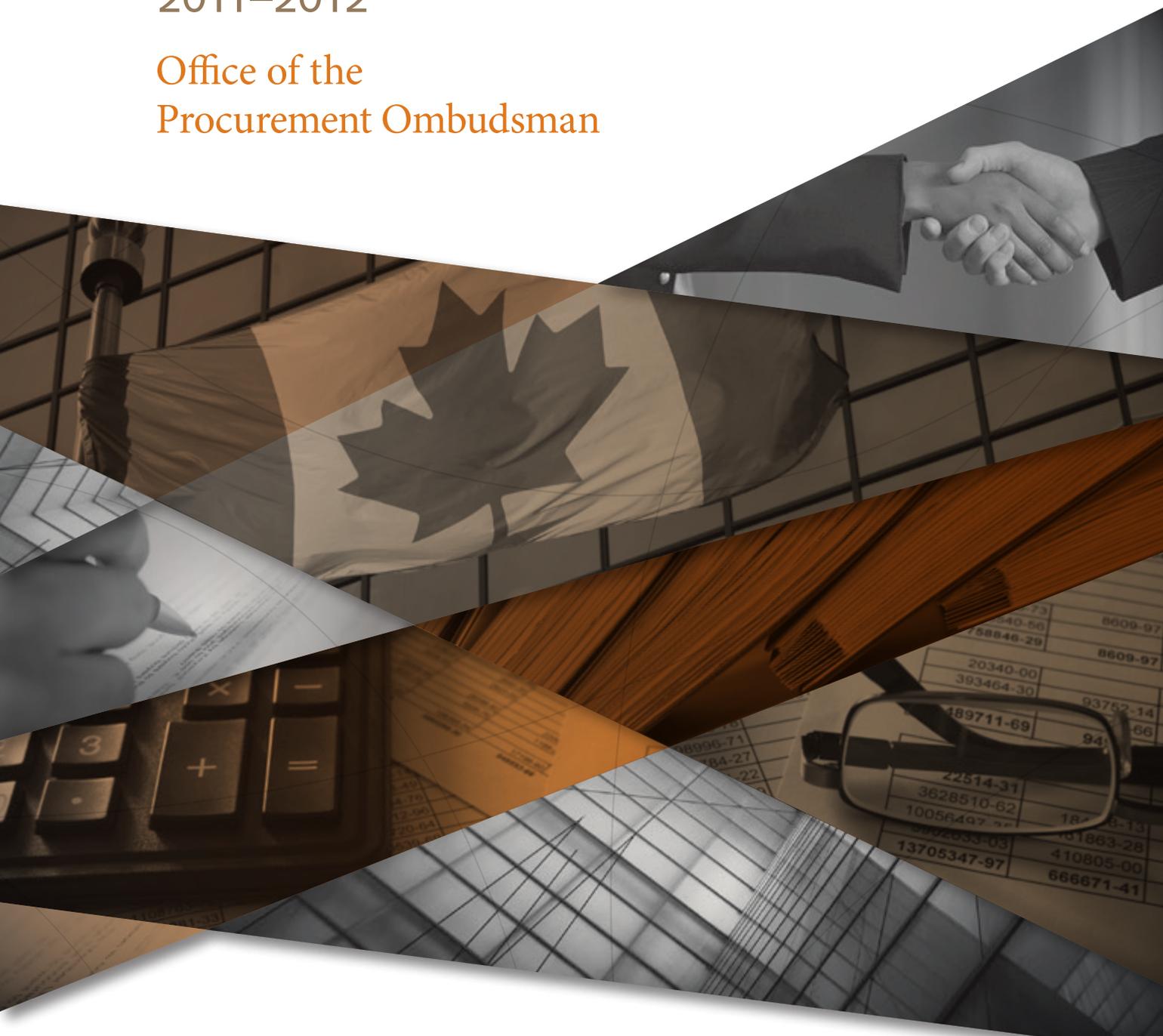


# Annual Report 2011–2012

## Office of the Procurement Ombudsman



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## The Minister of Public Works and Government Services

Dear Minister:

Pursuant to section 22.3(1) of the *Department of Public Works and Government Services Act*, it is an honour and a pleasure to submit the Procurement Ombudsman Annual Report for the 2011–2012 fiscal year.

Yours sincerely,

A handwritten signature in brown ink, appearing to read 'Frank Brunetta', written in a cursive style.

**Frank Brunetta**  
Procurement Ombudsman  
Ottawa, July 2012



A collage of documents and papers. The top half is a large white area. Below it, there are several overlapping papers. One is a grid table with numbers. Another is a pair of glasses. A third is a paper with a maple leaf logo. The bottom part of the collage is a dark brown background.

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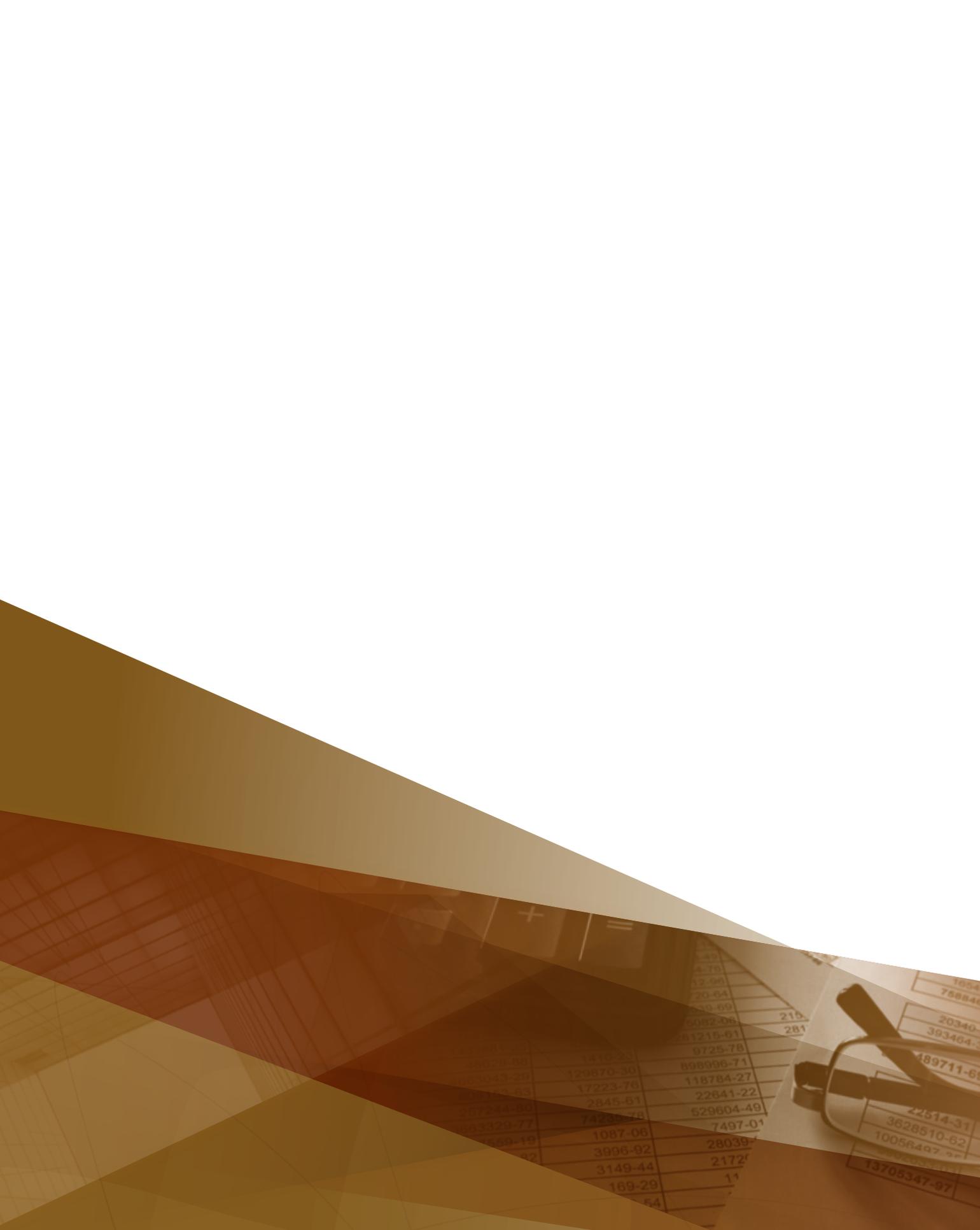


