



# OFFICE OF THE PROCUREMENT OMBUDSMAN



## PROCUREMENT PRACTICES REVIEW

### *FOLLOW-UP REPORT*

### *2008-2009 PROCUREMENT PRACTICES REVIEWS*

OTTAWA  
NOVEMBER 2011

PROMOTING FAIRNESS, OPENNESS AND TRANSPARENCY IN FEDERAL PROCUREMENT

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ISBN: 978-1-100-19556-8  
Cat. No.: P114-2/2011E-PDF

This publication is also available in electronic format at:  
**[www.opo-boag.gc.ca](http://www.opo-boag.gc.ca)**

**Table of Contents**

**MAIN POINTS.....ii**

    WHAT WE REVIEWED .....ii

    WHY IT’S IMPORTANT .....ii

    WHAT WE FOUND.....ii

**INTRODUCTION ..... 1**

    FOLLOW-UP OBJECTIVES ..... 1

    SCOPE, METHODOLOGY AND TIMING OF THE FOLLOW-UP ..... 2

    WHY IT’S IMPORTANT ..... 2

**ASSESSMENTS OF PLANNED AND IMPLEMENTED CHANGES AND PROGRESS .....3**

    CHAPTER 1: PROCUREMENT CHALLENGE AND OVERSIGHT FUNCTION ..... 3

*Targeted changes should assist departments in their procurement practices ..... 3*

    CHAPTER 2: SUPPLIER DEBRIEFINGS ..... 5

*Significant improvements made to the practice of Supplier Debriefings..... 5*

    CHAPTER 3: ADVANCE CONTRACT AWARD NOTICES (ACANS) ..... 8

*Many steps taken to yield improvements, yet certain issues remain to be addressed..... 8*

    CHAPTER 4: MANDATORY STANDING OFFERS ..... 12

*PWGSC has made important strides in how standing offers are established..... 12*

    CHAPTER 5: CORCAN PROCUREMENT ALLEGATIONS..... 15

*CORCAN took a number of steps to correct deficiencies noted ..... 15*

**OVERALL CONCLUSION ..... 18**

    ANNEX A – SUMMARIZED OPO RECOMMENDATIONS AND DEPARTMENTAL RESPONSES ..... 19

## Main Points

### What We Reviewed

1. In our first year of operation, the Office of the Procurement Ombudsman (OPO) conducted five procurement practices reviews to assess the fairness, openness and transparency of federal procurement practices. The following review reports were issued in August, 2009:

*Chapter 1: Procurement Challenge and Oversight Function*

*Chapter 2: Supplier Debriefings*

*Chapter 3: Advance Contract Award Notices*

*Chapter 4: Mandatory Standing Offers*

*Chapter 5: CORCAN Procurement Allegations*

2. Each of these reports includes recommendations to be considered by deputy heads accountable for ensuring the fairness, openness and transparency of federal procurement practices. In August 2010, we asked the 16 departments and agencies that had participated in these reviews to provide information about any actions taken in response to the recommendations included in the review(s) in which they had participated.

3. The purpose of our follow-up exercise was to determine whether departments and agencies had assessed our recommendations against their own practices and taken actions or developed plans to improve their existing practices. For each of the recommendations included in our reviews, we assessed the information received from these organizations for reasonableness and credibility. This report provides a summary with some specific examples of departments' and agencies' descriptions of their progress on implementing changes in response to our recommendations.

### Why It's Important

4. There are three main reasons why reporting on progress made on the implementation of OPO recommendations is important. First, it informs interested stakeholders of specific actions the government has taken and will take to improve the fairness, openness and transparency of its procurement practices. Second, by sharing information on changes being implemented by the departments and agencies whose practices were reviewed, we can facilitate the introduction of similar improvements in other federal organizations. Lastly, this information on the nature and extent of the changes departments and agencies are introducing in response to our recommendations provides OPO with indications of the usefulness of our reviews.

### What We Found

5. We are encouraged by departments' and agencies' commitment to continuous improvement in their procurement practices. All of the organizations participating in this follow-up review assessed the OPO recommendations for the review(s) in which they had participated, and provided information on their respective plans and actions taken.

Many of these organizations have provided comprehensive action plans and reported on significant changes already implemented to improve their procurement practices. The majority of the planned actions were close to completion. OPO is pleased with the extent of co-operation we received in conducting this follow-up, and are encouraged by the progress assessed by the participating departments and agencies. We have noted considerable progress on introducing rigour in new and previously established senior procurement review committees, which play an important role in the broader procurement management framework. Many of the introduced changes reflect an increased focus on risk-based decision-making and also on plans to assess the effectiveness of their methods for managing procurement risks.

6. The actions departments have taken in response to our recommendations on supplier debriefings demonstrate a strong commitment to improving communications with suppliers and ensuring that suppliers and departmental contracting authorities have a common understanding of the core principles surrounding supplier debriefing. We believe that the increased transparency of supplier debriefing practices will create an environment in which suppliers and federal employees can work together to improve procurement results.

7. Departments and agencies have reported important progress in response to our recommendations related to the use of Advance Contract Award Notices (ACANs) that should improve the fairness and transparency of these practices. For example, three of the five reviewed departments have reported actions to ensure that decisions related to the use of ACANs are properly documented and that posting periods are determined on the basis of complexity and risks. Our recommendation that supplier negotiations should not commence prior to the closing of an ACAN posting period has been accepted by two of the five organizations that participated in our review; two others had refined or were refining their direction while still allowing the practice, and one other felt that its existing policies were already adequate to ensure fairness. Lastly, in response to our recommendation that TBS may wish to examine the appropriate limits for directed contracts awarded using an ACAN, TBS has reported that consideration is being given to adopting a more risk-based approach to determining contract approval limits.

8. PWGSC has embedded the requirement to ensure suppliers have reasonable access to government business opportunities in its methods for establishing Standing Offers (SOs). It has also taken action to improve the management and use of data regarding call-ups issued against standing offers (SOs). These actions should continue to improve the fairness, openness and transparency of these methods. Given the number and variety of SOs, the volume of business conducted through SOs and the number of recent improvements made in response to OPO recommendations, this is an area where we intend to maintain a focus for future practice reviews.

9. Correctional Services Canada (CSC) has adequately addressed the specific allegations presented in reference to CORCAN construction services contracts and has taken steps to address any systemic problems and ensure compliance with delegated financial signing authorities and contract approval requirements. CSC's internal audit function conducted a national review of CORCAN construction contracts and made recommendations to ensure the adequacy of procurement training and compliance with relevant policies, guidelines and approval requirements.

