

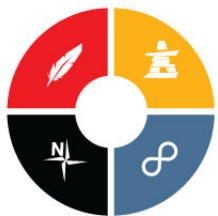


# Audit of Exceptional Contracting Limits Authority

Internal Audit Report

Prepared by: Audit and Assurance Services Branch

September 2023



# Table of Contents

<b>ACRONYMS</b> .....	<b>III</b>
<b>EXECUTIVE SUMMARY</b> .....	<b>IV</b>
<b>1. CONTEXT</b> .....	<b>1</b>
<b>2. ABOUT THE AUDIT</b> .....	<b>2</b>
2.1 <i>Why it is Important</i> .....	2
2.2 <i>Audit Objective</i> .....	2
2.3 <i>Audit Scope</i> .....	2
2.4 <i>Audit Approach and Methodology</i> .....	3
<b>3. KEY FINDINGS AND CONSIDERATIONS FOR MANAGEMENT</b> .....	<b>4</b>
3.1 <i>Contract Stewardship and Compliance</i> .....	4
3.2 <i>Performance Management</i> .....	6
<b>4. CONCLUSION</b> .....	<b>8</b>
<b>ANNEX A: AUDIT CRITERIA</b> .....	<b>9</b>
<b>ANNEX B: COMPONENT GROUP PROCESSES</b> .....	<b>10</b>

## Acronyms

CD	Crown Deponent
CFN	Contract Federal Negotiator / Representatives
CFRDO	Chief Finances, Results and Delivery Officer
CIRNAC	Crown–Indigenous Relations and Northern Affairs Canada
ECLA	Exceptional Contracting Limits Authority
EW	Expert Witness
FAA	<i>Financial Administration Act</i>
LMOD	Litigation Management Oversight Directorate
NA	Northern Affairs
NAO	Northern Affairs Organization
PSD	Policy and Strategic Direction
R&P	Resolution and Partnerships
SACCB	Settlement Agreement and Childhood Claims Branch
TAG	Treaties and Aboriginal Government
TB	Treasury Board

## Executive Summary

Crown–Indigenous Relations and Northern Affairs Canada (CIRNAC), granted the Exceptional Contracting Limits Authority (ECLA) by Treasury Board (TB), uses this special authority to enter into and renew non-competitive contracts essential for negotiations and litigation. This includes contracts with contract federal negotiators / representatives, Crown deponents and expert witnesses.

The objective of this audit was to provide assurance that CIRNAC was in compliance with the ECLA terms and conditions set out by TB, that controls are in place to help achieve intended results and that the process mitigates actual or perceived lack of fairness.

The audit looked at 67 contracts that CIRNAC manages to verify that the ECLA contract processes were in compliance with relevant regulations, policies, and guidelines, ensuring controls are in place to achieve intended results and mitigating perceived or actual unfairness. Overall, the risks associated to the management of ECLA contracts is considered to be low at the time of this audit.

Throughout the audit fieldwork, we observed examples of controls that are properly designed and applied effectively by the Department. This has resulted in several positive findings as follows:

- System Analysis Program (SAP) system extracts were readily accessible to demonstrate the existence of commitment authority (*Financial Administration Act* (FAA), Section 32), certification authority (FAA, Section 34) and transaction authority (FAA, Section 41) for all contracts and contract amendments tested;
- All FAA approvals were provided by individuals who had the delegated authority at the time of the approval;
- All ECLA contracts and contract amendments adhered to the prescribed financial limits;
- Performance reports were provided annually to CIRNAC senior management and TB, outlining the status and performance of contract federal negotiator / representative (Treaties and Aboriginal Government (TAG) Sector work for the CIR Ministerial appointments and Northern Affairs Organization (NAO) for the Northern Affairs (NA) Ministerial appointments, in alignment with reporting requirements set out in the 2021 ECLA terms and conditions); and,
- Documentation included in ECLA contract files demonstrated that required contracting activities were followed and provided a full audit trail of all key decisions and communications related to ECLA contracts (e.g. justification for the use of ECLA, conflict of interest declaration).

