



Office of the Procurement
Ombudsman

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OFFICE OF THE PROCUREMENT OMBUDSMAN



CHAPTER 3

PROCUREMENT PRACTICES REVIEW *ADVANCE CONTRACT AWARD NOTICES*

Table of Contents

EXECUTIVE SUMMARY ii

BACKGROUND 1

 CONTEXT 1

 WHY IT MATTERS..... 3

FOCUS OF THE REVIEW..... 4

 OBJECTIVES 4

 SCOPE AND PERIOD OF REVIEW 4

 CRITERIA 6

 METHODOLOGY 6

FINDINGS 6

 TREASURY BOARD AND DEPARTMENTAL POLICIES..... 6

 IMPLEMENTATION OF THE ACAN PROCESS 8

Rationale for directing a contract and publishing an ACAN 8

 ACAN PUBLICATION PERIOD AND PERIOD FOR SUBMITTING STATEMENT OF CAPABILITIES 9

 PROCESS FOR ACCEPTING OR REJECTING STATEMENTS OF CAPABILITIES 10

 OVERSIGHT AND REPORTING 11

CONCLUSION 13

RECOMMENDATIONS..... 15

Executive summary

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

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

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

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

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

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

There are inherent risks, under the current framework, when awarding a directed contract by means of an ACAN. For instance, the publication period allows other potential suppliers time to submit a Statement of Capabilities. These periods should be reasonable, in keeping with the complexity and value of the requirement. If suppliers are not provided sufficient time to prepare a measured response, it can have a negative impact on the fairness, openness and transparency of the process.

The TB Contracts Directive, which requires TB approval to enter into or amend certain contracts, has been separated into three categories which correspond with the risks associated with awarding a contract. At one end of the spectrum, where the contracting

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

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

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

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

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

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

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

TB also states that, if no valid Statements of Capabilities are received during the 15-day publication period, the contract may be awarded to the pre-identified supplier. PWGSC not only meets the TB Contracting Policy requirement, its policy further states that when a Statement of Capabilities is received after the ACAN closing date but before the award of the contract, it must still be considered prior to proceeding with the contract

award. PWGSC's policy is based on the fact that, if procurement personnel become aware of another potential supplier at any time before the award of a directed contract, the statement "only one supplier is capable of performing the contract" is no longer valid and proceeding with contract award contravenes the GCRs. The difference in the two policies is important, as in some cases many months can elapse between the closing date for an ACAN publication and the actual award of the contract due to the complexity of negotiations, for example.

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

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

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

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

Finally, while TB only requires that the rejection of a Statement of Capabilities be reviewed by a different official, PWGSC and CRA require this review to be carried out by an official at a higher level than the one who approved the publication of the ACAN. In our view this is a more effective practice which other departments may want to adopt, based on a risk assessment of their procurement process.

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

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

We are particularly concerned by the significant number of cases where the documentation showed that the government was dealing with only one supplier because

there was a pressing emergency, it was not in the public interest or because the supplier owned the intellectual property rights, and, by definition, the government was unable to accept Statements of Capabilities from potential suppliers.

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

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

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

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

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

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

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

The government recognizes that directed contracts pose risks. They could be perceived as a source of preferential treatment, diminished access to all suppliers, and challenges

to achieving value for money in the expenditure of public funds. However, by assigning significantly higher contracting approval authorities to directed contracts awarded using the ACAN process – with potentially less oversight – the government has diluted a major control mechanism to mitigate those risks.

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

We recommend the following:

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

ADVANCE CONTRACT AWARD NOTICES

approved by the senior review committee responsible for the procurement challenge and oversight function.

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

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

Background

Context

3.1 The Government of Canada is committed, under the Financial Administration Act (FAA), to taking appropriate measures to promote fairness, openness and transparency in the bidding process.

3.2 The regulations made under the FAA, the Government Contracts Regulations (GCRs), stipulate that before a contract is entered into, bids shall be solicited. The competitive approach in selecting a supplier should therefore be the norm.