10. An overview of OPO's recommendations and the responses and progress that departments and agencies subsequently reported is provided in Annex A to this report.

## Introduction

11. Following the appointment of the first Procurement Ombudsman in May, 2008, we conducted our first set of procurement practices reviews. As a result of these reviews, the following reports were issued in August 2009:

*Chapter 1: Procurement Challenge and Oversight Function*

*Chapter 2: Supplier Debriefings*

*Chapter 3: Advance Contract Award Notices*

*Chapter 4: Mandatory Standing Offers*

*Chapter 5: CORCAN Procurement Allegations*

12. We conducted our reviews using a systematic, evidence-based approach with the objective of identifying effective practices and opportunities for improvement that could lead to enhancements in the fairness, openness and transparency of federal procurement. Each of the five procurement practices review reports included recommendations for consideration by responsible departments and agencies. Some of the recommendations were directed to a single department that has primary responsibility for the procurement practices under review (e.g. recommendations in Chapters 4 and 5). In certain instances, we recommended that PWGSC, in its role as common service procurement provider, take the lead in the development of improvements that other departments could subsequently consider for implementation in their organizations. Where the reviewed practices fall within the responsibility of a broad range of federal organizations, those recommendations were intended to be considered by all deputy heads accountable for ensuring the fairness, openness and transparency of federal procurement practices.

## Follow-up Objectives

13. The follow-up to the 2008–2009 reviews was conducted with four key objectives in mind. Through this follow-up, we set out to determine:

- whether the departments that participated in our reviews assessed our recommendations and our reported effective practices against their own current practices;
- whether action plans had been prepared and approved, as well as the coverage of those action plans in reference to our recommendations and reported effective practices;
- what action had been taken to date on each recommendation and reported effective practice; and
- the extent to which each action had been completed. We had also anticipated determining the extent to which the actions had resolved the issues raised, but given the limited amount of time for departments to assess whether their implemented changes had satisfactorily resolved the issues raised, we established that it was too soon to make such a determination.

14. We anticipated that some departments would have formal or informal action plans corresponding to certain recommendations and that most departments would have introduced some changes to improve their procurement practices, with or without action plans.

### **Scope, Methodology and Timing of the Follow-up**

15. We asked all 16 of the departments and agencies that participated in the five 2008–2009 reviews to report on changes implemented or planned as a result of the recommendations included in our 2008-2009 Report chapters. The fact-gathering phase of this report was held during the fall of 2010 with clarifications obtained in the winter of 2011. We did not review further the planned implementations the departments reported to us, if we deemed them reasonable and credible.

16. This follow-up exercise differs in some respects from our procurement practice reviews that use a systematic, evidence-based approach to carrying out independent, objective reviews of federal government procurement practices. For this follow-up exercise, the assessment of progress made on our recommendations is compiled from departmental self-assessments and assertions regarding their plans and actions. However, for each of the recommendations, we reviewed the information provided to us for overall reasonableness and credibility. We did so by:

- verifying whether any contradiction existed between departmental progress report statements and other available information such as previously reviewed or publicly available departmental policies and practices;
- analyzing the departments' responses to understand how their actions and changes address our recommendations and whether departments plan to monitor the results and effectiveness of these actions or changes; and
- seeking clarification, as required, to ensure a clear understanding of the information reported by departments.

Although we received and reviewed some documented evidence of the changes made by departments, we did not request evidence to support all the assertions made.

17. This report consists of an overview of the departmental assertions regarding their progress on implementing changes in response to our recommendations and reporting of effective practices. The information provided by departments provides a basis on which to assess the usefulness of our reviews and allows us to report on departmental assessments of progress being made to enhance the fairness, openness and transparency of federal procurement.

### **Why It's Important**

18. There are three main reasons why reporting on departments' progress to implement OPO recommendations is important. First, it informs interested stakeholders of specific actions the government has taken and will take to improve the fairness, openness and transparency of its procurement processes. Second, by sharing information on changes being implemented by the departments whose practices were reviewed, we can facilitate the introduction of similar improvements in other departments. Lastly, information on how departments have responded to our

recommendations and reporting of effective practices provides OPO with a basis on which to assess the usefulness of our reviews.

## Assessments of Planned and Implemented Changes and Progress

### Chapter 1: Procurement Challenge and Oversight Function

#### Targeted changes should assist departments in their procurement practices

##### Summary of the 2008–2009 Review Findings and Recommendations

19. The procurement challenge and oversight function is a key component of the broader set of management controls used to ensure the sound management of government procurement. In many departments, the principles of fairness, openness and transparency in procurement are safeguarded through the oversight, review and monitoring of procurement by a senior procurement review committee. The objective of our review reported as *Chapter 1: Procurement Challenge and Oversight Function* was to examine departmental practices related to the senior departmental committees responsible for the procurement challenge and oversight function.

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

21. In the Chapter, we focused on the organization and processes of the most senior committee responsible for the procurement challenge and oversight function within the following nine departments and agencies: Agriculture and Agri-Food Canada (AAFC), the Canada Revenue Agency (CRA), Canadian Institutes Health Research (CIHR), the Canadian International Development Agency (CIDA), the Department of Justice (DOJ), Environment Canada (EC), Industry Canada (IC), Public Safety Canada (PS) and Public Works and Government Services Canada (PWGSC).

22. Our review revealed that the review committees were at various stages of evolution. Three departments were operating mature review committees and used performance measures to assess their effectiveness. Two departments were in the process of establishing their review committees, while another department was using a different model appropriate to its size. In addition, three of the organizations indicated that they would be improving their existing oversight mechanisms.

23. Given these review results, we were generally satisfied with the progress made on establishing effective senior procurement review committees. In addition, we found that some of the reviewed organizations would benefit from clearer definitions of their review committees' authority, roles and responsibilities. In particular, we found that key risk factors, such as those related to the use of ACANs and to assurances regarding the implementation of past vendor performance measures, were not clearly reflected in the

committee terms of reference (TORs). We also noted opportunities to improve monitoring to ensure the effectiveness of procurement review committees.

24. OPO recommended that ten essential characteristics be prevalent in the creation and operation of these committees. We also identified eight additional effective practices that departments and agencies might wish to consider in strengthening their senior procurement review committees.