Since the findings were positive and compliance with the requirements of the ECLA was found for the period under review, no formal recommendations were made. Although the audit team is not making any recommendations, sectors utilizing the ECLA might consider developing and implementing a formal performance review process for Crown Deponent and Expert Witness appointments, which tracks and documents the performance of contractors throughout the lifecycle of the contract. Additionally, the development and utilization of candidate pools for these

appointments could enhance the diversity and quality of candidates and facilitate a more efficient procurement process. These considerations for management aim to refine the ECLA process.

## **Statement of conformance**

The audit conforms with the Institute of Internal Auditors' *International Standards for the Professional Practice of Internal Auditing* and the Government of Canada's *Policy on Internal Audit*, as supported by the results of the Quality Assurance and Improvement Program.

# 1. Context

In 2002, Treasury Board (TB) granted the then Minister of Indian and Northern Affairs the authority to use an Exceptional Contracting Limits Authority (ECLA) to enter into and renew non-competitive contracts with contract federal negotiators/representatives for negotiations with Indigenous groups, Crown deponents, and expert witnesses deemed necessary for litigation.

To deliver on its mandate to re-engage in a renewed nation-to-nation relationship with Indigenous peoples and to move forward with reconciliation and resolution, the Minister of Crown–Indigenous Relations (CIR), and the Minister of Northern Affairs (NA) continue to require the ability to award and amend contracts under the ECLA. More specifically, the ECLA allows the departments to maintain the continuity of contract federal negotiator/representatives, Crown deponents, and expert witnesses required for negotiations and litigation. The authority was last renewed in 2021 and will expire on March 31, 2027.

Within the departments, there are five (5) component groups that administer the ECLA process, as follows:

- Litigation Management Oversight Directorate’s (LMOD) scope covers Expert Witnesses (EW) and Crown Deponents (CD) for the Minister of Crown–Indigenous Relations (CIR);
- Treaties and Aboriginal Government sector’s (TAG) scope covers Contract Federal Negotiators/Representatives (CFN) for the Minister of CIR;
- Settlement Agreement and Childhood Claims Branch’s (SACCB) scope covers EW and CD for the Minister of CIR;
- Northern Affairs Organization’s (NAO) scope covers all CFN appointments for the Minister of NA; and
- Chief Finances, Results and Delivery Officer (CFRDO) Sector provides review and support to ensure compliance with the FAA.

The ECLA threshold limits are prescribed by Treasury Board and allow up to \$2,000,000 for CFNs and, \$800,000 for EWs and CDs. Table 1, below, details active contracts and expenditures for the fiscal year 2022-2023 as of April 1, 2023.

**Table 1 – Summary of ECLA Contracts as of April 1, 2023**

	<b>Active Contracts (as of April 1, 2023)</b>	<b>Amount Spent on Active Contracts</b>	<b>Expenditure Limit</b>
EW’s	51	\$4,982,527	\$40,800,000
CD’s	2	\$192,336	\$1,600,000
<b>LMOD</b>	<b>53</b>	<b>\$5,174,863</b>	<b>\$42,400,000</b>
EW’s	4	\$314,071	\$3,200,000
CD’s	0	\$ 0	\$ 0

<b>SACCB</b>	<b>4</b>	<b>\$314,071</b>	<b>\$3,200,000</b>
CFN's	18	\$6,609,141	\$36,000,000
<b>TAG</b>	<b>18</b>	<b>\$6,609,141</b>	<b>\$36,000,000</b>
CFN's	1	\$504,778	\$2,000,000
<b>NAO</b>	<b>1</b>	<b>\$504,778</b>	<b>\$2,000,000</b>
<b>Total</b>	<b>76</b>	<b>\$12,602,853</b>	<b>\$83,600,000</b>

## 2. About the Audit

The Audit of Exceptional Contracting Limits Authority was included in the Crown–Indigenous Relations and Northern Affairs Canada Risk-Based Audit Plan for 2022-23 to 2023-24, which was presented to the Departmental Audit Committee and approved by the Deputy Minister in June 2022.

### 2.1 Why it is Important

The audit was identified as a priority as CIRNAC is required by TB to perform an audit of contracting for Expert Witnesses, Crown Deponents and contract federal negotiators/representatives on a three-year cyclical basis and it will support the upcoming renewal of the authority. The last audit was completed in December 2020.

