ombudsman

Ottawa, May 25, 2010

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MESSAGE FROM THE PROCUREMENT OMBUDSMAN



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

The Office of the Procurement Ombudsman (OPO) was created following the implementation of the *Federal Accountability Act*, and I was confirmed as Procurement Ombudsman in May 2008. We became fully operational in September 2008 and we are now at the end of our first full year of operations. I am pleased to report that we have made great strides in building trust and confidence among all the stakeholders in public procurement. Our success is reflected in the good working relationships the Office has developed with the supplier community and the government. The feedback we have received from all stakeholders confirms that our dedicated staff is professional, knowledgeable in procurement and impartial; the recommendations we make are reasonable, well thought out, affordable and practical.

We are greatly encouraged by the results of our efforts. Formal follow-up on recommendations normally occurs after two years, but informal inquiries indicate that stakeholders have found our interventions to be very helpful and significant actions have already been taken on recommendations we have made to departments and agencies.

The main objective of the Office is to strengthen Canadians' confidence in public procurement. Parliament has given me, in my role as Procurement Ombudsman, a clear and focussed mandate. When I appeared before the Standing Senate Committee on National Finance on February 12, 2008, the Committee suggested that OPO interpret its mandate broadly. The Chair said: *"Let me suggest that you may want to interpret your mandate broadly. You described the procurement processes as broad, with contracting being only a small piece. As Senator Di Nino raised with you, the pre-awarding of a contract – the requests for proposals and other aspects at the front end – is an important area to review."* Standing Committee on Government Operations and Estimates members expressed the same sentiments when I subsequently appeared before them.

Procurement means the process related to the acquisition of goods, services or construction services, from the initial concept of a requirement to the completion of all post-contractual actions. The mandate for procurement practices reviews includes all phases in the life cycle of procurement. This entails defining the requirements for goods and services, developing a procurement strategy, soliciting and evaluating proposals, awarding the contract, administering it, completing file final action and closing out the file. The mandate also gives OPO the authority to respond to inquiries and to conduct investigations regarding complaints that meet specific criteria respecting compliance with federal procurement regulations. Thirdly, OPO is responsible for ensuring that an Alternative Dispute Resolution (ADR) process is provided, with the agreement of both parties. The three business lines – Practice

Reviews, Inquiries and Investigations, and ADR – are committed to strengthening fairness, openness and transparency in all phases of federal procurement.

Our Office continues to deliver on its promise to maintain an active outreach program. We made presentations on the activities of our Office to suppliers and public servants across the country on more than thirty occasions. We also hosted international delegations from Kenya, China and the Ukraine.

As stakeholders have become aware of our existence and our services, they have increasingly sought our assistance. The Office has received a growing number of inquiries from suppliers. The majority of inquiries are concerns and complaints about procurement-related issues. Initially, many suppliers contacted us to determine why they had not been awarded a contract. Now, many suppliers bring more complex issues to our attention, issues that involve questions of fairness, openness and transparency in the procurement process. For example, they are asking questions about the appropriateness of time lines to bid on Requests for Proposals and other details of the solicitation, evaluation and contract award process.

The Office has chosen to implement a business model that focusses on a collaborative approach to ensure efficient and timely resolution of issues between the government and suppliers. Deputy Ministers in all departments have provided us with key contacts in their organizations, and we have developed good working relationships with them. Our collegial approach to procurement disputes has been very well received, and the results are impressive. Most of the complaints brought to us have been resolved without our resorting to detailed investigations, saving time and effort on the part of both suppliers and government officials. We have only had to conduct a limited number of formal investigations. Suppliers prefer to spend their time managing their businesses, not investigations. Government officials prefer to manage their operations, not disputes.

However, as stated last year, stakeholders should not underestimate our willingness and determination to use all the authority provided by our mandate. If required, the Office will use more powerful tools to investigate and resolve procurement-related complaints and disputes.

Canadians expect the government to take a proactive, balanced and reasonable approach to managing the government's procurement process. We expect departmental managers to identify and assess risks, develop mitigation strategies and target their limited resources to the management of significant risks. By assessing risks and determining controls for public procurement, they can ensure that the procurement system supports, to the highest degree possible, the principles of fairness, openness and transparency.

TWO RECURRING PROBLEMS REQUIRING IMMEDIATE ATTENTION

In our work this year, we noted two recurring problems that have existed for a long time but now require the immediate attention of senior government officials: incomplete file documentation and poor communication between the government and the supplier community. Both impede the transparency of the federal government procurement processes.

Incomplete file documentation weakens transparency

In our practice reviews and investigations, we repeatedly observed the lack of essential documentation to explain and support the decisions made and actions undertaken. Despite the requirements of the Treasury Board Contracting Policy, the duty to keep accurate records under the North American Free Trade Agreement, as well as departmental manuals and the numerous calls for proper documentation of files by internal audits, the Auditor General and the Gomery Commission, this problem persists and it is troubling.

There are a number of reasons why a properly documented file is necessary. There cannot be transparency and accountability without documentation to support decision making. The numerous stakeholders involved in the procurement process should have the ability and the information necessary to review and understand decision making to ensure that public funds are being properly administered and spent. Lack of documentation on a file also raises questions and often leads to speculation on the integrity of the procurement process.

In some cases, lack of documentation has resulted in unfavourable consequences in both tribunals and courts when government decisions were challenged. In fact, the Canadian International Trade Tribunal found that “maintenance of complete documentation for each procurement is essential to preserving the integrity and transparency of the procurement system.” (Re Hewlett-Packard (Canada) Ltd., (2001) C.I.T.T. No. 20 at para. 154.)

Finally, as has been evident to us during our work, a poorly documented file results in a totally unnecessary but significantly increased workload for both the procurement officials and those involved in oversight functions. While the responsibility for documenting files rests with both the managers requesting contracts and the procurement officers, we are also deeply concerned that the managers responsible for reviewing procurement files have not acted upon this long-standing weakness.

It is not enough to repeat that there is a need to properly document procurement files. Concerted efforts must be made to address this issue and to ensure documentation commensurate with the risk to government. This is a requirement of public sector administration that can be made a performance objective in the annual performance agreement of the executive cadre with appropriate recognition or consequences for success or failure to achieve results.

Poor communications negatively affect relations between the government and its suppliers

This issue, which was raised in our 2008–2009 Supplier Debriefings Procurement Practices Review Report (available at <http://opo-bca.gc.ca/paapp-prorev/chptr-2-eng.html>), still represents a significant challenge. Much stress and aggravation could be avoided by better communications between the government and the supplier community.

We were repeatedly told by supplier associations and even some Members of Parliament that the government does a lot of consultation where public servants are hearing but not listening. Furthermore, we were informed by individual suppliers of many instances of misunderstandings and miscommunication during their dealings with procurement officials. There is a cost to both parties when there is poor communication and a lack of respect, real or perceived, intended or unintended.

In many of the complaints made to the Office by suppliers, the government's first response has been denial of either the existence of a problem or any responsibility for it. While we understand the need to minimize legal liability, unnecessary denial leads to delays, unnecessary costs and a breakdown of trust between the government and its suppliers. Just as procurement officers expect to be treated with respect, suppliers too are mature partners in the supply management team and should be treated with the same respect.

Given the sheer number of contracts entered into by the government and its suppliers, on occasion, misunderstandings and mistakes by either party do happen. OPO's Alternative Dispute Resolution process provides an independent, inexpensive and non-confrontational mechanism to discuss and resolve disputes. This year, several suppliers requested assistance from OPO to resolve contractual issues with departments. In most cases, satisfactory resolution was achieved by the parties coming together and communicating their positions. However, in two cases, there have been long delays by a department to respond to requests for some form of ADR. While the Department states that it needed time to carry out a thorough process, the delays has caused frustration for the affected suppliers. Details can be found on p. 23.

We were informed by government departments that, further to our 2008–2009 Supplier Debriefings Procurement Practices Review, they are taking steps toward improving communication. We are very encouraged by this and will, later this year, conduct a formal follow-up on the management action plans developed in response to the recommendations we made.

ETHICS IN FEDERAL PROCUREMENT

Improving communication and strengthening an ethical environment would strengthen Canadians' confidence in federal procurement. Our business model is less about just following the rules and much more about doing the right thing. Procurement decisions should always take ethical considerations into account. The real question is not just what minimum actions government officials must take to meet a narrowly defined policy or legal requirement, but how those actions ensure that the principles of fairness, openness and transparency are upheld.

As stated in the Bellamy Report of 2005 on the *Toronto Computer Leasing Inquiry*: "It is widely recognized that public officials have a greater responsibility to uphold ethical standards to protect the public interest." With respect to government procurement practices in particular, the report notes the following:

"In surveying the literature and research on procurement, it quickly becomes evident that a primary focus of professional attention is on policies, procedures, directives, guidelines, techniques, best practices, etc. However, procurement is about more than the technical components. Almost universally, experts offered the view that ethics-related values and principles are the essential foundation of public sector procurement in leading jurisdictions."

As Paul Emanuelli notes in *Government Procurement*, second edition: "Promoting values-based procurement is a key component to a public institution's system of internal checks-and-balances. This calls for the implementation of mechanisms to enable both self-governance and reporting by individuals and internal monitoring by internal compliance offices within the institution."

Public Works and Government Services Canada (PWGSC) has recognized this need and has in place a strong ethics program, which identifies four values to guide its employees in serving the Canadian public:

- Respect
- Integrity
- Excellence
- Leadership

The goal is to build ethical considerations into the department's approaches, plans and strategies and to embed ethical actions and decision making in employees' daily work. Over 13,000 employees have been trained, and a framework for ethical decision making has been established. We would encourage other departments and agencies to review the PWGSC experience and adopt a formal ethics program to benefit the federal procurement process.

The Office is striving hard to strengthen the confidence of Canadians in public procurement. Small and medium-sized enterprises have expressed their gratitude for our assistance in resolving issues without a lengthy or costly investigation or the need to go to court when they have contractual disputes with government departments. Departments and agencies are generally supportive of our work, and Deputy Ministers and central agencies have been particularly supportive. We jealously guard our independence, but we are a team player. We have a specific role to play but there are many other important players. We want to thank all of those departments, agencies, suppliers and associations that are working in collaboration with us to promote fairness, openness and transparency in the procurement process.

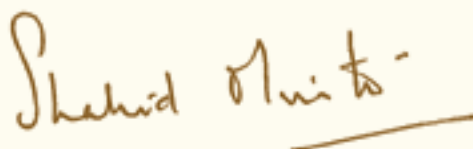
IN CLOSING...

And finally, on a personal note, I have had the honour and privilege of serving Canadians for more than 33 years in the federal public service. For 28 years, I worked in one of the most respected national audit offices in the world, the Office of the Auditor General of Canada. I then became the first Chief Risk Officer in a federal department and was mandated to monitor and report that the operations of PWGSC were conducted with fairness and transparency. Since May 2008, I have served as Procurement Ombudsman, with a specific mandate to establish an independent, neutral and highly professional office that helps deal with suppliers' concerns as well as ensure that government procurement practices support fairness, openness and transparency. I am proud of what we have created and of our success in promoting better procurement, better government and better value for Canadians.

My career in the public service has provided me with an opportunity to interact with Canadians from all parts of the country and to understand and appreciate the great multilingual and multicultural society we live in. Among the many, many wonderful memories of my career, the two that stand out the most are, firstly, the numerous opportunities I had to appear before the various committees of Parliament and truly appreciate the functioning of the system of checks and balances in a democratic society and, secondly, the opportunity to establish the first Office of the Procurement Ombudsman.

I am planning to retire this year, but I am hopeful that I can continue to contribute to the strengthening of risk management, governance and oversight in some other capacity. The Office has been built on a very strong foundation and I am confident that it will continue to work to improve the public procurement process.

I would like to thank all those with whom I have had the honour of working and all those who have put their trust in me and allowed me to serve on their behalf. I would also like to thank the officials of the Treasury Board Secretariat and the Deputy Ministers, in particular, François Guimont, Deputy Minister of PWGSC, without whose constant support and counsel we could not have achieved the success that we have had.

A handwritten signature in dark ink, reading "Shahid Minto", with a horizontal line underneath the name.

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

PROCUREMENT OMBUDSMAN MANDATE

“I THINK ONE OF THE THINGS THEY (THE PUBLIC SERVANT) WOULD REALLY LIKE FROM THIS COMMITTEE IS SOME APPRECIATION FOR THE EFFORT THESE PUBLIC SERVANTS DO PUT IN. THERE ARE SO MANY TRANSACTIONS NOW AND SO FEW PEOPLE, AND THEY’VE COME THROUGH SUCH A TOUGH TIME.”