### Responses to OPO Recommendations

25. We are encouraged by the implemented and proposed changes brought about by departments and agencies in response to our review recommendations. All of the reviewed organizations have assessed the recommended essential characteristics and effective practices for senior procurement review committees. We had reported in the 2008-2009 review that two had already achieved the essential characteristics. As a result of their assessments, six departments and agencies have reported implemented or planned changes. In addition, one department has reported similar improvements resulting from an internal audit of procurement files submitted to their senior procurement review committee. The reported changes include: the establishment or improvement of the senior procurement committee's TORs to clearly define the committee's scope, roles and authority; expansion of committee membership; improved templates and methods to ensure the adequacy of the information submitted for review by the committee; and enhanced monitoring to ensure the effectiveness of the committee. An overview of some of the key planned or implemented changes is provided below.

#### ***Comprehensive Terms of Reference and Multidisciplinary Membership***

26. Three of the reviewed organizations already had comprehensive review committee TORs in place; five reported they had implemented revisions to their TORs and one had plans to do so. For example, PS has reported that in September 2009 it formally adopted a comprehensive TOR that reflects multidisciplinary representation on the committee and a rigorous approach to establishing which contracts must be reviewed. DOJ has informed us it updated the TORs for their National Capital Region (NCR) committee in 2009 so that their TORs define which procurements require reviews based on several risk indicators. Both DOJ and PS have introduced ACANs as one of the areas of risk to be considered for submissions to the senior procurement review committee. In addition, PWGSC has indicated it will establish a formal procurement risk assessment regime that includes tools to support decision-making and risk management. EC has reported it will review risk indicators, especially as new procurement tools and processes are released by PWGSC.

#### ***Improved Submissions to Support Informed Decision-Making***

27. DOJ, EC, IC and PWGSC reported planned or implemented updates of submission requirements and templates to improve the information for review committee decision-making. PWGSC's revised submission format is intended to ensure that their review committee is aware of relevant vendor performance information, as well as other departments' involvement in the procurement. CIDA also reported that the risk assessment tool it was developing would address OPO's recommendation that review

committees be provided with assurances that solicitation and evaluation methods will respect any existing restrictions or conditions imposed on a vendor as a result of poor performance. Furthermore, in response to our recommendation that review committees be provided with assurances related to the implementation of past vendor performance measures, DOJ indicated that as a first step it plans to develop a vendor performance monitoring policy in 2011 or 2012. CRA indicated that it will consider implementing a vendor performance policy upon review of PWGSC's revised Vendor Performance Policy.

### ***Enhanced Monitoring to Ensure Effective Operations***

28. Six of the nine reviewed departments and agencies reported implemented and/or planned changes to enhance the monitoring of their procurement. For example, Industry Canada has established a monitoring and reporting unit responsible for ensuring that the review committee receives all submissions within its mandate. It has also added a review committee control number in its financial systems to track submissions. PS has decided that non-compliance with review committee recommendations must be reported to the DM.

### **Conclusion on Follow-up to Chapter 1: Procurement Challenge and Oversight Function**

29. The implemented and proposed changes brought about by departments and agencies in response to our review recommendations have been specific and forward-looking. These improvements should assist departments in obtaining the best value for Canadians while enhancing the fairness, openness and transparency of government procurement. In the coming months, other departments not reviewed may wish to implement similar changes to enhance their own effectiveness in procurement.

## **Chapter 2: Supplier Debriefings**

### **Significant improvements made to the practice of Supplier Debriefings**

#### **Summary of the 2008–2009 Review Findings and Recommendations**

30. Debriefing by the Government of Canada takes place after the contract has been awarded. It is the process by which suppliers are given the results of the evaluation of their bid. In most cases, these debriefings are requested by bidders who have been unsuccessful in winning a competitive contract, although successful bidders can also request debriefings. Debriefings allow suppliers to judge the fairness of the procurement process and how their bid was assessed. The objective of the review was to identify effective practices and key success factors in debriefing suppliers following contract award.

31. For each contract awarded following a competitive solicitation, there is at least one supplier that has “lost”. The solicitation process therefore entails the risk that one or more suppliers will be unhappy with the outcome. If suppliers are unable to obtain a debriefing or do not receive relevant information, they can become discouraged from bidding, potentially leading to a smaller supplier base, higher procurement costs and lower quality goods, services and construction.

32. In our 2008–2009 review reported as *Chapter 2: Supplier Debriefings*, we reviewed debriefing practices carried out from October 2008 to March 2009 and the structure and tools by which debriefings were being performed in six government departments and agencies: the Canadian International Development Agency (CIDA), Citizenship and Immigration Canada (CIC), the Correctional Service of Canada (CSC), the Department of National Defence (DND), Aboriginal Affairs and Northern Development (AAND) – formerly known as Indian and Northern Affairs Canada (INAC) and Public Works and Government Services Canada (PWGSC).

33. Our review revealed a "patchwork" of norms regarding what bid information to disclose during debriefings. Although we found that some guidance was available on what specific information to release, most procurement personnel were required to use their own discretion to determine what information they could reveal in a debriefing. Such discretion could have adverse effects because limiting information provided to suppliers has the potential to feed suppliers' negative perceptions as to the fairness of the process.

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

1. Develop Consistent Core Principles, i.e. have a consistent approach in order to ensure that suppliers and procurement personnel have a clear understanding and clear expectations of what a debriefing will or will not include (thus creating a "safe zone")
2. Inform Suppliers of their Right to Request a Debriefing and Recourse Mechanisms
3. Establish Debriefing Methods
4. Improve Training

### Responses to OPO Recommendations

35. In response to the recommendations in our report, departments we reviewed have made significant improvements to their debriefing practices. In understanding the importance of informing unsuccessful suppliers of their right to request a debriefing, all of the reviewed organizations have assessed OPO's recommendations regarding supplier debriefings against their own practices. Four departments informed us of changes made to address the four OPO recommendations. CIDA has concluded that the majority of practices reflected in our recommendations are already in place and no further changes are required at this time. DND informed us, for applicable recommendations, it will review its policies and procedures to determine whether additional direction and training is warranted. An overview of some of the key planned or implemented changes is provided below.

#### ***Developing Consistent Core Principles***

36. As the common service procurement organization, PWGSC issued Policy Notification 91 – Debriefings and Regret Letters (December 2009) to address the

majority of our recommendations. Among other things, the Notification specifies essential information to be disclosed in all debriefings, as well as guidelines on the appropriate time frame within which departments should notify unsuccessful bidders. So far, as suggested in our recommendation, CIC has adapted the information in the Notification and included it in their procedures manual, and CSC has adopted the approach PWGSC set out in the Notification. AAND also reported it will review both the new PWGSC procedures and the CIDA debriefing procedures identified in our Supplier Debriefing Report, with a view to possible use within AAND.

### ***Informing Suppliers of their Right to Request a Debriefing and to Recourse Mechanisms***

37. Four of the reviewed organizations have updated their solicitation document templates to include clauses informing suppliers of their right to request a debriefing. Also, CSC reported its plan to include information advising suppliers that if they are dissatisfied with a debriefing, they can submit a review request to the Canadian International Trade Tribunal (CITT) or to OPO in the department's Notices of Planned Procurements on MERX. In addition to updating its solicitation templates, CSC now includes information on how suppliers can request a debriefing in each of its proactive disclosure contract award postings on the CSC Web site. As of May 2010, CIC is providing this information to suppliers during the debriefing. Both AAND and CIDA reported the existence of standard procedures to inform suppliers of their recourse options, such as senior departmental recourse mechanisms and the Canadian International Trade Tribunal (CITT). However, neither of these departments included information in their standard documentation to inform suppliers of the existence of OPO. Without this information, suppliers bidding on low dollar value requirements not subject to the CITT (i.e. goods valued at less than \$25,000 or services valued at less than \$76,600) are not advised of OPO as an available recourse mechanism for their complaints.

### ***Establishing Debriefing Methods***

38. PWGSC's new Policy Notification instructs contracting authorities to consider the complexity and value of the procurement when deciding whether the debriefing should be given by telephone, in writing or during a face-to-face meeting. The contracting authority is instructed to provide, at the very least, a written debriefing that can be combined with a regret letter. CSC has adopted the approach in PWGSC's Policy Notification. As of July 2009, CIC uses the regret letter as the initial method of delivering information regarding the results of the bid evaluation. If suppliers request additional information, a different method of delivery may be used to address their needs.

### ***Updated Training on Supplier Debriefing***

39. PWGSC updated their training on supplier debriefings to address relevant policy and procedural changes arising from our recommendations. CSC has informed us it has included supplier debriefing training in individual learning plans and is exploring the availability of courses to meet this requirement. As of April 2010, AAND was providing formal training sessions at its headquarters. CIC reported that it updated its supplier debriefing procedures in February 2010 and completed a full review of supplier debriefing with employees. DND reported that its existing policies and procedures will

be reviewed in 2011 to determine whether additional direction and training is warranted for any increased delegation of authority provided by PWGSC.

### Conclusion on Follow-up to Chapter 2: Supplier Debriefings

40. Supplier debriefings are an important aspect of the fair and transparent treatment of suppliers. The actions that the reviewed departments have planned and taken in response to our recommendations should result in improvements of benefit to suppliers. The Policy Notification issued by PWGSC should lead to similar improvements in other departments not reviewed.

### **Chapter 3: Advance Contract Award Notices (ACANs)**

#### **Many steps taken to yield improvements, yet certain issues remain to be addressed**

#### Summary of the 2008–2009 Review Findings and Recommendations

41. When a government department or agency does not intend to solicit bids because it has assessed that the proposed contract meets an allowed exception under the Government Contracts Regulations (GCRs), for example, where it believes there is only one supplier capable of providing the required goods or services, it may choose to direct a contract and post an Advance Contract Award Notice (ACAN). The ACAN informs the supplier community of the government's intention to direct a contract for a specific requirement to a specific qualified supplier. Other suppliers who believe they have the capacity to meet the requirement can challenge, within the specified time frame, which must be a minimum of 15 days, the government's proposal to negotiate a directed contract on the basis that only one supplier exists. If the supplier's challenge successfully demonstrates the supplier's capability to meet the requirements in the ACAN, the department or agency must instead carry out a full solicitation process in order to the contract award a contract. The focus of our review was to examine: the consistency of departmental policies and practices with TB policies and related guidelines; departmental practices; and how departments manage risks, including the reporting on activity levels and usage.

42. There are inherent risks when awarding a directed contract and using an ACAN under the current policy framework. All forms of directed contracts entail certain risks, such as being a source of preferential treatment, providing diminished access to all suppliers and creating uncertainty as to whether value for money will be achieved. If, for example, the period of the ACAN posting is insufficient for suppliers to formulate a well-developed statement of capabilities, they cannot successfully challenge the government's proposal to negotiate a directed contract on the basis that only one supplier exists. They may then perceive the process as being unfair.

43. A further risk involving ACANs is that the use of such notices allows the highest competitive approval and amendment authorities available to the department or agency, provided there is no successful challenge. This increases the risk that ACANs may be used inappropriately to benefit from the higher authority limits.

44. In our 2008–2009 review reported as *Chapter 3: Advance Contract Award Notices*, we assessed procurement practices related to the use of ACANs from January 2005 to December 2007 in the following departments and agencies: the Canada Revenue Agency (CRA), the Department of Fisheries and Oceans (DFO), the Department of National Defence (DND), Health Canada (HC) and Public Works and Government Services Canada (PWGSC). While most of the reviewed departmental policies were consistent with the TB Contracting Policy with respect to ACANs, we noted some variations among departments in key areas, such as ACAN posting periods, time frames for acceptance of an ACAN challenge and approval requirements, that increase the risk of suppliers being treated inequitably.

45. We also observed that by providing the same contracting approval authorities to procurement personnel—whether they post directed contracts using ACANs or conduct fully open competitive processes—the government may be encouraging unintended behaviour. Using an ACAN can be perceived as a way of shortening the procurement process.

46. Lastly, we noted a number of practices that raise questions about the fairness, openness and transparency of some contracts awarded following the use of an ACAN, such as:

- Some of the ACANs did not meet the TB Contracting Policy requirements for directed contracts and ACANs.
- The majority of files examined did not contain adequate documentation to support the procurement decision.
- In some instances, procurement personnel started negotiations with the pre-identified supplier before the closing of the ACAN posting period.
- Some ACANs for significant and complex requirements provided only the minimum of 15 days for other suppliers to challenge them.

47. To address the identified weaknesses, OPO recommended that:

1. PWGSC develop a policy for its own use, which other departments and agencies may wish to adapt, depending on their operational needs. The policy should be designed to:
  - reinforce file documentation standards; for example, documenting the rationale supporting the decision to publish an ACAN;
  - clarify that posting periods should be determined based on the individual risks and complexity of each requirement; and
  - provide guidance that negotiations with a pre-identified supplier should not commence before the closing of the ACAN posting period.
2. PWGSC should undertake policy research related to the time frames during which Statements of Capabilities can be received and assessed, and should attempt to find a viable solution to operational concerns resulting from the implementation of this policy.
3. TB may wish to examine, based upon risk considerations, the appropriate limits for directed contracts awarded using an ACAN.
4. Departments and agencies should 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. This recommendation was also included in *Chapter 1: Procurement Challenge and Oversight Function*.

### Responses to OPO Recommendations

48. Not all departments took action. The various departments and TBS reported disparate progress on making improvements to procurement practices related to the use of ACANs, leaving important issues to be addressed.

49. All the reviewed departments and agencies have assessed OPO's recommendations for improving procurement practices related to the use of ACANs. PWGSC's Policy Notification, issued in December 2009 to update instructions to its contracting authorities with respect to ACANs, covers most of our recommendations, as described in the paragraphs below. CRA, DFO and HC have also reported actions and plans to address one or more of the recommendations. Despite the fact that OPO had found weaknesses in its practices in the 2008-2009 Review, DND responded that it considers the ACANs it posts to be relatively low risk, and its existing policies and training to be adequate. TBS reported no changes made as yet, but that it is considering the issue. Some changes introduced by the departments, together with the remaining issues, are further outlined below.

#### ***Improving File Documentation***

50. PWGSC's revised ACAN policy reinforces the need for due diligence when documenting all phases of the ACAN process, including all aspects of the procurement process identified in our recommendations. In a similar vein, DFO reported it had drafted amendments to its departmental checklist in order to strengthen how directed contracting justifications are documented, and these amendments were expected to be finalized in December 2010. Although not solely the result of OPO's review of ACANs, HC also advised OPO that as part of a continuous improvement action plan, it is undergoing a process re-engineering with a focus on file documentation.

#### ***ACAN Posting Periods Determined on the Basis of Risk and Complexity***

51. PWGSC's revised policy states that although the current minimum posting period is 15 days, individual posting periods should be based on the complexity of each requirement. HC informed us it would update the Procurement Expert (PG) Reference Manual with an explicit reference to assessment of risk and complexity for determining ACAN posting periods, thus formalizing the current HC practice of using 15 to 40 days for posting, depending on the goods or services being purchased. DFO's revised directive on ACANs instructs its officers to post ACANs for more valuable and complex requirements for periods ranging from 15 to 25 days.

#### ***Guidance Regarding Negotiations Prior to ACAN Closing***

52. DFO and HC both reported on their plans to update their procurement policies and procedures to instruct staff not to commence negotiations prior to the closing of the ACAN posting period. PWGSC's revised instructions to contracting authorities state that care should be exercised to ensure that any such negotiation would not give the

pre-identified supplier an advantage, should there be a successful challenge before the contract award. Furthermore, due to this inherent risk, the pre-identified supplier must be cautioned not to commence any work or incur any costs before the contract award. CRA reported it will update its procedures to ensure an appropriate level of prudence be exercised in such situations.

#### ***Period for Acceptance of ACAN Challenges***

53. After consultations with subject matter experts, PWGSC provided guidance to contracting officers. As to whether or not ACAN challenges (Statements of Capabilities) should be considered following the closing of the ACAN posting, contracting officers are instructed to discuss the matter with their managers and legal services, as there are instances where such challenges can be accepted after the ACAN has closed.

#### ***Appropriate Authorities for Directed Contracts Awarded Using an ACAN***

54. TBS reported it was in the process of renewing its procurement policy instruments and that in doing so, consideration was being given to adopting a more risk-based approach to determining contract approval limits. However, TBS did not indicate the nature or extent of any new policy measures that may assist in addressing risks related to ACANs.

#### ***Senior Procurement Committee Reviews of Proposed ACANs***

55. PWGSC has reported an initiative to establish risk indicators based on materiality and complexity that will assist in determining which procurements should be reviewed by its senior procurement review committee. Also, HC reported that as part of its continuous improvement action plan, it expected to implement an updated risk-based decision matrix that identifies levels of risk and corresponding levels of review for all HC acquisitions.

56. With respect to senior committee reviews of ACANs, departments reported a variety of measures taken to address our recommendations, as follows:

- In June 2009, PWGSC approved an approach in order to ensure that all ACANs for PWGSC purchases are brought forward to the senior departmental committees responsible for procurement challenge and oversight.
- At HC, a senior management level review of ACANs is conducted on a weekly basis. In addition, as part of their annual verification strategy to monitor continuous improvement in contracting, ACANs from the 2009–2010 fiscal year were reviewed. HC reported that an action plan to implement effective practices resulting from that review would be developed by October 2010. The impact of changes to HC's ACAN practices will be included in an internal verification exercise to be conducted in 2012.
- DFO reported that senior officers in the regions will review ACANs that meet certain criteria of materiality and complexity prior to their being posted. In addition, following posting, Materiel & Procurement Services will review all ACANs for compliance. If significant levels of non-compliance are found, DFO may revisit the possibility of pre-approvals for ACANs.

- DND reported that since it has relatively low contracting authority (below \$25,000 for goods and \$2,000,000 for services), its posted ACANs tend to have a relatively low level of risk and complexity; therefore, review by a senior committee is not considered necessary. For service contracts above \$2,000,000, PWGSC is the contracting authority and works with DND as the technical authority.

### Conclusion on Follow-up to Chapter 3: Advance Contract Award Notices

57. Four of the reviewed departments and agencies took important steps to mitigate the risk of inappropriate use of the ACAN process and ensure that the principles of fairness, openness and transparency are respected. TBS has chosen to potentially address, as part of a larger initiative, the risk represented by the contract approval limits in the ACAN process. On DND's part, in spite of the weaknesses OPO had found on its ACAN files regarding the justification for directing a contract, DND responded to our follow-up by noting no changes to its practices. We remain concerned that given the disparity in the attention given to our recommendations and the progress made, together with the high authority limits that continue to be allowed for contracts issued under the ACAN process, considerable risk of their inappropriate use remains. OPO intends to continue to monitor departments' and agencies' progress in this area.