This authority allows the Ministers, through a non-competitive process, to appoint specific individuals, where the sensitivities of a particular file or the complexities of issues and/or litigation require highly specialized skills. This process is in place to meet special operational requirements that cannot be met by using the Department's standard contracting practices.

### 2.2 Audit Objective

The audit objective was to provide assurance that CIRNAC is in compliance with the ECLA terms and conditions as set out by TB, that controls are in place to help achieve intended results, and that the process mitigates actual or perceived lack of fairness.

### 2.3 Audit Scope

The scope of the audit included an examination of whether the Department was in compliance with the requirements of its ECLA. The audit criteria was based on relevant TB authoritative sources, including the:

- *Financial Administration Act* (FAA);
- TB Directive on Management of Procurement;
- TB Policy on the Planning and Management of Investments; and
- TB Directive on Delegation of Spending and Financial Authorities.

The scope of the audit covered the period from April 1, 2020 to March 31, 2023 and included the examination of a sample of contracts (67) and contract amendments (156) issued under the ECLA, within that timeframe. The file testing focused on the required FAA Section 32, 34, and 41 approvals, financial limits, and contracting documentation including controls over potential conflict of interest.

The following sectors were identified to be managing ECLA contracts during the audit period and therefore were included in fieldwork: Litigation Management Oversight Directorate (LMOD) within the Policy and Strategic Direction (PSD) sector; Treaties and Aboriginal Government sector (TAG); Northern Affairs Organization within the Northern Governance Branch and Settlement Agreement and Childhood Claims Branch (SACCB) within the Resolution and Partnerships (R&P) sector. The CFRDO sector supports the ECLA process, including approval of decision notes to the Minister.

Furthermore, the audit included an examination to determine the controls that are in place to help achieve intended results, and ensure that the process mitigates actual or perceived lack of fairness.

## 2.4 Audit Approach and Methodology

### Audit Approach

The audit was conducted in accordance with the requirements of the Treasury Board *Policy on Internal Audit* and followed the *International Standards for the Professional Practice of Internal Auditing*. The audit examined relevant evidence and obtained sufficient information to provide a reasonable level of assurance in support of the audit conclusion.

The audit was performed from October 2022 to June 2023 and consisted of three phases: planning, conduct and reporting. Based on information gathered during the planning phase, a risk assessment was completed to determine the most significant risks related to the management of ECLA contracts and to develop audit criteria. Annex A lists the audit criteria developed for this audit, which were informed by relevant policies, standards, and guidance.

The audit work was conducted as follows:

- Conducted multiple interviews with key stakeholders involved in the ECLA process across the three component groups;
- Performed walkthroughs with the component groups to gain an understanding of the ECLA contract and financial management processes;
- Documented and validated three process flowcharts to depict the ECLA processes across the component groups; LMOD, NAO, TAG, SACCB;
- Performed detailed examination and testing of 67 contracts, including 156 contract amendments, across the three component groups for compliance with the ECLA requirements; and,



- Conducted documentation review of the performance monitoring processes and related documents.

### Overview of Sampling Methodology

For the audit, contracts were segregated by control operator for testing purposes, and as such, three contract populations were established, in alignment with the four groups (TAG, NAO, LMOD, and SACCB).

Overall, 67 contracts were selected, including 22 contracts facilitated by TAG and NAO, 27 contracts facilitated by LMOD, and 18 contracts facilitated by SACCB. Samples were targeted by contract value. Within the 67 sampled contracts there was a total of 156 contract amendments which were also tested for compliance with the ECLA requirements.

Additional context on the sample selection is provided in table 2 below:

**Table 2 – Breakdown of Contract Population**

Breakdown of Contract Population	NAO	TAG	LMOD	SACCB	Total
Total number of contracts in population	1	21	122	18	162
Number of contracts selected for testing	1	21	27	18	67
Number of amendments selected for testing	3	64	47	42	156
Total amount of contracts (\$)	\$360K	\$2.3M	\$6.6M	\$801K	\$10M
Total amount of selected contracts (\$)	\$360K	\$2.3M	\$3.9M	\$801K	\$7.36M

## 3. Key Findings and Considerations for Management

Based on a combination of evidence gathered through interviews, examination of documentation, and analysis, each audit criterion was assessed and a conclusion was drawn for each. The observations presented below demonstrate that management practices and controls are adequate and functioning as intended.