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Annual Report  
2011–2012

Office of the  
Procurement Ombudsman



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# Message from the Ombudsman



**I**t is a pleasure to submit the 2011–2012 annual report for the Office of the Procurement Ombudsman (OPO). This report represents a summary of the activities undertaken by my office during my first full year as the Procurement Ombudsman.

My primary focus in 2011–12 has been on broadening the Office’s outreach activities so as to raise awareness of the Office, and the services it provides, and to listen to and build relationships with key stakeholders. These outreach activities have begun to pay dividends as they have revealed two unexpected areas of concern shared by suppliers and federal procurement personnel:

- Vendor performance; and
- The disparate nature of procurement documents.

Suppliers have raised the issue of firms that continue to obtain federal contracts despite being known within the community for providing inferior goods or services. Some question why the government continues to do business with these types of firms. Likewise, procurement officials have voiced frustration with executing lengthy procurement processes only to be faced with the prospect of having to accept a winning bid from a known underperforming supplier. Some departments have recognized this exposure and introduced vendor performance policies which articulate the measures to be invoked when dealing with substandard suppliers. These policies have not, however, been introduced by all departments and agencies, and there has been varied enforcement of the policies among organizations where they do exist. This fragmented approach within the federal government is allowing suppliers identified as underperforming by one department to successfully bid and be awarded contracts from other departments. Suppliers and government officials alike acknowledge the need for a more uniform approach to dealing with suppliers that are incapable of consistently meeting federal government standards or unwilling to do so.

Similarly, suppliers and government officials have raised concerns about the use of disparate procurement documents and associated processes across, and in some cases within, departments. Typical examples include the variation of requirements contained in documents such as bid solicitations and contracts to procure similar goods and services, the variable criteria for evaluating bids for comparable solicitations and the unpredictability of decisions regarding when contracts are competed versus sole-sourced. Small and medium-sized supplier sentiment is quite simple: the level of effort required to adjust to the different departmental approaches for supplying virtually the same service is costly, time-consuming and often not worth the effort. Some suppliers have gone as far as to identify this issue as a barrier to doing business with the federal government. Similarly, procurement personnel have expressed frustration with the inefficiency involved in preparing slightly different procurement documentation for essentially similar services. It is not uncommon for these officials to cite the many potential benefits (and savings) that could be derived from greater standardization of key procurement documents and tools. While the supplier and procurement communities recognize that departments need a certain degree of discretion in customizing procurements to meet their particular operational requirements, both communities have identified an untapped opportunity for greater efficiency and mutual benefit through increased standardization.

Training is a subject that I highlighted in my first annual report and one that bears ongoing focus. Over the past few years, strides have been made to further professionalize the procurement function. In addition to mandatory training courses, an optional certification program was introduced in 2006 targeting federal procurement officials. In my discussions with some of these officials, I have been impressed with the level of understanding that exists for the need to continuously strengthen the procurement function. As enablers to

**As the federal procurement process is not the exclusive domain of procurement personnel, having trained, qualified procurement specialists is only part of the equation. Non-procurement personnel, namely, program managers, share and often have an equal responsibility for purchasing decisions.**

roughly \$15B to \$20B in annual procurement expenditures supporting the delivery of programs and services to Canadians, procurement officials recognize the need to obtain the highest possible level of training and accreditation. Yet these officials have also shared frustration with the administration of the program. Six years after the program was introduced, 26 of the approximately 3,200 procurement specialists working in the federal government have been certified at the program's first of three levels, and none have received complete program certification.

As the federal procurement process is not the exclusive domain of procurement personnel, having trained, qualified procurement specialists is only part of the equation. Non-procurement personnel, namely, program managers, share and often have an equal responsibility for purchasing decisions. Decisions on what goods or services are required to deliver programs and services to Canadians almost always begin with program managers. These decisions often have an impact on the procurement process. So while there is a need for a continued emphasis on training and certification of procurement officials, there is an equal need for a sustained effort in providing procurement training for program managers.

Two other issues that I raised in last year's annual report were a) supplier reticence and b) Advance Contract Award Notices (ACANs).

- a) Last year I reported that some suppliers contacting my office were reticent to disclose the names of departments with which they were having procurement concerns for fear of being excluded from future business opportunities. To better understand this issue, we re-examined case files specific to these suppliers. Our objective was to ascertain the source of the reluctance. We were successful in contacting 12 of the 15 suppliers that, in raising issues with this office, were reticent to disclose the names of departments with which they had procurement issues. Of the 12 suppliers, 11 indicated that their reluctance was based on either a perception or a suspicion that complaining might jeopardize future business opportunities. Some rescinded their comments entirely. As an added measure in my attempt to understand this issue, I sought and received the assistance of the Canadian Federation of Independent Business. My office collaborated with the Federation in jointly contacting suppliers to solicit their views on this issue, among others. The interviews of a relatively small sample of micro and small business representatives were informative in identifying other reasons for not complaining, such as suppliers not having the time to dwell on unsuccessful bids and not knowing to whom complaints should be directed. However, while neither these interviews nor the case file reviews revealed specific examples to substantiate that suppliers are indeed reticent to complain about particular departments for fear of being excluded from future federal contracting opportunities, the interviews did reveal that this perception may still exist.

b) In discussions with a complainant who raised concerns with my office in 2010–11 regarding the award of four contracts for professional services using Advance Contract Award Notices (ACANs), the complainant claimed his concern was simply the “tip of the iceberg” in the improper use of ACANs. The allegation led my office to monitor posted ACANs for a six month period in 2011–12. The results of this monitoring exercise, outlined in the body of this report, once again raise questions about whether the policies governing the use of ACANs are sufficiently explicit and unambiguous to allow ACANs to be used as intended.

Finally, I have taken steps to ensure that the foundation on which my office operates is sound by examining some key areas of our operations. While examining these areas has caused us to ask ourselves some difficult questions, the process has been valuable. It has resulted in a clear, shared understanding of required adjustments. Three noteworthy areas are:

- 1) An internal review of closed complaint case files received since the Office opened in 2008 was completed. The intent was to assure myself that all cases coming to the Office’s attention were dealt with in accordance with the regulatory parameters that guide the Office’s operations. As a result of the review of each file, I am satisfied that the disposition of each case was appropriate.
- 2) In the area of procurement practice reviews, we are:
  - a. refining the protocol for topic selection, which will be the basis for the identification of practice reviews to be conducted in the future;
  - b. revising the methodology for conducting reviews to ensure the Office produces high quality, timely reports.