– SHAHID MINTO,
TO THE STANDING COMMITTEE ON
GOVERNMENT OPERATIONS AND ESTIMATES



The specific mandate of the Ombudsman set out in subsections 22.1(3) 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.”

Sub-section 22.1(4) indicates:

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.

FAIRNESS, OPENNESS AND TRANSPARENCY

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 all potential suppliers with 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

KEY STAKEHOLDERS

We have defined three principal stakeholder groups, as follows:

Suppliers: Includes individual suppliers and supplier associations

Federal Government Departments: Includes central agencies, and may include other departmental structures such as special operating agencies

Parliamentarians: Includes Committees

OPO MISSION, VISION AND STRATEGIC OBJECTIVES

MISSION Strengthen the confidence of Canadians in public procurement

VISION An independent and helpful organization recognized by stakeholders as facilitating the resolution of procurement issues and strengthening the fairness, openness and transparency of federal government procurement

STRATEGIC OBJECTIVES

- Provide assurance to stakeholders that procurement practices of departments and agencies support fairness, openness and transparency
- Identify and promote best practices and make affordable, doable and effective recommendations in areas identified for improvement
- Deal with issues and complaints raised by Canadian suppliers on award and administration of contracts in a neutral, independent, efficient, timely manner
- Provide assistance to potential suppliers in understanding and demystifying the procurement processes
- Develop capacity to ensure that Alternative Dispute Resolution processes are provided in a neutral, independent, efficient, timely manner
- Ensure full integration of all OPO business lines

PROCUREMENT INQUIRIES AND INVESTIGATIONS



“MY STAFF AND I WOULD LIKE TO THANK YOU FOR YOUR SPECTACULAR EFFORTS IN RECTIFYING A DISAGREEMENT (...) AS A SMALL, LOCAL NORTHERN ONTARIO COMPANY, IF YOUR OFFICE HAD NOT INTERVENED THE CONSEQUENCES COULD HAVE BEEN VERY COSTLY TO OUR SURVIVAL.”

– D. JOHNSTON,
NORTHERN BUSINESS SOLUTIONS

The Inquiries and Investigations team plays a key role in the work of the Office of Procurement Ombudsman (OPO). It is the public face of the Office. This year, the team has successfully handled over 500 inquiries and complaints, a significant increase over last year. Recognized and respected by both suppliers and government, the team has experience in procurement and conflict resolution. By helping to resolve the issues between government officials and the supplier community, they strengthen confidence in public procurement.

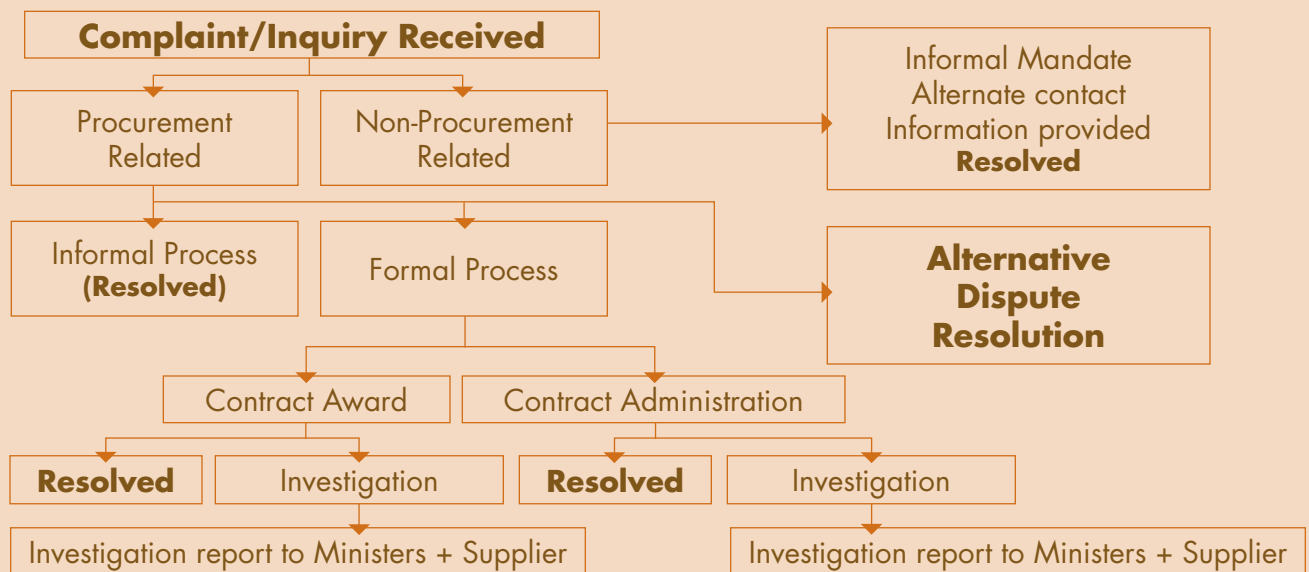
Our business model encourages suppliers to try to resolve procurement issues directly with the relevant department first. If a supplier informs us that its request for clarification or information was unanswered or not fully answered, we encourage them to discuss their issues with us and allow us the opportunity to help resolve them as quickly as possible through informal means. Only if this does not work, do we proceed with a formal investigation. Both parties benefit from a collaborative approach as procurement processes continue in a timely manner, quality is not compromised and the parties maintain a good working relationship for future procurement contracts.

Suppliers can reach us by letter, e-mail or telephone call on the toll-free inquiries telephone line. When an inquiry is received, the investigator acknowledges the contact within one working day and stays with the inquiry until it is completed. Trust and efficiency are promoted by this commitment to personalized service. Feedback we have received indicate that people are pleased with the continuity and the fact that they do not have to tell their story over and over again.

In the course of our work, we are looking at a broad range of considerations but always balancing the interest of both parties. We are watching for indications that people were doing the right thing not just meeting the minimum required by the rules. We expect to see that all parties treat each other respectfully and take a thoughtful approach to procurement. For example we expect to see documented reasons for decisions that consider the broader context surrounding a particular transaction including ethical concerns.

What we are finding is that the root cause of most inquiries is misunderstandings between departments and their suppliers. What we hear from suppliers is that departments often give bureaucratic messages, conveying a minimum of information or feedback. Often this is the case, but sometimes it is also a case of the supplier not having a full understanding of the procurement process. Our investigators often describe the various parts of the procurement process in question which provides the supplier with an explanation sufficient to address their concerns. In our view there is much to be gained from clear, open and timely communication.

Inquiry & Investigation Process

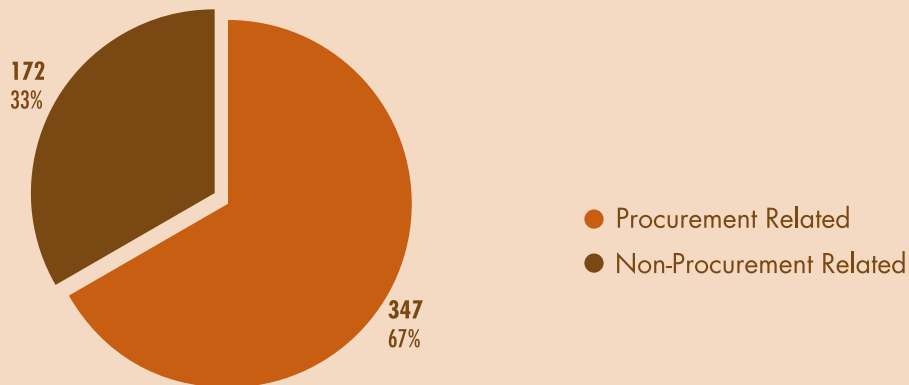


In 2009–2010, most inquiries were concluded without having to undertake a formal investigation or refer the case to Alternative Dispute Resolution (ADR). By working with our key contacts cooperatively, we have been able to ensure efficient and timely resolution of issues between the government and suppliers. With the issues resolved, suppliers can move forward with running their businesses and government officials can focus on running their operations. That we were able to conclude most inquiries informally is an important measure of our success in following a business model based on collegiality and communication.

This year, we noted that more of the supplier community seemed to know that we exist and what role we play. Callers were more aware of our mandate and had clearer expectations about how the Office could help them.

As illustrated in the chart, Procurement vs. Non-Procurement Inquiries, the Office received 519 inquiries in 2009–2010. Only 33 percent of the 519 contacts were non-procurement-related (for example, inquiries about late pension payments, alimony payments and housing). In these cases, the investigators explained that the issues were not within the Office's mandate. They did not dismiss these citizens' concerns but attempted to provide information on where the caller could get help, providing a name and telephone number when possible.

Procurement vs. Non-Procurement Inquiries



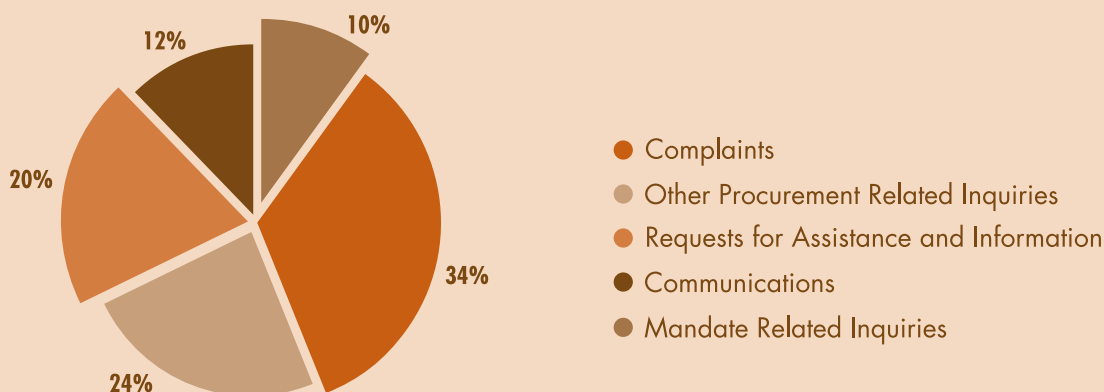
We started using our Case Management System in 2009–2010, but the fact that 2008–2009 was a start-up and partial year, makes the comparison between the two years difficult.

347 of the 519 inquiries (approximately 67%) made in 2009–2010 were procurement-related. The nature of these procurement-related inquiries is:

- **Complaints:** concerns about the award or administration of contracts are a key focus for us. Helping to resolve these concerns is one of the most important roles the Office plays. Complaints represented 34 percent of all procurement-related inquiries.
- **Other Procurement-Related Inquiries:** procurement-related inquiries that do not fall within the legislated mandate of the Office. Examples include referrals to other levels of government, and systemic Government of Canada procurement issues that were referred to our Procurement Practices Review team.
- **Requests for Assistance and Information:** general information requests on procurement from suppliers, other government departments and Canadians.
- **Communications:** requests for the Procurement Ombudsman or other representatives of the Office to speak, to give interviews, or to submit articles to journals.
- **Mandate-Related Inquiries:** requests for information on the mandate of OPO, what it can or cannot do.

We encourage our stakeholders to inform the Office of all their procurement issues. This information can help the Office identify systemic issues and provide input for planning of future procurement practices reviews.

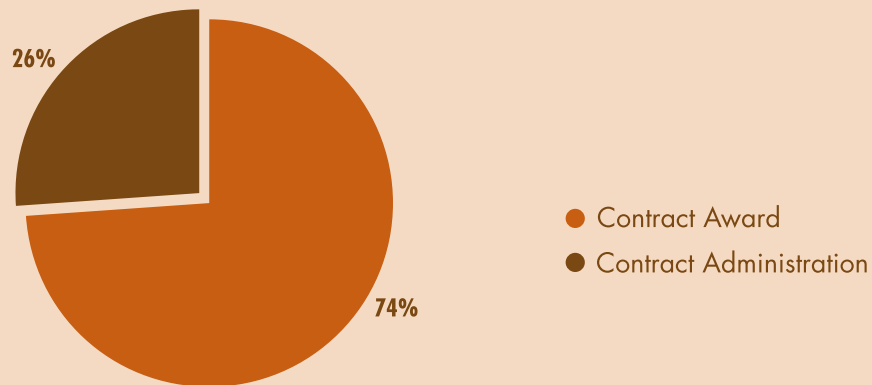
Type of Procurement Inquiries



COMPLAINTS

As shown in the chart called Procurement Complaints, there are two broad categories for the 121 procurement-related complaints received in 2009–2010: contract award and contract administration.

Procurement Complaints



Complaints on Contract Award

The Office of the Procurement Ombudsman can investigate:

- the award of a contract for the acquisition of goods below the value of \$25,000 and services below the value of \$100,000 where the criteria of Canada's Agreement on Internal Trade apply.

