



OFFICE OF THE PROCUREMENT OMBUDSMAN



PROCUREMENT PRACTICE REVIEW

*Review of Procurement Practices for the Acquisition of
Dental Services by the Department of Health,
First Nations and Inuit Health Branch, Manitoba Region*

OTTAWA

APRIL 2014

PROMOTING FAIRNESS. OPENNESS AND TRANSPARENCY IN FEDERAL PROCUREMENT

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Introduction

Context

1. Between May 2009 and November 2011, six written complaints were filed with the Office of the Procurement Ombudsman (OPO) regarding the contracting practices of the Manitoba Region of the First Nations and Inuit Health Branch (FNIHB Manitoba) of the Department of Health (Health Canada) for the provision of dental services. Concerns / issues raised included: (1) FNIHB Manitoba exhibited bias in the awarding of contracts; (2) FNIHB Manitoba was entering into employer/employee relationships with the dentists; (3) there were unfair practices in establishing *per diem* rates for the dentists; and, (4) FNIHB Manitoba was not providing adequate information about the contracting process.
2. Paragraph 22.1(3)(a) of the *Department of Public Works and Government Services Act* and subsection 4(1) of the *Procurement Ombudsman Regulations* (the *Regulations*) provide the Procurement Ombudsman with the authority to review the procurement practices of departments to assess their fairness, openness and transparency if there are reasonable grounds to do so. After considering the information provided by those who contacted OPO, the Procurement Ombudsman determined there were reasonable grounds to conduct a review. While the report will not conclude on the specific complaints raised, the concerns have been considered in the review of FNIHB Manitoba's procurement practices.

Scope and Period of the Review

3. The scope of the review focussed on the procurement practices used by FNIHB Manitoba for acquiring dental services through contracts awarded during fiscal years 2009-2010 to 2012-2013.

Review Objective and Methodology

4. The objectives of this review were to determine whether the procurement practices used by FNIHB Manitoba to acquire dental services were consistent with relevant policies, guidance and procedures, and if those practices supported the principles of fairness, openness and transparency.
5. OPO defines the principles of fairness, openness and transparency as follows:
 - a. Fairness: Providing equal treatment to all current and potential suppliers;
 - b. Openness: Providing all potential suppliers with the opportunity to submit bids for government procurement;
 - c. Transparency: Providing information to Canadians in a timely manner that facilitates public scrutiny of the decisions made and actions undertaken.
6. To achieve the objectives of this review, OPO compared the information in the files provided by FNIHB Manitoba against the relevant federal legislative, regulatory and policy frameworks. The review considered whether Health Canada's procurement policies complimented Treasury Board procurement policies and focussed on examining whether FNIHB Manitoba's contracting practices were consistent with both sets of policies.
7. OPO considered the relevant sections of Treasury Board's *Contracting Policy* and the Treasury Board Secretariat's *Directive on Delegation of Financial Authorities for Disbursements* as well as a number of Health Canada guidance and control policies, most notably:

- The Health Canada *Contracting Guide for Cost Centre Managers and Administrators (Contracting Guide)* presents and explains most situations which Health Canada's contracting community may face. Although written from the perspective of Health Canada, reference is made throughout the document to contracting policies and guidelines common to all federal government departments and agencies.
 - The Health Canada *Contract Review Process (Regions)* describes the role of the Contract and Requisition Control Committee, specifically noting, among other things, that all contracts over \$10,000 must be approved by this Committee before a contract is awarded.
8. OPO reviewed a judgemental sample of 20 contract files (and their related program files) completed during fiscal years 2009 – 2013. This sample included the contracts which were the subject of the issues raised to OPO.
 9. OPO conducted interviews with Health Canada employees in Ottawa, Ontario and Winnipeg, Manitoba. These Health Canada employees represented contracting and procurement staff in Ottawa as well as the managers of the FNIHB Manitoba dental services program in Winnipeg.
 10. Under the *Regulations*, the provision of departmental information and documentation is at the discretion of the department whose processes are being reviewed. As such, the observations in this report are based on the documentation and information provided by Health Canada.

Background

11. Health Canada works with First Nations, Inuit, other federal departments and provincial and territorial partners to support healthy First Nations and Inuit individuals, families and communities. The goal of the FNIHB dental plan in Manitoba is to enhance overall health by improving the dental/oral health of the First Nations and Inuit population. One of its objectives is to provide access to dental/oral care services to all eligible registered First Nations and Inuit individuals in Manitoba. This entails either sending the dentists to the First Nation and Inuit community, or arranging for the transportation of First Nation and Inuit clients to the closest site of service for treatment that cannot be provided in the community. The contracts to send dentists to the First Nation and Inuit communities were the focus of OPO's review. FNIHB Manitoba also manages the program of sending clients to the closest site of services, but it did not form part of OPO's review. According to FNIHB Manitoba, the dental services program is structured such that a dentist is only sent to a community if it is more cost effective than the alternative of flying patients to a dentist for services.
12. FNIHB Manitoba contracts with dentists who provide preventive services and a wide range of oral health treatments, such as exams, fillings, extractions, dentures, crowns, and root canal therapy. Most communities have a permanent dental treatment clinic and the service may be provided on a full time or regular part-time basis. According to FNIHB Manitoba, it tries to provide larger First Nation communities with dental services four weeks per month and smaller communities with two weeks of service per month.
13. Communities are designated as either "drive-in" (generally located in southern Manitoba and accessible by vehicle) or "fly-in" (located in the northern and more isolated regions of the province and best accessed by air travel). The dental clinics are predominantly located in community facilities (e.g., health centres, nursing stations or schools) and are set up with Health Canada-supplied, standardized dental equipment that is the property of Health Canada and remains in the clinic.

14. From the documentation reviewed, it appears that in 2009 FNIHB Manitoba took over the responsibility for awarding these contracts from the Department of Public Works and Government Services. FNIHB Manitoba subsequently solicited proposals on an annual basis and awarded an increasing number of contracts each year.

Exhibit 1: Number and Value of Contracts Awarded For Dental Services by Year

| Year | Number of Contracts awarded | Value of the awarded contracts (\$000)* |
|------|-----------------------------|---|
| 2009 | 36 | 5,360 |
| 2010 | 39 | 6,905 |
| 2011 | 43 | 7,656 |
| 2012 | 45 | 7,963 |

*The amount actually spent varies from the awarded value, which is based on the number of days the dentist indicates they will be available to work and the dentist's *per diem* (or daily) rate. The dentists are only paid after they have been assigned to a community and are on location providing the necessary services.

15. Each year, FNIHB Manitoba advertised the requirement in a number of newspapers and dental journals and sent individual notices to all dentists registered in the province. Interested parties were asked to contact FNIHB Manitoba, and were provided with a bid solicitation package. If interested in being awarded a contract, dentists were then required to submit a proposal to FNIHB Manitoba demonstrating they met the mandatory criteria listed in the bid solicitation package. These proposals did not include prices, as the bid solicitation package advised dentists they would be paid a *per diem* established by FNIHB Manitoba.¹ The bid solicitation package advised returning dentists their *per diems* would be based on their productivity during the previous contract. The bid solicitation package also contained a standard *per diem* for dentists being awarded their first contract.
16. After the dentists' proposals were evaluated by FNIHB Manitoba, it sent contracts to the qualified dentists for their signature. The value of these contracts included the FNIHB Manitoba-determined dentists' *per diem* as well as allowances for hiring assistants, ordering supplies, incurring travel and living expenses and a small "miscellaneous" budget. The dentists signed the contracts and became eligible to be sent to First Nation and Inuit communities.
17. In fiscal years 2009-2010 and 2010-2011, dentists indicated in their proposals the communities in which they preferred to work. In fiscal years 2011-2012 and 2012-2013, FNIHB Manitoba no longer required the dentists to provide this information. FNIHB Manitoba always made the final determination as to where the dentists would be assigned, but in 2009-2010 and 2010-2011 the decision was based, in part, on when the dentists indicated they were available to work. According to FNIHB Manitoba, it worked with the dentists to arrive at mutually acceptable community assignments. This was done to maximize the services provided to the communities while taking

¹ As will be discussed later in the report, the *per diem* rates are established by FNIHB Manitoba as part of its mechanism to ensure productivity.

into account the dentists' scheduling circumstances (e.g., if a dentist wished to remain close to Winnipeg for family reasons).

18. FNIHB Manitoba then issued monthly "call-ups", informing the dentists in which community they would be working for the upcoming month. If a dentist was scheduled to work in a "fly-in" community, FNIHB Manitoba arranged air transportation to and from the community and provided accommodation in the community for the dentist. Regardless of which type of community to which the dentist was sent (i.e. "drive-in" or "fly-in"), there was a Health Canada dental clinic on site, furnished with standard dental equipment and dental supplies. The dentists were required to bring dental instruments that could be reasonably transported to the location (such as restorative and surgical instruments) when they were sent to a community.

Review Observations

19. OPO reviewed the 20 sample contract files (and their related program files) as well as relevant Health Canada procurement policies to determine whether its procurement policies, guidance and procedures supported fairness, openness and transparency and whether FNIHB Manitoba's contracting practices for acquiring dental services during the review period were consistent with the appropriate policies, guidance and procedures. OPO analysis revealed:
 - a. The procurement and contracting environment for the acquisition of dental services for First Nation and Inuit communities in Manitoba contained characteristics not found in typical procurement and contracting; and,
 - b. Some of FNIHB Manitoba's procurement practices differed from both government-wide and Health Canada internal procurement policy requirements.

FNIHB Manitoba's Contracting Environment is Not Typical

20. As described in the Background section, one of the objectives of FNIHB Manitoba is to provide access to dental/oral care services to all eligible registered First Nations and Inuit individuals in the province. Currently, however, the demand for dental services exceeds the availability of dentists. A challenge that FNIHB Manitoba faces is that some communities are remote and designated as "fly-in", which can impact the scheduling of services. Taking into consideration all of the unique circumstances of running the dental program, FNIHB Manitoba has indicated it has been necessary to adapt its procurement practices from the traditional approach to procurement.
21. One notable difference between the traditional approach to procurement and these dental services contracts was that the multi-million dollar program (i.e. the aggregate value of all the awarded contracts), was not posted on the government electronic tendering service.² As dentists may not

² The Treasury Board Contracting Policy states as follows: "The use of electronic media enables instantaneous notification of suppliers of the opportunity to bid and facilitates bid submission by those who are interested. This method is particularly suitable as an expeditious approach to competitive procurement. Depending on the circumstances, this sourcing method may be supplemented by the use of more traditional methods of calling for bids in newspapers or trade publications as well as source lists where, in the judgement of the contracting authority, they are necessary to ensure adequate competition."

have been aware of the government electronic tendering service as a source of contract opportunities in the federal government, FNIHB Manitoba instead advertised the requirement in a number of newspapers (e.g., *Winnipeg Free Press*, *La Liberté*), dental journals (i.e., *Manitoba Dental Association Bulletin* and the *Journal of Canadian Dental Association*) and sent individual notices to all dentists registered in Manitoba. In 2009, the dentists were advised on March 14, 2009 of the contracts that were to run from June 1, 2009 to March 31, 2010. Bids were due by April 24, 2009, or 41 days later. In 2010, 2011 and 2012 dentists were first advised of the following year's contracts in mid-October, with a due date for the receipt of bids in early January of the following year, a period of more than two and one-half months.

22. Another notable difference was the contracting approach used by FNIHB Manitoba. FNIHB Manitoba described its contracts as competitive and used a two-step process that, while having the characteristics of a standing offer process, used what FNIHB Manitoba referred to as a "call-up" but which is actually a work allocation tool. The first step in the contracting process was to create a pool of qualified suppliers by awarding contracts to dentists who submitted proposals in response to the solicitation documents. The contracts included a *per diem* rate established by FNIHB Manitoba, which is discussed later in the report, and were awarded with a ceiling value as the services would only be called-up on an "if and when requested" basis. The second step was when the "call-up" was issued; which occurred on a monthly basis. The dentists first provided FNIHB Manitoba with their specific availability dates for set time periods, e.g., for the 2012 contracts, dentists had to provide FNIHB Manitoba with their availability in September by August 3. Once the dentists provided their availability, FNIHB Manitoba issued the "call-ups" to advise each dentist of which community(ies) they would serve during the relevant time period. FNIHB Manitoba decided which dentist went to which community based on a number of factors including: whether flights and accommodation were available; if the clinical equipment was operational; if there were any local health issues (e.g., flu/tuberculosis outbreaks); whether the dentist could provide service for the entire time the community required (e.g., a dentist may need to be available 4 weeks a month); whether the dentist could provide the care needed (the experience of the dentist to provide the full range of dental services), and, if the dentist had a good working relationship with the community.
23. One of the issues brought to OPO's attention between May 2009 and November 2011 concerned perceived unfair practices in establishing *per diem* rates for the dentists. As discussed earlier in this report, the bid solicitation package advised dentists they would be paid a *per diem* rate established by FNIHB Manitoba. The bid solicitation also advised returning dentists their *per diems* would be based on their productivity during the previous contract. To determine a dentist's productivity rate, FNIHB Manitoba compared the dentist's *per diem* for the previous contract with the value of the services provided to the community.³ For example, if the dentist's previous *per diem* was \$1,000, and the reimbursement rate for all the work performed on a given day was \$950, FNIHB Manitoba considered the dentist to have had a 95 percent productivity rate. The 2012-2013 bid solicitation documents stated if a dentist had an average productivity rate above 80 percent for their 2011-2012 contract that dentist would be offered a higher *per diem* for 2012-2013. If a dentist had a productivity rate of between 55 and 79 percent, they were offered the same

³ Health Canada's Non-insured Health Benefit Regional (Manitoba) Dental Benefit Grid is used by all dentists that provide dental coverage under Health Canada's Non-Insured Health Benefits Program for First Nations and Inuit. For dentists under contract, the Grid provides the basis for valuing dental procedures performed while on site in First Nation communities.

per diem for 2012-2013 as in 2011-2012. If a dentist had a productivity rate lower than 54 percent, the dentist was offered a *per diem* lower than their 2011-2012 *per diem*⁴. FNIHB Manitoba considered this method of establishing *per diem* rates to have certain benefits in that it intentionally incorporated the monitoring of vendor performance into the contracting process and was applied equally to all dentists thereby ensuring fairness in the process. By letting dentists know at the solicitation stage that their *per diems* would be based on their productivity, this element of the process was transparent.

24. Another issue brought to OPO's attention concerned the working relationship between FNIHB Manitoba and the dentists, more specifically that the dentists were being treated as employees and not independent contractors. Health Canada's *Contracting Guide* advises that contractors are not to be treated as employees with the admonition that if an employer-employee relationship can be proven to exist, the department may be found liable for claims to pension and other benefits. In a typical service contract, the contractor is supposed to provide the service in the manner it chooses; the Crown is not to tell the contractor how to do the job. It is the responsibility of the contractor to determine the best way possible for it to complete the work.
25. The contracts specifically contained a clause stating the dentists were contractors; however FNIHB Manitoba noted the circumstances surrounding these service contracts required measures that went beyond what would normally be limits of control. FNIHB Manitoba did not tell the dentist what to do (e.g. which procedure to use for different patient requirements) nor did it tell the dentist how work was to be done (e.g. how to clean out or fill a cavity, how to prepare for and insert a crown). Due to the nature of the contracts and the locations where these services are required, FNIHB Manitoba told the dentist: where they would work, their hours of work; and, that they had to hire an assistant from the community to which they have been sent. In addition, FNIHB Manitoba arranged for the dentist's flights, located accommodation for the dentist in the community, and provided the dentists with clinics, including the dental equipment and supplies required to perform the work. This approach was used given it would be impossible for a dentist to operate a dental clinic if, for example, the dental chair, dental equipment, light, power and water were not provided by Health Canada in these remote communities. It would also be impossible to send dentists to remote communities if accommodation was not arranged; it is noted that in locations where commercial accommodation is readily available, the dentists arrange their own accommodations.
26. As noted above, FNIHB Manitoba did not tell the dentist what to do or how work was to be done. Nonetheless, the nature of the contracts and the locations where the services are required necessitated additional actions on behalf of FNIHB Manitoba. FNIHB Manitoba is aware that this approach can be construed as employer-employee relationships, and discussions are regularly held with Manitoba Contracts personnel to determine whether employer-employee relationships exist.
27. **RECOMMENDATION:** The Procurement Ombudsman recommends Health Canada take appropriate steps to ensure that employer-employee relationships are not created when contracting

⁴ In 2012 there were 16 *per diems* levels from \$1,000 to \$1,375. The most a dentist could increase was two levels higher than in 2011, if the dentist had a productivity rate of over 125 percent for the 2011 contract. There was also a *per diem* of \$980 for first time contractors with less than 12 months experience and a "special level" of \$750 for dentists with a productivity rating of under 45 percent. If a "special level" dentist failed to achieve a 55 percent productivity rate, they could be offered a rate lower than \$750 or not offered a contract at all.

for dental services and that it has not created unnecessary risks by differing from its *Contracting Guide*.

Some FNIHB Manitoba Practices Deviate from Procurement Policy Requirements

Approval for the aggregate requirement may be required

28. The Treasury Board *Contracting Policy* defines a contract as:

... an agreement between a contracting authority and a person or firm to provide a good, perform a service, construct a work, or to lease real property for appropriate consideration.

29. According to Treasury Board's *Contracting Policy*, Health Canada may enter into a service contract or contractual arrangement without the approval of the Treasury Board if the amount payable does not exceed \$2,000,000, including entering into a contract for the provision of health care services to Canadian Indians and Inuit. Item 6.22 (line 1) of Health Canada's Delegation Matrix allows Regional Directors and Regional Directors-General to sign contracts valued at \$200,000 and \$400,000, respectively.

30. The Treasury Board *Contracting Policy* states that departments must not engage in "contract splitting", which occurs when a department "...unnecessarily divid[es] an aggregate requirement into a number of smaller contracts, thereby avoiding controls on ... contract approval authorities". Health Canada's *Contract Review Process (Regions)* policy echoes this by including contract splitting in its "Questionable or Forbidden Practices" and indicates:

... It is important to note that a supply method must not be chosen as a means to circumvent established contracting rules. These may include...structuring requirements in a manner which becomes "contract splitting".

31. OPO noted none of the contracts under review were valued at more than \$400,000 and all were signed at the appropriate level. The annual "aggregate requirement" for the years that OPO reviewed was valued at between \$5.3M and \$7.9M per year.

32. Treasury Board's *Contracting Policy* acknowledges that a department may have received prior approval of a program and related funding; which may be sufficient for the department to proceed to contract. The policy notes that program approval does not carry with it implicit authority to enter into contract and, when significant risks and issues are involved, specific review and approval by Treasury Board should be obtained, including where other national policies and objectives are related. Given the nature of the dental services program and the approach FNIHB Manitoba used to contract with dentists, it is unclear whether the yearly aggregate requirement should have been approved by Treasury Board prior to the solicitation being initiated.

33. **RECOMMENDATION:** The Procurement Ombudsman recommends Health Canada confirm whether Treasury Board approval is required prior to the release of the request for proposals for fiscal year 2015-2016 dental services requirement.⁵ If it is determined that Treasury Board approval is required, Health Canada should obtain the necessary approvals for 2015-2016 and, in accordance with section 11.2.12 the Treasury Board *Contracting Policy*, seek ratification from

⁵ As of the release of this report, FNIHB Manitoba had already solicited bids for the 2014-2015 requirement.

Treasury Board of the dental services' contracts awarded between fiscal years 2009-2010 and 2013-2014.

Competitive Contracts and Best Value Normally include Price Considerations

34. FNIHB Manitoba characterized the contracts as being “competitive”, both in its Proactive Disclosure Reports (since 2011) as well as in internal approval documents (since 2009). Both the Treasury Board *Contracting Policy* and Health Canada’s *Contracting Guide for Cost Centre Managers and Administrators* provide essentially the same definition of a “competitive” contract. Under both policies, a contract is considered competitive if, after seeking bids, the lowest bid or the bid that offered the best value, as set out in the evaluation criteria in the bid solicitation and as determined by the contracting authority, is accepted. In the case of these dental services contracts there were no “rated” evaluation criteria; dentists only had “pass/fail” mandatory criteria, meaning that no one dentist provided a better “value” than another. In any event, the “lowest bid” reference was to price, which was set by FNIHB Manitoba after the proposal was submitted and not bid by the dentists as part of their proposals.
35. The Treasury Board *Contracting Policy* defines “best value” as:

... the combination of price, technical merit, and quality, as determined by the contracting authority prior to the bid solicitation and set out in the bid solicitation evaluation criteria, and which forms the basis of evaluation and negotiation between buyers and sellers to arrive at an acceptable basis for a purchase and sale.
36. FNIHB Manitoba advised OPO that it considered the overall costs of its two options regarding the provision of dental services to the inhabitants of the First Nations and Inuit communities: either send the dentist to the community; or, transport the affected community members to dentists in Winnipeg or another location outside of the members’ community. According to FNIHB Manitoba, due to the high cost to pay for eligible travel of clients to see dentists, and the ability within the Non-Insured Health Benefits National Medical Transportation Policy Framework to pay for provider travel in lieu of client travel, FNIHB Manitoba pursued the option to have service providers go to the clients. As such, FNIHB Manitoba considers the dental services contracts at issue collectively represent the “best value” to the Canadian taxpayer and also provide the necessary services to the communities.
37. Regarding the issuance of “call-ups”, there was no indication that price, and hence “best value”, played any role in determining which dentists were selected to serve a particular community, i.e., dentists with lower *per diems* were not given “first crack” at a community because they were less expensive. The only manner in which a dentist was given any type of preference was for dentists who self-identified as aboriginal; they were given first choice of community in which they wished to work, as noted in the contract. As noted previously, FNIHB Manitoba determined the allocation of work based on a number of factors depending on the circumstances of the various communities.
38. The Treasury Board *Contracting Policy* states that

... the objective of government procurement contracting is to acquire goods and services . . . in a manner that enhances access, competition and fairness and results in best value or, if appropriate, the optimal balance of overall benefits to the Crown and the Canadian people. Inherent in procuring best value is the consideration of all

relevant costs over the useful life of the acquisition, not solely the initial or basic contractual cost.

and

The analysis necessary to achieve best value should not be confined to the actual procurement process; it should begin in the planning and appraisal of alternatives and continue through the definition of requirements which would include assessment and award criteria, evaluation of sources, selection of contractor, preparation, negotiation, execution and award of contract, contract administration and post-contract evaluation.

39. Considering the contracting environment that FNIHB Manitoba operates in, OPO recognizes that FNIHB Manitoba strove to meet the objective of government procurement contracting to achieve best value for the overall dental services program.

FNIHB Manitoba Awarded Contracts to Non-compliant Bidders

40. Bidders are required to meet all mandatory requirements in order to be considered for contract award. Failure to meet even one mandatory criterion should result in the disqualification of a bid from further consideration. Health Canada's *Contracting Guide* states "[I]ate bids are not to be accepted and will be returned unopened" and that evaluators are to "...reject without further consideration all bids that fail to meet any mandatory criterion (i.e., non-responsive bids)".
41. In 13 out of 20 contract files reviewed, the dentists were awarded contracts even though their proposals did not meet all the mandatory requirements of the solicitation in question. All of these proposals met the mandatory criteria related to providing the necessary services, i.e., the ability to practice dentistry in Manitoba. However, in nine cases the dentist's proposal was not received by FNIHB Manitoba prior to the due date for the receipt of bids. In seven cases (some bids could have been disqualified for more than one reason) the dentist did not provide the required three professional references, and in three cases the dentists did not provide some necessary documentation or properly fill out the table in which they were to identify the requested communities in which they wished to work.
42. It should be noted there was no indication that FNIHB Manitoba awarded a contract to anybody other than a licensed dentist. It appeared that because the demand for dental services in First Nations and Inuit communities exceeded the number of available dentists, FNIHB Manitoba allowed bids that should have been disqualified to be considered with the goal of providing these communities with as much dental care as possible. If FNIHB Manitoba required flexibility on the due date for receipt of bids, or other administrative aspects of the solicitation, it should have clearly indicated this in the solicitation document.
43. **RECOMMENDATION:** The Procurement Ombudsman recommends in future solicitations FNIHB Manitoba clearly articulates those elements that represent the minimum requirements that are essential to the successful completion of the work (i.e. mandatory criteria) and those where flexibility is permitted. For example, mandatory criteria could be related to the professional dental qualifications and flexible requirements could be related to the submission due date.

Timing of Contracting Oversight Mechanism may need to be reviewed

44. The Treasury Board *Contracting Policy* indicates that it is the responsibility of departments and agencies to ensure that adequate control frameworks for due diligence and effective stewardship of public funds are in place and working.
45. The objective of Treasury Board Secretariat's *Directive on Delegation of Financial Authorities for Disbursements* (the *Directive*) is to ensure that appropriate financial and operational management controls are applied to the delegation of financial authorities associated with the expenditure process. For example, the person with the authority to enter into contracts should be separate from the person who certifies the receipt of goods and the provision of services and who determines the entitlement, verification of accounts and preparation of requisitions for payment or settlement (i.e., section 34 of the *Financial Administration Act*). This directive states if the process or other circumstances do not allow such separations of these duties, alternate control measures are to be implemented and documented.
46. The *Directive* defines management controls as "policies, processes, procedures and systems that enable a department to operate its program and activities, use its resources effectively, exercise sound stewardship, fulfill its obligations and achieve its objectives".
47. Health Canada has a Contract and Requisition Control Committee (CRCC) which, among other responsibilities, has to approve every contract valued at more than \$10,000. According to Health Canada's *Contract Review Process (Regions)* policy, the CRCC is to be made up of the CRCC Chair, the regional Procurement and Contracting Manager, and, on an ad hoc basis, human resource officers, legal services advisors, IM/IT officers, branch or regional scientific, contracting and technical managers and officers, the material management unit, security or other appropriate subject matter experts. According to Health Canada's *CRCC Reference Guide*, this Committee forms the foundation of the contract review process. According to the *Reference Guide*, the responsibilities of the CRCC include, for example, ensuring that: contracts meet the required conditions in accordance with the *Government Contracts Regulations* and are within the departmental spending authority; there is no contract splitting; the basis of the award of the contract is sound and the authorities and approvals required are appropriate.
48. In Health Canada, Cost Centre Managers (CCM) are delegated the authority to enter into contracts and, in the case of the 19 signed dental services contracts, 11 were signed by the person identified as the CCM for this requirement. The other eight were signed by different personnel based on the dollar value of the contract, (i.e. if the dollar value of the contract exceeded that of the CCM's authority, it was elevated to the appropriate level for signature). In three instances, however, the person who signed the contract also signed under section 34 of the *Financial Administration Act* relating to services provided under that contract. The *Directive* recognizes there could be circumstances that do not allow for the separation of duties under the *Financial Administration Act* and as such Health Canada relies on the process established for its CRCC to ensure its management control obligations are met.
49. FNIHB Manitoba provided OPO with the audit trail related to each of the contracts and, in each case, the CRCC granted its approval, allowing the appropriate authority to enter into contract.
50. OPO noted, however, that the CRCC review typically took place months after bids had been received but within days of the proposed contract start date. Given the short time remaining before the expiration of the previous year's contracts, some First Nations communities would have been left without a dentist if the CRCC had determined, for example, that the 13 proposals which did not meet the mandatory administrative criteria were ineligible to be awarded contracts.

51. **RECOMMENDATION:** The Procurement Ombudsman recommends that a more robust contract review committee process be implemented (including ensuring complete documentation is available on the CRCC process) and that the CRCC review the overall requirement, including any planning documents, *before* bids are solicited to ensure adherence to the appropriate Treasury Board and Health Canada policies.

Lack of Documentation and Information to Suppliers

52. Section 12.3.1 of the Treasury Board *Contracting Policy* states:

Procurement files shall be established and structured to facilitate management oversight with a complete audit trail that contains contracting details related to relevant communications and decisions including the identification of involved officials and contracting approval authorities.

53. Health Canada's *Contracting Guide* requires that the file contain original copies of the following documents for a period of six years after final contract completion and non-renewal:

- contract request;
- funding documentation (commitment);
- sole source rationale, if appropriate;
- Advance Contract Award Notice (ACAN) justification, if appropriate;
- all approvals, including appropriate CRCC documents;
- the contract proper;
- notes, minutes and other ongoing correspondence;
- payment history, if applicable;
- amendment documentation and justifications, if applicable; and
- performance documentation.

The *Contracting Guide* also requires that the complete evaluation results and the names of all evaluators be recorded in the contract file.

54. While the sample files contained most of the above information, FNIHB Manitoba was not able to provide any original "call-ups" as these were issued electronically and, according to FNIHB Manitoba, copies are not normally kept on file. FNIHB Manitoba was, however, able to re-print the majority of them for OPO's review. FNIHB Manitoba considers the "call-ups" to be an administrative process. In OPO's view however, the "call-ups" form an integral part of the contracting process as they are the document which authorizes the dentist to go to a community, perform work at that location and facilitate payment and evaluation of contractor performance. Therefore the "call-ups" should form part of the file documentation to facilitate transparency of decisions made.

55. Health Canada requires the project authority responsible for managing a contract to assess the contractor's performance at the end of the contract period by completing a Contract Performance Evaluation Report, for all contracts of \$10,000 or more. An automated reminder to complete the report is sent to the Cost Centre Administrator and the CCM. None of the files contained any contract performance evaluation report even though the CRCC audit trails indicated a reminder was sent to the project authority and Cost Centre Administrator in 14 of the cases. These audit trails also

indicated a CCM approved these reports for all five 2011 contracts, however there was nothing on any of the 2011 files we reviewed.

56. In addition, there was nothing on any of the sample files indicating who had conducted the evaluation of the dentists' proposals or how FNIHB Manitoba selected which dentist to go to which community.⁶ These elements (evaluation, selection and performance of the dentists) should be clearly documented in the file.
57. One of the original issues raised to OPO was that FNIHB Manitoba was not providing adequate information about the contracting process. By not providing adequate information to suppliers, this could compromise the openness and transparency of the contracting process. After reviewing the sample files, and after discussions with representatives of Health Canada and FNIHB Manitoba, OPO found the process by which FNIHB Manitoba awarded the original contracts to have been transparent. FNIHB Manitoba openly advertised the requirement, specifically contacting all dentists in Manitoba, and did not attempt to restrict access to the opportunity of being awarded a contract. As noted above, it appears that FNIHB Manitoba attempted to maximize the number of dentists by not disqualifying dentists who missed administrative, albeit mandatory, criteria.
58. The dental services were to be provided (called-up) "if and when requested" by the Project Authority. The dentists' contracts indicated that the number of clinic days per community/location depended on the needs of the community, the availability of the dentist, clinic facilities, dental equipment, accommodation or as directed by the Project Authority. A community/location was not permanently assigned or guaranteed to any one dentist. FNIHB Manitoba advised OPO that it worked with the dentists, taking into account the dentists' personal circumstances when issuing the "call-ups". While considering that dentists were aware that FNIHB Manitoba retained the right to assign them to work locations, OPO notes that, although there was no requirement to do so, FNIHB Manitoba did not share the rationale for its decision on work location assignments with the dentists. Such rationale included factors such as whether flights and accommodations were available, if the clinical equipment was operational, if the clinic was open, if there was construction, flu or other epidemics.
59. **RECOMMENDATION:** The Procurement Ombudsman recommends FNIHB Manitoba maintains complete procurement files, including all correspondence and all documents related to the assignment and payment of the work, in accordance with Treasury Board and Health Canada policies.

⁶ The only insight OPO, and the dentists, have into how the work could be allocated is that, for the period of review, aboriginal dentists were given first right to preferred clinic locations.

Final Conclusions

60. OPO notes and appreciates the challenges FNIHB Manitoba faces in providing the necessary dental services to its clients living in First Nation and Inuit communities. However, so long as FNIHB Manitoba provides these services using contracts, as opposed to some other mechanism (challenges notwithstanding) it must follow the applicable Treasury Board and Health Canada procurement policies.
61. OPO found no evidence to suggest that FNIHB Manitoba has abused its authority nor that it has done anything but attempted to maximize the amount of dental care being provided to First Nation and Inuit communities. However, during the review period, OPO found that FNIHB Manitoba differed from some elements of the applicable Treasury Board and Health Canada procurement policies.
62. In addition, as discussed below, OPO found that most aspects of FNIHB Manitoba's contracting practices were fair, open and transparent however there were areas where OPO recommends further actions.

Fairness

63. As mentioned in the report, FNIHB Manitoba's first step in the contracting process was to create a pool of qualified suppliers by awarding contracts to dentists who submitted proposals in response to the solicitation documents. It appeared that FNIHB Manitoba waived certain administrative mandatory criteria in an effort to obtain as many dentists as possible for its First Nation and Inuit clients. This waiving, especially as it related to the due date for receipt of bids, benefited dentists whose proposals were received sometimes months after the due date. However, by not making this flexibility clear in the solicitation document, there may have been dentists who did not submit proposals because they did not believe they could meet the due date, which was identified as a mandatory requirement. Clarifying the due date flexibility in the solicitation document would enhance the clarity and transparency of the process.
64. Regarding the issuance of "call-ups", OPO could not determine whether dentists were treated equally. This was due to the lack of documentation on the monthly assignment of dentists to communities. We noted aboriginal dentists were provided with first right to preferred clinic locations. Of the files OPO reviewed, three dentists (all in 2009) self-identified as aboriginal and, in all cases, those dentists were assigned to their preferred communities for all but a total of five weeks in 2009.

Openness

65. OPO considers FNIHB Manitoba to have advertised the requirement in a fair and open manner, especially by contacting each dentist registered in Manitoba. According to Health Canada's *Contracting Guide*, for competitive procurements not subject to the trade agreements the bidding period should be not less than fifteen (15) calendar days. The contracts under review were not subject to the trade agreements and the time allotted for dentists to submit proposals exceeded Health Canada's guideline.

Transparency

66. As noted above, FNIHB Manitoba did not follow a number of procurement/contracting policy requirements. For example, the lack of documentation regarding the evaluation of the proposals and

issuance of the “call-ups” makes it difficult for FNIHB Manitoba to demonstrate it properly followed all relevant policies and procedures.

67. FNIHB Manitoba has a duty and an obligation under the Treasury Board *Contracting Policy* to maintain a complete audit trail related to communications and decisions made during the procurement process. This documentation serves to verify that the procurement process has been carried out in accordance with the principles of fairness, openness and transparency and to support the decisions made. The failure to maintain appropriate records is in contravention of the *Contracting Policy*.

Recommendations

The following recommendations appear throughout the report following the relevant sections:

68. The Procurement Ombudsman recommends Health Canada take appropriate steps to ensure that employer-employee relationships are not created when contracting for dental services and that it has not created unnecessary risks by differing from its *Contracting Guide*.
69. The Procurement Ombudsman recommends Health Canada confirm whether Treasury Board approval is required prior to the release of the request for proposals for fiscal year 2015-2016 dental services requirement.⁷ If it is determined that Treasury Board approval is required, Health Canada should obtain the necessary approvals for 2015-2016 and, in accordance with section 11.2.12 of the Treasury Board *Contracting Policy*, seek ratification from Treasury Board of the dental services' contracts awarded between fiscal years 2009-2010 and 2013-2014.
70. The Procurement Ombudsman recommends in future solicitations FNIHB Manitoba clearly articulate those elements that represent the minimum requirements that are essential to the successful completion of the work (i.e. mandatory criteria) and those where flexibility is permitted. For example, mandatory criteria could be related to the professional dental qualifications and flexible requirements could be related to the submission due date flexibility.
71. The Procurement Ombudsman recommends that a more robust contract review committee process be implemented (including ensuring complete documentation is available on the CRCC process) and that the CRCC review the overall requirement, including any planning documents, *before* bids are solicited to ensure adherence to the appropriate Treasury Board and Health Canada policies.
72. The Procurement Ombudsman recommends FNIHB Manitoba maintain complete procurement files, including all correspondence and all documents related to the assignment and payment of the work, in accordance with Treasury Board and Health Canada policies.

Departmental Perspective

73. In accordance with section 5 of the *Regulations*, the Procurement Ombudsman provided Health Canada the opportunity to comment on the proposed recommendations and the reasons for them. Health Canada comments have been taken into consideration in finalizing this review.

⁷ As of the release of this report, FNIHB Manitoba had already solicited bids for the 2014-2015 requirement.