### 3.1 Contract Stewardship and Compliance

#### 3.1.1 Contract Documentation Requirements

Treasury Board (TB) sets the rules for contract documentation in procurement, including for the ECLA. According to the TB Directive on the Management of Procurement (Section 12), the ECLA Decision Note / Contracting package needs several things: a justification for selecting the contractor, key outputs and timelines, the budget / cost estimate, an indemnification clause, and Former Public Servant documentation. For the processes and files selected for review, the audit

expected to find evidence of compliance with the documentation requirements related to the decision note/contracting packages.

The Department follows a standard contracting process for entering into and amending service contracts for the services of CFNs, EWs, and CDs. As identified through interviews and documentation, a range of supporting documents (see Annex B for the type and flow of documentation in the process) must be submitted in order for the contracting process to commence.

The audit found that all 67 contracts reviewed included the necessary supporting documentation. It was also found that the documentation was complete and sufficient to demonstrate that the requirements for CFNs, EWs, and CDs were clearly articulated and defined. The evidence reviewed confirmed compliance with the Contracting Policy set by Treasury Board.

Also, the indemnification clause, which aims to manage risk and clarifies the liabilities of the appointee and the Government of Canada, was found to be incorporated in the CFN contracts reviewed. The audit also examined compliance with security clearance requirements and the evidence of security clears and found no issues for the contracts reviewed.

### **3.1.2 Selection Process and Approvals for Contracts**

The *Financial Administration Act* (FAA) establishes the general financial management framework for the Government of Canada. Within the FAA, Sections 41 and 32 prescribe the approvals required to be in place before an ECLA contract is entered into. Section 41 consists of receiving approval from the applicable Minister per respective component group prior to entering the contract. Section 32 approvals consist of designated individuals from the leads on the contracts that approve of the funds being used to pay for the contractor's services, before the expenses are incurred.

The audit expected to find evidence of Section 32 and 41 approvals for every contract and amendment tested, including validation that the approver had delegated authority at the time of the approval.

During the course of the audit, the audit team gathered evidence to demonstrate that the CFN/CD/EW selection processes complied with TB requirements, departmental policies, and guidelines for all contracts reviewed. The audit found that appropriate delegated expenditure initiation authority (Section 32 of the FAA) was obtained prior to the commencement of the work for all contracts and contract amendments reviewed.

The audit also found that for all contracts and amendments tested, FAA Section 41 approval was performed prior to the contract date. It should be noted that this is an improvement in the Department's level of compliance in the management of the contracting authority as the previous audit of the ECLA conducted in 2020 found instances of non-compliance with the timing of Section 41 approvals.

File testing demonstrated that all selected ECLA contracts and amendments were approved by an individual holding authority delegation at the time of the approval and signed by the contractor in a timely manner, with no exceptions.

### **3.1.3 Contract Compliance with ECLA limits**

Individual ECLA contracts are established within the ECLA threshold limits prescribed by Treasury Board. The audit tested each selected contract against the ECLA Threshold Limits to validate that the contracts did not exceed the ECLA Threshold limits and that contract payments had not exceeded these limits. Further, the audit reviewed and tested the individual contract limits, validating that payments made against individual contracts had not exceeded the contracted amount.

The audit expected to find evidence of compliance with contracts to comply with their respective ECLA thresholds across all three component groups.

The audit team tested the sample of exceptional contract and contract amendment files to ensure that exceptional contracting authority limits were respected for the overarching ECLA thresholds set by Treasury Board as well as the individual contracted amounts.

The audit found that all the agreements were managed within the authorized thresholds and contract limits. All contracts reviewed were managed in compliance with the authority.

## **3.2 Performance Management**

### **3.2.1 Performance Management of Contracts**

Performance management in the context of procurement is the process of assessing, monitoring and managing the performance of a contract to ensure that both parties meet their obligations in achieving the agreed upon objectives. Effective contract performance management helps limit performance issues, manage risks, and maximize the benefits of the contract.

While not an ECLA requirement, the audit looked at the extent to which the department developed and implemented processes to track and monitor contract results, with risks to the achievement of results identified and actively mitigated.

Across the three component groups administering the ECLA, each had slightly different processes to conduct performance management, and as such, observations were noted separately.