3.3 Nonetheless, the GCRs permit entering into a contract without soliciting bids (a “directed contract”) under certain exceptions: when there is a pressing emergency, when the value of the contract is below certain dollar thresholds, when it is not in the public interest to solicit bids, and when there is only one supplier capable of performing the contract.

3.4 National and international trade agreements also contain procurement obligations and include “limited tendering” provisions where the government can enter into a contract without soliciting bids. For example, the Agreement on Internal Trade (AIT), the North American Free Trade Agreement (NAFTA) and the World Trade Organization – Agreement on Government Procurement (WTO-AGP) all contain provisions to limit tendering to protect patents, copyrights or other exclusive rights or in cases where there is an absence of competition for technical reasons and the goods or services can only be supplied by a particular supplier and no reasonable alternative or substitute exists.

3.5 Under the Treasury Board (TB) Contracting Policy, when it is clear that more than one supplier exists that can meet the requirement, a competitive process is to be followed. When the government does not intend to solicit bids, it must invoke an exception to the GCRs and, if applicable, use limited tendering provisions under trade agreements. Under the TB Contracting Policy there are two contracting processes that can be followed in such cases:

- 1) awarding a directed contract without publishing an advance notice to the supplier community; or
- 2) publishing an Advance Contract Award Notice (ACAN), using the Government Electronic Tendering Service (currently known as “MERX”), to inform the supplier community of the government’s intention to direct a contract.

3.6 In accordance with the TB Contracting Policy and related guidelines, ACANs are not to be published when the government cannot accept a Statement of Capabilities from another supplier that considers itself fully qualified and available to meet the specified requirement. For example, in a pressing emergency such as an imminent life-

ADVANCE CONTRACT AWARD NOTICES

threatening situation, the government may direct the contract without publishing advance notice to the supplier community.

3.7 However, when it is possible that more than one supplier can meet the government's requirement but the government does not have detailed market knowledge, then an ACAN can be an effective marketplace test. A Statement of Capabilities is an opportunity for a potential supplier to demonstrate that it is also capable of fulfilling the government's requirement.

3.8 If other potential suppliers submit Statements of Capabilities which meet the requirements set out in the ACAN, the department or agency must proceed to a full solicitation process in order to award contract.

3.9 Under the TB Contracting Policy and guidelines, the minimum period for publishing an ACAN is 15 calendar days. If other potential suppliers do not submit a successful Statement of Capabilities during this period, the resulting contract is considered competitive and the contract can be awarded using higher contracting limits (electronic competitive as opposed to non-competitive approval authorities), in accordance with the TB Contracts Directive and as set out in Table 1 below.

Table 1 Basic Contracting Limits for Goods and Services¹

Contracting Authorities	Electronic competitive	Traditional competitive²	Non-competitive
<i>Goods</i> - Public Works and Government Services Canada (PWGSC)	\$40,000,000	\$10,000,000	\$2,000,000
- Departments	(subject to delegation from PWGSC)	(subject to delegation from PWGSC)	(subject to delegation from PWGSC)
<i>Services</i> - PWGSC	\$20,000,000	\$10,000,000	\$3,000,000
- Departments	\$ 2,000,000	\$ 400,000	\$ 100,000

Note 1: CRA is not subject to any of the above "limits" as it has unique authorities derived from enabling legislation – authorities that are separate and distinct from the authorities set out in the TB Contracts Directive but which mirror a similar structure in terms of how those contracting authorities are applied to competitive and non-competitive procurement processes.

Note 2: Bids solicited from at least two suppliers without electronic publication.

3.10 The TB Contracting Policy states that publishing an ACAN can be advantageously used to fulfill the GCRs requirement to solicit bids. There has long been debate, however, on whether an ACAN is a competitive or non-competitive process. This review was not aimed at resolving the issues raised in that debate. Our focus was on the process to implement the ACAN policy.

Why it matters

3.11 Over the three-year period from January 2005 to December 2007, directed contracts published using ACANs accounted for approximately \$1.7 billion or 4.3% of the total dollar value of government contracts over \$25,000 (the threshold for soliciting bids under the GCRs).

3.12 Although the government normally publishes a notice after awarding a directed contract, ACANs were developed in the early 1990's to add transparency by publishing the intent to award a directed contract before doing so.