- 3) The Office initiated an evaluation of its effectiveness during the first three years of its operations. An independent third-party contractor was engaged to carry out the evidence-based formative evaluation, which includes obtaining the views of stakeholders. An external advisory committee of senior officials is assisting me in ensuring the evaluation approach is thorough. The evaluation results will guide any necessary adjustments to improve our service delivery.

As we move ahead, we will continue our outreach efforts to ensure that those who can benefit from our services know we exist. This includes meeting with Canadian companies, associations, federal organizations and parliamentarians. We will continue to seek opportunities to participate in conferences and events with the aim of listening, learning and sharing some of the effective procurement practices we have observed in our three-plus years of operation. In short, we will ensure that the people we were created to assist are aware that the office is available to help them.

Lastly, in keeping with the Government of Canada’s greening government initiatives and further to the Government’s decision to transition all government publications from print to electronic publication, this report represents the final year in which OPO’s annual report will be available in hard copy. The printing and distribution of this 2011–12 report is being limited. The transition to paperless reporting will be completed in 2012–13. The Office’s reports, including annual reports, will continue to be available on our Web site: <http://opo-boa.gc.ca/rpt-pub-eng.html>.



**Frank Brunetta**  
Procurement Ombudsman

# We Are Here to Help



Federal procurement can be complex. The framework governing procurement comprises more than 15 acts of Parliament and numerous regulations and policies. To adhere to this framework, federal departments and agencies have established procurement processes and procedures. These processes and procedures, and their associated requirements, can appear to be daunting to suppliers wanting to obtain their first contract with the federal government. They can also challenge suppliers that have experience doing business with the federal government.

And doing business with the federal government is big business. The size and scale of federal procurement is significant. It is an approximately \$20 billion-a-year field driven by the needs of more than a hundred federal organizations, resulting in hundreds of thousands of contracts with thousands of suppliers. The vast majority of the volume of these contracts, roughly 90%, are for low dollar value contracts; contracts, that is, less than \$25K for goods and \$100K for services, which for any given year can total approximately \$1B.

Prior to the creation of the Office, suppliers of these low dollar value contracts had limited options when issues arose with federal departments and agencies. They could negotiate directly with the department with which they had a conflict, commence a potentially lengthy and costly litigation process or simply accept the issue. And when these problems re-occurred, there was no dedicated independent body to determine if systemic procurement issues existed.

The Office of the Procurement Ombudsman (OPO or the Office) was created to provide an avenue for suppliers and other stakeholders – federal government departments and agencies, and parliamentarians – to have procurement-related concerns addressed.

## TESTIMONIAL...

*“Thank you for taking the time to respond to my e-mail and with such a cordial reply at that. I do appreciate the obvious time and effort taken.”*

- Supplier -

OPO helps all stakeholders better understand the federal procurement system and assists suppliers in resolving procurement-related disputes with departments and agencies. In doing so, the Office works with the federal procurement community to identify ways to improve fairness, openness and transparency, and share effective procurement practices.

OPO is neither a lobbyist for suppliers nor an apologist for government departments and agencies. The Office is in a unique position to encourage open communication and the sharing of effective practices among all stakeholders involved in procurement. Operating in the fashion of a true ombudsman, the Office's motto is simple: “We are here to help.” While the Office's regulatory mandate is very specific regarding the nature and types of issues OPO is permitted to examine, each of the Office's staff is committed to ensuring that everyone who contacts the Office receives personalized service and prompt responses to questions raised.

## TESTIMONIAL...

*“I would like to express my gratitude — and to say I am actually touched — by the fact that you personally called the Contracting Authority for the RFP [Request for Proposal] I complained about.”*

- Supplier -

## LEGISLATIVE MANDATE

Transparency and integrity in procurement are key priorities in the Government’s accountability agenda. Accordingly, the *Federal Accountability Act* (2006) and Federal Accountability Action Plan contained a number of measures to enhance trust in the institutions and practices of government. One of these measures was the creation of a Procurement Ombudsman to act as a neutral and objective authority on matters of federal procurement.

Pursuant to the *Federal Accountability Act* (2006), OPO’s legislated mandate stems from amendments to the *Department of Public Works and Government Services Act* (1996) and the *Procurement Ombudsman Regulations*, which came in to force in 2008.

### OPO’S MANDATE

- Review any complaint respecting the award of a contract for goods below the value of \$25,000 and for services below the value of \$100,000, where the criteria of Canada’s domestic *Agreement on Internal Trade* (AIT) would apply.
- Review any complaint respecting the *administration* of a contract for the acquisition of goods or services by a department or agency, regardless of dollar value.
- Review the practices of federal departments and agencies for acquiring goods and services to assess their fairness, openness and transparency and make any appropriate recommendations to the relevant department.
- Ensure an Alternative Dispute Resolution (ADR) process is provided when all parties to the contract agree to participate.

## MISSION AND STRATEGIC OBJECTIVES

OPO's mission and strategic objectives have been formulated to enable the Office to achieve its mandate and provide services to stakeholders.

OPO's *mission* is clear: **to promote fairness, openness and transparency in federal procurement**. All of the Office's activities are carried out with this mission in mind.

### OPO DEFINITIONS

**Fairness** – providing equal treatment to all current and potential suppliers

**Openness** – providing all potential suppliers with the opportunity to submit bids for government procurement

**Transparency** – providing information to Canadians in a timely manner that facilitates public scrutiny of the decisions made and the actions undertaken

## STRATEGY — THE THREE PILLARS

To achieve its mission, OPO's strategic objectives focus on three areas:

- (i) Raising awareness of procurement issues and exchanging information through *education*;
- (ii) De-escalating potential disputes and helping resolve issues whenever possible through *facilitation*; and
- (iii) Reviewing of procurement issues through *investigation*.



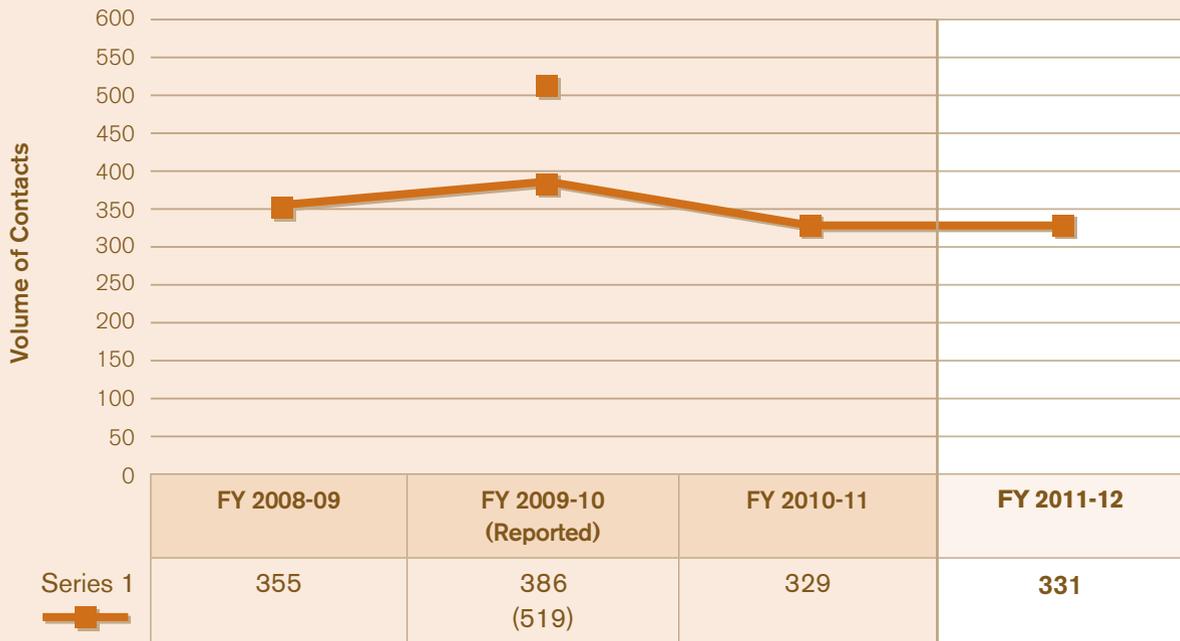
These three strategic pillars are the cornerstones of the Office's interactions with stakeholders, and they act as guides for staff contacted by suppliers, federal departments and agencies, and others interested in federal procurement.

## PROFILE OF CONTACTS

One of the Office's primary functions is to respond to inquiries from stakeholders seeking to better understand federal procurement, or suppliers wishing to discuss concerns with a particular department or procurement process. Responding to these contacts in a helpful and timely manner is a priority for the Office.

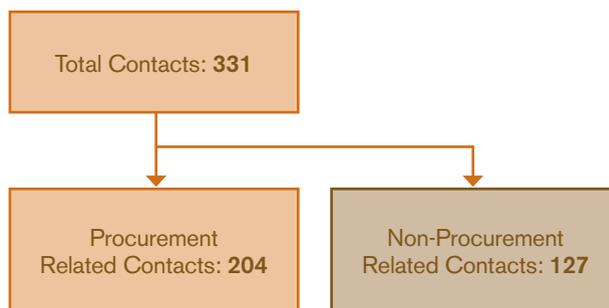
During the past year, OPO recorded 331 contacts by telephone, e-mail or fax. The number of contacts has remained relatively stable over the Office's four years of operations, fluctuating between a low of 329 contacts in 2010–11 and a high of 386 in 2009–10. It should be noted the total number of contacts reported in 2009–10 (519) included unsolicited sales and marketing contacts, which are no longer tracked in OPO's database.

**Total Contacts Received per Fiscal Year**



Of the 331 contacts with the Office, 204 (62%) were procurement-related while 127 (38%) touched on issues unrelated to the Office's legislative mandate (e.g. questions regarding pensions, taxation and other matters). Guided by the Office's motto "We are here to help," in all instances OPO staff strive to provide quick and useful information to everyone who contacts the Office.

The distribution between procurement and non-procurement-related contacts is consistent with past years, as the percentage of procurement-related calls has remained in the range of 62% to 75%. In addition to the 331 contacts, OPO staff participated in numerous conferences and events and had multiple meetings with stakeholders to answer procurement questions and discuss concerns.



The following three sections elaborate on the nature of the 204 procurement-related contacts using OPO's three strategic objectives of Educate, Facilitate and Investigate.

# Educate



## EDUCATE

Raise awareness of procurement issues and exchange information

### TWO-WAY STREET

The Office approaches its Educate strategic objective as a two-way street. On the one hand, the 204 contacts provide OPO with a valuable source of procurement-related information, which allows monitoring of issues and trends; on the other hand, it enables OPO to share and exchange information that often de-escalates issues that are brought to the Office's attention.

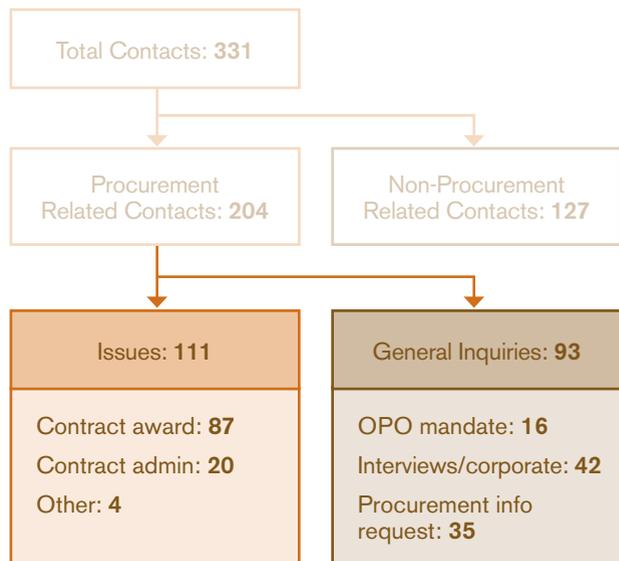
Of the 204 procurement-related contacts with the Office in 2011–12, 111 (54%) were categorized as *issues* and 93 (46%) as *general inquiries*.

The most common procurement-related issues brought to OPO's attention by suppliers in 2011–12 did not significantly differ from the previous year, with five of the six issues remaining unchanged. The one exception is the addition of "Inaction by department", which replaced "Payment" among the top issues. The issues being

**The most common procurement-related issues brought to OPO's attention by suppliers in 2011–2012 did not significantly differ from the previous year, with five of the six issues remaining unchanged.**

reported to the Office in the "Inaction by department" category include not providing adequate responses to suppliers' questions, and not debriefing unsuccessful bidders following the award of contracts.

In addition, OPO has heard concerns from suppliers regarding standing offers and supply arrangements, tools used by the government for the repetitive purchase of common goods and services. These concerns include the view of suppliers that it is cumbersome and difficult to prepare bid documents and qualify under these tools, the impact not qualifying has on their business as they may not have access to government business for an extended period, and the perception that the processes to establish these tools are not always transparent. We have also heard from government officials who express confusion over which of the various standing offers or supply arrangements should be used for services (given some of the tools appear to be similar) and concerns regarding suppliers



Top Procurement-Related Issues	2011–12*	2010–11
Evaluation and Selection Plan (e.g. restrictive criteria or biased ratings)	32	29
Procurement Strategy (e.g. too often non-competitive)	27	19
Statement of Work or Specification (e.g. unclear or biased)	24	13
Evaluation of Bids (e.g. unfair evaluation process)	22	33
Contract Execution (e.g. altering the contract)	14	16
Inaction by Department (e.g. not responding or providing debriefings)	9	n/a
Payment (e.g. late payments)	n/a	10

\* Top related issues for 2011–12 total 128, which differs from the 111 issues-related contacts. This discrepancy is due to multiple procurement issues being identified through single contacts.

changing items and/or prices on standing offers when contracts are issued. The *Procurement Ombudsman Regulations* prevent the Office from investigating specific complaints on standing offers and supply arrangements as these are not contracts, but rather an umbrella agreement that may result in contracts for qualifying suppliers. Nonetheless, the Office brings these types of concerns to the attention of key senior federal officials and, where reasonable grounds can be established, launches practice reviews.

**In addition, OPO has heard concerns from suppliers regarding standing offers and supply arrangements, tools used by the government for the repetitive purchase of common goods and services.**

The remaining 93 (46%) procurement-related contacts with the Office were *general inquiries*, which include requests for information on OPO's mandate, seeking information on the federal procurement process, and copies of reports and other procurement-related information. Responding to inquiries can be as simple as providing information over the telephone. It may also involve pointing stakeholders to effective practices or recommendations for improving fairness, openness and/or transparency in reports published by the Office. Whether it is addressing issues or responding to inquiries, OPO strives to share information brought to its attention with federal departments to try and help resolve issues.

For example, OPO received a complaint regarding a Request for Proposal (RFP) where the competition had been limited to companies located in the National Capital Region. The contract in question was subject to the *Agreement on Internal Trade* which is meant, among other things, to reduce

barriers to trade within Canada. The Office brought this discrepancy to the attention of the contracting department. In response, the department terminated the resulting contract, explaining to the Office that it had not been aware of the requirement to open the competition to suppliers in all provinces and territories in instances where contracts are subject to the *Agreement on Internal Trade*.

OPO's efforts to share information are not limited to the Canadian context. In the fall of 2011, the Office was invited to meet with officials of the Russian government to discuss Russia's efforts to transform its federal procurement system. OPO was able to provide information on procurement training and methods of resolving contract disputes outside the court system. The Office was informed about legislation being established in Russia that will require federal departments to publish three-year forecasts of projected procurements. OPO's efforts to remain aware of effective procurement practices in other jurisdictions, in conjunction with stimulating positive dialogue and the exchange of ideas, are an important component in promoting continuous improvement in the federal procurement process.

The Office strives to raise awareness of procurement issues through information exchange. Often, exchanging information helps address complaints made to this office. In other cases, the provision of information is not enough, and we are called upon to help facilitate issues raised by stakeholders.

**OPO's efforts to remain aware of effective procurement practices in other jurisdictions, in conjunction with stimulating positive dialogue and the exchange of ideas, are an important component in promoting continuous improvement in the federal procurement process.**

# Facilitate



## FACILITATE

De-escalate disputes and help resolve issues

Suppliers calling the Office often do so because they have been unsuccessful in dealing with a department. It is not uncommon for a caller to be frustrated. In these cases, one of the Office's primary functions is to understand the supplier's concerns and find ways of de-escalating the issue. This is the basis for the Office's Facilitate strategic objective: to assist suppliers and departments in resolving potential conflicts through constructive dialogue.

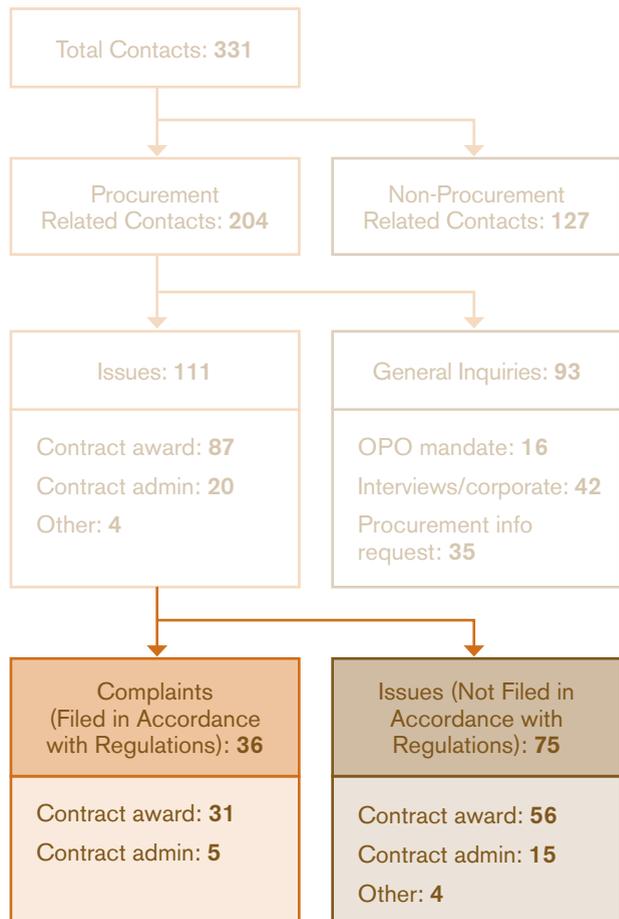
When procurement-related issues are brought to OPO's attention, the Office makes every effort to stimulate dialogue and de-escalate potential conflicts by leveraging its neutral and independent third-party status. When suppliers bring issues to OPO's attention, the Office:

- provides assistance to increase their overall understanding of federal procurement;
- informs them of available options; and
- with the supplier's written consent, contacts the department in question to facilitate dialogue.

**This is the basis for the Office's Facilitate strategic objective: to assist suppliers and departments in resolving potential conflicts through constructive dialogue.**

OPO's business model encourages the parties to discuss issues in an open and straightforward manner. We see our role as guiding suppliers and departments through issues based on an understanding of their respective requirements and concerns. The aim of this approach is to facilitate effective solutions in an expedient and cost-effective manner.

Of the 111 issues received by the Office last year, 87 (78%) pertained to the *award* of a contract and 20 (18%) to the *administration* of a contract.



The remaining 4 (4%) were other requests for either Alternative Dispute Resolution (ADR) services or procurement practice reviews.

OPO's approach in handling procurement-related issues is prescribed by the *Procurement Ombudsman Regulations*, which provide the parameters for the Office's activities. To be pursued by the Office, complaints must be filed in accordance with the criteria established in the *Regulations* (more specifically, subsection 7(1) for contract *award* or subsection 16(1) for contract *administration*).

Of the 111 issues brought to the Office's attention by suppliers, 36 (32%) of the filed complaints allowed the Office to formally intervene.

In instances where suppliers elect not to file a complaint or the assessment of the complaint determines it is outside OPO jurisdiction, the Office attempts to facilitate a resolution or provide options for suppliers to consider. For example, if the issue clearly falls outside the Office's regulatory parameters, we will put the supplier in contact with an organization that may be in a better position to provide assistance.

**As an independent ADR service provider, OPO helps facilitate the resolution of these types of disputes and the development of legally binding agreements.**

## ALTERNATIVE DISPUTE RESOLUTION

Contractual disputes can jeopardize the timely completion of contracts, lead to increased costs and result in late payments. Conversely, facilitating the resolution of disputes may salvage the original intent of the contract and preserve business relationships, the objective of the OPO Alternative Dispute Resolution (ADR) service.

When contracts are already in place and a dispute arises, the *Regulations* stipulate that the Ombudsman will ensure an ADR process is provided when requested by one of the parties to the contract and agreed to by the other party. This applies to disputes pertaining to the interpretation or application of the terms and conditions of an issued contract. For example, a supplier contacted the Office regarding a verbal agreement to amend the contract that had been signed between the supplier and the department. The verbal agreement centred on a change to the delivery site, which resulted in costs savings to the department. After the delivery had been completed, there was a disagreement between the parties on the magnitude of the savings. The supplier informed OPO that, as a result of the dispute, the department refused to pay the outstanding balance resulting from the verbal agreement. The Office contacted the department in question and obtained their agreement to participate in an ADR process. The process resulted in the parties reaching a mutually acceptable agreement that avoided a lengthy and costly legal process. As an independent ADR service provider, OPO helps facilitate the resolution of these types of disputes and the development of legally binding agreements.

Year	ADR requests	Not within Regulations	Department declined to participate	ADR process initiated	Outcome: Settlement reached or request withdrawn
2011–12	5	2	0	3	2 (1 case ongoing)

In 2011–12, the Office received five requests for ADR services. One case is ongoing. In two cases suppliers decided not to proceed and the files were subsequently closed. In the two remaining cases, the disputes were resolved to the satisfaction of the supplier and the implicated department.

While OPO has often been effective in facilitating the resolution of issues between suppliers and government departments, occasionally the Office is made aware of specific cases or systemic procurement practices which bring into question the fairness, openness or transparency of federal procurement. In these cases, the Office relies on its third strategic objective: Investigate.

# Investigate



## INVESTIGATE

Examine and review procurement issues

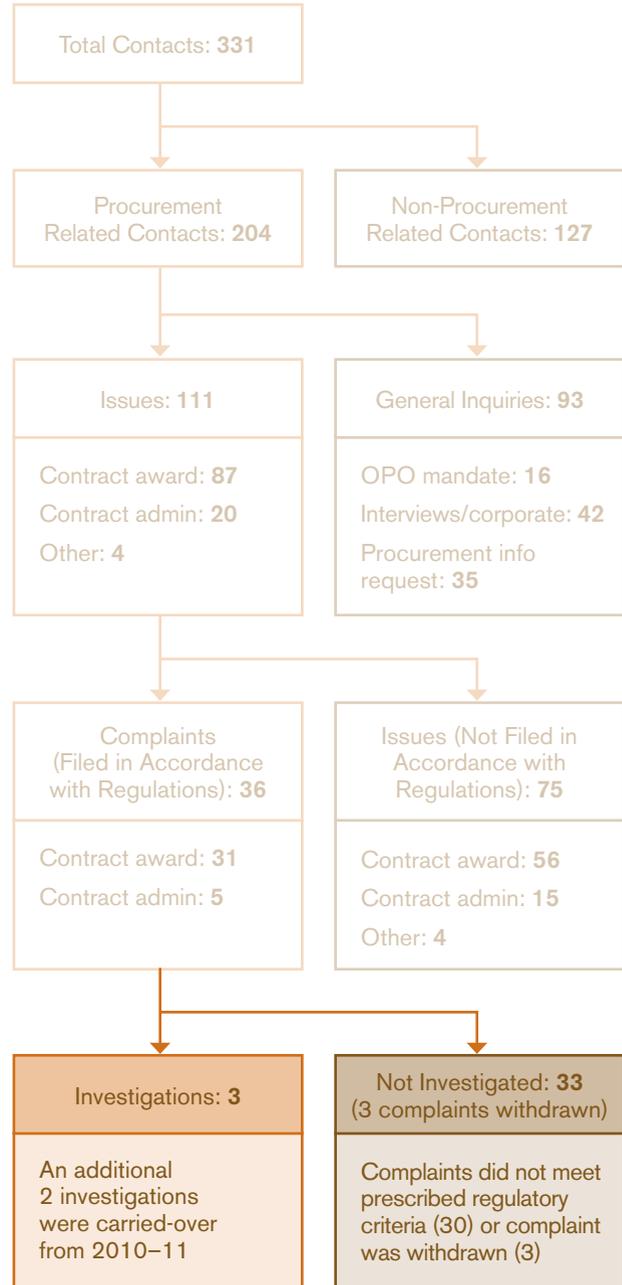
The Office investigates complaints from suppliers about procurement practices associated with specific contracts, and reviews procurement practices which may be systemic in nature.

### THE INVESTIGATIVE APPROACH

In instances where the Office receives a complaint filed in accordance with the *Procurement Ombudsman Regulations*, the complaint is assessed by a team of federal procurement experts and a senior legal advisor. The assessment ensures adherence to the prescribed criteria of the Regulations (*see sidebar on next page*). Only when a complaint meets the prescribed criteria is the Procurement Ombudsman permitted to launch an investigation.

In 2011–12, of the 36 complaints filed in accordance with the Regulations, 6 met all of the prescribed regulatory criteria. As a result three investigations were launched while three complaints were withdrawn. The Office also completed two investigations on work that carried over from the previous fiscal year.

**Only when a complaint meets the prescribed criteria is the Procurement Ombudsman permitted to launch an investigation.**



**Some of the regulatory criteria that must be met for OPO to review complaints on contract award:**

- Complainant is a Canadian supplier
- Complaint is filed in writing, within prescribed timeframes
- Contract has been awarded
- Contract value is less than \$25K for goods or \$100K for services
- Department falls under the jurisdiction of the Ombudsman
- Applicability of *Agreement on Internal Trade*, except for dollar thresholds
- Facts or grounds of the complaint are not before the *Canadian International Trade Tribunal* or the courts
- Reasonable grounds

**Complaints on the administration of contracts must meet some of the above criteria (however, no dollar thresholds apply). Additional regulatory criteria include:**

- Supplier was awarded the contract to which the complaint relates
- Complaint about application/interpretation of terms and conditions

For the complete list of criteria, please consult the *Procurement Ombudsman Regulations* which can be found at <http://opo-boa.gc.ca/plainte-complaint-eng.html>

The remaining 30 complaints did not meet the prescribed regulatory criteria. The most common regulatory criteria not met, which resulted in the complaint being outside the Office's jurisdiction, entailed the following:

- The service was not covered by the *Agreement on Internal Trade* (for example, Aboriginal set-aside programs);
- The complaint dealt with a standing offer or supply arrangement; or
- The contract was above OPO's dollar value thresholds (\$25K for goods, \$100K for services).

Despite issues falling outside the OPO prescribed regulatory criteria, the Office strives to help address complaints. With the written permission of the complainant, the Office submits the complaint to the attention of the deputy head of the federal organization involved. In addition, and in keeping with the Office's motto "We are here to help," OPO staff work with the federal organization involved to try and help resolve the complaint. In one instance, a complaint was received with respect to the award of a contract for services. Specifically, a supplier alleged that the contract had not been awarded to the lowest cost proposal, as per previous solicitations issued by the same department for similar services. Although the value of the contract in question exceeded OPO's regulatory threshold for investigating complaints regarding the award of a service contract, the Office raised the issue with the department in question. As a result, the department terminated the contract and issued a revised solicitation.

The following summarizes the five investigations completed in 2011–12, all dealing with the *award* of contracts.

## INVESTIGATION SUMMARIES

### **(i) Bid evaluation criteria were not restrictive, but the department did not share contract award information in a timely manner**

OPO investigated a complaint received regarding a Request for Proposal (RFP) and the subsequent award of a contract for services. One of the allegations was that the department's mandatory and rated bid evaluation criteria unfairly limited the opportunity to specific bidders. The supplier also alleged that the department refused to provide information regarding when and to whom the contract was awarded in an effort to delay the complainant's raising the issue with OPO.

The investigation found no basis for concluding that the department unfairly limited the opportunity as alleged. In fact, evidence demonstrated that the department adjusted the RFP to allow for a broader range of bidders. The Office did, however, recommend that in the future the department provide timely information on when and to whom the contract was awarded.

### **(ii) The department's actions did not favour a particular supplier, even though some aspects of the requirement were not disclosed**

A supplier alleged that a department intentionally issued the solicitation just before a long weekend to discourage participation in a bidding process and that certain bid evaluation criteria favoured a particular supplier.

The investigation found that the department provided 15 calendar days to all suppliers to submit proposals, consistent with federal practices, and there was no evidence to support the complainant's allegations.

OPO noted, however, that the department did not disclose the full extent of the service requirements and recommended that this be done in the future as it could influence potential bidders' decisions on whether to submit a proposal.

### **(iii) The department evaluated all proposals in the same way but did not inform suppliers of changes to selection methods**

OPO investigated a complaint regarding the award of a contract for consulting services. A department's evaluation process ranked the complainant's proposal second. The complainant raised several issues with OPO, including allegations that the department applied a revised selection method, which had not been stated in the bid solicitation document or conveyed to bidders at any point.

The investigation concluded that although all proposals were rated and evaluated in the same manner, the failure to communicate the selection method compromised the integrity and transparency of the procurement process. In addition, the department did not have adequate file documentation to support decisions and actions taken. The Office recommended that the department: (i) ensure all criteria are provided to potential bidders and applied as part of the evaluation; and (ii) ensure required documents are included in procurement files.

### **(iv) The department followed the terms of the Request for Proposal in assessing proposals, but used undefined adjectives in describing the requirements**

OPO investigated a complaint regarding the award of a contract for services following a competitive Request for Proposal (RFP) process wherein nine suppliers were invited to submit proposals. The complainant alleged that the department did not follow the terms of the RFP in assessing its proposal and did not apply the same bid evaluation criteria to assess all proposals.

The investigation found that the department followed the terms of the RFP and applied the same criteria and standards to assess all the proposals in a consistent manner. However, the Office recommended against

the use of undefined adjectives (such as “extensive” when describing experience) for bid evaluation criteria that are subjective.

**(v) The complainant receives compensation for the cost of submitting its bid where the contract was awarded using undisclosed bid evaluation criteria**

OPO received a complaint regarding the award of a contract against a National Master Standing Offer for the provision of services. This arrangement involved a list of pre-qualified suppliers with a “right of first refusal” clause whereby the supplier with the lowest rate is required to be approached first by the department and offered the work. If the supplier cannot fulfill the requirement, the next ranked supplier on the list is provided with the opportunity.

The supplier was asked by the department to submit a proposal and then advised by the department that the proposal did not meet the mandatory criteria of “extensive knowledge” in a particular area. The supplier contacted OPO alleging the mandatory requirements were not clearly identified.

OPO’s investigation concluded the mandatory requirements must be assessed on a pass/fail basis, and failure to define “extensive knowledge” did not allow for an objective assessment. Moreover, by not defining the word “extensive” in describing knowledge, the department applied undisclosed criteria in evaluating the proposals.

The circumstances surrounding this case met the requirements of the *Procurement Ombudsman Regulations*, whereby OPO can recommend payment of compensation to the supplier. Accordingly, OPO recommended that the department pay the supplier compensation equal to the cost of submitting the bid. Financial compensation was negotiated and agreed to by the supplier and the department.

### QUICK FACT

For complaints about *contract award* that are founded, the Office of the Procurement Ombudsman can recommend compensation to a supplier. Regulatory factors that must be met for the Office to recommend compensation include submission of a bid by the complainant, a reasonable prospect that the complainant would have been awarded the contract and the degree to which the complainant was prejudiced.

### ADDRESSING SYSTEMIC ISSUES

Many procurement issues brought to OPO’s attention are isolated to a specific procurement process. Sometimes, however, the Office becomes aware of issues that are systemic in nature and can affect the federal procurement system more broadly. As a means to help preserve the integrity and accountability of federal procurement, the Office reviews procurement practices of a federal department(s) to assess their fairness, openness and transparency and, where warranted, recommends improvements.

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## PROCUREMENT PRACTICES REVIEW SUMMARIES

In 2011–12, OPO released three procurement practices reviews. The full version of each report is available at [www.opo-boa.gc.ca](http://www.opo-boa.gc.ca). A summary of each review follows.

### (i) Selected Advance Contract Award Notices

Based on a complaint from an OPO stakeholder who raised concerns about favouritism and tailored requirements, the Office reviewed four Advance Contract Award Notices (ACANs) issued by the Public Service Commission (PSC). An ACAN is used to advertise a department's intention to direct the award of a contract to a specific supplier, under certain circumstances.

OPO assessed whether the PSC's activities supported fairness, openness and transparency and adhered to applicable policies regarding the use of an ACAN. In each of the four ACANs for the services of four external members of the Independent Audit Advisory Committee, the PSC claimed only one individual could perform the required work.

OPO found that: the PSC knew there was more than one supplier who could do the work and therefore had no basis for directing the four contracts to those individuals or for using the ACAN process; the ACANs were missing information that would have assisted other potential suppliers in determining whether they were capable of performing the work; and the PSC favoured the existing committee members by tailoring requirements to match their capabilities. The Office made several recommendations designed to increase the accountability, fairness and transparency of future directed-contracting processes. The PSC agreed with OPO recommendations and did not exercise the option to renew the four contracts.

### (ii) Professional Services Online

Professional Services Online (PS Online) is an electronic procurement tool with a database of pre-qualified suppliers that provide professional services. Departments can use this tool to reduce the amount of time normally required for a competitive procurement process for low dollar value procurements (i.e. for service contracts under \$100K). The Office interviewed nine departments and received survey responses from 22 of the 30 suppliers contacted.

OPO's review sought to assess: Public Works and Government Services Canada's (PWGSC's) management of PS Online; the extent to which selected departments made use of the tool, support fairness, openness and transparency; and, obtain the views of suppliers.

OPO observed that PWGSC did not have any means of capturing data on the number and dollar value of contracts awarded through PS Online, thus limiting its ability to ensure optimal usage of the tool and promote it to departments not currently using it. Also, departments are using PS Online inconsistently or not at all as they have a choice among many procurement tools. Finally, the results of the review indicated the pre-qualification process worked well and suppliers are generally happy with it.

OPO recommended that PWGSC continue with plans to update PS Online support systems to make it easier for departments to use the tool, and continue with efforts to minimize the overlap with other methods of supply for professional services.

## TESTIMONIAL...

*“It is encouraging to observe that complaints such as mine will be thoroughly examined and, if deemed worthy, will be actioned. It is also deeply gratifying to me as a taxpayer that our government is not so large and bureaucratic as to ignore the legitimate concerns of its citizens. I intend to bid again ... whether or not I am successful, I wish to thank you and your office for your efforts on my behalf.”*

- Supplier -

### (iii) Follow-up on 2008–09 Reviews of Procurement Practices

Follow-up reviews are an annual activity undertaken by OPO to determine what action federal departments have taken with regard to the Office's recommendations. OPO's review assessed recommendations contained in five reports on procurement practices reviews conducted in 2008–09 involving 16 federal departments.

All 16 departments participated in the follow-up process, with many providing comprehensive action plans and reporting on the implementation of significant changes designed to improve their procurement practices. The majority of planned departmental actions were near completion. The report informed stakeholders of specific actions being taken by departments to improve fairness, openness and transparency in procurement. Several examples of positive initiatives were found, including increased consultation with suppliers, enhanced post-contract

procedures for debriefing unsuccessful suppliers and strengthened governance for procurement review committees. The review activity also served to share information on improvements being implemented in the 16 departments reviewed, which may facilitate the introduction of similar advances in other departments. Information on the nature and extent of the changes being introduced in response to OPO recommendations provides the Office with an indicator of the usefulness and relevance of its work.

### ADDITIONAL ANALYSIS

There are occasions where procurement issues are brought to the Office's attention and it is not apparent at the outset whether they necessitate a practice review. In those instances, the Office may undertake additional analysis of the issue to determine if it is systemic in nature, if it is relevant to OPO stakeholders and if reasonable grounds exist to launch a review. This additional analysis is exploratory in nature and allows the Office to determine if more in-depth work should be undertaken on the issue. In 2011–12, the Office undertook additional analysis in two areas.