The Office of the Procurement Ombudsman cannot review:

- any complaint that falls within the mandate of the Canadian International Trade Tribunal or is the subject of a proceeding in court.
- any complaint that relates to problems that arose prior to the Procurement Ombudsman Regulations coming into force (May 5, 2008).
- any complaint related to contracts awarded where the government pursues a legitimate social objective, such as Aboriginal set-asides.
- any complaint about the procurement of certain government entities such as the Bank of Canada, the Canada Council and the Canada Deposit Insurance Corporation.

The issues brought to our attention in this category of complaints include unnecessary and restrictive selection criteria, lengthy or cancelled bidding processes, and biased and inconsistent evaluation processes.

Initially, we use informal means to resolve complaints. The following cases show how the Office used its informal process to facilitate communication and achieve timely, efficient resolution of disputes.

- A supplier was not able to compete for a public procurement contract because of the technical specifications identified in a request for proposal (RFP). The company tried to set up a meeting with the government agency to explain its concerns and seek modification to the RFP. The agency officials refused to meet. The company then contacted our Office. Once we understood their concerns, we were able to assist in demystifying the procurement process. Subsequently the supplier was able to reframe his concerns which he sent directly to the agency. The agency officials agreed to a meeting. The specifications were modified, which meant that the company was able to successfully compete for this and future agency contracts. The supplier wrote the Office saying, "by allowing [our company] to compete, your office ensured the Government of Canada is receiving a high quality solution at a competitive price. The competition will ensure Canadian taxpayers receive the best possible value for tax dollars."
- A government agency wanted security cameras to photograph vehicles. In the \$500,000 request for proposal (RFP), the agency included security clearances as a mandatory requirement. A potential supplier contacted the Office to complain that this restricted competition. We advised the supplier that we could not initiate a formal investigation because the high dollar value of the contract was outside the Office's mandate. However, we called the agency and through a simple discussion, the agency agreed that security clearances were not necessary. The agency then notified all potential suppliers that this requirement had been waived, which means this opportunity was opened to a much broader field of potential suppliers.

If we are unable to address the supplier's concerns using our informal process, we use the process set out in the Procurement Ombudsman Regulations. This year, two formal investigations were completed and three investigations on contract award were ongoing at year-end. Two cases are described below:

- A supplier complained about a mandatory technical requirement that restricted the openness of the solicitation process. During the solicitation process and afterwards, the complainant challenged the appropriateness of the mandatory requirement on the basis that it was restrictive and discriminatory. The complainant also was unable to obtain, despite several attempts, a rationale for including the mandatory requirement. In response to queries during the solicitation process, the tendering department simply

refused to change the requirement and provided no explanation for it. Our investigation found that the mandatory requirement was a legitimate operational requirement of that particular solicitation process. However, we also agreed with the complainant that a rationale should have been provided in a timelier manner to potential suppliers.

- A supplier alleged that a requirement cancelled from one electronic bidding tool and re-advertised using another electronic tool but with much more stringent mandatory requirements in an attempt to exclude his proposal. Our investigation found that the department had carried out a fair competition and the supplier had been disqualified in accordance with the rules. However, our investigation also noted that the procurement files were poorly documented and the rationale for the tools selected and decisions made were not clearly stated.

In bringing these complaints to our attention, suppliers are contributing to a process which results in recommendations that are aimed at strengthening fairness, openness, and transparency of the procurement system.

Complaints on Contract Administration

The Office of the Procurement Ombudsman can investigate the administration of contracts irrespective of dollar amounts.

The Office of the Procurement Ombudsman may not make recommendations:

- altering the terms and conditions of a contract.
- providing a remedy other than as specified in the contract.


Where the other criteria in the Procurement Ombudsman Regulations are met, the Office can review complaints about the administration of a contract which includes issues such as late payments, no interest on late payments and standing offer (SO) extensions. Where the complaint centers on the interpretation or application of terms and conditions of the contract, we transfer it to the Alternative Dispute Resolution team.

The following two examples from 2009–2010 show how we resolved contract administration cases without the need to conduct formal investigations.

- A standing offer (SO) renewal notice was sent to a supplier at 4 p.m. on the day the SO was to expire. The supplier was traveling in Asia at the time and was unable to respond to the department for three days. On returning to Canada, the supplier requested the department make an allowance for his circumstances but the department refused to extend the deadline for returning the acceptance. The supplier then complained to our Office. We phoned the department and asked that it reconsider its position. Initially, the department took the position that what it had done was within the terms of the standing offer but failed to see it was neither ethical nor respectful. It had not considered the effect on suppliers of its decision to send the renewal notice on the last possible day. After we questioned the department's reasons for its decision, the department acknowledged its part in creating this difficulty and agreed to renew the SO with the supplier.
- A company complained that a department was late in paying its invoices. We called the department who apologized indicating that it was just implementing a new financial system. The company called us back to say that they had received payment but no interest had been paid. Subsequent to a further call from us, the department advised that the interest module on their new system had not been activated. The department fixed the system and paid the supplier the interest owed.

In 2009–2010, there were no formal investigations of contract administration complaints. Since many contract administration issues pertain to the interpretation or application of the terms and conditions of the contract, it is more likely the matter will be referred to the Alternative Dispute Resolution team who will assist the parties to resolve their disagreement quickly and respectfully so that the parties can maintain their working relationship to produce a quality result.

ALTERNATIVE DISPUTE RESOLUTION



“RESOLUTION WOULD NOT HAVE BEEN POSSIBLE WITHOUT THE AWESOME WORK OF OPO’S TEAM. THANK YOU ALL, I FELT VERY WELL SUPPORTED”.

– BILL MERKLINGER,
ASSISTANT DEPUTY MINISTER AND CHIEF FINANCIAL
OFFICER, NATURAL RESOURCES CANADA

In any contractual relationship, there may be disagreement over the application of the terms and conditions of a contract. Parties to a contract may have different interpretations of the same words, phrases or paragraphs. To assist both suppliers and government departments to resolve contractual disputes, the Office of the Procurement Ombudsman offers Alternative Dispute Resolution (ADR) services.

RANGE OF SERVICES PROVIDED

In the first year of operations, a significant amount of time was spent developing which services and how our Office would provide these services. Ultimately, we decided on three types of services:

- **Facilitation.** Facilitation is meant to be an opportunity for parties to come together in a neutral setting to set out points of view about a contract dispute. The facilitator is responsible for keeping the discussion on track and trying to minimize differences to resolve the dispute. We have also developed a set of ground rules, as well as a facilitation agreement, which the parties are required to sign prior to commencement of the facilitation. There is no charge to either the supplier or the department to participate in a facilitated session. We provide the facilitation services in-house.
- **Mediation.** Mediation is a process intended to identify the interests at play and determine if there is a way to ensure those interests are protected, yet resolve the dispute. Mediation services are provided by qualified mediators. We are currently working with the ADR Institute of Canada to identify mediators who would be interested in being on the Office’s roster. As our services are available across the country, we intend to have several geographically based rosters and a roster of bilingual mediators. Fees associated with mediation are to be borne by both parties on an agreed-upon basis. The parties are required to sign a mediation agreement.

- **Neutral evaluation.** Neutral evaluation is a process that results in a written opinion about the legal merits of each party's position. This type of process is best suited to either a supplier or a government department that wants to proceed on a right-based analysis. Often, this type of assessment will be a catalyst in moving a party from an entrenched position to either facilitation or mediation. Neutral evaluation services are provided by individuals outside the office with legal training. For example, this type of service could be provided by a retired judge.

Commencing in late summer of 2009, we made deliberate and concerted efforts to ensure that government departments and agencies covered by our mandate were aware of the services available to them. We made over 35 presentations to various departments and agencies with a specific focus on how ADR could help them when they are faced with contractual disputes. Through our outreach program, we also reiterated the availability of ADR services to suppliers.

We typically receive feedback from the parties indicating they appreciate the respectful environment we create and the effect this has on their ability to deal with an unfavourable situation and move forward. The following testimony is illustrative of the sentiments of the parties.

"This past year, I had occasion to solicit the aid of the OPO to facilitate a dispute between my company and [a department] over the termination of a contract.... Throughout the process, [the Deputy Ombudsman] displayed humaneness, compassion, integrity, transparency, forthrightness, openness, and a genuine desire to be of service."

The outreach is starting to show results as several new cases were initiated and completed in 2009-2010, an increase over 2008-2009. Here are a few examples of ADR cases:

CASE No 1

A supplier contacted our Office because its contract to provide training services had been terminated. The department had offered the supplier negligible compensation and was holding firm on its position. The contractor felt strongly that the way the department had treated him was unfair and he wanted to provide the services his firm had been contracted for or else obtain more reasonable compensation for the termination.

We brought both parties together and asked them to present their side of the story. We facilitated a better understanding of each other's position. This led them to arrive at an acceptable settlement. Both parties expressed their appreciation for our assistance.

CASE No 2

A scientist was contracted to provide research in three separate phases. The first phase was successfully completed and the contractor was paid. During phase 2, the contractor and the department disagreed on a number of contractual issues. The contractor felt that her efforts to complete deliverable 2 had been affected by the department's inability to provide equipment necessary to complete the task. Secondly, the contractor felt that she had received conflicting instructions from multiple departmental representatives as to how to proceed with delivering on the contract, which required that she expend more time and effort than originally anticipated and for which she sought compensation. After several attempts by the contractor and the department to come to an agreement, the parties reached an impasse and the contractor sought our assistance to resolve the dispute.

In our initial discussions with the department it became apparent that communications was an issue. We brought the parties together and facilitated a discussion of the many issues. The department subsequently made an offer to acknowledge that they had contributed to the creation of the dispute, which the contractor accepted. Both parties agreed to treat the contract as ended.

A significant feature of OPO's process for conducting ADR is its ability to bring the parties together in a timely manner so that unnecessary costs and aggravation can be avoided. However, the success of this is based upon receiving full co-operation and timely responses from both parties. In some cases, there have been long delays by Public Works and Government Services Canada in responding to requests for ADR. Two examples are described below:

- In August 2009, the Office received a complaint alleging a company had been removed from a National Master Standing Offer (NMSO) without proper notification and due process. The complainant claimed that this decision was based on hearsay and without any formal inquiry into his removal. The department was contacted and attempts were made to assist in resolving this issue. Over the past nine months, OPO has attempted, by letter, by phone and in person, to engage the department and there were numerous discussions on this situation. On April 27, 2010, nine months after the commencement of the process, the department provided OPO with the result of some work it had done. Because of the lateness of the receipt of the information from the department, we have been unable to review its content prior to the finalization of this report.
- In October 2009, the Office received a request for alternative dispute resolution from a party to a contract who believed his contract had been unjustly terminated. We called the department and made a request to participate in an ADR process. The department requested some additional

time to obtain more information relating to the complainant's concerns. We received repeated calls from the supplier who was anxious to resolve this situation. The department was continuously made aware of the supplier's concerns by us. Four months after the department's request for additional time, the department declined the offer to engage in an ADR process.

While we accept that departments are entitled to decide whether or not to participate in ADR, making that decision in a timely manner would go a long way to improving communication and fostering confidence among the parties in the process.

The department has advised that these two cases involved particularly complex situations and significant research and consultation had to be undertaken before arriving at a final decision. The need to ensure all relevant facts were exposed and explored, coupled with the need to consider the legal implications of the cases resulted in lengthy, thorough processes.

LOOKING AHEAD

OPO will continue to promote its ADR services. Keeping disputes out of the courts and resolving disputes in less litigious ways has tremendous benefits for both the government and the supplier communities. Costs can be kept down and disputes can be dealt with expeditiously. Relationships can be preserved.

Where appropriate, OPO is also prepared to assist other entities and levels of government with the creation of dispute resolution bodies through the provision of information and lessons learned.

PROCUREMENT PRACTICES REVIEWS



“WE’RE HOPING THAT THE RECOMMENDATIONS WE MAKE WILL BE USED BY ALL DEPARTMENTS. EVEN BY THOSE WE DIDN’T SPECIFICALLY LOOK AT.”

– SHAHID MINTO,
PROCUREMENT OMBUDSMAN

SELECTION OF REVIEWS

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 the acquisition of goods and services.

Reviews are different from audits, but some of the concepts are applicable to both, such as detailed examination of individual procurement files. Practice reviews examine past events, as well as past and current practices but also look at trends and forecasts. Reviews are more proactive than audits. Reviews are results-based as opposed to compliance-based. They identify areas for improvement, as well as good initiatives and best practices, while audits generally focus on deficiencies, causes and impacts.

Selecting the topics for review is a complex task. It starts with an environmental scanning exercise performed by the Quality Assurance and Risk Management (QARM) team (detailed information on this exercise can be found in its section of the Annual Report). The results of the environmental scan and subsequent impact analysis formed the basis of the practices review annual plan.

We also consulted with government officials of central agencies (including the Office of the Auditor General and the Office of the Comptroller General) as well as other government departments to discuss and take into consideration their audit and review plans, and procurement-related initiatives. This exercise aims at reducing duplication of effort. It also complements the environmental scan by obtaining information on any concerns these organizations may have related to federal procurement.

Finally, we examined some pragmatic factors such as 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.

Although most topics for procurement practices reviews are selected further to the environmental scanning process conducted by the QARM team, some 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.

During 2009–2010, we conducted reviews in six important areas:

1. Construction Contract Amendments
2. Departmental Verification of Suppliers' Records to Validate Contract Payments
3. Procurement Strategies (Bid Evaluation and Selection Methods)
4. Environment Canada – Review of Procurement Practices Related to Management Consulting and Other Professional Services
5. Methods of Supply (Standing Offers and Supply Arrangements)*
6. A Management Approach to Vendor Performance*

The last two procurement practices reviews, identified with an asterisk, were conducted as studies. Our studies aim to stimulate discussions; ensure that the procurement community has a balanced understanding of the interests and concerns of government, suppliers and parliamentarians; explore trends and developments; identify criteria for use in future practice reviews; and publicize best practices with the aim of strengthening the federal government procurement process by improving fairness, openness and transparency. For these reasons, studies do not involve detailed examination of individual procurement files and follow a process that is more fluid, similar to a research project.

This section presents summaries of all of these reviews, including studies. The detailed reports from the reviews will be posted on our Web site at www.opo-boa.gc.ca.

CORRECTION TO THE OPO 2008–2009 PROCUREMENT PRACTICES REVIEW

Also, included at the end of this section is a correction to the OPO 2008–2009 Procurement Practices Review on Advance Contract Award Notices – Chapter 3.

Subsequent to the publication of the 2008–2009 Annual Report, it was brought to our attention that the value of government-wide Advance Contract Award Notices (ACAN) contracting activities included in our report may have been materially

understated. The report stated, “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....” Our data had been taken from the annual Treasury Board (TB) Purchasing Activity Reports, which were based upon data submitted by PWGSC.

A PWGSC investigation and review of its ACAN reporting data from 2005 to 2007 found that a total of four ACAN contracts worth \$869,494,763 had not been included in the data submitted by PWGSC to TB.

The net effect of these omissions is that the originally reported amount of \$1,680,869,000 was understated by 34% and should have been \$2,550,364,000 for the 2005–2007 period.

PWGSC has assured us that the omission was caused by human error and that it takes the quality of its data seriously. It indicated to us that its review of the data arising from this incident has been most useful to the department in identifying areas of risk and providing the opportunity to focus on a course of action to address the gaps.

We reviewed the departmental investigation and concluded that the omission was not deliberate but was caused by a combination of human error and the failure of the department’s internal controls to detect and correct the error in a timely manner.

While reviewing the above issue, we also noticed two errors in our Table 2: the total number of government-wide contracts and the total dollar value of contracts issued for the year 2007 were added incorrectly. We presented these two totals in Table 2 to provide contextual global figures on the total government contract activity, and thus these two errors were not material to the Procurement Practices Review messages relating to ACANs.

The correct figures (after correction of the foregoing errors) are shown in the revised table on page 57.

LOOKING AHEAD

For the upcoming year, we will continue to refine our annual planning and operational process based on lessons learned and feedback received from departments and agencies.

In addition to conducting practice reviews on selected topics, we will follow up on the extent to which departments and agencies have implemented the recommendations of the Office's 2008–2009 procurement practices reviews of the following:

- Procurement Challenge and Oversight Function
- Supplier Debriefings
- Advance Contract Award Notices
- Mandatory Standing Offers
- CORCAN Procurement Allegations

We will also finalize another study, which we started in the current year. The purpose of this study will be to contribute to improving the fairness, openness and transparency of the procurement process by drawing attention to the risks associated with contracts below \$25,000 where bids do not have to be solicited. We expect this study to be completed in early summer 2010 and posted on our Web site as soon as it is ready.

The Office's procurement practices reviews draw from the information and experience gathered from our other lines of business. The PPR team shares the Office's commitment to support the government procurement function in "doing the right" thing rather than just meeting minimum requirements for compliance purposes. While rigorously maintaining our independence and objectivity, we remain committed to producing reviews and studies that do not create further administrative burden, but rather become part of the solution for both suppliers and government.

This section presents summaries of the six Procurement Practices Reviews conducted in 2009-2010. **The detailed reports will be posted on our Web site at : www.opo-boa.gc.ca**

CONSTRUCTION CONTRACT AMENDMENTS

EXECUTIVE SUMMARY

- 1.1 The Office of the Procurement Ombudsman (OPO) reviewed the practices of some federal departments and agencies in the management of amendments to construction contracts. The OPO believes that it was important to review this area given the government's intention to inject billions of dollars into the Canadian economy, through stimulus spending on infrastructure. A considerable amount of this spending will be for federal construction projects. Treasury Board had previously increased construction contract delegations of some departments and agencies for specific programs and real property renewal projects. The OPO wanted to find out if there were adequate management frameworks in place to allow for effective management of these increased delegations by looking specifically at the management of construction contract amendments.
- 1.2 The construction industry has a long history of co-operation with the Government of Canada; the industry has had a voice in the development of the government's policies and procedures for contracting and managing construction services. Construction industry practices are generally conservative, a trend solidified by a large number of construction-related court cases. Consequently, the industry expects that federal government construction contracts will be managed in a consistent manner. Consistent practices are thought to support fairness, access for interested and qualified suppliers, and openness in procurement.
- 1.3 Until recently, Public Works and Government Services Canada (PWGSC) was the principal purchaser of construction services for the federal Government's departments and agencies. The other departments and agencies had limited or no responsibility for construction contracts. The necessity to renew real property assets changed that, and other organizations have been given increased responsibility for managing construction contracts and contract amendments. Recent programs such as the twinning of the Trans-Canada Highway through Banff, the renewal of national historic and visitor facilities, the Small Craft Harbours Program and other recapitalization activities have resulted in a significant increase in contracting and contract management in departments and agencies that previously carried out little or no construction contracting.
- 1.4 PWGSC was a participant in our review because it is the major player in the construction and management of real property for the Government of Canada. PWGSC annually awards approximately \$700 million in construction contracts and manages 1,800 new construction contracts of one kind or another. PWGSC's management framework for construction

contract amendments, which included their policies, procedures, guidelines and practices, served as a basis against which we compared selected departments and agencies. The departments and agencies reviewed were the Parks Canada Agency, Atlantic Service Centre; Royal Canadian Mounted Police, Atlantic Region; and Department of Fisheries and Oceans, Newfoundland and Labrador Region.

- 1.5 The OPO found that PWGSC has identified the risks associated with construction contract amendments and has developed detailed procedures, tools and training programs to manage these risks. Contract amendments are made with the same care as new contracts. PWGSC contract officers are required to maintain a complete file, or audit trail, which justifies the reason a construction contract amendment is required and demonstrates that the price is fair and reasonable. The contract officers are expected to follow this management framework, a framework that is designed to promote fairness, openness and transparency, and protect the public purse while complying with government-wide rules for contract amendments.
- 1.6 The RCMP has developed a number of detailed policies and procedures related to construction project delivery and property management. But there are limited policies, procedures or guidance on how to handle construction contract amendments. The Department of Fisheries and Ocean's policies and procedures on construction contract amendments are inadequate. Their procedures manual says that the project officer is to inform the departmental Contract Services of the need for an amendment; Contract Services is to issue the amendment; and the contract officer is to complete a contract file checklist. Our file review revealed that the required documentation was seldomly completed for amendments.
- 1.7 As renewal and stimulus funding flows to government departments and agencies, the OPO recommends that other departments and agencies consider adopting and adapting PWGSC's management framework for construction contract amendments. The OPO found that the Parks Canada Agency is taking this approach. Its policies and procedures are in the draft stage but are being tested in the field.
- 1.8 DFO and the RCMP reported that it is challenging to find the human resources necessary to effectively manage the increasing numbers of contracts. The Parks Canada Agency recognized that contracting for construction requires specialized skills and knowledge, and the Agency is recruiting staff with experience in the construction industry.
- 1.9 To build public trust, the government must demonstrate that procurement is well managed and that public funds are spent appropriately. In conducting its review, the OPO expected to see contract amendment files

with full and complete records that revealed the decision-making processes. The OPO expected to find the following documentation for construction contract amendments on each file:

- A clear description of the change requirements;
- A justification or rationale for the change;
- Quotes from the contractor;
- Confirmation that the price quote received from the contractor was fair and reasonable;
- Confirmation that the change was within the scope of the contract;
- Identification of the type of change – e.g. an unknown site condition, an error or omission, a design change; and
- Signed copies of contract amendments that have been issued to the contractor.

1.10 With the exception of PWGSC, many files in the selected departments and agencies were incomplete and critical information was missing. It was often not evident from the file that a signed contract amendment had been sent to the contractor or that there had been a mutual understanding between the contractor and the government over the requirements of the contract amendment.

1.11 Our review indicates that the framework for management of construction contract amendments is not well developed outside PWGSC. In addition we found considerable variability in the management of these amendments. The OPO concluded that other departments and agencies would benefit by adopting the PWGSC policies and procedures for construction contract amendments and adjusting them to fit within their own environment and risk factors. Other departments can learn from PWGSC, the department with expertise, experience and a good relationship with the construction industry. The OPO believes that fairness, openness and transparency in procurement would be promoted by the adoption of this management framework.

All departments and agencies involved in this review were given an opportunity to review this report and their comments were taken into consideration when it was finalized.

The detailed report is available at: www.opo-boa.gc.ca (Reports and Publications).

DEPARTMENTAL VERIFICATION OF SUPPLIERS' RECORDS TO VALIDATE CONTRACT PAYMENTS

EXECUTIVE SUMMARY

- 2.1 The Government of Canada buys goods and services from many different suppliers through contracts worth about \$14 billion a year. Like any household, the government incurs bills that must be paid. Before paying bills, Canadian taxpayers look at the invoices they have been sent to make sure they are accurate and fair. The Government of Canada does the same thing, but the government's purchases are large and complex and many departments may be involved.
- 2.2 While the government is committed to procurement that is fair, open and transparent, there are a number of risks it has to manage. The use of audit, inspection and examination of supplier records upholds the principles by demonstrating the price being paid is fair and reasonable. This is true, especially in cases of high-risk contracts such as large cost-reimbursable contracts where the price is not determined until after the work is done and the amount to be paid under the contract can vary with a number of factors.
- 2.3 The Financial Administration Act (FAA), legislated by Parliament, sets out the procedures the Government of Canada is expected to follow in managing taxpayers' money. Before a payment is made, the FAA says that the government's program managers must make sure that work specified in contracts has actually been done, that goods or services have been received and that the amount charged agrees with the price written in the contract. If the contract does not state a firm price, program managers are expected to see that the amount invoiced is reasonable before a payment is approved. If an error occurs in the process and a supplier is paid more than the amount that was due, the FAA requires that the overpayment be collected and the money returned to the government.
- 2.4 The government processes millions of invoices a year, and there is a risk of making an incorrect payment if an invoice was prepared or paid incorrectly. The government recognizes these risks and has developed mitigating strategies. One of the ways it manages the risk of incorrect payment, and the need to later recover overpayments, is to incorporate audit provisions – referred to in this report as the "audit provision" – in contracts. Of the tens of thousands of contracts that the Government of Canada issues every year, most provide for the examination, inspection or audit of the suppliers' books and records. The government can and does include an audit provision in its contracts to the effect that the government has the right to conduct reviews, inspections and audits and recover overpayments

or payments made in error. Included in the terms of the contract, suppliers are required to keep detailed documentation, such as time sheets or contracts with subcontractors, for six years.

- 2.5 These audits provide assurance that the contracts do not contain a material amount of loss to the Crown due to excessive profits or inaccurate or unreasonable costing practices; deter contractors from initiating unacceptable practices by maintaining a sufficient level of audit presence; and provide quality control information on the acquisitions process, including contract management. The risk of excess charges could be mitigated by the undertaking of cost audits, as appropriate, which is authorized in clear audit provisions of the terms and conditions of contracts.
- 2.6 This year, the Office of the Procurement Ombudsman (OPO) reviewed whether government procurement managers are effectively using departmental verification of suppliers' records to ensure correct contract payments as a means to maintaining fairness, openness and transparency in the procurement of goods and services. The period of review was from April 1, 2007, to January 5, 2010. This review looked at eight departments and agencies chosen for their size and their contracting activity: Public Works and Government Services Canada (PWGSC), National Defence, Foreign Affairs and International Trade, Agriculture and Agri-Food Canada, Canadian Heritage, the National Research Council of Canada, the Public Service Commission and the Canadian Nuclear Safety Commission. The review looked at whether these eight organizations included the right to audit, inspect or examine suppliers' records in their contracts and whether they actually undertook any of these activities. The review also looked at a type of contract used by the Government of Canada in special circumstances called a "cost-reimbursable contract." Audit provisions are particularly important in "cost-reimbursable" contracts.
- 2.7 Cost-reimbursable contracts are considered high-risk contracts because the specific price to be paid to the supplier is not known at the time the contract is signed. The amount to be paid must be calculated based on a number of factors such as the actual costs of materials, parts or sub-contract work; the number of hours of labour at a fixed rate; or a volume or demand that will vary with time. Typical cost-reimbursable contracts would be for professional services at a per-hour rate or for the repair and overhaul of defence materiel, such as fixed wing aircraft or helicopters. In the latter case, the rate per hour for scheduled maintenance can be determined when the contract is signed, but the actual amount of required maintenance will depend on flying time. Some contracts specify a maximum profit percentage. These contracts may be "sole-sourced," that is, they may not go to competitive bidding. In the example of the maintenance of a specific aircraft such as the F-18 fighter, only the suppliers with proprietary

rights and specialized expertise are qualified for the work and the contract may be in force for the many years of the life of the aircraft, with periodic amendments. PWGSC is the contracting authority for the majority of such cost-reimbursable contracts for itself and other government departments such as National Defence. According to PWGSC figures, there are over 4,000 such contracts awarded each year with an estimated annual dollar value of \$5 billion.

- 2.8 The Office of the Procurement Ombudsman's review focussed on two areas. In the first, the eight departments and agencies were contacted and questioned on their use of the audit provision. Secondly, the Office reviewed how PWGSC exercised the audit provision in cost-reimbursable contracts. The review looked at the use of audit provisions in these cost-reimbursable contracts because they often involve large amounts of money, they are often sole-sourced under one of the allowable exceptions, and the amounts payable are based on suppliers' calculations of cost or profit. Because of the large amounts involved, if overpayments were to occur, these overpayments could involve millions of dollars. In addition, as a number of these contracts are for military procurement, the program is important to the Department of National Defence (DND) and is of interest to the U.S. military, which shares with Canada many of the same suppliers.
- 2.9 All eight of the organizations reviewed used a standard audit provision in the contracts where they were the contracting authority. PWGSC included the audit provision in nearly all of its own contracts and in contracts it issued on behalf of other departments. In the eight organizations examined in the first part of the review, the Office found that audit provisions were used like an "insurance" policy. The existence of an audit provision may have a deterrent effect and helps to prevent overcharging the government in the first place, but it will not be effective unless suppliers know that there is a chance of the clause being actually invoked. This clause also authorizes the recovery of overpayments or payments in error.
- 2.10 The eight organizations said that although all contracts included an audit provision, procurement managers had not performed any formal audits, inspections or examinations of suppliers' records during the period under review. The organizations had not issued specific guidance on how this control should be used. They had not formally considered how conducting a certain number of audits, inspections or examinations would reinforce the preventive value of the control. The organizations said that overpayments were prevented by other controls and procedures. For example, they said that financial officers closely scrutinized invoices and supporting documentation in the file for a given contract. In a limited number of cases, the clause had been used informally to obtain additional documentation from the suppliers.

- 2.11 Audits may be conducted at any time within a six-year period specified in a contract. Suppliers are required to keep detailed documentation during this period, including time sheets, contracts with their suppliers and subcontractors, and invoices from their supply chain. Suppliers appear to accept this requirement as part of doing business with the Government of Canada and the government's need for accountability to taxpayers. All eight organizations said that the audit provision is useful even if never formally used because both the government and the supplier know that an audit can be conducted. This promotes compliance with the terms of the contract. The effect is similar to the way a potential audit promotes taxpayers' compliance with the Income Tax Act.
- 2.12 During the period under review, PWGSC procurement officers had not formally invoked the audit provision for any contracts other than cost-reimbursable contracts. They had rarely used the audit provision even for high-value, complex contracts such as those for information technology projects. At the end of our review, PWGSC had prepared a draft internal audit report on Information and Technology Branch task authorization contracts, which deals with some of the topics raised in this review. Another internal audit completed by PWGSC of construction contracts recommended that the Department ensure that construction contracts include a more detailed audit provision in its standard terms and conditions, and that these audits be undertaken. We have been informed by officials at the Department of National Defence that internal audits conducted at National Defence have often recommended to PWGSC that it invoke the clause for specific contracts where there is believed to be a higher risk of overpayment. The Office recommends that PWGSC and other departments and agencies consider invoking the audit provision in the case of high-risk, complex contracts, as is being done for cost-reimbursable contracts.
- 2.13 For cost-reimbursable contracts, PWGSC has for many years employed a cost audit program. This program is used to validate that the contract payments for goods and services are appropriate and assist the contracting officer in determining a final price for such contracts. The program employs Audit Services Canada (ASC), a special operating agency within the Department, to conduct the audits. Audit Services Canada produces a report that may suggest adjustments to the price to be paid, based on its interpretation of the contract requirements. The contracting officer, who is responsible for administering the contract and recommending invoices for payment, is also involved in negotiating the final price with the supplier. PWGSC is currently undertaking to clarify the process and accountability for disposing of the cost audits' suggested adjustments.
- 2.14 We note that PWGSC has undertaken a renewal of this program to make it more relevant and effective. In the interim, the number of audits of cost-reimbursable contracts has decreased, and mandated or required audits

for cost-reimbursable contracts have become backlogged. In a number of cases, it has taken considerable time to establish the validity of the audit adjustments, which has had a corresponding effect on recovering the appropriate amounts in a timely manner. PWGSC has recognized this problem and has recently allocated additional resources to clear the backlog.

- 2.15 PWGSC's Cost Audit Program (CAP) for cost-reimbursable contracts represents a good practice with clear financial benefits through the recovery of overpayments to suppliers. PWGSC is currently carrying out an action plan to renew the program and implement the many needed improvements. Implementing the improvements identified and obtaining sustainable funding are crucial to the effective survival of this important program.
- 2.16 PWGSC has made good progress in revising its approach to cost-reimbursable contracts. However, there are some important issues that it was continuing to address at the completion of our review. One of them is to clearly identify the roles and responsibilities of all the players in the determination of the final disposition of the "audit adjustments." This is a particularly complex matter given the multitude of players involved: DND (or other department) as the department with the program and the appropriation; PWGSC as contracting authority with the concentration of duties in the hands of the contracting officer; ASC as the cost auditor (PWGSC is the employer of record for ASC employees); and of course the affected suppliers.
- 2.17 The vision and direction of the renewal resonate with most stakeholders as being an improvement over the current way of operating. Key proposals being considered intend to alleviate the problems of the buildup of audit backlogs due to lack of funding and unclear selection parameters; the slow recoveries due to the timing of audits; and the use of various methods of recovery that may be unauthorized. The renewed program will use a risk model to focus discretionary audit effort, with a new risk assessment methodology that goes beyond simple dollar value. Audits will occur over the whole life of a contract, not as a post-contract activity, which will be of more value to managers approving payments under section 34 of the FAA. There will be a measure of accountability through program reporting to the Directors General Council (DG Council) under the Assistant Deputy Minister, Acquisitions Branch. To keep up with the requirement for mandatory audits and enable the Cost Audit Group (CAG) to perform discretionary audits on a risk selection basis, the renewal is working toward a multi-faceted approach to stable funding.
- 2.18 We were impressed with the efforts of PWGSC to strengthen the relevance, efficiency and effectiveness of its Cost Audit Program. We encourage all other government departments to review the new program framework and, where appropriate, to adapt it to their own contracting activities.

- 2.19 In our view, the confidence of Canadians in public procurement and the government's commitment to transparency would be strengthened by the publication of summary level results of the Cost Audit Program.
- 2.20 Another issue that merits further study is whether to continue the current practice of having the cost audits done exclusively by government employees or whether the program would benefit by using some of the expertise available in the private sector.

RECOMMENDATIONS

- 2.21 As part of their account verification risk mitigation strategies, departments should include a guideline as to how and when to use the audit provision for contracts that do not fall under the auspices of CAG at PWGSC and are of a cost-reimbursable nature, taking into consideration the expectations of suppliers' record keeping and the principle of openness regarding audit suppliers.
- 2.22 The DG Council in the Acquisitions Branch of PWGSC should monitor the implementation of the updated action plan and report progress to senior management on a frequent basis.
- 2.23 In order to strengthen transparency and enhance the deterrent effect of cost audits, summary level reporting of the CAP results should be prepared and made available to the public.

All departments and agencies involved in this review were given an opportunity to review this report and their comments were taken into consideration when it was finalized.

The detailed report is available at: www.opo-boia.gc.ca (Reports and Publications).

PROCUREMENT STRATEGIES (BID EVALUATION AND SELECTION METHODS)

EXECUTIVE SUMMARY

- 3.1 Public Works and Government Services Canada (PWGSC) and other government departments utilize procurement plans that address operational needs and proposed methods of solicitation, bid evaluation and supplier selection, as well as the identification of key risks and mitigation strategies to support the effective acquisition of goods and services.
- 3.2 A clearly defined procurement plan provides the foundation for the effective management of decisions that take place throughout the life of the procurement. It also provides the baseline against which results can be measured and improvement plans developed. Proper procurement plans are particularly important when setting up supply arrangements (SAs) that may cover several years and are used by departments to award multiple contracts to pre-qualified suppliers.
- 3.3 The Treasury Board (TB) Contracting Policy establishes the framework within which contracting authorities must be exercised. The Policy states: "The objective of government procurement contracting is to acquire goods and services and to carry out construction in a manner that enhances access, competition and fairness and results in best value or, if appropriate, the optimal balance of overall benefits to the Crown and the Canadian people."
- 3.4 The Policy defines "best value" as "the combination of price, technical merit, and quality, as determined by the contracting authority prior to the bid solicitation and set out in the bid solicitation evaluation criteria, and which forms the basis of evaluation and negotiation between buyers and sellers to arrive at an acceptable basis for a purchase and sale." It further states that factors such as all relevant costs over the useful life of the acquisition should be considered.
- 3.5 Some suppliers have expressed concerns about the complexity and ambiguity of bid evaluation and selection methods, which led them to question the fairness, openness and transparency of the government's procurement practices. The Association of Registered Graphic Designers of Ontario (RGD Ontario) approached the Office of the Procurement Ombudsman (OPO) with concerns about competitive bid evaluation and selection methods that raise questions about the following:

- Whether bid evaluation and selection methods took into account an appropriate balance between cost and quality or other factors that add value;
 - Whether the bid solicitation methods were aligned with industry capacity and conditions;
 - Whether the contracts awarded met the operational needs of purchasing organizations; and
 - Whether the bidding requirements were fair.
- 3.6 The government's 2008 Speech from the Throne emphasized that ways needed to be found to make it easier for businesses to provide products and services to the government and deliver better results for Canadians.
- 3.7 In 2009-2010, the OPO chose to conduct a review of the policies and practices relating to competitive procurement planning and corresponding solicitation, bid evaluation and selection methods relevant to the purchase of graphic design services (GDS). Government departments have established a number of SAs to procure graphic design services. SAs are a method of supply used to procure goods and services from a list of pre-qualified suppliers. This list is established through a competitive process that measures both quality and price. This is the first stage of bidding. In the second stage of bidding, departments meet their specific needs by issuing a subsequent call for bids to suppliers on the list. This call for bids may be made to a single supplier, a number of suppliers or all suppliers on the list, depending on the details in the SA.
- 3.8 The practice review focussed on three SAs. Two of these were set up by PWGSC and one by Transport Canada (TC). The objective of the review was to determine whether the three SAs for GDS were based on adequate strategies and plans to support the development of effective and efficient bid solicitation, evaluation and selection methods and to determine whether these plans and their practical implementation
- support operational needs;
 - reflect best value considerations; and
 - encourage both competition and quality.
- 3.9 The OPO selected a sample including the three SAs and 39 related files from contracting activity undertaken between June 2006 and January 2010. The sample was drawn from the contracting data in three of the departments identified as significant purchasers of GDS: Human Resources and Skills Development Canada (HRSDC), Natural Resources Canada (NRCan) and Transport Canada (TC). Public Works and Government

Services Canada was the common service procurement provider for HRSDC and NRCan. We noted that the vast majority of contracts awarded under the SAs were for less than \$25,000 and thus, in accordance with the Government Contracts Regulations, could have been awarded without any competition.