3.13 The opportunity for other suppliers to submit a Statement of Capabilities was later added to enhance the openness of the process. The publication of an ACAN gives the government the opportunity to hear from other potential suppliers, unknown to the government, that may be capable of fulfilling the requirement, potentially leading to increased competition and better value for Canadians. However, when it is not possible or not feasible to accept a Statement of Capabilities from another potential supplier, the contract is to be awarded without publishing an ACAN.

3.14 There are inherent risks, however, when awarding a directed contract using an ACAN under the current policy framework. In particular, the government may not be perceived as providing fair and open access to suppliers because it may be a challenge for suppliers to submit a Statement of Capabilities within a limited ACAN publication period.

3.15 In addition, directed contracts entail certain risks e.g. a source of preferential treatment, diminished access to all suppliers, and challenges to achieving value for money. As a result, they should be subject to appropriate controls to minimize those risks. Instead, since directed contracts awarded using ACANs are considered to be competitive, procurement personnel can use the highest contracting approval authorities. This increases the risks to the government in that confirmation that ACANs are being used appropriately is provided by less senior authorities.

3.16 The U.S. government is currently implementing procurement reforms to improve competition for its contracts¹. It has seen a significant increase in the dollars spent on contracts awarded without full and open competition over the past few years. Reports have shown that "non-competitive contracts...have been misused, resulting in wasted taxpayer resources, poor contractor performance, and inadequate accountability for results". It is U.S. government policy that agencies not engage in non-competitive contracts except in those circumstances where their use can be fully justified and where appropriate safeguards have been put in place to protect the taxpayer. By the fall of

¹ Federal Register / Vol. 74, No. 43 / Friday, March 6, 2009 / Presidential Documents

2009, the U.S. government intends to develop and issue guidelines on the appropriate use and oversight of non-competitive contracts, and to minimize the risks and maximize the value of government contracts in general.

Focus of the review

Objectives

3.17 The review objectives were to identify effective practices and areas for improvement in the fairness, openness, and transparency of ACANs. In particular:

- consistency of departmental policies with TB policies and related guidelines;
- practices related to implementation of the ACAN policy; and
- practices related to implementation and risk management, including reporting on activity levels and usage.

Scope and period of review

3.18 The review covered the period from January 2005 to December 2007, where an ACAN was published for a directed contract for goods and services (not including construction).

3.19 The review included departments and one agency located in the National Capital Region and regions across Canada, as follows:

- Canada Revenue Agency (CRA)²
- Department of Fisheries and Oceans (DFO)
- Department of National Defence (DND)
- Health Canada (HC) and
- Public Works and Government Services Canada (PWGSC), which does contracting on behalf of the above agency and departments either when dollar values are above their contracting approval authorities, or upon request.

3.20 The agency and departments were chosen, based on the extent of their contracting activities as shown in Table 2 below, in order to provide a reasonable overview of practices related to contracts awarded using ACANs.

² For the purposes of this report, the Canada Revenue Agency is referred to as a department.

ADVANCE CONTRACT AWARD NOTICES

Table 2

ACAN and Contracting Activities (over \$ 25k)								
By Departments included in this review and Government-Wide								
2005								
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)
CRA	461	\$ 241,380	80	\$ 51,782				
DFO	1,054	\$ 252,450	137	\$ 15,358		Data not available for 2005		
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	22,483	\$ 14,780,801	1,664	\$ 595,169				
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	4,804	\$ 7,318,839	310	\$ 219,330	6	\$ 3,556	304	\$ 215,774
HC	542	\$ 238,575	87	\$ 26,460	26	\$ 3,852	61	\$ 22,608
TOTAL (4 Departments)	6,613	\$ 7,955,051	608	\$ 314,218	143	\$ 51,244	465	\$ 262,974
Total Government-wide	20,625	\$ 10,501,578	1,505	\$ 588,938				
2005 – 2007								
GRAND TOTAL (4 Departments)	20,792	\$ 21,215,395	1,931	\$ 897,996				
GRAND TOTAL (Government-wide)	65,114	\$ 36,226,701	4,750	\$ 1,680,869				

Criteria

3.21 Our review was based on the following criteria:

1. Departmental policies are consistent with TB policies and guidelines.
2. Departmental implementation of the ACAN process complies with TB policies and guidelines, specifically concerning the:
 - rationale for directing a contract and publishing an ACAN
 - ACAN publication period and period for other potential suppliers to submit Statements of Capabilities; and
 - process for accepting or rejecting any Statements of Capabilities received.
3. Departmental implementation and risk management, including reporting on activity levels and usage.

Methodology

3.22 We examined the federal legislative, regulatory and policy framework related to ACANs; we conducted interviews with departmental management and procurement personnel; and we analysed departmental practices by performing a review of procurement files.

3.23 We selected a sample totalling 177 files: 148 files where an ACAN was published and 29 files where a directed contract was issued without the publication of an ACAN. In selecting procurement files from departments, we considered such factors as business volume; balance between the National Capital Region and regional offices; files with and without a Statement of Capabilities; and files where an ACAN was published and there were significant increases to dollar values after award of the contract. In addition, we chose files where the ACAN process was cancelled.

3.24 It should be noted that we did not assess the quality of the rationale used to support a directed contract. We also excluded from our review Contract Award Notices that are published after a directed contract is awarded.

3.25 We reviewed TB Purchasing Activity Reports and a PWGSC internal report on ACANs. We also sought feedback from supplier associations.

Findings

Treasury Board and Departmental policies

3.26 We noted that CRA is not subject to the GCRs or the TB Contracting Policy, although it does employ the same exceptions to soliciting bids as contained in the GCRs. These exceptions are set out in the CRA Contracts Directive. The Agency also

follows similar procurement processes for directed contracts to those described in paragraphs 3.5 through 3.8 of this report.

3.27 Although departmental policies are consistent with the TB policies and related guidelines for the most part, we found three notable differences with regard to the publication period, the period for submitting Statements of Capabilities, and the process for reviewing Statements of Capabilities.

3.28 Firstly, according to the TB Contracting Policy and guidelines, an ACAN is to be published for no less than 15 calendar days. With the exception of DND, all departmental policies we reviewed reiterate the TB Contracting Policy requirements. DND requires that ACANs be published for a minimum of 22 days when procurements are subject to the NAFTA and/or WTO-AGP trade agreements.

3.29 Secondly, the TB Contracting Policy states that other potential suppliers can submit Statements of Capabilities within the 15 calendar day publication period. If no valid Statements of Capabilities are received during this period, the contract may be awarded.

3.30 PWGSC not only meets this TB Contracting Policy requirement, its policy further requires that any Statements of Capabilities received after the publication period of an ACAN must be considered up to contract award.

3.31 This difference in PWGSC's policy is based on the premise that if procurement personnel become aware of another potential supplier at any time before the award of a directed contract, the statement "only one supplier is capable of performing the contract" is no longer valid and proceeding with contract award contravenes the GCRs.

3.32 Nonetheless, PWGSC's standard wording included in ACANs is at variance with its own policy requirement. The notice states that if no other supplier submits, on or before the closing date, a Statement of Capabilities that meets the requirements set out in the ACAN, a contract can be awarded to the pre-identified supplier. In essence, PWGSC does not inform suppliers that it will accept Statements of Capabilities until contract award.

3.33 The above two differences may be perceived by the supplier community as impeding the fairness, openness and transparency of the process. A department, whose policy is aligned with the TB Contracting Policy, will not accept Statements of Capabilities after the 15 day publication period when doing its own contracting. If PWGSC does the contracting for that department, however, Statements of Capabilities will be accepted up to contract award. Suppliers may therefore not be treated the same, depending on which department they are dealing with.

3.34 We recognized that there are attendant operational risks regarding the consideration and potential acceptance of a Statement of Capabilities up to contract award. However, it is our view that some of those risks could be mitigated. For example, a clear stipulation could be included in the ACAN that the government will consider

Statements of Capabilities up to contract award, but that negotiation will commence with the pre-identified supplier after the last day of the ACAN publication. It should also be made clear in writing to the pre-identified supplier that, should a Statement of Capabilities submitted by another potential supplier be accepted during negotiations but prior to the contract award, the solicitation will be cancelled and re-issued on a competitive basis.

3.35 However, there is an additional unresolved operational risk. Suppliers may ignore the closing date of the ACAN and delay the submission of their Statements of Capabilities until a much later date (but prior to contract award). This could prolong the process and cause significant delays in meeting operational requirements. It is for this reason that PWGSC has followed an “accept but not encourage” approach.

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

3.37 Thirdly, TB requires that the decision to reject a Statement of Capabilities be reviewed by an official other than the one who approves the use of an ACAN. PWGSC and CRA have even more stringent controls as they require that the review be carried out at one level higher than the official who approved the publication of the ACAN. This is an effective practice that other departments may want to adopt in some form (such as approval by a senior review committee) based on a risk assessment of their process.

Implementation of the ACAN process

Rationale for directing a contract and publishing an ACAN

3.38 Among the 148 procurement files that used an ACAN process, we expected to find evidence invoking one of the GCR exceptions to soliciting bids. The vast majority of CRA files contained evidence, but this was not the case for the four departments.

3.39 With regard to trade agreements, we expected to find evidence to support using limited tendering provisions. The procurement files we reviewed at PWGSC, CRA and DND contained such evidence. However, there was no evidence on any of the DFO files and about half of the HC files.

3.40 If, at this point in the decision-making process, the government cannot accept a Statement of Capabilities from another supplier, an ACAN is not to be published. In accordance with the TB Contracting Policy, the directed contract can be negotiated and awarded to the pre-identified supplier.

3.41 However, in cases where there is some level of uncertainty as to whether or not there is really only one supplier that can fulfill the contract, we expected that procurement personnel would have conducted some form of market research. In the files we reviewed, we found very little evidence across all departments to indicate that market research was being conducted.

3.42 Market research would help procurement personnel make an informed decision to direct a contract using the “only one supplier” claim. The findings would in turn justify the decision to publish or not publish the intention to direct a contract in advance of the award. We generally noted the absence of key documents on file, in the four departments and CRA, to support the rationale behind these two decisions.

3.43 In addition, in the majority of the procurement files we reviewed, these decisions were not subject to a review by a peer or a superior prior to publication of an ACAN.

3.44 As a result, we have a number of concerns regarding the completeness of the documentation on file. We are most concerned that there is little support to justify the publication of an ACAN where the government is unsure if there is only one supplier capable of meeting their requirement.

3.45 We also found a significant number of cases where the documentation on file did not support publishing an ACAN since the government was unable to accept a Statement of Capabilities from another potential supplier (e.g. due to a pressing emergency, not in the public interest or one supplier owning intellectual property rights or possessing the exclusive authority to carry out specific work). Using an ACAN in such cases was contrary to the TB and CRA contracting policies.

3.46 The decision to use an ACAN must be supported by rationale. There must be a reasonable level of uncertainty (or a seed of doubt) about the claim that only one supplier can fulfill the contract, and there must be potential for other suppliers to be considered for the contract. In cases where detailed market knowledge verifies that there is only one supplier, there should be no publication of an ACAN and the contract should be approved under lower contracting authorities. On the other hand, if detailed market knowledge reveals that there is more than one potential supplier; procurement personnel should use a competitive bidding process with higher contracting authorities.

ACAN publication period and period for submitting Statement of Capabilities

3.47 With regard to the ACAN publication period, we found evidence that CRA and DFO were publishing ACANs for a maximum of 15 calendar days instead of the minimum it was intended to be. We could not validate this for the other departments because, in most cases, copies of the actual ACAN publications were not on file.

3.48 We also found that the 15-day publication period was the same period used for other potential suppliers to submit a Statement of Capabilities. Where ACANs are for simple, small dollar value procurements, 15 days may be perfectly sufficient. However, as illustrated in the Table 3 below, we found that recent ACANs published by the departments had the same period, whether they were simple with small dollar values or highly complex, multi-million dollar procurements.

Table 3

ADVANCE CONTRACT AWARD NOTICES

Estimated Contract Value	Brief Contract Description	Period
\$32,130	Contract to purchase a spectrometer	15 days
\$38,367	Contract to purchase a glassware washer	15 days
\$253,000	Contract for household furniture	15 days
\$300,000	Service contract for groundfish survey	15 days
\$1,077,200	Contract for consulting services for a software system integration and technical support project	15 days
\$2,103,000	IT contract relating to local area networks, systems, and/or components	15 days
\$10,553,117	Contract for miscellaneous Vessel Maintenance	15 days
\$42,000,000	Contract for two-way radio communication services	15 days

3.49 For some of these more complicated requirements, suppliers may have to consult with their affiliates in Canada or abroad, or pool their resources with other suppliers to prepare a joint response. In these situations, it is difficult to conceive that a proper Statement of Capabilities could be submitted in a 15-day window of opportunity.

Process for accepting or rejecting Statements of Capabilities

3.50 We reviewed a multi-year report, prepared in 2007, on ACANs published by PWGSC when it contracts for itself and on behalf of other government departments and agencies. Although data was only readily available for two of the three years within our scope, we found that suppliers submitted Statements of Capabilities for only about 7% of ACANs and that almost half of these Statements of Capabilities were rejected.

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

3.52 We reviewed a total of 29 files where Statements of Capabilities had been received. We found that the criteria and process used for evaluating them were frequently missing from procurement files. We observed that only 7 of the 29 files contained evidence that Statements of Capabilities were measured against the requirement published in the ACAN. The action taken on the other files was not documented, including two files where the requirement was cancelled prior to reviewing the Statement of Capabilities. Without documentation describing the process for accepting or rejecting Statements of Capabilities, it was difficult to assess whether the process was conducted in a fair manner.

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

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

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

3.56 An article in Summit, a magazine on Canada's Public Sector Purchasing, alluded to the above risks: "To understand how ACANs work, one can think of a race where one contestant gets a head start, before the others even know there is a race."

Oversight and reporting

3.57 A directed contract awarded to a pre-identified supplier may pose a risk to the fairness, openness, and transparency of the procurement process. For example, this could be perceived as a source of preferential treatment, diminished access to all suppliers, and a challenge to achieving value for money in the expenditure of public funds.

3.58 Such risks are recognized for directed contracts where notice is not published in advance and more stringent controls have been put in place as a risk mitigation strategy - there is usually increased oversight and procurement personnel have lower contracting approval authorities. The TB Contracts Directive states that the general departmental contracting approval authorities for non-competitively acquired services are \$100,000 as opposed to \$2,000,000 for a fully competitive contract (see Table 1). As a result, for higher dollar value directed contracts where an advance notice is not published, the process has to undergo an independent review to reduce the risk of unfairness to other potential suppliers.

3.59 Although similar risks exist when awarding a directed contract using an ACAN, the same level of control does not apply to mitigate those risks. For contracting approval purposes, procurement personnel can use the same authority for ACANs as they can for a fully competitive contract – up to \$2,000,000. They have the same contracting approval authorities as fully competitive contracts, without the rigor of open competition. Consequently, there is increased risk to the government because this

process usually has less oversight and there may be no independent review of the rationale to support publishing an ACAN. This is a major concern because, based on our review, a majority of procurement files did not have documentation to support this rationale.

3.60 When procurement personnel publish an ACAN, a directed contract can be awarded much faster because it is not necessary to obtain higher contracting approval authority. We found that some ACANs are being published when they shouldn't be, as described in contracting policy requirements related to ACANs. This, and discussions with procurement officials, leads us to conclude that some ACANs are being used as a way to avoid the longer contracting approval process when a directed contract is not published in advance.

3.61 TB publishes an annual Purchasing Activity Report which covers contracting done by federal government departments and agencies, and the use of ACANs by individual departments, including those subject to this review. The TB report is based on input from individual departments and identifies the number, type (goods, services, or construction) and the value of ACAN contracts.

3.62 PWGSC also has the ability to generate detailed reports on the ACANs it publishes when contracting for itself and on behalf of other government departments. In addition to the basic information available, PWGSC can identify directed contracts awarded using an ACAN where PWGSC received a Statement of Capabilities from another potential supplier and accepted or rejected the Statement of Capabilities, as well as those files where the ACAN was cancelled.

3.63 PWGSC is the only department, out of the four departments and one agency subject to our review that had the capability to easily identify files with this type of information. The other departments can track the files on which an ACAN was issued, but the other information is not readily available.

3.64 If the information about directed contracts awarded using an ACAN is not tracked, it suggests that management is not routinely considering the risk this process poses to their operations that are supported by those contracts.

3.65 The U.S. government also has concerns about non-competitive contracts and, as part of its procurement reforms designed to improve competition for federal contracts, recently stated that "...it is essential that the Federal government have the capacity to carry out robust and thorough management and oversight of its contracts in order to achieve programmatic goals, avoid significant overcharges, and curb wasteful spending."³

³ Federal Register / Vol. 74, No. 43 / Friday, March 6, 2009 / Presidential Documents

Conclusion

3.66 We fully support the view that the principles of fairness, openness and transparency and the objective of obtaining best value for Canadians are best served by open competition for government contracts. We also recognize that, under exceptional circumstances, a competitive process is not feasible and a directed contract is the only option.

3.67 There were some files containing evidence that the government is publishing ACANs where it is contrary to TB Contracting Policy requirements, CRA's Contract Directives and departmental policies and procedures. This affects the confidence of suppliers in the federal government procurement process.

3.68 The majority of files examined contained neither sufficient nor appropriate documentation. In our opinion, this raises concerns about whether departments understand the policy and guidance documents or choose not to follow them; it also raises concerns as to how they fulfill their obligations to fairness, openness and transparency.

3.69 The process must provide the possibility for different suppliers to do business with the government. If ACANs are used to achieve the same results as directed contracts that are not published, there is a risk that suppliers could lose confidence and stop participating, which could reduce the pool of potential suppliers and increase costs to the government.

3.70 We are concerned that procurement personnel start negotiations with the pre-identified supplier before the closing of the ACAN publication period, even though it is a practice not allowed under a fully competitive process. In addition to a risk of being unfair to other potential suppliers, this may send the wrong message - that the government is not actually willing to entertain other options.

3.71 We also question whether publishing an ACAN for only 15 calendar days for significant and complex requirements is "doing the right thing". The objectives of government procurement are best served not by just meeting the minimum policy requirements, but by striking the right balance amongst the sometimes-conflicting dimensions of the public interest. Giving the shortest time possible to suppliers to review a fairly complex requirement may not be well received and, in practice, may have the opposite effect, if the period to respond by submitting a Statement of Capabilities is not considered reasonable to the supplier community.

3.72 We are particularly concerned that TB and PWGSC policy requirements are not aligned with regard to consideration of Statements of Capabilities up until the time of contract award. This lack of consistency increases the risk of suppliers being treated unevenly.

3.73 Our review revealed that there is very limited supplier participation in PWGSC's ACAN processes. To date, we have not been made aware of any analysis that has

been carried out to ascertain the reasons for this low rate of supplier participation. We noted at a recent Parliamentary Committee meeting on the federal government's procurement process, however, the CFIB, representing 105,000 members across Canada, indicated that its members find it difficult to do business with the federal government and it is probable that a lot of businesses have just given up.⁴ While the CFIB testimony did not directly mention ACANs, it did speak to government procurement processes, which of course includes ACANs.

3.74 The Canadian Centre for Policy Alternatives (CCPA) published a research paper in June 2007,⁵ which raised questions about the openness and transparency of the ACAN process specifically for military requirements.

3.75 We have often heard from both suppliers and procurement personnel that the procurement process has become cumbersome and that obtaining the necessary approvals takes too long, which can cause difficulties in meeting operational requirements in a timely fashion. By providing procurement personnel with the same contracting approval authorities whether they publish a directed contract using an ACAN or if they conduct a fully open competitive process, the government may, in fact, be encouraging unintended behaviour. Using an ACAN is perceived as a way to shorten the procurement process.

3.76 Directed contracts, notwithstanding that advance notice is provided, pose risks to the government. By assigning the highest contracting approval authority to directed contracts awarded using ACANs, the government has diluted an essential control mechanism.

3.77 In 2007, the Canadian International Trade Tribunal (CITT) reviewed a complaint from a supplier that the government had incorrectly rejected its Statement of Capabilities⁶. The CITT noted that an ACAN "often provides only a short description of the specific requirement for which a solution is being sought. Therefore, a [Statement of Capabilities] to an ACAN by a potential supplier that views its alternative solution as being viable cannot be expected to contain the same level of detail as would its response to a competitive [bid solicitation]." As a result, the CITT determined that if another potential supplier believes itself to be capable of responding to the government's operational needs, then they should be given the opportunity to respond, in a competitive environment, to a fully detailed statement of requirements.

⁴ Standing Committee on Government Operations and Estimates, Thursday, February 26, 2009

⁵ 2007 CCPA Foreign Policy Series, *No Bang for the Buck: Military contracting and public accountability*

⁶ *Information Builders (Canada) Inc. v. Department of Public Works and Government Services, CITT, July 16, 2007*

3.78 Subsequent to the completion of our review, we were informed by CRA that it has published a new procurement procedures document that includes the following content regarding the mandatory posting periods for ACANs:

- *“Advertising Periods – (...) The setting of a closing date must take into account the level of complexity of the requirement and of the technical and financial proposal required, the advertising medium used, and the client’s operational needs.”*
- *“Limited Tendering – If an Advance Contract Award Notice (ACAN) is used, the posting period must not be less than fifteen calendar (15) days from the date the ACAN is first displayed on the GETS (Government Electronic Tendering Service). A longer posting period will be used when the requirement is of such scope or complexity as to require additional time for the preparation and submission of a Statement of capability.”*

3.79 While we have not reviewed the implementation of these new procedures; we consider them to be good practices which other departments may wish to adopt.

Recommendations

3.80 Based on our observations, the government should re-think its approach to the implementation of the ACAN process to ensure that the inherent risks, including the risks pertaining to the fairness, openness and transparency of the contracting process, are being managed appropriately by departments and agencies. We recommend the following:

3.81 PWGSC should develop a policy for its own use, which other departments and agencies may wish to adapt, based upon their operational needs. The policy should be designed to:

- strengthen their procurement practices to reinforce compliance with government documentation standards to support all phases of the procurement process, including:
 - the rationale for directing a contract
 - the results of adequate research to determine whether or not there is only one supplier capable of performing the contract
 - the rationale supporting a decision to publishing an ACAN
 - the ability to accept a Statement of Capabilities from another supplier
 - the process to accept or reject a Statement of Capabilities, including an independent review
 - if a Statement of Capabilities is accepted, the resulting competitive process

- evidence of notifying and debriefing (upon request) suppliers, , who submitted Statements of Capabilities.
- clarify that, although there is a minimum posting period for ACANs, the contracting authority should determine the individual posting period based on various risks associated with the requirement, including complexity and materiality; and
- Since, from a contracting authority perspective ACANs are deemed to be competitive, provide guidance to procurement personnel that negotiations should not commence with the pre-identified supplier before the closing of the ACAN publication.

3.82 PWGSC should undertake policy research related to the timeframes during which Statements of Capabilities can be received and assessed. PWGSC should attempt to find a viable solution to operational concerns resulting from the implementation of this policy, while maintaining the fairness of the ACAN process.

3.83 Given there are three levels of contracting authority limits, the lowest contracting limit for non-competitive contracts, a higher limit for traditional competitive contracts and the highest contracting limit being assigned to electronic competitive contracts, TB may wish to examine, based upon risk considerations, the appropriate limits for directed contracts awarded using an ACAN.

3.84 As reported in the summary of the Procurement Practices Review on *Procurement Challenge and Oversight Function*, of the OPO's first Annual Report, five of nine departments have their senior review committees approve procurements where contracts are to be directed using the ACAN process. We believe that such submissions pose a special risk and we recommend that departments and agencies:

- establish risk indicators based on materiality and complexity, and
- all directed contracts using ACANs that meet the risk profile would have to be approved by senior departmental committees responsible for the procurement challenge and oversight function

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