TAG developed and implemented annual Performance Evaluation Forms to monitor CFN contract results. CFN contractors are evaluated on their performance each fiscal year. For each contract, both a self-assessment performance report and a departmental performance report are required. The annual Performance Evaluation Forms, included in Ministerial packages, are used to assess each contractor and determine if there are performance issues and/or if the contract is required going forward. For TAG-led files, each CFN's performance is also discussed at the Senior Management and Ministerial level during the Annual Review of Negotiations and Related

Processes exercise (Table Review) meetings. One of the discussion items at these meetings is to determine if specific ECLA contracts and their contractors should be renewed.

Testing found that all 22 contracts sampled under TAG and NAO included evidence of the Performance Evaluation Form. These evaluations evidenced that performance was suitable and aligned with contract requirements. None of the evaluations documented poor performance.

While LMOD and SACCB also participated in an annual negotiation meeting, they had not developed or implemented a tool to conduct a documented evaluation of their respective contractors.

All three component groups had implemented varying levels of performance management as it relates to the ECLA contracts and the groups can continue to refine the operational aspects of their processes and implement best practices outside of the baseline ECLA requirements. Although the audit team is not making recommendations in this area, sectors utilizing the ECLA may want to consider enhancing formal performance review processes for Crown Deponent and Expert Witness appointments that track and document the performance of contractors throughout the lifecycle of the contracts.

### **3.2.2 Pool of Potential Contractors**

ECLA contracts generally require candidates with specialized qualifications, and as such, the development of a candidate pool would help ensure that the needed capacity and capability exists to address upcoming contracts. More specifically, a pool would provide CIRNAC with (1) access to a more diversified skill set and expertise that comes with the variety of contractors maintained in a pool, (2) fulfillment of capacity requirements should the need grow in one particular area, (3) improved diversity and competition in the procurement process, and (4) quicker access to qualified candidates, thereby potentially reducing delays in various proceedings.

With this context in mind, the audit looked at whether the department had a practice of developing a diverse pool of potential candidates for future ECLA contracts purposes, which is maintained and updated, being utilized to refine and improve the overall process by helping to expand and diversify the pool of candidates.

The audit found that TAG maintains a document containing a pool of potential contractors. This pool is updated on an ad-hoc basis to maintain a relevant listing of potential contractors. TAG confirmed that the pool is an informal document used to facilitate efficiency in the ECLA process by providing case managers access to potential contractors in a timely manner. LMOD has begun developing a pool, however at the time of the audit, it was not finalized. SACCB did not have a contractor pool listing developed.

Having a pool of candidates is not an ECLA requirement but doing so may enhance the efficiency and quality of the procurement process. Developing and using candidate pools for these appointments may also contribute to enhanced diversity and quality of candidates and may facilitate a more efficient procurement process. As this is a consideration for management and not a formal recommendation, a management action plan is not required.

## 4. Conclusion

The audit found that controls are in place to help achieve intended results and that the ECLA contract processes are managed in compliance with applicable regulations, policies, and guidelines, and facilitate the mitigation of actual or perceived lack of fairness.

Minor improvements to some elements of the business processes (i.e., formal documented performance reviews and candidate pools) would allow for further alignment with best practices in the administration of the ECLA contracts.

Overall, the risks associated with the management of ECLA contracts is considered to be low at the time of this audit.