- 3.10 We reviewed policies, procedures and guidance in each department. In addition, interviews were conducted with procurement personnel, and in three departments, information was also obtained from program personnel. Practices were assessed against four criteria that support the development of an effective and efficient procurement strategy:
1. Departmental procurement policies and processes support the development of effective and efficient procurement plans and corresponding solicitation, bid evaluation and selection methods.
 2. Procurement plans and practices ensure operational needs are supported and clearly defined.
 3. Departmental procurement plans and practices reflect key best value considerations.
 4. Departmental procurement plans and practices integrate the principles of fairness, openness and transparency, including encouraging competition and allowing innovation, while respecting the requirements of legislation, trade agreements, regulations and procurement policies.
- 3.11 We noted that all four departments had defined roles and responsibilities in terms of specific procurement activities. Departmental policies and procedures reflected the requirement to achieve best value as well as the principles of fairness, openness and transparency. The primary focus of their guidance was on ensuring the adequacy of statements of work and compliance with trade agreements and the Treasury Board (TB) policies. Competitive bidding was encouraged in all departments. Each department had established checklists to ensure that these key considerations were addressed.
- 3.12 At PWGSC, we observed requirements to obtain written confirmation of the client's agreement with the statement of work (SOW) and, for sensitive or high-risk procurements, with the evaluation and selection methodology. We believe that for such procurements where multiple organizations are involved, obtaining sign-offs is an effective means of minimizing risks of acquiring goods and services that do not meet operational needs.

- 3.13 In terms of the practical application of the principles of fairness, openness and transparency, PWGSC and HRSDC reminded personnel that competitive solicitation of bids for requirements valued below \$25,000 should be pursued whenever it was cost-effective to do so. At TC, contracting procedures included a list of relevant considerations to assist contracting specialists in vetting the bid evaluation and selection methods to ensure that they were adequate to encourage competitive bidding.
- 3.14 We noted, however, that in some instances, departmental policies needed to be updated to remain in sync with changes to trade agreements and TB policies. For example, at HRSDC, the policy on intellectual property had not been updated to reflect new TB policy requirements.
- 3.15 Overall, the policies and guidance relating to the procurement planning of the SAs reviewed support the principles of fairness, openness and transparency; reflect the requirement to achieve best value; and allow for the development of effective and efficient procurement plans.
- 3.16 We reviewed the procurement planning for each of the SAs and expected to find detailed procurement plans that clearly showed the processes and procedures that would be followed by procurement personnel during the procurement. We looked to see if the decisions reflected in the plans were supported by documentary evidence of proper analysis in support of risk evaluation and the decisions made.
- 3.17 The review found that two of the three SAs were supported by procurement plans. PWGSC had prepared the plans for HRSDC and NRCan. We note that TC, which had issued its own SA, did not have a formal supporting procurement plan. We were informed that in that department, some planning activity was carried out by program officers and that it influenced the decisions reflected in the SA.
- 3.18 Both of the plans we reviewed contained high level descriptions of required services, estimated business volume, solicitation and evaluation methods, relevant trade agreements, and policies and milestones for establishing the SA. We further examined files and supporting documentation to understand the rationale and basic analysis for the bid evaluation and selection methods used for the three requests for supply arrangements (RFSAs) and the subsequent bidding processes conducted at stage 2. We found the documentation to be weak or missing in a number of areas, including identification of risks and corresponding mitigation strategies and documented analyses supporting the rationale for the use of an SA over other procurement options, for estimates of business volumes, and for the evaluation and selection methods to qualify suppliers for the SA and subsequent calls for bids.

- 3.19 The complexity and diversity of the bid evaluation and selection methodologies being used caused confusion for suppliers. The departments had similar requirements for GDS but used different detailed methods of evaluation and selection. For example, each of the three user departments had different thresholds and requirements for competitive bidding at stage 2. At HRSDC, competitive bidding was required for individual requirements valued in excess of \$15,000. At NRCan, all purchases were to be competed. At TC, the competitive bidding threshold was set at greater than \$25,000.
- 3.20 In addition, for the NRCan RFSA, we found the lack of clarity in the description of mandatory and rated requirements resulted in 35 questions from suppliers, creating an unnecessary level of effort on the part of departments as well as suppliers.
- 3.21 At TC, we noted a number of instances of confusing information contained in the solicitation document. For example, references to the basis of payment varied from “firm hourly rates” to “ceiling per diem” rates. Significant deficiencies in the methodology also prompted TC to replace all of the evaluation criteria.
- 3.22 In addition, we noted that RFSAs included more than 50 pages of relevant instructions, terms and conditions, including references to further clauses and general conditions that were published in on-line publications accessible to suppliers. Suppliers’ comments received as part of our review raised concerns about the appropriateness of the level of effort to qualify for an SA. The majority of the suppliers who responded to our questionnaire recommended that the government standardize methods of procuring GDS. Suppliers further advised us that there is a significant level of effort and cost associated with preparing a bid in response to an RFSA. Estimated costs mentioned ranged from \$2,000 to \$5,000 to respond to an RFSA.
- 3.23 PWGSC has an initiative to develop a new method of supply for graphic, Web, and exhibit and display design services that would be available for use by all government departments and agencies. The objective of this initiative is to develop a standard method that would incorporate the results of a market analysis and the views of key stakeholders. This initiative is being led by PWGSC in cooperation with eight federal departments, the Office of Small and Medium Enterprises (OSME), the Office of Greening Government Operations and a former president of RGD Ontario. We believe PWGSC’s decision to pursue a strategic commodity management approach is well considered and demonstrates leadership.

- 3.24 The OPO found that the requirements included in the RFSA's for GDS did ensure that the suppliers who received supply arrangements had the capacity to perform a range of graphic design services in accordance with established quality standards. The government supported quality and best value by ensuring that only suppliers with an established track record and capacity to perform the needed services were pre-qualified for the SA. For bid evaluation, the departments under review considered the suppliers' years of experience in the graphic design industry, the depth of experience, and the qualifications of its personnel and its capacity to carry out various types of graphic design work. In addition, samples of previous work were examined. These factors were individually rated and assigned points. Bidders were required to achieve an overall technical score of 75 to 85 percent. Qualified suppliers were also obligated to meet further quality requirements such as Government of Canada printing, editing and writing standards and green procurement requirements that were built into the SOWs for the SAs.
- 3.25 In the subsequent solicitations under the supply arrangements, the second stage of bidding, pre-qualified suppliers submitted bids for clearly defined requirements. At that stage, the financial considerations were much more important, and cost was usually the determining factor for selecting pre-qualified bidders. The quality and completeness of work was reviewed against the stated requirements. Given that most of the contracts were under \$25,000, we concluded that this is a reasonable approach to obtaining best value.
- 3.26 Our review found that GDS were performed in accordance with the terms of the contracts, with clearly defined requirements and detailed lists of deliverables. Interviews with departmental personnel confirmed that the overall quality of the work was satisfactory. In the files reviewed, the findings indicated that operational requirements as defined were met.
- 3.27 Our review of the procurement of GDS confirms that the methodology used for awarding contracts is indeed heavily weighted toward quality over price. We are also supportive of the PWGSC initiative to strengthen the processes even further.
- 3.28 The three supply arrangements for GDS were based on adequate strategies and plans to support the development of effective and efficient bid solicitation, evaluation and selection methods. Overall, these plans and practices support operational needs, reflect best value considerations, and encourage competition and quality.

RECOMMENDATIONS

- 3.29 The OPO encourages PWSGC to include the following key areas in its development of a new method of supply for graphic, Web, and exhibit and display design services:
- Developing a streamlined standard method of supply, to the extent feasible, to purchase GDS within the government;
 - Ensuring clearly defined bid evaluation and supplier selection methods; and
 - Ensuring projected business volumes are supported by a proper analysis of departmental needs.
- 3.30 The OPO also recommends that there be adequate documentation in procurement files in support of decisions made. The level of documentation should be commensurate with the risks of the particular procurement. Ensuring that documentation is complete saves time and effort when procurement personnel respond to questions and inquiries about specific procurements. Complete documentation is a requirement of TB and PWGSC policies, and documentation is essential to prevent speculation about whether procurement is fair, open and transparent.

All departments involved in this review were given an opportunity to review this report, and their comments were taken into consideration when it was finalized.

The detailed report is available at: www.opo-boa.gc.ca (Reports and Publications).

ENVIRONMENT CANADA – REVIEW OF PROCUREMENT PRACTICES RELATED TO MANAGEMENT CONSULTING AND OTHER PROFESSIONAL SERVICES

EXECUTIVE SUMMARY

- 4.1 In the spring of 2007, a supplier made a formal complaint to the Canadian International Trade Tribunal (CITT) alleging that Environment Canada (EC) had showed favouritism toward another company in the award of a contract. The CITT reviewed the case and recommended that EC re-evaluate the complainant's submission. The proposal was re-evaluated with the same outcome as the initial evaluation. The supplier then complained to Justice Canada. Justice Canada responded that the CITT had reviewed the case and provided a judgment.
- 4.2 The complainant further complained to the Information Commissioner and the Office of the Auditor General of Canada. In December 2008, the supplier brought the complaint to the Office of the Procurement Ombudsman (OPO). After some preliminary discussions, the OPO decided to carry out a review of EC's procurement practices to ensure they supported the principles of fairness, openness and transparency. The OPO and Environment Canada agreed that a review would be carried out using a collaborative approach, and EC hired an external audit firm to conduct a procurement audit.
- 4.3 The scope of the audit included all phases of the procurement process specific to "Management Consulting and Other Professional Services." The scope included procurement planning (e.g. requirements definition), solicitation activities and contract award, contract administration and contract close-out. It was agreed that the objectives of the review would be to:
 - assess whether the allegations of favouritism were founded;
 - review the procurement process specific to "Management Consulting and Other Professional Services" to determine whether Environment Canada complied with the Treasury Board Contracting Policy and the Government Contracting Regulations; and
 - determine whether the procurement business function was based on sound contracting management practices and is fair, open and transparent.
- 4.4 OPO staff reviewed the objectives, scope and methodology of the audit and was satisfied with the work that was performed by the external audit firm.

- 4.5 The external auditors have completed their examination and concluded that EC has an adequate management control framework appropriate to the needs of the Department and that overall procurement activities comply with the policies of the Treasury Board, Public Works and Government Services Canada and its own department with respect to contracting for management consulting and other professional services.
- 4.6 The external auditors also concluded there was no evidence that EC had shown favouritism toward any firms in the proposal evaluation and contract award process during the period examined.
- 4.7 The audit report noted the following:
- There were six of the fifty files in the statistical sample and four of the seven files in the judgmental sample where the evaluation documentation was incomplete. As a result, the Department may be at risk of being challenged on its decisions;
 - While EC does not have a contracting policy, it follows the Public Works and Government Services Canada (PWGSC) Supply Manual. According to the Supply Manual, "All notes taken during the evaluation must be kept in their original form and retained on the procurement file for audit purposes." While not mandatory for departments and agencies, this is clearly a best practice to be emulated. The Supply Manual also states that "evaluators' worksheets are an integral part of the evaluation process and constitute part of the complete record regarding the procurement and part of the written record of all communications substantially affecting the procurement within the meaning of the international trade agreements".
 - As a result, in OPO's view, without properly documented forms and complete reports, EC Procurement cannot demonstrate compliance with either the Treasury Board Contracting Policy or PWGSC policy requirements relating to the documentation of files. If there are instances where decisions are not adequately documented, this may give the perception that the procurement practices in the Department are not being conducted in a fair, open and transparent manner.
- 4.8 The OPO has used the audit findings as the basis for this report. The OPO has also reviewed the auditor's working papers and is satisfied with the results.

- 4.9 The OPO concurs with the findings and the recommendations of the audit. The OPO has concerns regarding the lack of documentation in the evaluation process and in the process used to engage the co-chairs of the Committee on the Status of Endangered Wildlife in Canada (COSEWIC) at Environment Canada.
- 4.10 It is recommended that the department should:
- (1) revise the standard instruction letter that is provided to evaluators to clearly outline what minimum standards of documentation are required. The minimum standards should also be revised on the Web site instructions, and the Director should ensure that these minimum standards are followed;
 - (2) ensure that all amendments are properly justified and processed prior to contract expiry dates; and
 - (3) obtain from Public Works and Government Services Canada and the Treasury Board of Canada a resolution on how to process transactions similar to those related to COSEWIC in light of legislative obligations.

DEPARTMENTAL RESPONSE

Environment Canada concurs with the recommendations contained in this report and the work that was performed by the independent audit firm. It will be preparing a management action plan, which will be presented to its independent External Audit Advisory Committee in June 2010.

The detailed report is available at: www.opo-boa.gc.ca (Reports and Publications).

STUDY ON METHODS OF SUPPLY (STANDING OFFERS AND SUPPLY ARRANGEMENTS)

EXECUTIVE SUMMARY

- 5.1 According to the Treasury Board Purchasing Activity Reports, in the last 10 years, the value of federal government procurement has increased by over 40%, while the number of transactions has decreased. The government, therefore, is managing a larger amount of procurement of increasing complexity. The government strives to increase its administrative efficiency, but has to balance these measures against its commitment to fairness, openness and transparency in procurement. Suppliers would benefit from the government's efforts to simplify and streamline procurement practices. It is in everyone's interest to reduce the burden of paperwork, time and effort.
- 5.2 There are two principal methods of supply that are used to streamline the procurement process for specific types of goods and services. Standing offers (SOs) and supply arrangements (SAs) are frameworks for procurement that are meant to:
- reduce the cost of common goods and services used on a government-wide basis and purchased on a repetitive basis;
 - ensure that procurement processes are timely; and
 - attain good value for taxpayers' dollars.
- 5.3 A standing offer (SO) is a continuous offer from a supplier to the government that allows departments and agencies to purchase goods or services, as requested, through the use of a call-up process incorporating the conditions and pricing of the standing offer. SOs are intended for use where the same goods or services are needed within government on a recurring basis and are commercially available.
- 5.4 With the use of SOs, suppliers that meet the evaluation criteria and selection methods are pre-qualified and issued an SO. An SO is not a contractual commitment by either the government or the supplier. When goods and services available through an SO are needed, departments issue a call-up, the supplier's acceptance of which constitutes a contract. The call-up is done relatively quickly. Departments do not conduct a competitive bid solicitation for the goods and services procured under an SO.
- 5.5 A supply arrangement (SA) serves a purpose similar to that of an SO. An SA is a non-binding arrangement between the government and a pre-qualified supplier that allows departments and agencies to award contracts and solicit bids from a pool of pre-qualified suppliers for specific

requirements within the scope of the SA. Departments meet their specific needs by issuing another call for bids – a subsequent, second-stage solicitation – to one, some or all of the suppliers on the SA list, depending on the details in the SA.

- 5.6 With SOs, the terms and conditions, including price, are set as part of the bidding process. But when calls for bids under the SA are issued to listed suppliers, those suppliers have the opportunity to include changes in their bids to reflect market changes, innovation, new technology or pricing adjustments. This is beneficial to both the supplier and the government.
- 5.7 The major similarities and differences between an SO and an SA are described in the following table:

Table 1: Comparison of SOs and SAs

Standing Offer	Supply Arrangement
Stage 1	
Is not a contract	
Is an “offer” from a qualified supplier	Is a “non-binding arrangement”
To supply goods and/or provide services	
Required on a regular or recurring basis by one or more departments	
But actual demand is not known in advance	
For standardized goods/services the requirements of which can be defined at the outset	For goods/services not fully definable at the outset
Pricing basis can be defined and established at Stage 1	Pricing basis cannot be completely defined at Stage 1 and is established only at Stage 2
In accordance with agreed terms and conditions	
Based on an anticipated business volume that is an approximation given in good faith	
And does not constitute a commitment for work	
SO for specific goods/services may be issued to one or more suppliers	SA for a range of goods/services may be issued to a number of pre-qualified suppliers
Usually resulting from competitive solicitation but can be directed to one supplier for its full range of catalogue goods or services	Resulting from a competitive solicitation
Stage 2	
A contract is formed when	A contract is formed when
A department accepts the existing offer as outlined in the SO, usually by issuing a call-up against the SO	A bid in the second-stage bid solicitation is accepted by the department or agency
No second-stage bid competition – Selection of one supplier based on allocation of work stipulated in the SO agreement, e.g. right of first refusal, proportional basis, exclusive rights	Usually competitive amongst pre-qualified suppliers but can also be directed to one supplier based on allocation of work stipulated in the SA, e.g. to a specific number of suppliers based on dollar value, rotational basis

- 5.8 Most SOs and SAs are put in place by Public Works and Government Services Canada (PWGSC). The department acts as a common service organization and the government's main contracting arm. In 2005, the government made a significant change in the use of SOs and SAs. It became mandatory for all departments to buy certain high volume goods and services through SOs and SAs managed by PWGSC.
- 5.9 The government said that these measures to streamline and consolidate procurement would ensure that the federal government better pursues opportunities to reduce the cost of its purchases, by using the size of the federal government to get the best possible price.
- 5.10 Conceptually, the idea has merit. In theory, these tools should reduce paperwork, speed up the procurement process and lower the cost of goods and services. As with any new initiative, it has to be subject to a quality management system, where the impact and effectiveness of the implementation is monitored and its performance assessed against anticipated results. Gaps need to be identified, decisions made and actions taken to improve the process.
- 5.11 To date, the emphasis has been on the design and implementation of individual SOs and SAs; the monitoring, quality assurance and corresponding adjustments regime is still under development according to the PWGSC Commodity Management Framework Plan.
- 5.12 Last year the Office of the Procurement Ombudsman reported that the use of mandatory SOs had an impact on small and medium enterprises in doing business with the government. There is open competition when PWGSC solicits bids to become a qualified supplier. But competition is limited after that. Unsuccessful bidders and new entrants to public procurement are essentially "out" until the existing SO is renewed or refreshed. In some cases, the outcome of a solicitation may result in fewer successful suppliers. The Office also reported that the government's evaluation and reporting systems were inadequate to measure whether the use of mandatory SOs and SAs had met the government's original objectives in mandating the use of these procurement instruments. PWGSC reports that there are a number of informal means through which Commodity Management Teams and Commodity Managers gather business intelligence for use in the decision making process.
- 5.13 However, a recent PWGSC Internal Audit Report found that without a coordinated departmental approach and collaboration by all stakeholders, the impact of standing offers as a beneficial method of supply remains unknown. The lack of integrated and meaningful information on standing

offers, and a mechanism to share this information, means that it cannot be used to support planning, decision making and action, or demonstrate the achievement of the government's shared objective of buying smarter, faster and at a reduced cost.

- 5.14 This year the OPO further studied unresolved concerns about the impact of mandatory SOs and SAs. The Office examined the federal legislative, regulatory and policy framework related to SOs and SAs. We conducted interviews with departmental management and procurement personnel, as well as experts in public procurement in Canada and other jurisdictions. Finally, suppliers and a supplier association were interviewed.
- 5.15 Feedback from both departments and the supplier community identified advantages and concerns related to the use of mandatory SOs and SAs. The advantages, where SOs and SAs are properly designed and implemented, are presented in Table 2. There are also concerns, identified by departments and suppliers, which are listed in Table 3.

Table 2: Advantages of SOs and SAs

Procurement is faster and less complex if suppliers have been pre-qualified.
Because standard terms and conditions have been previously agreed to, there is less risk and complexity for both the government and the supplier.
When a department has a requirement that can be procured via a call-up, then it does not have to carry out a full competition, and time, effort, and resources are reduced.
Suppliers benefit if they are pre-qualified for SOs. Having competed once to obtain an SO, they can generate business without the need to compete again to meet individual government requirements.
There is more flexibility in the SAs than in SOs as the government can add customized technical requirements and suppliers can adjust prices and offer innovation or the latest technology. Both the government and suppliers therefore benefit from dynamic competition.

Table 3: Client Departments and Supplier Concerns About Mandatory SOs and SAs¹

In some cases, several different procurement vehicles are in place for the purchase of the same good or service. This added complexity leads to confusion among suppliers and departments.
PWGSC has had limited success in retaining the industry knowledge and expertise required to successfully manage commodities.
PWGSC's rationale for reducing certain contract and call-up limits from TB approved levels is not always clear to departments.
PWGSC's reasons for determining how contractors will be selected at the second stage (right of first refusal, proportional, lowest cost, etc.) are often not readily understood.

Note 1: PWGSC states that it takes note of the above concerns and has already initiated a number of measures to address these issues.

- 5.16 The most efficient and fair procurement tool varies from one commodity to another. An SO may be an effective and efficient procurement tool for the purchase of one type of commodity, but not for the purchase of another. Generally SOs are more suitable for the purchase of goods than services.
- 5.17 To date, the government's monitoring and evaluation of the mandatory use of SOs and SAs have been limited, using a transactional basis rather than a strategic perspective.
- 5.18 The mandatory use of certain standing offers and supply arrangements five years ago was an important initiative in the government's ongoing efforts to ensure that its procurement is efficient and effective, represents value for money, and meets operational requirements and program delivery objectives. Since that time, the government has expended significant effort in the design of mandatory procurement tools and in implementing the policy decision. To date, the government has not collected reliable data that would enable it to undertake an assessment of the impact of this policy shift. We note, however, that PWGSC is refocusing the practice of commodity management to deliver more strategic procurement approaches and more standardized and simplified processes and tools.
- 5.19 The ongoing challenge is the need to ensure that the momentum to improve is maintained while ensuring that the balance between efficiency and suppliers' right to federal procurement opportunities is not sacrificed.

The detailed report is available at: www.opo-boa.gc.ca (Reports and Publications).

STUDY ON A MANAGEMENT APPROACH TO VENDOR PERFORMANCE

EXECUTIVE SUMMARY

- 6.1 In this study, the Office of the Procurement Ombudsman (OPO) examined how organizations approach vendor performance and identified best practices for sharing to assist organizations in implementing a vendor performance program.
- 6.2 More specifically, we studied how these organizations monitor, evaluate, apply corrective measures (if necessary) and report on whether performance objectives were met.
- 6.3 This subject is of interest to our stakeholders due to the significant amount of money that is spent by the federal government on procuring goods, services and construction to deliver programs to taxpayers.
- 6.4 Due to the volume of business that vendors do with the federal government, issues with regard to performance are bound to arise. When the government and a vendor enter into a commercial contract, both parties have legal obligations to meet its terms and conditions. Holding vendors accountable for their performance is an important tool for making sure the government receives good value from its contracts. This also fosters better communication and results in improved relationships between the government and its vendors.
- 6.5 Eight Canadian government organizations responsible for the procurement of goods, services and construction at the federal, provincial, and municipal levels participated in the Study. It is important to note that five of these organizations, which are not covered by our mandate, contributed on a voluntary basis.
- 6.6 We carried out research that included a review of academic and government literature related to vendor performance. We also interviewed officials responsible for procurement, contract management and project management at participating organizations.
- 6.7 We found that vendor performance management is best supported by a vendor performance program with an established framework and policy. The elements of the framework need to be aligned with corporate strategic goals and objectives, as well as risk mitigation strategies.
- 6.8 All organizations we interviewed have best practices that address elements of a framework for a vendor performance program. For example, they have established processes; use performance clauses in contracts; use tools and automated systems to monitor, evaluate and report performance results; follow contract file close out procedures; and can apply corrective measures on vendors for poor performance.

- 6.9 A good vendor performance program helps to protect Crown interests and provides transparency on what the government's expectations are. Vendors are also entitled to know the rules of engagement. If government organizations apply corrective measures by clearly communicating, in advance, evaluation criteria coupled with due process, it is more likely to be defensible in a legal action.
- 6.10 In addition to vendor performance being monitored on a day-to-day basis for operational needs, senior procurement review committees will greatly benefit by having vendor performance information available to assist in the mitigation of risks when making procurement strategy and contract award decisions as noted in our 2008-2009 review of the Procurement Challenge and Oversight Function. This will minimize the risk of contracting with repeat poor performers.
- 6.11 The *Federal Acquisition Regulation* governing U.S. Government procurement requires agencies to consider past vendor performance information as an evaluation factor in future contracts. Although the U.S. has a number of best practices in this regard, there are also several challenges that hinder capturing adequate performance information for government-wide sharing. As a result, the President has announced new legal requirements to strengthen the use of vendor performance information.
- 6.12 The key piece in any framework is a comprehensive policy. Public Works and Government Services Canada (PWGSC) – Acquisitions Branch has had a vendor performance policy in place since 1996. However, roles and responsibilities are perceived to be unclear and there are concerns about legal consequences. This contributes to corrective measures for non-performance being infrequently applied.
- 6.13 In 2007, an Independent Advisor to the Minister of PWGSC issued a Report on Public Opinion Research Practices of the Government of Canada. The Independent Advisor expressed concerns about the effectiveness of the government's vendor performance policy and made a number of recommendations with regard to the evaluation of vendor performance and client satisfaction. In response, PWGSC committed to updating its Vendor Performance Policy and including a performance evaluation process.
- 6.14 Since many years, PWGSC – Acquisitions Branch has been revisiting its policy on vendor performance. PWGSC has advised us that the outstanding policy work and related consultations with stakeholders will be completed by March 31, 2011. This is an opportunity for PWGSC to consider the best practices and lessons learned of other organizations to develop a comprehensive and well reasoned approach to vendor performance that can serve as a model for others and contribute to improving the fairness, openness and transparency of the procurement process.

The detailed report is available at: www.opo-boag.gc.ca (Reports and Publications).

CORRECTION TO 2008–2009 PROCUREMENT PRACTICES REVIEW – ADVANCE CONTRACT AWARD NOTICES

The following documents are amended as follows:

1. 2008–2009 Annual Report, Section 2, Getting Down to Work, Practice Reviews, Page 45, Paragraph 6
2. Procurement Practices Review – Chapter 3: Advance Contract Award Notices, Paragraph 6 of the Executive Summary and paragraph 3.11 in the body of text:

Delete:

“... for approximately \$1.7 billion or 4.3% of the total dollar value of government contracts over \$25,000 ...”

Add:

“... for approximately \$2.5 billion or 6.4% of the total dollar value of government contracts over \$25,000 ...”

Chapter 3: Advance Contract Award Notices,
paragraph 3.20 – Table 2 is revised as follows:

ACAN and Contracting Activities (over \$ 25k) By Departments included in this review and Government-Wide								
Department	Total Contracting Activity		Total ACANs published		ACANs Published by the Department itself		ACANs Published by PWGSC on behalf of the Department	
	Number	\$ Value (000s)	Number	\$ Value (000s)	Number	\$ Value (000s)	Number	\$ Value (000s)
2005								
CRA	461	\$241,380	80	\$51,782	Data not available for 2005			
DFO	1,054	\$252,450	137	\$15,358				
DND	4,852	\$7,417,570	379	\$239,109				
HC	975	\$174,903	121	\$20,984				
TOTAL (4 Departments)	7,342	\$8,086,303	717	\$327,233				
Total Government-wide	22,484	\$14,780,938	1,665	\$595,306				
2006								
CRA	335	\$287,572	52	\$21,144	48	\$20,478	4	\$666
DFO	940	\$173,877	160	\$40,383	62	\$6,874	98	\$33,509
DND	5,073	\$4,605,658	342	\$181,346	8	\$5,069	334	\$176,277
HC	489	\$106,934	52	\$13,672	17	\$5,828	35	\$7,844
TOTAL (4 Departments)	6,837	\$5,174,041	606	\$256,545	135	\$38,249	471	\$218,296
Total Government-wide	22,006	\$10,944,322	1,581	\$496,762				
2007								
CRA	223	\$230,609	25	\$32,261	25	\$32,261	0	0
DFO	1,044	\$167,028	186	\$36,167	86	\$11,575	100	\$24,592
DND	4,805	\$8,187,839	311	\$1,088,330	6	\$3,556	305	\$1,084,774
HC	542	\$238,575	87	\$26,460	26	\$3,852	61	\$22,608
TOTAL (4 Departments)	6,614	\$8,824,051	609	\$1,183,218	143	\$51,244	466	\$1,131,974
Total Government-wide	20,655	\$14,070,936	1,508	\$1,458,296				
2005 – 2007								
GRAND TOTAL (4 Departments)	20,793	\$22,084,395	1,932	\$1,766,996				
GRAND TOTAL (Government-wide)	65,145	\$39,796,196	4,754	\$2,550,364				

Note: Revised figures are in orange.

QUALITY ASSURANCE AND RISK MANAGEMENT



“I ESPECIALLY APPRECIATED YOUR
COMMENTS (...) THAT AN OMBUDSMAN
NEEDS TO BE SEEN AS PART
OF THE SOLUTION AND NOT AS
PUBLIC EXECUTIONERS.”

– J. PAUL DUBÉ,
TAXPAYER'S OMBUDSMAN, IN A NOTE
TO THE PROCUREMENT OMBUDSMAN

Within the Office of the Procurement Ombudsman, the Quality Assurance and Risk Management (QARM) team divides its activities into two broad areas:

- Quality assurance and risk management; and
- Continuous improvement.

During the year, the QARM team established a Quality Assurance Framework which provides a foundation for ensuring that the Office's work is carried out in accordance with applicable legislative and regulatory requirements, professional standards and Office policies. The Framework is intended to help the Office balance the management of key risks through key control steps while ensuring flexibility and discretion. Monitoring the implementation of the Framework and refining Quality Assurance policies and procedures will be an area of focus for the QARM team in the coming year.

The QARM team supports the other business units by conducting quality control reviews at key points in their work (e.g. plans, reports, communication materials); conducting environmental scanning, including research and studies, on developments in the field of procurement; and carrying out continuous improvement activities.

The environmental scan is one of our key information-sharing activities. There are many sources of information that we analyse as part of this exercise. We gather feedback on the federal procurement system through various means such as our Outreach Program, inquiries and complaints made to this Office, the Ombudsman's appearances before committees of Parliament, as well as meetings and consultations with departments and suppliers. Written materials are also important sources of information, so we include a range of media (magazines, research papers, audit reports, newspapers) in our scan. The information is analysed, and the results of the scan are used as input to the Office's planning processes, to identify potential topics for procurement practices reviews, to enhance the knowledge of our staff, and as input to the organizational learning plan.

As a result of our environmental scanning exercise, the areas of concern or interest that emerged from stakeholders included the following:

- There are many methods of supply for buying the same or similar services, and it is not clear to departments when to use one method over the others.
- Bid solicitation documents are complex and difficult for suppliers to understand.
- Mandatory requirements in bid solicitation documents are often excessive or unnecessarily restrictive.
- Suppliers want increased access to low dollar value procurement.
- Parliamentarians have told us that sole sourcing contracts under \$25,000 is a critical issue and they question how those decisions are justified and who audits that reason.
- Strengthening procurement through greater rigour in supplier selection and contract management.
- Business managers and procurement officers should be knowledgeable to limit inconsistent interpretation of the rules and handling of the files.
- Business managers and procurement officers should be empowered to make decisions to assume some risk.

QARM undertook two studies as a result of the environmental scanning results: (1) "A Management Approach to Vendor Performance"; and (2) another study drawing attention to the risks associated with contracts under \$25,000 where bids do not have to be solicited under the *Government Contract Regulations*. The first study has been completed, while the second one is still in progress. Detailed information on these studies can be found in the Practice Reviews section of this Annual Report, and the complete reports will be published on OPO's Web site.

A key element of our continuous improvement activities is the lessons learned process. This year, the QARM team gathered lessons learned from the Office's first year of carrying out procurement practices reviews. The observations and suggestions from staff were compiled and analysed, and the results were brought to the management committee for both information and action. The results of the analysis were also returned to the Procurement Practices Review team so that its policies and procedures could be adjusted to improve the quality of its outputs. In the coming year, we will focus on lessons learned in other areas of our work.

The QARM team is dedicated to ensuring integrity and professionalism in all aspects of the Office's work. By instituting high measures for quality assurance, listening to and addressing concerns brought to our attention, and undertaking continuous improvement activities, QARM helps to ensure that the Office demonstrates respect for all stakeholders, including the Canadian public.

COMMUNICATIONS AND CORPORATE MANAGEMENT

“YOUR PRESENTATION WAS REAL, ETHICAL AND POETIC. I SINCERELY THANK YOU FOR YOUR TIME.”

– MATHIEU LOUIS-SEIZE,
PROCUREMENT OFFICER, IMMIGRATION
AND REFUGEE BOARD OF CANADA



COMMUNICATIONS

The Communications and Corporate Management (CCM) team strives to ensure our stakeholders know that we exist and are aware of the services we provide. This year, we maintained an active outreach program organizing over 30 speaking engagements and meetings for representatives of this office. These presentations outlined the activities during our first year of operation and highlighted our success in resolving procurement disputes through informal, collaborative intervention.



In line with our commitment to maintaining a balanced and neutral perspective, we focussed our outreach on both government and supplier communities. We met with national procurement associations, industry associations, other ombudsman offices and regional offices of government departments to discuss areas of mutual interest.

In other countries, there is a high degree of interest in the concept of an Ombudsman for Procurement, especially where significant corruption in government procurement has been identified. Many foreign countries are trying to create procurement oversight bodies and for that reason have a particular interest in the nature of our Office. We hosted international delegations from Kenya, the Ukraine and China. Representatives from these countries took special notice of the fact that we operate under a legislated mandate and have an arms-length relationship from program departments. All of the representatives expressed sincere appreciation for our willingness to share ideas and experiences that may be valuable to them.



Hosting delegation from the Chinese Ministry of Supervision

Our outreach program also includes written media such as our corporate brochure and annual report. On occasion, we also produce articles for specialized magazines. For example, *Optimum Online* – The Journal of Public Sector Management – invited us to submit an article for their special issue on Ombudsing in September 2009. This article provided background information about federal procurement, described the Office's unique mandate and summarized how we have gained the trust of stakeholders. The Ombudsman also reflected on the future of the Office.

We sent copies of our first Annual Report to all Members of Parliament and Senators. Subsequently on December 1, 2009, the Procurement Ombudsman appeared before the House of Commons Standing Committee on Government Operations and Estimates. It is clear from the discussions that Parliamentarians had read our report and had a genuine interest in the results of our work.



Visit from the Procurement Oversight Authority, Government of Kenya

Other stakeholders also showed interest in our work, as statistics from our Web site indicate that there was an increase of 80% in the number of people accessing the site after the 2008-2009 Annual Report was released.

The CCM team is responsible for ensuring our Web site is user-friendly and current. Our Web site provides all our stakeholders access to our services and information about our activities. The Web site address is <http://opo-bou.gc.ca/>.

CORPORATE MANAGEMENT

Our case management system was implemented in 2009–2010. This system is a powerful database that will help us identify themes and trends such as which supplier groups have the most concerns, as well as the nature of those concerns. This kind of information will help us decide where to focus our work and resources to achieve optimum results in specific areas of importance.

In last year's Annual Report, two milestones were identified for the Program Evaluation Framework:

- A formative evaluation to measure the extent to which the Office's program has been implemented and to ensure that the Office is proceeding according to its mandate and expectations. This will be carried out in 2010–2011.
- A summative evaluation to measure the extent to which the Office has achieved its intended objectives, results and outcomes. This will be carried out in 2013–2014.

The time lines for the formative evaluation were adjusted because 2008–2009 was not a full year of operations. The formative evaluation will be aligned with the performance commitments outlined in the Report on Plans and Priorities for 2009–2010.

Stakeholders will be consulted as part of these evaluations in an effort to ensure that our services remain relevant, efficient and accountable. As a result of carrying out these evaluations, we will have a clearer understanding of results achieved and a strong basis for any realignment of business operations.

The CCM team contributes to OPO's overall goal to improve fairness, openness and transparency by ensuring that all messages distributed are balanced, neutral and respectful.

The Procurement Ombudsman would like to thank all the Office of the Procurement Ombudsman staff for their dedication and support. The success of the Office is largely due to their professionalism, knowledge and hard work.



In the picture, from left to right:

Gilles Pineau, Paul Morse, Oriana Trombetti,
Amy Dubeau, Lisa Teed, Janet LaBelle,
Janet Barrington, Jean Carruthers, Clifford Dunning,
Carole Vautour and Isabelle Deslandes.



In the picture, from left to right:

Arthur Miskew, Shahid Minto, Françoise Brisebois,
Michael Senzilet, Linda Francis, Michel Fréchette,
Caroline Villeneuve, Lisa Saruwatari, Daniel Fortin,
Paapa Abekah and Suleiman Rana

ANNEX

OFFICE OF THE PROCUREMENT OMBUDSMAN STATEMENT OF OPERATIONS AND NOTES

MARCH 31, 2010

STATEMENT OF OPERATIONS

Expense	2009-2010	2008-2009
Salaries and employee benefits	2,305	1,790
Professional Services	244	96
Office removal an relocation	29	191
Operating expenses	95	132
Information and communication	46	93
Materials and supplies	38	33
Paid to BC Ombudsman	27	84
Corporate services paid to PWGSC	536	413
Services from Audit Services Canada	84	390
Total	3,404	3,222

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

OFFICE OF THE PROCUREMENT OMBUDSMAN

NOTES TO THE STATEMENT OF OPERATIONS FOR THE YEAR ENDED

March 31, 2010

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. Its budget is approved by the Treasury Board.

3. RELATED PARTY TRANSACTIONS

During the year, the Office paid PWGSC \$84 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 \$536 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	123
Information technology	347
Total	536

4. COMPARATIVE FIGURES

Fiscal period 2008-2009 was a partial year and provided for start-up costs for the establishment of the office, which was created in May 2008.

In 2009-2010 the Office completed the staffing process in order to deliver on its mandate. The increase in cost for Corporate Services was due to the emphasis placed on the development and finalization of the case management system.

In 2009-2010, translation costs in the amount of \$71 thousand are included under Professional Services. In 2008-2009, translation costs in the amount of \$33 thousand were included under Information and Communication. This change is in line with the requirements of the Receiver General for Canada Chart of Accounts.