



OFFICE OF THE PROCUREMENT OMBUDSMAN



ANALYSIS OF ADVANCE CONTRACT AWARD NOTICES (ACAN) FOR A SIX MONTH PERIOD

OTTAWA

December 2013

Promoting Fairness, Openness and Transparency in Federal Procurement

Table of Contents

INTRODUCTION	1
BACKGROUND AND CONTEXT	1
METHODOLOGY	2
LIMITATION OF THIS ANALYSIS.....	3
RESULTS OF THIS ANALYSIS	4
Did the ACAN contain sufficient information to allow a supplier to submit a statement of capabilities?4	
Did it appear the ACAN was posted as a “true market test” to assess whether other suppliers could satisfy the requirement?	5
Did the information in the ACAN appear to be customized to a specific supplier’s good or service?.....	6
Was the government in a position to accept a statement of capabilities from other suppliers?.....	6
APPARENT AMBIGUITIES ON WHEN TO PUBLISH AN ACAN	7
CONCLUSION	9

INTRODUCTION

1. In early 2012, the Office of the Procurement Ombudsman (OPO) monitored 442 Advance Contract Award Notices (ACANs) posted on MERX™, Canada's electronic tendering service. The federal government used MERX™ to notify suppliers of upcoming opportunities and to solicit bids from suppliers who wish to do business with the federal government. MERX™ allowed suppliers to view and search such procurement notices.
2. ACANs are a tool available to all federal government departments and most federal agencies to inform suppliers that a contract is to be awarded to a specific supplier, without competition, and to provide an opportunity for other suppliers to demonstrate they are capable of satisfying the requirements set out in the ACAN. Suppliers who wish to challenge an ACAN may submit a document entitled "statement of capabilities" to the federal organization that posted the ACAN. In this document the supplier attempts to describe how it is capable of meeting the requirements of the ACAN.
3. In the summer of 2011, the Office received a complaint from a concerned individual who had read OPO's June 2011 Report entitled "*Selected Advance Contract Award Notices (ACANs)*".
4. The concerned individual who contacted the Office stated the issues identified in the report were the "tip of the iceberg" regarding the misuse of ACANs. As a result, OPO decided to monitor and analyze ACANs for a six month period.
5. The ACANs monitored and analyzed by the Office were posted on MERX™ from late July 2011 to late January 2012. A summary of the results of this analysis was included in OPO's Annual Report for the 2011-2012 fiscal year.¹

BACKGROUND AND CONTEXT

6. There are several sources of information that provide guidance to federal organizations regarding the use of ACANs. These are:
 - the Treasury Board (TB) *Contracting Policy*;
 - the Treasury Board of Canada Secretariat (TBS) *Contracting Policy Notices*;
 - and,

¹ The 2011-2012 annual report by the Office of the Procurement Ombudsman was tabled in Parliament on August 22nd 2012 and is available at www.opo-boa.gc.ca.

- the TBS *Guide for Managers – Best Practices for Using Advance Contract Award Notices (ACANs) (Revised January 2004)* (Referred to as “TBS *Guide for Managers*” in this report).
7. As stated in the TBS *Guide for Managers*, the objectives of the ACAN process are to:
- Provide a procurement process that is efficient and cost effective;
 - Provide potential suppliers with the opportunity to demonstrate, by way of a statement of capabilities, that they are capable of satisfying the requirements set out in the ACAN; and
 - Respect the principles of government contracting by enhancing access and transparency.
8. All federal departments and agencies (with few exceptions) adhere to the TB *Contracting Policy* and associated TBS guidance. In addition, the Public Works and Government Services (PWGSC) *Supply Manual*, and associated *Policy Notifications*, provide guidance on the use of ACANs. These PWGSC documents are noted because PWGSC is not only responsible for issuing its own contracts but also acts as the contracting authority for most other departments and agencies, depending on the value of the contracts and the goods or services being purchased. When undertaking their own contracting, departments and agencies may consult PWGSC’s *Supply Manual* and *Policy Notifications* (which were updated in January 2012 – at the end of the period we analyzed) to assist with their procurement activities. It is the contracting authority (i.e., PWGSC or the department/agency) to whom suppliers submit statements of capabilities when challenging ACANs.

METHODOLOGY

9. In early 2012, OPO looked at 442 ACANs posted between July 2011 and January 2012. Five of these were notices indicating that an ACAN had been cancelled therefore, OPO analyzed 437 ACANs. OPO analyzed only the information found on the MERX™ notices. There were a few instances in which the ACANs indicated that additional documentation could be ordered or where suppliers were requested to contact the contracting authority for more information. For this analysis, OPO staff did not order documents nor contact the contracting authority; the analysis was based solely on the information contained in the ACANs posted on MERX™.
10. The above noted guidance documents require the inclusion of specific information in an ACAN. This information is meant to provide suppliers with sufficient facts to allow them to determine whether they are capable of providing the government with the required goods or services. The ACANs must also contain administrative instructions for suppliers (e.g., the required delivery date, to whom statements of capabilities should be addressed, etc.).

11. A combination of objective and subjective analyses was used to assess whether the 437 ACANs met the applicable requirements. With respect to the objective analysis, OPO examined whether the necessary data was included in the ACAN (e.g. did it indicate the closing date? Did it list which of the trade agreements applied? Did it state the expected value of the contract?). With respect to subjective analysis, OPO's observations are based on the following four questions:
- Did the ACAN include sufficient information to allow a supplier to submit a statement of capabilities?
 - Did it appear the ACAN was posted as a "true market test" to assess whether other suppliers could satisfy the requirement?
 - Did the information in the ACAN appear to be customized to a specific supplier's goods or services?
 - Was the federal government in a position to accept a statement of capabilities from other suppliers?

LIMITATION OF THIS ANALYSIS

12. OPO's analysis examined the information publicly available to suppliers when departments posted the ACANs. In using this approach, OPO recognizes certain limitations in the analysis. First, OPO staff did not obtain any additional information from the departments that posted the ACANs; the information reviewed was what suppliers saw when initially deciding whether to challenge an ACAN. Second, ACANs are typically viewed by suppliers within the industry for which the ACAN is related, i.e. the contracting department will post an ACAN for scientific equipment using terminology and references specific to that industry, class of goods or class of services. OPO staff had limited technical knowledge of the particularities of a majority of industries from which the government sought to purchase its goods and services.
13. For example, an ACAN may state that an intake valve for a hydraulic system component has to be 10.5 centimeters in diameter. A layperson might consider this to be a reasonable width, whereas the industry expert may know only one company manufactures a hydraulic system with a 10.5 centimeter intake valve. The opposite may also be true – the layperson may view this as an attempt to restrict a requirement and to direct a contract to a particular supplier, whereas the industry expert may know that a 10.5 centimeter intake valve is the necessary width to allow the hydraulic system to function properly. In these types of situations, OPO noted it could not make an assessment.
14. OPO's analysis was done at an exploratory level; the nature of the analysis provided OPO with gross data regarding the entire sample of 437 ACANs. As noted above, OPO's analysis was limited to the information contained in the ACANs

themselves and did not delve into a department's rationale regarding what information was included in the ACANs nor challenge the departments' decisions for issuing an ACAN. Results are therefore presented in reference to the entire sample, as opposed to identifying a specific number of ACANs in responding to the above-noted four questions.

RESULTS OF THIS ANALYSIS

15. Regarding OPO's objective analysis of the data elements contained in the ACANs, OPO considers that, in general, there are no areas of concern. In other words, the ACANs examined typically contained all the basic data required by policy and guidance documents (e.g., the name of the department, an address for suppliers to submit questions, the due date for the submission of a statement of capabilities, etc.).
16. Regarding OPO's subjective analysis of the information contained in the ACANs in relation to the previously noted four questions, OPO found the following:

Did the ACAN contain sufficient information to allow a supplier to submit a statement of capabilities?

17. The TBS *Guide for Managers* provides templates which list the information that must be included in the ACAN. Among other things, the department posting the ACAN must provide a full description of what it is looking to buy and a description of the minimum essential expertise (for services) or product specifications (for goods).
18. Based on OPO's analysis, it appeared more than half of the ACANs provided sufficient information to allow a supplier to submit a statement of capabilities, as outlined in the TBS *Guide for Managers*. For the vast majority of the remaining ACANs, OPO did not believe the ACAN contained sufficient information to allow a supplier to submit a statement of capabilities. There was also a small number of ACANs for which OPO could not determine if the ACAN contained sufficient information to allow a supplier to submit a statement of capabilities.
19. For example, OPO reviewed an ACAN in which a government department wanted an "in-depth analysis of the competitive position" of a particular Canadian sector of a global industry. While the ACAN included some general background information on this global industry, it did not specify why the government wanted this analysis, how the analysis should be structured or delivered, or even when the information was required. In addition, the ACAN did not specify the minimum expertise a supplier would need to conduct this analysis, the identity of the pre-selected supplier, or why the requirement for the analysis was not being competitively tendered. This ACAN lacked information that would have allowed other suppliers to

submit a statement of capabilities to assert that they were also capable of performing the work.

Did it appear the ACAN was posted as a “true market test” to assess whether other suppliers could satisfy the requirement?

20. The TBS *Guide for Managers*, states: “ACANs normally arise when it is possible that only one supplier can perform the work. In circumstances where detailed market knowledge confirms this as fact then the contract should be awarded on a non-competitive basis with transparency achieved through a contract award notice.” In reviewing the ACANs OPO looked for text that explained why the pre-selected supplier was the only one capable of performing the work.
21. For example, OPO reviewed an ACAN for specialized custodial services in which the department included a full description of the work to be performed as well as the reason for that work being performed at that particular location. It included the name of the pre-selected supplier and noted the department had canvassed local businesses in the past but that no one had shown any interest in the work. The ACAN also included references to the applicable policy the department believed would permit it to award the contract without seeking bids from other suppliers. OPO considers this particular ACAN to have been a “true market test” because:
- The ACAN clearly explained that the department was only aware of one supplier that could provide the necessary services;
 - The department indicated in the ACAN it was willing to consider other service providers; and
 - While not a specific requirement, OPO noted the ACAN described the department’s efforts to locate other sources of supply.
22. In another instance, a department posted an ACAN regarding a contract for work to be done as “supplemental assessment” to an original study that was in progress when the ACAN was posted. The ACAN advised suppliers that “...no other options could be considered” because the pre-selected supplier was the only company that could perform the work due to the “proprietary nature of the input used in the modelling process”. Due to proprietary restrictions and the justification for the pre-selected supplier listed in the ACAN, OPO did not consider this ACAN to be a “true market test”. This is due to the fact that the department would not be able to accept a statement of capabilities from other suppliers.
23. Of the ACANs examined, OPO found about a quarter appeared to be a “true market test” to identify whether other suppliers could satisfy the requirement. OPO also found that just under three quarters of ACANs did not appear to be a “true market

test". OPO was unable to conclude whether the few remaining ACANs were "true market tests".

Did the information in the ACAN appear to be customized to a specific supplier's good or service?

24. OPO considered the ACANs' descriptions of the goods and services being sought and the reasons the departments listed to justify the award of a contract without competition. OPO attempted to assess if product specifications or experience and education requirements listed in ACANs were based on the departments' needs, or if they appeared to be based on a particular product's specification or a service provider's credentials.
25. OPO identified examples of ACANs in which the requirement appeared to be customized to a specific product or service. For instance, one ACAN did not include a list of qualifications deemed essential to do the work; rather it listed the work to be done and a description of the pre-selected supplier's qualifications and previous experience. The ACAN advised suppliers the contract was to be awarded to a particular individual because that individual "...specialized..." and had "...extensive experience..." and "...extensive knowledge..." in the subject field. These qualifications were not quantified in the ACAN, i.e., there was no indication of how many years of experience enable a person to be considered "specialized" or to have "extensive" experience or knowledge. In other words, short of an individual having the exact same experience as the selected supplier, it's unlikely another supplier could provide a statement of capabilities challenging the ACAN to demonstrate such nebulous "extensive" knowledge and experience.
26. Based on OPO's analysis, about half of the ACANs analyzed appeared to be customized to specific individuals or products. Slightly over a third of the ACANs did not appear to be customized. OPO considers the remaining ACANs did not include enough information to make a determination one way or another.

Was the government in a position to accept a statement of capabilities from other suppliers?

27. The TBS *Guide for Managers* states "ACANs should only be used where valid statements of capabilities can be accepted [by the department]". In other words, if the organization cannot accept substitute goods or services, an ACAN should not be published. OPO focussed on the ACANs' rationale regarding the pre-selection of a particular supplier, including the exceptions permitted under the relevant policies and trade agreements. Two of the most common exceptions from seeking

competitive bids subject to the trade agreements are: (1) if the government is procuring more of the same goods or services and cannot accept another product/service provider for reasons of compatibility and interchangeability with existing equipment; and, (2) when a pre-selected supplier owns the intellectual property rights to the requested good or service.

28. An example of an ACAN where it appeared the department could not accept a statement of capabilities from another supplier was repair and calibration of previously purchased scientific instruments. The pre-selected supplier was the exclusive distributor of the products at issue and was the only approved repair facility in Canada for the equipment. For these reasons, the ACAN stated only the pre-selected supplier could provide the required services. As such, the department did not appear to be in a position to accept services from other suppliers.
29. Based on OPO's analysis it appeared that for just over half of the ACANs analyzed, the departments would not have been in a position to accept a statement of capabilities from another supplier. For the majority of the remaining ACANs, OPO staff considered the department could have accepted a statement of capabilities from other suppliers. In about ten percent of the overall sample, OPO could not determine whether the department would have been able to accept a statement of capabilities.

APPARENT AMBIGUITIES ON WHEN TO PUBLISH AN ACAN

30. Given the results of our analysis, we went back to the two key documents which provide departments with guidance on the use of ACANs. In doing so, we noted apparent ambiguities between the *TB Contracting Policy* and the *TBS Guide for Managers* regarding the circumstances to be considered prior to posting an ACAN. When we examined these documents we found the following:

The *TB Contracting Policy* states, in part:

10.2.1 Section 6 of the *Government Contracts Regulations* contains four exceptions that permit the contracting authority to set aside the requirement to solicit bids. These are:

- a. the need is one of pressing emergency in which delay would be injurious to the public interest;
- b. the estimated expenditure does not exceed
 - \$25,000,
 - ...
- c. the nature of the work is such that it would not be in the public interest to solicit bids; or

d. only one person or firm is capable of performing the contract.

...

10.2.6 Any use of the four exceptions to the bidding requirement should be fully justified on the contract file or, where applicable, in submissions to the Treasury Board. Even if a proposed directed contract (see Appendix A) for goods and services qualifies under one of these four exceptions, the contracting authority is encouraged, whenever possible, to use the electronic bidding methodology to advertise the proposed award through an Advance Contract Award Notice (ACAN). If no statements of capabilities meeting the requirements set out in the ACAN are received within fifteen calendar days, the proposed contract is deemed to be competitive and may be awarded using the electronic bidding contracting authority. [Emphasis added]

31. The preceding policy excerpts appear to suggest that, if one of the four exceptions noted in paragraph 10.2.1 exists, a department may direct a contract to a specific supplier. Paragraph 10.2.6 requires the use of such exceptions be “fully justified” on the file. Nonetheless, the contracting authority is “... encouraged to advertise the proposed [contract] award through an ...ACAN...”.
32. The Introduction to the TBS *Guide for Managers* advises readers that the guide has been published to:
- Provide managers the key considerations associated with using an ACAN process, including the procurement strategy and the documentation requirements;
 - Re-orient the focus of ACANs for the supplier community so that suppliers have a better understanding of the government's requirements and can determine whether they possess the capabilities required to satisfy a given requirement;
 - Underscore the fact that ACANs should only be used where valid statements of capabilities can be accepted; and
 - Provide ACAN templates that will contribute to the improved quality of information in ACANs.
[Emphasis added]
33. The third bullet appears to run counter to the TB *Contracting Policy* requirements encouraging a contracting officer to post an ACAN. The TBS *Guide for Managers* does provide some examples of circumstances in which an ACAN should not be published:
- ACANs shall not be posted in situations where the contracting authority cannot accept a statement of capabilities or in solicitation processes where

electronic or traditional bidding cannot be used. Examples where an ACAN should not be used include situations involving national security or extreme urgency brought on by unforeseeable circumstances, or where work has already begun. In such cases, the rationale underlying the decision not to publish an ACAN should be well documented on the procurement file.

However, this list is not exhaustive and the ambiguity between the *TB Contracting Policy* and the *TBS Guide for Managers* could be confusing for contracting authorities when considering the particular needs of the requirement in question.

CONCLUSION

34. OPO could not substantiate or refute the concerned individual's "tip of the iceberg" allegations. However, our analysis raises questions about whether the policy and guidance documents governing the use of ACANs are sufficiently explicit and unambiguous to allow ACANs to be used as intended. This ambiguity may be resulting in departments making divergent interpretations on how and when ACANs should be used.