## Annex A: Audit Criteria

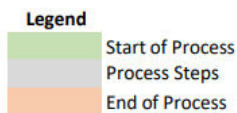
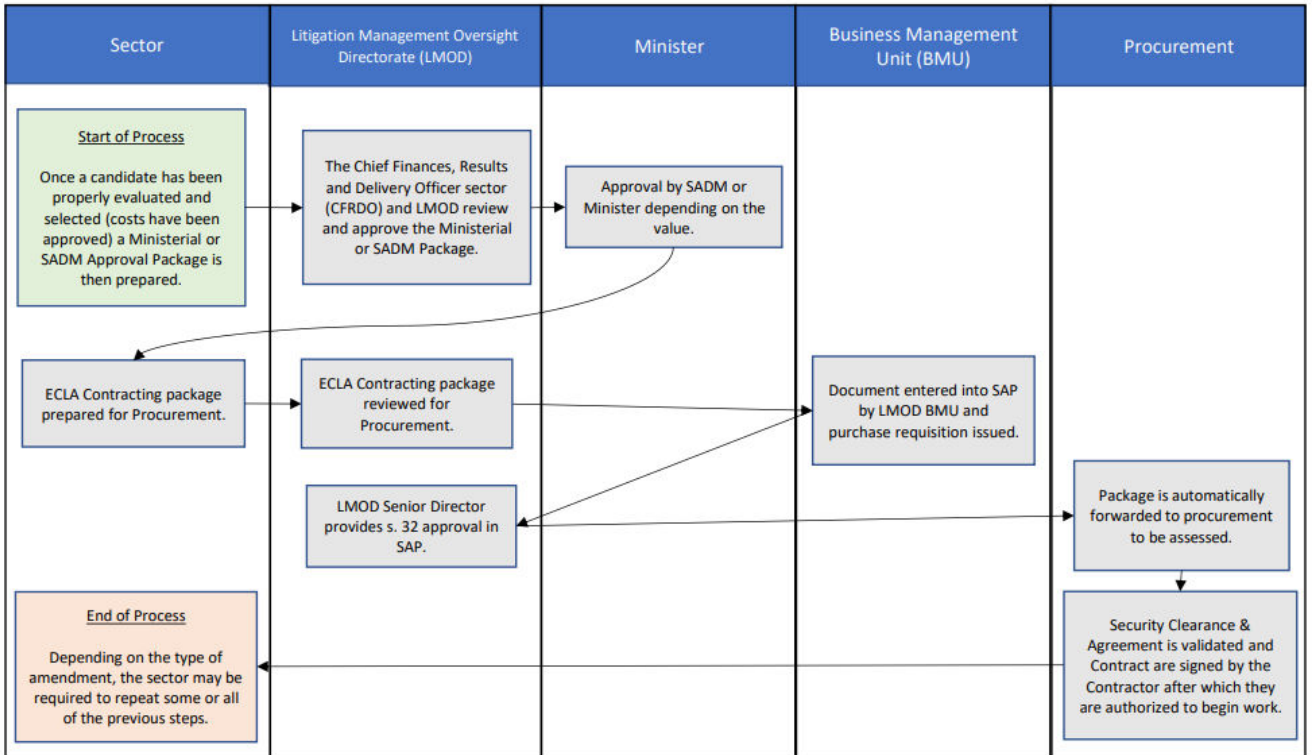
To ensure an appropriate level of assurance to meet the audit objectives, the following audit criteria were developed to address the objectives.

Audit Criteria	Audit Sub-criteria
<p>1. ECLA processes and controls are aligned with Treasury Board (TB) requirements and are functioning as intended.</p> <p>TB policies to be included:</p> <ul style="list-style-type: none"> <li>• <i>Financial Administration Act (FAA)</i></li> <li>• TB Directive on Management of Procurement</li> <li>• TB Policy on the Planning and Management of Investments</li> <li>• TB Directive on Delegation of Spending and Financial Authorities.</li> </ul>	<p>1.1 ECLA contracts, including amendments and renewals, are established and approved in alignment with (1) the defined authorities and FAA approvals, (2) documented fairness and conflict of interest checks, and (3) include all required components of the decision note package as dictated by TB Directives and Policies.</p> <p>1.2 ECLA invoices are approved by delegated authorities, evidencing FAA approvals and segregation of duties in the approval process.</p> <p>1.3 ECLA contracts do not exceed the threshold limits in a given year and/or over the course of the contract.</p>
<p>2. Processes exist to mitigate the risk of ECLA contracts not achieving their intended results.</p>	<p>2.1 Processes have been implemented to track and monitor contract results, with risks to the achievement of results identified and actively mitigated.</p> <p>2.2 Planning activities are established to ensure that the pool of potential contractors provides the necessary capacity and capability to meet CIRNAC's anticipated needs.</p>

## Annex B: Component Group Processes

During the course of the audit, the audit team developed and validated process flows for each group, documenting the overarching ECLA process. The validated process flows have been included for context and supplementary information.