## **Chapter 4: Mandatory Standing Offers**

### **PWGSC has made important strides in how standing offers are established**

#### Summary of the 2008–2009 Review Findings and Recommendations

58. In Budget 2005, the Government announced measures to streamline and consolidate procurement to make it more efficient. To achieve this goal, it became mandatory for all government departments to purchase their requirements for ten specified categories of products or services at established prices through a method of supply known as "standing offers" (SOs). These measures were established by the Department of Public Works and Government Services Canada (PWGSC). Suppliers compete to be on a list of qualified suppliers providing SOs for goods or services at set prices. The requirement for competition having been met, departments and agencies may "call up" an item on an SO, according to the method detailed in the SO document (e.g. "right of first refusal") and award a contract. The 2008-2009 review provided an opportunity to formulate some initial impressions of mandatory SOs and to examine in greater detail the implementation of SOs for three specific categories of commodities.

59. The introduction of the mandatory use of SOs to acquire 10 specified categories of commodities marked a fundamental change in the government's approach in that there are limited opportunities for refreshing prices or for qualifying other potential suppliers during the period of the SOs. This can have both perceived and real effects on the fairness, openness and transparency of government procurement. SOs have been the subject of much concern in the supplier community, especially among small and medium-sized businesses (referred to as small and medium-sized enterprises (SMEs)).

60. In our 2008–2009 review reported as *Chapter 4: Mandatory Standing Offers*, we assessed the extent to which mandatory SOs are fair, open and transparent. The review of mandatory SOs covered the period from April 2005 to August 2008. Since mandatory SOs are put in place and managed by PWGSC, we limited the scope of our review to PWGSC.

61. The SO method of supply yields important benefits, including a consistent approach for both the government and suppliers to conduct business at a reasonable level of effort and cost.

62. We found that while PWGSC's *Instructions to Contracting Staff* stated that the period of a mandatory SO should typically be one year, most SO periods ranged from more than one year to nearly five years, the overall average being over two years.

63. Our assessment of the availability and use of SO usage data to ensure reasonably accurate estimates of potential business volumes revealed inconsistent integration of timely and reliable data in decision-making. In addition, over 30% of the government-produced data on SO usage ("call-ups" issued by departments and agencies) could not be reconciled with any existing SO, and there is no government-wide automated system to capture this data. OPO also noted that PWGSC was routinely requesting suppliers to provide reports on actual call-ups against mandatory SOs, but these reports were not a primary source of information used to support the planning and management of any of the SOs reviewed.

64. Lastly, we observed one of the biggest challenges for the commodity teams' procurement personnel was capacity in terms of both qualifications (experience and skills) and numbers. As a result, the limited resources were focused on establishing SOs to meet departments' needs at the expense of ensuring adequate monitoring and analysis of the use of SOs to ascertain their effectiveness and make improvements.

65. Given these findings, OPO made the following recommendations to PWGSC:

1. Develop standards for SO periods and ensure supplier access.
2. Improve reporting and information management to support planning development and management of SOs, which includes:
  - improving reporting data;
  - analyzing and integrating reporting in decision-making;
  - eliminating unnecessary reporting; and
  - developing consistency in managing SOs by documenting processes for collecting, analyzing and using relevant information.
3. Ensure adequate resourcing.

### Responses to OPO Recommendations

#### ***Developing Standards and Ensuring Access***

66. PWGSC has laid a good foundation for ensuring that the approaches used to establish SOs support the principles of fairness, openness and transparency. Significant work lies ahead to improve data for transparency.

67. PWGSC has taken important steps to create a balance between achieving administrative efficiencies and providing suppliers with opportunities to compete for

government business. It is refocusing the practice of commodity management to deliver clear and strategic national approaches that better define how PWGSC will ensure an appropriate balance between the government's achievement of savings and benefits and suppliers' access to government opportunities.

68. The new Commodity Management Framework (August 2009) includes "Access for Business" as a guiding principle in the development of strategies and plans for government-wide SOs, reminding contracting officers that government business opportunities should be reasonably accessible to all Canadian companies and trade partners. Consultations with suppliers and consideration of the impacts on SMEs are reflected in the roles and responsibilities, the processes and the Commodity Management Plans that must be approved at the Assistant Deputy Minister (ADM) level. Proposed procurement strategies, including SO periods, are posted on the Internet at Buyandsell.gc.ca and on the Government Electronic Tendering Service (MERX) under a Request for Information that seeks input from suppliers before the strategy is finalized.

69. For SOs not governed by the strategic national approaches, PWGSC's Policy Notification (PN) – 72R1 on its revised Review Process for Standing Offers and Supply Arrangements (April 2010) provides instruction to its contracting officers requiring that designated reviewers endorse proposals to create SOs. The reviewers must take into account key factors relevant to fairness and openness, such as whether SME considerations were included in the strategy and the reasons for proposed SO periods. Any proposal to deviate from the standard period for an SO requires the next higher level of approval, up to the ADM, Acquisitions Branch. The PN contains no explicit information that defines the standard periods for SOs not governed by the national approaches. However, in January 2011, PWGSC reported it will introduce additional information and tools to assist in the determination of appropriate SO periods.

### ***Improved Reporting and Information Management***

70. PWGSC's Spend Management/Analysis team assists commodity teams in their analysis of supplier and departmental reports and their integration of commodity management decisions. PWGSC is also working with departments through an interdepartmental working group to streamline and automate reporting, with a view to improving the completeness, timeliness and accuracy of data. In January 2011, PWGSC reported that it is working on the feasibility of developing a Web-based tool to be fully implemented in March 2012, with the aim of improving transparency and the integrity of data across government. PWGSC also noted that as of January 2011, TBS requires departments to provide full reporting on the usage of SOs as part of the Purchasing Activity Report.

### ***Ensuring Adequate Resourcing***

71. To ensure that resources are in place to effectively carry out commodity planning, development and management functions, PWGSC's recently established Commodity Management team, as well as the Market Analysis team, provides support and guidance to its commodity teams, including procurement planning, spending and market analysis, and related services. The Commodity Management Plan template, which is used to seek approval for plans for government-wide SOs, also requires a description of the human resources implications for PWGSC and user departments, as well as a summary of the implementation risks, including internal constraints and time or

resource issues. Lastly, in response to our recommendations, PWGSC reported that it had revised the Human Resources Plan for Acquisitions Branch.

#### Conclusion on Follow-up to Chapter 4: Mandatory Standing Offers

72. PWGSC has made important strides towards establishing methods for supporting the principles of fairness, openness and transparency in relation to SOs. Key to the success of its work to date will be necessary improvements to data for transparency.

### **Chapter 5: CORCAN Procurement Allegations**

#### **CORCAN took a number of steps to correct deficiencies noted**

##### Summary of the 2008–2009 Review Findings and Recommendations

73. OPO was contacted in May 2008 by a supplier who made several allegations about irregularities in the contract award and contract administration of the CORCAN construction services program at Correctional Services Canada (CSC). CORCAN is one of CSC's key rehabilitation programs. It has four business lines, including construction. It operates as much like a business as possible, given the institutional setting and training imperatives. OPO conducted a review using a collaborative approach in which CSC engaged a private sector firm to review the allegations and report its findings. OPO wanted to ensure that CSC took sufficient steps to investigate the allegations and, if the allegations proved founded, would undertake sufficient actions to prevent any such irregularities in the future. CSC and OPO officials agreed on the terms of this review and the subsequent actions to be taken by CSC and OPO to meet the review objectives.

74. The 2008–2009 review reported as *Chapter 5: CORCAN Procurement Allegations* covered the period from September 2006 to November 2008 and focused on substantiating the private sector firm's review findings and verifying the sufficiency of the review and the appropriateness of the management action plan. The scope of the firm's review included reviewing CORCAN documents referred to in the allegations. Key personnel were also interviewed.

75. The report observed significant flaws in the procurement practices that compromised the fairness, openness and transparency of the transactions reviewed, as follows:

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

76. Further to our assessment of the firm's review and to CSC's management action plan to address the review findings, we were satisfied that CSC had adequately dealt with the specific allegations. To obtain assurance from CSC that no systemic problems exist and no laws have been broken, OPO recommended that CSC:

1. review its other construction contracts to ensure that it does not have a systemic problem affecting the fairness, openness and transparency of its procurement process and that no delegated financial or procurement authorities have been breached;
2. review the need for training in the area of procurement, including construction services, and devise an appropriate action plan; and
3. review, in consultation with PWGSC and TBS, the appropriateness and legality of Business-to-Business (B2B) as a procurement method, including issues pertaining to the application of the GCRs, TB policy and delegated departmental authorities.

### Responses to OPO Recommendations

77. OPO notes that CSC adequately addressed the recommendations resulting from its review of the allegations regarding a specific contracting arrangement. CSC also implemented additional improvements.

#### ***Review Fairness, Openness and Transparency of Construction Contracts***

78. Following our recommendation, CSC internal audit function undertook a national review of CORCAN construction contracts. The objectives of the review were to provide reasonable assurance that a management framework is in place in support of CORCAN construction contracts and to determine the extent of CORCAN's compliance with legislation and policies. Although our recommendations did not specifically address the elements relating to fairness, openness and transparency detailed in paragraph 75 above, we asked whether they had been addressed. CSC provided documentation showing their review had a broader scope, and the review report did not specifically mention OPO's concerns. The report was posted on its Web site on May 12, 2010, and included the following relevant recommendations to the CORCAN CEO:

1. Reinforce the need to comply with CSC's requirement to submit qualifying contracts to Contract Review Boards (CRBs) for approval prior to the award of the contract.
2. Proceed with the assessment of training as per CSC Departmental Response to the Office of the Procurement Ombudsman's 2008–2009 report (Chapter 5).
3. Ensure compliance with TB policies, CD 240 (Commissioner's Directive on Contracting) requirements and CSC guidelines, including documentation requirements for sole-source and in-house tendering.

79. CSC reported the following plans and actions to address recommendations 1 and 3. The response to CSC Internal Audit's review recommendation 2 is described below in the section entitled "Review of Training Needs."

80. In May 2010, the CORCAN CEO held a conference call with key departmental officials, during which he reminded all managers of their obligations under departmental financial signing authorities and CD 240. The conference call was documented and communicated to managers and financial officers. During the call, the CEO reminded all managers of their obligations to comply with financial signing and contracting authorities, including submission of specified construction contracts to the CRB for

approvals. In response, the CORCAN Comptroller group implemented an enhanced monitoring process related to financial signing and contract approval requirements in order to correct potential deviations, ensure ongoing compliance and take corrective measures, as required.

81. CORCAN's regional business managers (RBMs) are required to conduct annual reviews of each institution in their region to confirm compliance with the Financial Administration Act (FAA) and related departmental policies. A checklist is used to assist RBMs in managing these reviews and calls for a sample of construction contracts to be reviewed annually and the results to be analyzed. CSC reported as a result of its internal review that it has enhanced this process and required each Regional Director to present a plan for the completion of the RBM checklist, for approval by the CORCAN CEO by May 31, 2010. It further reported that, as of June 2010, each region had presented their plan for completion of the checklist and the CORCAN Comptroller's Office was monitoring the review process. Lastly, to ensure payment authorization has been properly exercised under Section 33 of the FAA, CORCAN was implementing a checklist for review by the Financial Officer.

#### ***Review Training Needs***

82. CORCAN completed a review of training needs and provided it to the National Comptroller on October 4, 2010. CORCAN was assessing its training needs against available training modules. OPO was informed that the preliminary findings of this assessment indicated that, although the existing training modules were adequate, certain areas could be refined to address CORCAN's specific issues. The CSC National Comptroller will work with CORCAN to develop the required training material.

#### ***Review of Business-to-Business (B2B) as a Procurement Method***

83. Upon completion of the review of B2B as a procurement method, CSC directed CORCAN to no longer use B2B arrangements. CSC directed CORCAN to use appropriate sales arrangements or government contracting methods instead, as the situation warrants.

#### **Conclusion on Follow-up to Chapter 5: CORCAN Procurement Allegations**

84. CSC has adequately addressed the specific allegations presented in reference to a particular B2B arrangement. We are also encouraged by the significant steps taken to address any systemic problems and to ensure compliance with delegated financial signing authorities and contract approval requirements.

## Overall Conclusion

85. All the departments and agencies that were asked to participate in this follow-up report assessed OPO's recommendations for the review(s) in which they participated, and provided information on their respective plans and actions. Several of these organizations provided comprehensive action plans and reported on significant changes that have already been implemented to improve their procurement practices. Nearly all of the remaining planned actions were close to completion. OPO appreciates the extent of co-operation received during this follow-up and is encouraged by the progress made by participating departments in improving the fairness, openness and transparency of the assessed procurement practices.

## Annex A – Summarized OPO Recommendations and Departmental Responses

Summarized Recommendations	Departmental Response/Progress
<p><b>Chapter 1: Procurement Challenge and Oversight Function</b> – OPO recommended, for consideration by all departments and agencies, 10 essential characteristics of senior procurement review committees and 8 effective practices, to support the following principles:</p> <ul style="list-style-type: none"> <li>• Senior procurement review committees should have comprehensive terms of reference and multidisciplinary membership.</li> <li>• Information provided to the committees should be sufficient to support informed decision-making.</li> <li>• Committees should be monitored to ensure their effectiveness.</li> </ul>	<p>Six of the nine reviewed departments and agencies have reported actions being taken to respond to OPO's recommendations. One department has introduced similar improvements as a result of an internal audit, while the two remaining organizations had already achieved the essential characteristics. In total, six of these organizations have already introduced improvements to their senior procurement review committee function.</p> <p>Summary of the planned or implemented changes:</p> <ul style="list-style-type: none"> <li>• Revisions to review committee Terms of Reference ( 6 organizations)</li> <li>• Updates to submission requirements and templates to improve the information for review committee decision-making (4 organizations)</li> <li>• Enhanced monitoring of the procurement review function (6 organizations)</li> </ul>
<p><b>Chapter 2: Supplier Debriefings</b> – OPO provided recommendations to all departments and agencies with respect to:</p> <ul style="list-style-type: none"> <li>• Informing suppliers of their right to request a debriefing and to recourse mechanisms</li> <li>• Developing consistent core principles to ensure suppliers and procurement personnel have a clear understanding and expectation of what a debriefing will or will not include</li> <li>• Establishing clear instructions on debriefing methods</li> <li>• Ensuring procurement personnel have appropriate skills and are adequately trained</li> </ul>	<p>Four of the six reviewed departments reported actions or plans to respond to our recommendations. Many of the changes have already been implemented and demonstrate significant progress on ensuring that suppliers and departmental staff have a clear understanding of suppliers' right to request a debriefing and on developing and communicating the corresponding methods and types of information that will be provided to suppliers.</p> <p>PWGSC issued a Policy Notification that serves as a model of core principles and supplier debriefing methods. Two of the other reviewed departments adopted the PWGSC model or adapted it to suit their needs. A third department reported its plan to review the PWGSC and CIDA models with a view to possibly using them.</p> <p>Four of the departments have taken measures to ensure that staff is adequately trained to provide supplier debriefings.</p>
<p><b>Chapter 3: Advance Contract Award Notices</b> – OPO recommended that PWGSC develop a policy for its own use, which other departments and agencies may wish to adapt, as appropriate. The policy should be designed to:</p> <ul style="list-style-type: none"> <li>• Reinforce compliance with government documentation standards</li> <li>• Determine appropriate ACAN posting periods based on risk and complexity</li> <li>• Provide guidance that negotiations should not commence prior to ACAN closing</li> </ul> <p>PWGSC should research timeframes during which ACAN challenges can be accepted and attempt to find a viable solution to relevant concerns.</p>	<p>Four of the five reviewed departments have reported actions or plans to respond to our recommendations.</p> <p>Three departments have reported actions to ensure that decisions related to the use of ACANs are properly documented and that posting periods are determined based on complexity and risks.</p> <p>Two departments have instructed staff that contract negotiations should not commence until the ACAN posting period has closed. Two other organizations will instruct procurement staff to ensure that caution is exercised when negotiations commence prior to the closing of an ACAN posting.</p> <p>Following its research on timeframes during which ACAN</p>

<p>TB may wish to examine appropriate approval limits for directed contracts awarded following an ACAN process</p> <p>Departments and agencies should establish risk indicators based on materiality and complexity, and all directed contracts using ACANs that meet the risk profile should be reviewed by the senior departmental review committees.</p>	<p>challenges can be accepted, PWGSC informed its contracting authorities that there may be circumstances when an ACAN challenge could be considered after the specified closing date and that contracting officers should discuss this with their managers and legal services.</p> <p>TBS reported that it was in the process of renewing its procurement policy instruments and in doing so, consideration was being given to adopting a more risk-based approach to determining contract approval limits.</p> <p>Three departments reported actions to ensure that ACANs are subject to senior level reviews. DND reported that since it has relatively low contracting authority, its posted ACANs tend to have a relatively low level of risk and complexity; therefore, review by a senior committee is not considered necessary.</p>
<p><b>Chapter 4: Mandatory Standing Offers –</b> OPO recommended that PWGSC:</p> <ul style="list-style-type: none"> <li>• Develop standards for SO periods and ensure supplier access</li> <li>• Improve reporting and information management to support commodity management</li> <li>• Ensure adequate resourcing of commodity management initiatives</li> </ul>	<p>PWGSC has integrated supplier access as a key consideration in establishing mandatory standing offers. Proposed procurement strategies, including proposed standing offer (SO) periods, are posted on the Internet in an effort to seek input from suppliers. SOs that are not governed by a national approach must be endorsed by a designated reviewer taking into account the reasons for the proposed SO period.</p> <p>As of January 2011, TBS requires full reporting on the use of standings offers as part of the Purchasing Activity Report. PWGSC's Spend Management Team is working in conjunction with financial or procurement clusters to develop automatic reporting on SO use across the government, which will be fully implemented in March 2012. This will also help commodity management teams when reviewing various commodities.</p> <p>PWGSC's Commodity Management Plan template now requires a description of the HR implications for both PWGSC and its clients and a summary of implementation risks and internal constraints to be provided before it is submitted for approval. As part of its response, PWGSC also reported that it has a new Human Resources Plan for Acquisitions Branch.</p>
<p><b>Chapter 5: CORCAN Procurement Allegations –</b> OPO recommended that CSC:</p> <ul style="list-style-type: none"> <li>• Review its other construction contracts to ensure that it does not have a systemic problem affecting the fairness, openness and transparency of its procurement process and that no delegated financial or procurement authorities have been breached</li> <li>• Review procurement training needs and devise an appropriate action plan</li> <li>• Review the appropriateness and legality of B2B as a procurement method</li> </ul>	<p>A review of CORAN construction contracts was conducted by CSC's internal audit function. As a result of the review, CSC and CORCAN have reinforced the requirement for senior review board approvals and enhanced monitoring processes to ensure compliance with key financial signing and contract approval authorities.</p> <p>A review of CORCAN's training needs was completed in October 2010. CSC reported that the training needs identified by CORCAN were being assessed against available training modules.</p> <p>Upon completion of the review of B2B as a procurement method, CSC directed CORCAN to no longer use B2B arrangements.</p>