#### Advance Contract Award Notices

Following the publication of OPO's review on the use of Advance Contract Award Notices by the Public Service Commission, a complainant indicated that the issues identified in the report were “the tip of the iceberg” in the misuse of ACANs. This allegation resulted in the Office's monitoring of all ACANs published on MERX™, Canada's electronic tendering service, for a six-month period to determine the validity of the complainant's allegation.

OPO reviewed 442 ACANs published between July 2011 and January 2012 using a combination of objective and subjective criteria to assess whether

they met Treasury Board and Public Works and Government Services Canada policy requirements. More specifically, the monitoring focussed on whether it appeared the information contained in the ACANs: (a) was so specific that it suggested requirements were being tailored to a specific supplier's goods or services; (b) could be construed as a true "market test" to evaluate whether another possible source of supply existed; and (c) was sufficiently complete to allow a challenge (i.e. another supplier could submit a statement of capabilities demonstrating that it is capable of meeting the requirements of the ACAN). The Office also examined data elements to ensure they were properly included in the monitored ACANs (e.g. the closing date of the ACAN, the contact point for questions, the name and address of the proposed supplier). This process enabled OPO staff to identify cases where the ACAN did not appear to have been used as intended and/or policy requirements did not appear to be fully respected.

The results of the monitoring revealed that just over half of the 442 ACANs appear to contain enough information to allow another supplier to submit a statement of capabilities, and that less than one quarter appear to be a legitimate attempt by the contracting department to test the market for an alternative source of supply.

While OPO could not substantiate or refute the complainant's allegation based on this monitoring exercise, the results of this analysis raise questions about whether the policies governing the use of ACANs are sufficiently explicit and unambiguous to allow ACANs to be used as intended.

### **Monitoring of MERX™ Postings**

The Office was contacted by a stakeholder alleging an apparent "growing number of misclassifications" of solicitations on MERX™. MERX™ is Canada's electronic tendering service that enables suppliers to search, view and bid on federal, provincial and

municipal procurement opportunities. The stakeholder highlighted the potential for solicitations to be intentionally misclassified by a public sector organization in order to provide a preferred supplier with an opportunity to furtively respond to the organization's solicitation with little to no competition. Specifically, the stakeholder alleged bid opportunities related to road work were improperly categorized under the category of "communications, photography, mapping, printing and publishing services". While the "misclassification" examples provided by the stakeholder were not of federal government solicitations, the Office undertook an assessment of a sample of MERX™ postings from July to November 2011 to determine the potential for this allegation to apply to federal procurement.

The analysis revealed that the association of the numbers used to identify a good or service (i.e. the Goods and Services Identification Numbers, or GSINs) to their corresponding category or categories is beyond the control of the contracting organization. While an organization can select the identification number that most closely matches the required good or service, the associated category(ies) is automatically generated by the system. We did however find that the process of selecting identification numbers can be subjective, potentially leading to inconsistencies in the categorization of postings for similar requirements. For example, identification number J17220A (Carpet, Installation) linked to the category *Furniture*, whereas identification number 5169FC (Carpet Laying/installation) is linked to the category *Construction Services*. In both cases the requirement is the same: laying carpet.

The results of the assessment did not uncover any evidence to substantiate the allegations of potential misclassifications at the federal level. The perception of misclassification may be a result of the fact that identification numbers are often associated with more than one category, a practice that results in broader advertisement of the opportunity.

# Moving Forward



**E**stablished in 2008, OPO continues to mature as an organization and to refine the manner in which it carries out its mandate. Two key initiatives are expected to further influence these refinements.

The first concerns the results of a formative evaluation launched in 2011–12. The objective of the evaluation is to assess OPO's overall effectiveness during its first three years of operation. This evaluation is consistent with Treasury Board requirements to periodically assess the value for money of federal programs. Two steps were taken to ensure that the evaluation is neutral and independent:

- 1) An external advisory committee made up of senior officials was established and is overseeing the approach and conduct of the evaluation.
- 2) An independent third-party contractor was engaged to carry out an evidence-based analysis, which includes obtaining the views of OPO stakeholders.

Once completed, the Office will make the results of the evaluation public and make any necessary adjustments to address the evaluation findings.

The second area involves a continued emphasis on transparency and outreach. The Office is currently exploring ways to provide stakeholders with easier access to its products and services. For example, OPO is updating its Web presence to make the information available on its Website easier to access. The Office is also actively implementing a more robust outreach program geared to engaging the Office's stakeholders in a more meaningful way. This means providing suppliers and the federal procurement community with easier access to the Office's people, services and reports. It also means putting stock in the suggestions of the people the Office was created to help by actively seeking their feedback on-line, by telephone and in person.

# Appendix A



## STATEMENT OF OPERATIONS FOR THE YEAR ENDED MARCH 31, 2012

### Statement of Operations

Expenses	2011–2012
	(\$000)
Salaries and employee benefits	2,589
Professional services	480
Operating expenses	38
Information and communication	30
Materials and supplies	49
Corporate services provided by PWGSC (note 3)	428
<b>Total</b>	<b>3,614</b>

The following notes are an integral part of the Statement of Operations.

#### OFFICE OF THE PROCUREMENT OMBUDSMAN

#### NOTES TO THE STATEMENT OF OPERATIONS FOR THE YEAR ENDED MARCH 31, 2012

##### 1. Authority and objective

The position of Procurement Ombudsman was created through the *Federal Accountability Act* and established through amendments to the *Department of Public Works and Government Services Act*. OPO is an independent organization with a government-wide mandate, which is defined in the *Procurement Ombudsman Regulations*. Its overall objective is to ensure the fairness, openness and transparency of government procurement.

##### 2. Parliamentary authority

The funding approved by the Treasury Board for the operation of the Office of the Procurement Ombudsman is part of Public Works and Government Services Canada's (PWGSC's) appropriation, and consequently, the Office is subject to the legislative, regulatory and policy frameworks that govern PWGSC. Nonetheless, implicit in the nature and purpose of the Office is the need for OPO to fulfill its mandate in an independent fashion, and be seen to do so, by maintaining an arm's-length relationship with PWGSC.

### 3. Related party transactions

The Office has a memorandum of understanding whereby PWGSC provides corporate services to the Office in the areas of finance, human resources and information technology. In 2011, the Office incurred expenses of \$428,000 for these services, which are broken down as follows:

<b>Corporate services provided by PWGSC</b>	<b>(\$000)</b>
Finance	88
Human resources	75
Information technology	216
Services received from Government Consulting Services	49
<b>Total</b>	<b>428</b>

### 4. Comparative figures

In 2011–12, the Office undertook several key initiatives and projects in the areas of environmental scanning, human resources, procurement research and formative evaluation, leading to an increase in professional services expenses over the previous fiscal year. This resulted in an overall increase in expenditures of approximately \$190,000.

<b>Expenses</b>	<b>2011–12</b>	<b>2010–11</b>
	<b>(\$000)</b>	<b>(\$000)</b>
Salaries and employee benefits	2,589	2,611
Professional services	480	261
Operating expenses	38	67
Information and communication	30	27
Materials and supplies	49	53
Corporate services provided by PWGSC	428	405
<b>Total</b>	<b>3,614</b>	<b>3,424</b>