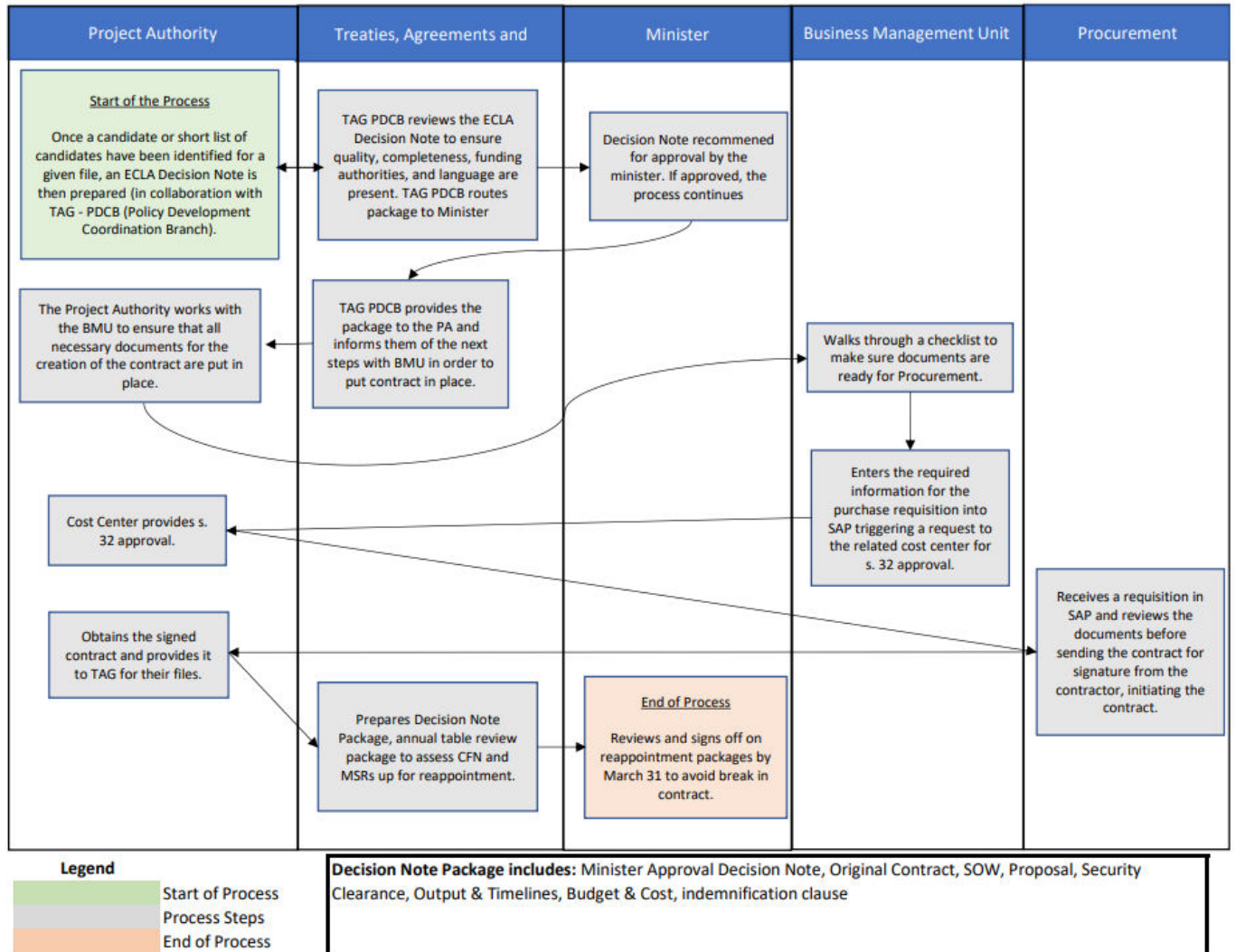
### LMOD:



**Ministerial or SADM Approval Package includes:** Minister Approval Decision Note, Annex A (Information on Contractor), & routing slip

**Contracting Package includes:** Ministerial or SADM Approval package (Decision Note, Annex A and Routing Slip), JUS Justification Memo, Signed Contractor Proposal (which provides details on deliverables, timelines, budget and cost), CVs for each resource proposed by the Contractor, Signed Fee Certification and Sample Invoice, Statement of Work, Security Requirements Checklist (SRCL), Procurement & Contracting Checklist, and Former Public Servant Declaration Form (if applicable).

**TAG:**





# SACCB:

