



Promoting Fairness,
Openness and
Transparency in
Federal Procurement

2013-2014 Annual Report



**OFFICE OF THE
PROCUREMENT
OMBUDSMAN**



Office of the Procurement
Ombudsman

Bureau de l'ombudsman
de l'approvisionnement

Canada

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**THE MINISTER OF
PUBLIC WORKS AND
GOVERNMENT SERVICES**

Dear Minister:

Pursuant to paragraph 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 2013–2014 fiscal year.

Yours sincerely,

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

Frank Brunetta

Procurement Ombudsman

Ottawa, July, 2014

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**MESSAGE
FROM THE
PROCUREMENT
OMBUDSMAN**

MESSAGE FROM THE PROCUREMENT OMBUDSMAN

It is a pleasure to submit the Annual Report for the Office of the Procurement Ombudsman (OPO). This report represents a summary of the activities undertaken by my office in the 2013–14 fiscal year.

This year has seen a marked increase in the number of contacts to my office. We received 501 contacts in 2013–14 compared to 369 in 2012–13. This 36% increase is attributable, in large part, to our sustained efforts to inform suppliers selling goods and services to the federal government that we are here to help those experiencing difficulty.

Commensurate with the increase in the volume of contacts has been an increase in the number of procurement-related issues being raised to us. This increase is to be expected as a supplier contacting my office often raises more than one issue. It is not unusual, for example, for a supplier to contact us to discuss an unsuccessful bid and, in the process, raise other issues such as the department's chosen procurement strategy, the clarity of the statement of work or perhaps the department's refusal to provide an explanation of the bid's shortcomings.

In the vast majority of cases, suppliers contacting my office are not doing so with the specific intent of filing a complaint. Most are simply looking for information or an explanation from an impartial, neutral third party. Consistent with the role of an ombudsman, we do our utmost to help these callers, some of whom are exasperated. Our goal is to deal with each individual and the issues they raise in a prompt, personalized manner while remaining unbiased and objective. What has become apparent in dealing



with these business men and women is that it isn't necessarily the information we provide to them or our explanation of the procurement process or federal contracting rules that matter; what matters is hearing the facts from an independent source that has no vested interest in the issues being raised. We've found that it is often not a case of what is being said, but who is saying it that makes the difference.

As I have outlined in the body of this report, the vast majority of issues raised with my office are issues that have previously been reported and which are a source of continued frustration for suppliers. These include recurring issues such as the time and expense of preparing bids only to have them rejected for seemingly insignificant administrative reasons, the time and difficulty associated with obtaining security clearances or the ongoing perceptions of biased statements of work. Among these issues are two which have come up on occasion in the past, but were voiced repeatedly over the course of the year: the requirement for suppliers to carry liability insurance as a contract condition, and the perception that there are an escalating number of national solicitations that include a requirement for country-wide delivery capability.

We heard of the issue of liability insurance in Ottawa, at one of our first town halls of the year, and it was echoed throughout the year at other outreach events across the country. There is a sense among suppliers that departments are arbitrarily defaulting to requiring firms to carry insurance whether or not there is an established need. Government policy requires departments to assess the risks associated with each contract and to make an informed decision as to whether there is a risk-based need to require the supplier to carry liability insurance. The policy provides federal departments the discretion to include liability clauses in contracts if appropriate and warranted, such as for highly specialized services contracts in support of ensuring the health, safety and economic well-being of Canadians. The policy guidance acknowledges that excessive requests for liability protection may increase the expected cost to the contractor and may lead contractors to increase prices or refrain from dealing with the Crown. Accordingly, departments have the option of remaining “silent” on the insurance requirement. Where a department chooses to remain silent suppliers have the discretion whether or not to purchase liability insurance. In these situations common and civil law principles apply, meaning both the government and suppliers are respectively liable for losses and damages under their control.

Firms supplying services such as research, writing, editing and training are voicing concern about what they perceive as the burdensome and wasteful expense being created by departments’ indiscriminate inclusion of the liability insurance requirement when their type of work involves little to no potential for liability.

The second issue is a sentiment expressed by suppliers, particularly those outside the National Capital region, of feeling “squeezed out” by the

escalating number of national solicitations that include a requirement for country-wide delivery capability. Departmental officials point out that in this period of budgetary restraint it is more efficient to establish and manage single, national contracts as opposed to the numerous, smaller, regionally-issued contracts. While this may make good economic sense in a period of fiscal austerity, smaller firms, many who have for years supplied goods or services in communities across Canada, are feeling increasingly disadvantaged. Some have told us they are no longer able to compete for federal contracts. One supplier in Edmonton spoke of a solicitation which contained a requirement for firms to have offices across the country. She described this requirement as a barrier to continuing to do business with federal departments she has been doing business with for years. A supplier in Kingston was categorical in stating “these bigger contracts are disadvantaging smaller firms who don’t have the resources to compete”. While most business men and women see “the big picture,” there is nevertheless a frustration by what appears to be a disconnect—on the one hand, the apparent steady shift by departments and agencies to national procurements, which, while the intent is to be more cost effective, are denying them the prospect of bidding on traditional business opportunities; and on the other, the government’s desire to stimulate a healthy, vibrant small- and medium-sized-business community in all regions of the country.

In last year’s report I mentioned my office was continuing to pursue recommendations stemming from two studies, an assessment of our outreach program as well as an independent formative evaluation carried out on the effectiveness of the Office.

As I alluded to earlier, significant progress has been made in implementing the formative evaluation recommendation for a more robust outreach program

to reach a larger number of suppliers and inform them about the services we offer. This includes such things as targeted town hall meetings with suppliers in key locations across the country, presentations to Chambers of Commerce, meeting Members of Parliament and their constituency staff, participating in events organized by provincial business networks and municipal economic development organizations, developing a social media presence and creating new means for suppliers to contact us. Judging from the increase in the number of contacts to the Office, the program appears to be working. Whether by telephone, letter, e-mail, website or in-person at one of our outreach events, more than 1000 suppliers took the time this year to share with us their issues and experiences in selling goods and services to the federal government.

Another element to this targeted approach to informing suppliers of my office's existence included referencing it as a recourse mechanism in departmental and agency procurement documents. To promote this initiative, in June 2013, the Minister of Public Works and Government Services wrote to her Cabinet colleagues encouraging them to work with their deputy heads to include information related to the Office in key procurement documents (namely solicitations, resulting contracts, and regret letters informing suppliers they have been unsuccessful in bidding for a contract) issued by federal departments and agencies falling within their portfolios. It is important to remember that in establishing the Procurement Ombudsman position, the Government of Canada provided Canadian firms supplying goods and services to federal departments and agencies with an impartial authority, one that is independent of the organizations doing the purchasing, to receive and help resolve issues and review complaints. Accordingly, suppliers doing business with the federal government have a right to know an impartial

authority exists: an authority which is independent of the department or agency they are dealing with, so that they can make an informed decision on how to pursue their issues. As mentioned earlier, ensuring suppliers are aware of the Office and are provided the opportunity to make this decision has been the impetus of our sustained outreach efforts and was a key consideration in this particular initiative.

In terms of the two remaining formative evaluation recommendations, one dealt with my office's mandate, the other with our dispute resolution service. I will start with the mandate recommendation.

After identifying that a "significant number of suppliers" indicated the mandate of the Office should be expanded to better address the needs of small- and medium-sized businesses, the evaluation recommended we assess the advantages and disadvantages of expanding our mandate to include complaints of higher dollar-value, and measures requiring departments to address the recommendations made in our reviews. The assessments have been completed. The independent assessment found no persuasive reason for changing the monetary thresholds that underpin the Procurement Ombudsman's mandate. This assessment concluded the original policy rationale, namely that my position fills a gap in the federal dispute resolution system for contracts, remains compelling. The second assessment found no compelling reason why the Procurement Ombudsman's recommendations should be mandatory as such authority would be inconsistent with the status of an ombudsman.

The formative evaluation also identified a concern from within the supplier community that departments are able to decline participation in my office's dispute resolution service when it has been requested by a

supplier. The evaluation recommended we determine if participation could be made mandatory. An independent assessment found the voluntary participation in our mediation service is in keeping with the principles of alternative dispute resolution.

Looking to the year ahead, I am committed to continuing with our efforts to raise awareness of our services amongst both the supplier and federal procurement communities. Of particular importance will be promoting our dispute resolution service which has great potential to help suppliers and departments but is largely unknown and underutilized. As it is reasonable to expect these efforts will result in a continued increase in the number of suppliers contacting the Office, I am equally committed to making the necessary organizational adjustments to enable us to maintain an exemplary level of responsiveness to suppliers and government officials who turn to us for help.



Frank Brunetta
Procurement Ombudsman



**WE ARE
HERE
TO HELP**

WE ARE HERE TO HELP

The Office of the Procurement Ombudsman (OPO) provides an avenue, both to Canadian firms selling goods and services to the federal government and government officials purchasing those goods and services, to address the procurement-related issues that inevitably arise in any day-to-day commercial transactions. The Office is an independent organization, not beholden to any government department or agency, available to help when issues arise that cannot be resolved between the supplier and the department. As a legislated ombudsman there is a legal mandate and regulations governing how the Office operates. Such things as what complaints the Office is permitted to review and the time in which the review must take place, among others, are prescribed in the *Procurement Ombudsman Regulations* (the Regulations).

primary responsibilities as helping to foster more open, effective, and productive relationships between federal departments and suppliers. This is often more easily achievable through constructive dialogue than through formal recourse.

Despite our best intentions and efforts however, occasionally concerns and issues are brought to our attention that cannot be resolved through our informal third-party intervention role. The issues raised to us in these cases suggest the principles of fairness, openness or transparency have been compromised in a procurement process or that a systemic issue exists. In these situations we have a responsibility to examine the matter impartially and objectively, being careful to neither be an advocate for suppliers nor an apologist for government departments or agencies. In doing so, our goal is to expose the facts, and where necessary, assist departments and agencies in identifying corrective measures to reinforce, or on occasion, restore those principles.

“AS A SMALL BUSINESS OWNER WHO CONTRACTS WITH GOVERNMENT YOUR OFFICE PROVIDES AN INVALUABLE SERVICE TO HELP WHEN CONFLICTS ARISE AND CONTRACTS RUN INTO TROUBLE. THANK YOU FOR THE HELP YOU PROVIDE AND SHOULD WE EVER RUN INTO PROBLEMS IN THE FUTURE WE WILL NOT HESITATE TO CONSULT WITH YOUR OFFICE FOR INFORMATION AND HELP.”

— SUPPLIER

But the Office is nevertheless an ombudsman's office. Meaning we are, first and foremost, here to help. Help by answering questions, by explaining procurement processes, by de-escalating disputes and by helping to resolve issues. So while there is a certain formality we are required to respect when a complaint is filed or when we are approached to mediate a dispute, most of our efforts are spent trying to deal with matters informally. We do this because we view one of our

Whether we are clarifying some aspect of procurement, stimulating a more productive dialogue between a supplier and department or getting to the bottom of allegations, we are committed to doing our part in increasing Canadians' confidence in the fairness, openness and transparency of federal procurement activities.

Our Mission

To promote fairness, openness and transparency in federal government procurement.

Our Mandate

The *Department of Public Works and Government Services Act* provides the authorities for the Procurement Ombudsman to exercise his or her mandate as follows:

- Review complaints with respect to the award of a contract for the acquisition of goods below \$25,000 and services below \$100,000 (including taxes);
- Review complaints with respect to the administration of a contract, regardless of dollar value;
- Review the practices of departments for acquiring goods and services to assess their fairness, openness and transparency and make recommendations where necessary to improve those practices; and
- Ensure that an alternative dispute resolution process is provided, if requested and agreed to by both parties to a federal contract.

Educate, Facilitate and Investigate

To achieve our mission of promoting fairness, openness and transparency in federal procurement, our strategic objectives are focused on three areas, areas we call our pillars:



The Office is regularly contacted by suppliers and government officials who pose questions and raise issues or concerns regarding procurement. Responding to these contacts is the first step in how we are here to help.



**PROFILE OF
CONTACTS**

PROFILE OF CONTACTS

Each year the Office is contacted by hundreds of Canadians seeking assistance of one kind or another. While the majority contact us to discuss a procurement-related issue, others need different types of help; for example, finding the appropriate department to deal with a problem they are experiencing. Regardless of the nature of the call, we do what we can to assist those who contact us. The 501 contacts represent an increase of 132 contacts (36%) from the 369 contacts in 2012-2013 (Diagram 1).

Of the 501 contacts, 190 (38%) were non-procurement-related, meaning inquiries from members of the general public regarding such things as attempting to reach a government department or experiencing difficulty with a non-procurement-related government program. This past year saw an increase of 54 (40%) non-procurement-related contacts.

The remaining 311 (62%) contacts were procurement-related and are detailed in the remainder of the report.



DIAGRAM 1

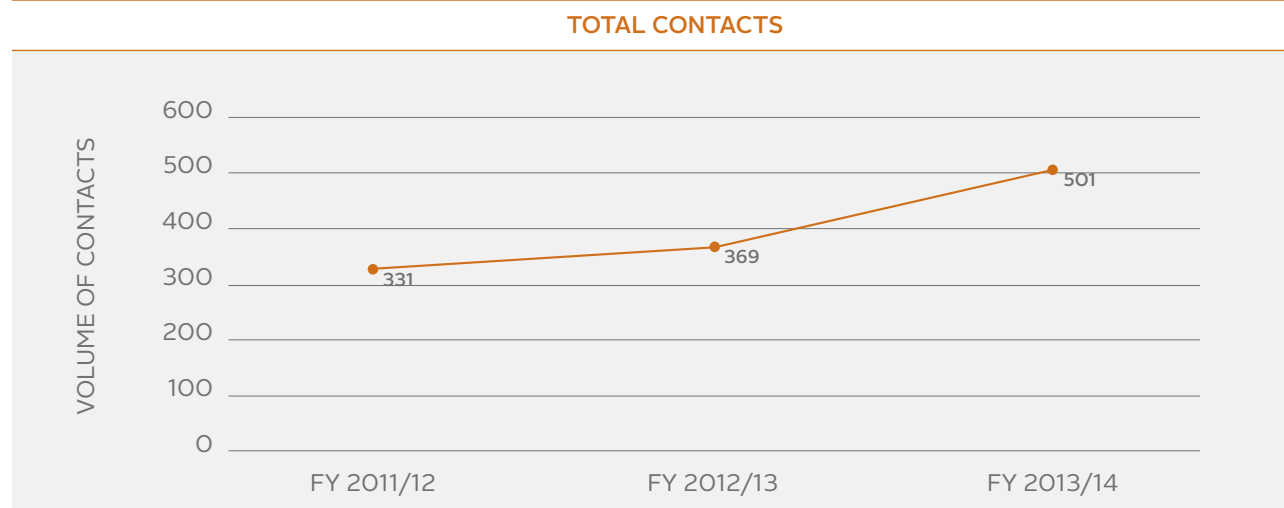
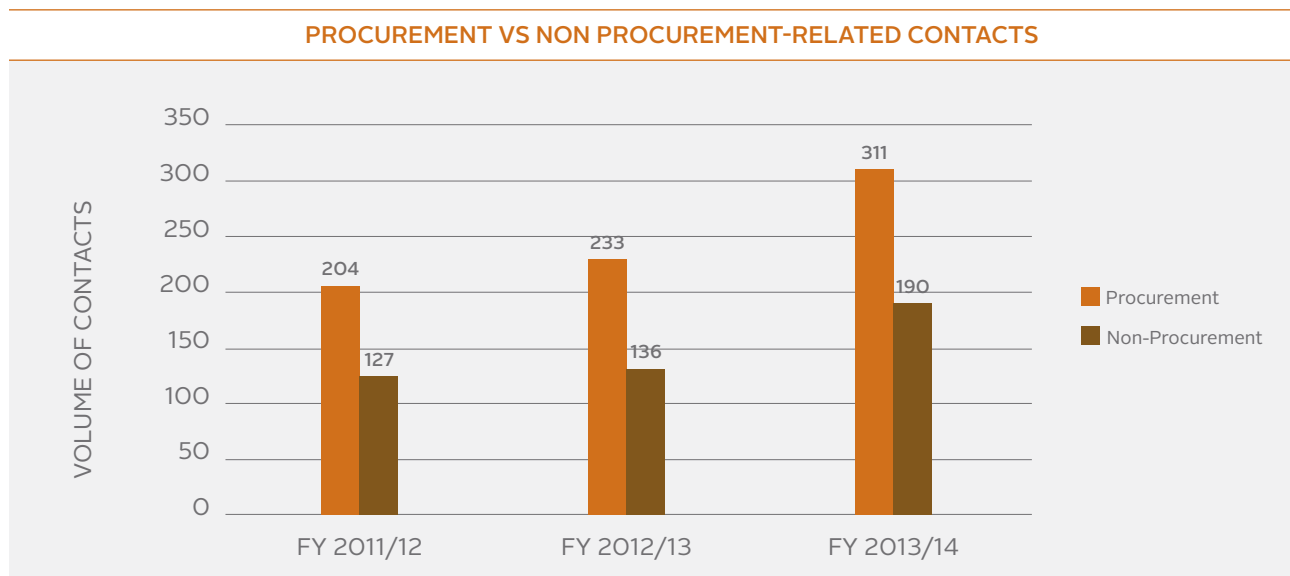


Diagram 2 illustrates an increase of 78 (33%) procurement-related contacts over the previous year and 107 (52%) since 2011-12 and reveals an ongoing increase in the number of Canadians contacting the Office for help.

DIAGRAM 2



OPO's three pillars — **Educate, Facilitate** and **Investigate** — provide the structure for understanding the nature of OPO's activities as well as how we handled the 311 procurement-related contacts, beginning with the Educate pillar.

**EDUCATE
FACILITATE
INVESTIGATE**

THE PROCUREMENT OM
CAN HELP YOU!

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EDUCATE

What We Did to Raise Awareness of Procurement Issues and Exchange Information

Communication is a critical component of the Educate pillar. Our ability to raise awareness of procurement issues is as linked to our ability to listen as it is to inform.

The 311 procurement-related contacts represent suppliers or government officials who turn to OPO for information and answers. Of these contacts, 117 (38%) fell into the “General Inquiries” category and include such things as questions about our legislated mandate or requests for procurement information. A good many of these inquiries are also from firms looking for information to better understand the various procurement tools and processes used by the federal government. These inquiries suggest an ongoing challenge in providing potential suppliers with clear, plain language instructions on how to do business with the federal government.

In other instances, suppliers want to discuss or alert us to something more particular or complex. As illustrated in Diagram 3 (on page 18), the Office saw a 73% increase in contacts of this nature, from 112 in 2012–13 to 194 in 2013–14. Of these 194 contacts, 114 (59%) raised issues related to the award of a contract and 34 (18%) spoke to us about issues related to the administration of a contract. The other 46 either provided their views regarding some aspect of procurement or provided suggestions regarding topics the Office should consider examining. As a firm contacting the Office typically raises more than one concern with us, these 194 contacts actually represent several hundred issues. For example, it is

not unusual for a supplier to contact us concerned about a failed bid and, in the process, raise other issues such as the department’s chosen procurement strategy, the contents of the statement of work or perhaps the department’s refusal to provide an explanation of the bid’s shortcomings.

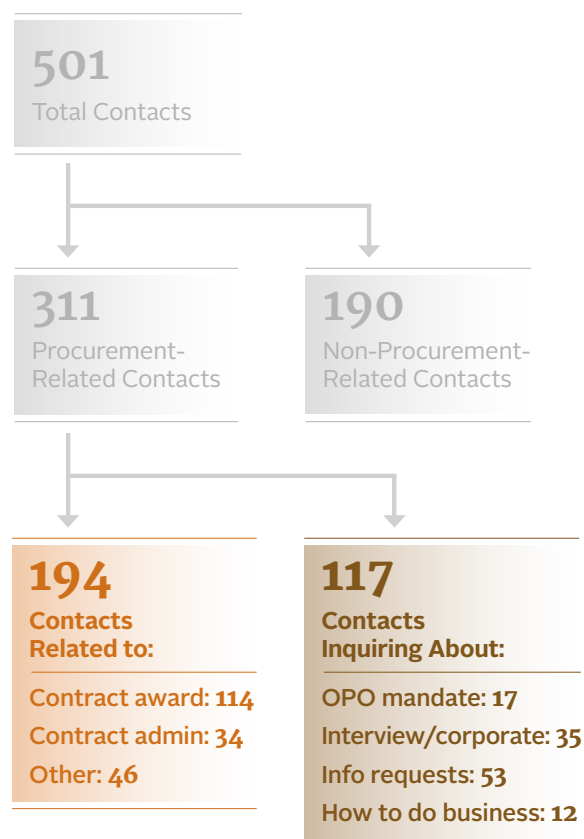
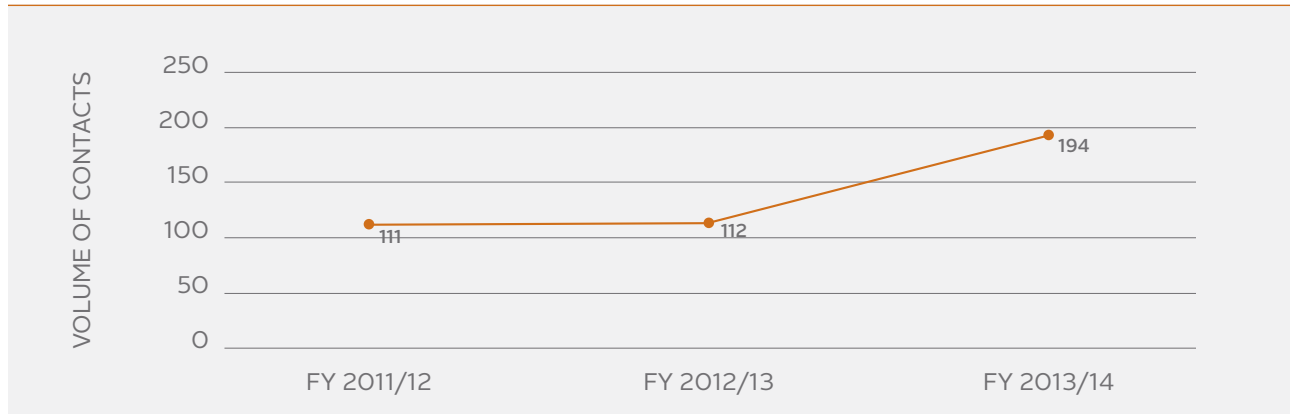


DIAGRAM 3

CONTACTS RELATED TO CONTRACT AWARD/ADMINISTRATION AND OTHER ISSUES



Departments and agencies are often best placed to address a supplier's concern. Accordingly, the Office's standard procedure when dealing with suppliers contacting us is to ask whether the implicated department or agency has been given the opportunity to address their concerns. In situations where the department has not been given this opportunity, suppliers are encouraged to contact the department. The Office intervenes once the supplier notifies us that it has unsuccessfully attempted to

resolve the concern with the department (which is most often the case), or the supplier is reluctant to contact the department.

Consistent with previous years, the issues most commonly raised to us by suppliers are typically spurred by an unsuccessful bid, a supplier's inability to bid and/or a department's treatment of the unsuccessful supplier. The list of the most common issues registered with the Office illustrated in Diagram 4

DIAGRAM 4

MOST COMMON PROCUREMENT-RELATED ISSUES 2013-14

Evaluation and Selection Plan (e.g., bias for or against supplier/class of suppliers, vague or unclear, excessive criteria, unbalanced weighting)

Evaluation of Bids (e.g., undisclosed/changed criteria, inconsistent application of criteria)

Procurement Strategy (e.g., competitive vs. non-competitive, type of contracting vehicle)

Professionalism (e.g., unreturned phone calls, unprofessional treatment, inconsistent advice, employer-employee relationship)

Debriefing (e.g., refused to provide, or provided insufficient information)

Statement of Work or Specification (e.g., bias for or against individual/class of suppliers, vague or unclear, insufficient information)

fall into these categories. While the issues contained in the list have remained consistent over time, this year the Office has noted an increase in the number of suppliers raising concerns regarding how a department has treated them. For example, suppliers have called us to discuss a department's refusal to provide information or not providing sufficient information, not returning phone calls, or staff behaving unprofessionally or providing inconsistent advice.

Hearing about concerns and issues is key to the Office's ability to identify potential shortcomings or areas for improvement in the federal procurement system. As such, in 2013–14 several new initiatives were launched as part of the Office's educate pillar. These included the following:

- 15 town hall style meetings with Canadian businesses from across the country. We discussed our legislated mandate and services, and in turn, participants shared their experiences and suggestions for doing business with the federal government.
- A social media presence with the creation of Twitter accounts (@OPO_Canada and @BOA_Canada).
- An online forum, "Share your thoughts on federal procurement", enabling Canadians to share either anonymous or identified feedback through the OPO website, which led to an additional 40 contacts to the Office.
- A quarterly e-newsletter, "Perspectives," raising awareness of OPO's mandate and services and highlighting upcoming OPO events, recent publications and initiatives.

These initiatives, coupled with the Office's traditional avenues, enabled suppliers to express their views, opinions and concerns. Highlights of some of the feedback received as a result of these initiatives include the following:

- Limited opportunities for the participation of small- and medium-sized businesses (SME) in large federal procurement projects.
- The negative impact on regional suppliers of bundling (i.e., grouping of commodities) and solicitations which require the ability to deliver on a national scale (e.g., National Master Standing Offers).
- Departmental reluctance to use directed or sole-source contracting for requirements under the \$25,000 threshold for competition.
- Excessive use by departments of directed or sole-source contracting for requirements under \$25,000.
- The amount of paperwork and time required to respond to solicitations reduces the profit margins and in certain cases makes it not worth bidding.
- The burden of being required to purchase liability insurance in low-risk contracting.
- The lack of up-front procurement planning by departments and subsequent negative consequences on suppliers (e.g., delays resulting in requests for suppliers to meet unreasonable delivery times, changing requirements mid-stream, cancelling the procurement process after suppliers have invested significant time and effort in bidding).

- The difficulty of building relationships and communicating with departments as procurement personnel are too focused on the process.
- The complexity and time associated with the security clearance process which is causing suppliers to miss out on business opportunities.

In addition, there were a few issues which were raised by both suppliers and government officials.

Examples include:

- The lack of procurement training and experience of some government personnel.
- The monitoring of vendor (i.e., supplier) performance.

These initiatives have allowed us to listen, learn and, where required, provide explanations to address the issues raised. In other cases, the provision of information was not enough and we were called upon to help facilitate the resolution of issues.



FACILITATE

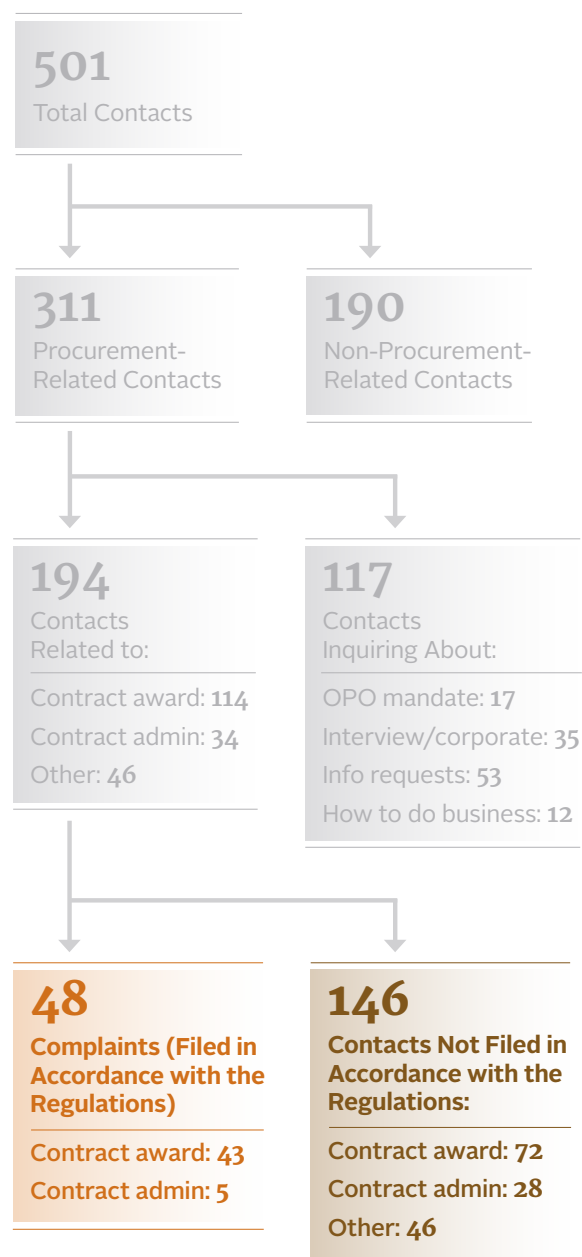
FACILITATE

What We Did to De-escalate Disputes and Help Resolve Issues

Suppliers contacting the Office with an issue are encouraged to provide the department they are dealing with the opportunity to address it before requesting our involvement. In situations where the supplier has been unsuccessful or is dissatisfied with its interactions with the department, or expresses a reluctance to contact the department, the Office tries to assist by playing an intermediary role. Often, this involves obtaining an understanding of the supplier's issue and contacting the department to outline and discuss it with them. Once we have obtained the department's perspective the information is relayed back to the supplier. In the majority of cases, this simple "go between" process alleviates the issue.

What has become apparent in playing this "go between" role is that often it isn't necessarily the information we provide as much as hearing it from an independent source; a source that has no vested interest in the issues being raised. In other cases, perhaps due to the complexity of the issue, playing the "go between" role is not enough. In these cases we either attempt to stimulate dialogue between the supplier and the department by encouraging them to speak to each other or by working with the department and supplier to find an acceptable, informal solution to the matter.

Of the 194 contacts, 146 (75%) were either dealt with informally (i.e., through our "go between" role) or could not be pursued for regulatory reasons. The 48 (25%) remaining cases, all of which were written complaints, are dealt with in the next section of the report, entitled: Investigate.



Examples of our success in helping to resolve issues through our facilitation role include the following:

The solicitation is on its way. But when?

A supplier, whose contract had expired several months earlier, was looking for the renewal he was told would be solicited shortly. “Shortly” turned into months. The supplier contacted the Office frustrated with what he perceived as a lack of accountability and caring on the part of the department. With the supplier’s consent, OPO contacted the department who informed us the renewal in question was still moving forward despite unforeseeable delays, and that the supplier would be advised when he could begin looking for the solicitation on the Government of Canada’s electronic tendering website: buyandsell.gc.ca.

Even limited tendering has to be slightly unlimited

A supplier had not been included in a list of invited suppliers for a solicitation. The supplier realized he could fulfill the requirement and approached the department to ask for a copy of the solicitation so as to submit a proposal. The department informed him he could not be included in the process as he had not been on the initial list of invitees. Unsure of the validity of the department’s explanation, the supplier called the Office. Working with the department it became clear that a list of invited suppliers should not be exclusive and the supplier was included in the competitive process.

Where have all the solicitations gone?

A supplier contacted OPO concerned a monopoly might exist in a requirement category where a Request for Proposal (RFP) had not been issued in more than 20 years. OPO conducted a search of the Government’s buyandsell.gc.ca website and identified several posted solicitations for the specific requirement as well as a record of a recently awarded contract. This information was relayed to

the supplier which not only dispelled the monopoly myth but also informed him of where to locate government solicitations.

But I thought you meant...

Upon being informed his proposal was not successful, a supplier requested clarification from the department. Frustrated by the department’s refusal to provide information, the supplier contacted the Office. After a discussion with OPO, the department realized there had been an error in the evaluation and the supplier had in fact been correct in raising its concerns. The department also realized the error had been consistently applied to all proposals it had evaluated as the criterion in question was vague and open to interpretation. While the outcome in awarding the contract did not change, the department committed to ensuring future criteria would be clearer.

Why isn’t that in the Statement of Work?

A supplier provided services under the contract, as required. However, the outcome was not what the department expected and payment was withheld. Concerned, the supplier contacted the Office. After a discussion with OPO, the department realized that while the outcome of the contract was not what it had expected, the supplier had nevertheless completed the work as stipulated in the statement of work. The department agreed to pay the supplier in full.

Many of the cases brought to our attention are dealt with through this type of “go between” process. There are other cases where the parties to a contract are in disagreement and no longer communicating with one another, or if they are, communicating acrimoniously. In these cases a dispute has occurred that requires a more formal approach to help resolve it.

“... WE WERE A BIT HESITANT GOING INTO [OPO'S ALTERNATIVE DISPUTE RESOLUTION PROCESS] WITH VERY LITTLE TO OFFER. IN THE END, THE MEDIATION SESSION PROVED HELPFUL TO US... IT ULTIMATELY MEANT LESS WORK FOR [US] AND A BETTER OVERALL UNDERSTANDING BETWEEN THE PARTIES OF OUR RESPECTIVE NEEDS AND CONCERNS. IT IS CERTAINLY HELPFUL THAT THE OPO OFFERS THIS SERVICE AND NO DOUBT HELPS SAVE MONEY (AND EFFORT) WHEN IT CAN RESULT IN AVOIDING COSTLY LITIGATION. THANK YOU FOR YOUR ASSISTANCE IN THIS MATTER.”

— DEPARTMENTAL LAWYER

Helping Parties to a Contract Resolve Disputes

When disputes arise during the performance of a contract, they can have immediate negative consequences that can distract suppliers and government officials from what their focus should be: the completion of the contract on time and within budget. In cases where there is a dispute over the interpretation of terms and conditions of an existing contract, either party to the contract can request OPO's Alternative Dispute Resolution (ADR) service. The service is voluntary, confidential, free of charge and provides a viable alternative to lengthy and expensive litigation. The mediation service offered by the Office provides both parties the opportunity to generate a mutually agreed upon and legally binding settlement to resolve a dispute quickly and efficiently.

Consistent with past years, the Office continues to experience success in helping disputing parties who participate in the service. The reality, however, is that the service remains largely underutilized and the volume of requests continues to be low.

This year we received three requests for ADR, of which:

- one supplier request was declined by the department;
- one supplier request was withdrawn after an informal resolution was reached with the department; and
- one ADR process was successfully completed.

With regard to the successfully completed case, the Office received a request from a supplier concerned with a department's termination of the contract “for convenience”. The supplier did not understand the reason for the termination and wanted information from the department as well as assurance that, despite this termination, they could do business with the department in the future. While the department felt it had “little to offer” in terms of information and assurances, in the spirit of transparency it agreed to participate in a mediation session. The session proved fruitful in allowing both parties to share their perspectives. It also resulted in a mutually acceptable agreement.



INVESTIGATE

INVESTIGATE

What We Did to Examine and Review Procurement Issues

Any Canadian supplier suspecting the award of a contract has been prejudiced or has not been awarded in accordance with established procurement rules and procedures can complain to the Procurement Ombudsman and request the matter be reviewed (i.e., investigated). Likewise, a supplier not in agreement with the administration of its active contract can ask for a review of the matter.

In addition, issues are occasionally brought to our attention that suggest the principles of fairness, openness or transparency (FOT) may have been compromised at a more systemic level. In these situations, and when the required regulatory parameters have been met, the Ombudsman has an obligation to examine the matter impartially and objectively.

In doing so, the Office's goal is to expose the facts, and where necessary, assist departments and agencies by recommending corrective measures to reinforce, or on occasion, restore the principles of FOT. The Office does this by reviewing supplier complaints as well as reviewing departmental procurement practices.

Reviewing Supplier Complaints

The Office's treatment of written requests for reviews of supplier complaints is prescribed by the Regulations. To be considered filed, complaints must be submitted in accordance with the requirements spelled out in the Regulations (e.g., within so many days, including a clear statement of facts). Complaints that are determined to have met these requirements



DIAGRAM 5

FOR OPO TO REVIEW A COMPLAINT REGARDING CONTRACT AWARD, IT MUST MEET THE FOLLOWING REGULATORY CRITERIA:

- 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 less than \$100K for services.
- Department falls under the jurisdiction of the Ombudsman.
- Agreement on Internal Trade is applicable, except for dollar thresholds.
- Facts or grounds of the complaint are not before the Canadian International Trade Tribunal or the courts.
- Reasonable grounds exist to believe the contract was not awarded in accordance with regulations made under the *Financial Administration Act*.

COMPLAINTS REGARDING THE ADMINISTRATION OF A CONTRACT MUST MEET SOME OF THE ABOVE CRITERIA (HOWEVER, NO DOLLAR THRESHOLDS APPLY). ADDITIONAL REGULATORY CRITERIA INCLUDE:

- Supplier must have been awarded the contract to which the complaint relates.
- Complaint cannot be about the application/interpretation of the terms and conditions (in these cases, Alternative Dispute Resolution (ADR) services are available.)

For the complete list of criteria, please consult the *Procurement Ombudsman Regulations on our Website*.

must then be assessed against regulatory criteria (Diagram 5) within 10 working days. This assessment is undertaken to determine whether the Procurement Ombudsman has the jurisdiction to review the complaint. In addition to conducting the assessment, the Office utilizes the 10 working days to liaise with the complainant and department in an attempt to de-escalate and facilitate an informal resolution to the issues.

Of the 48 complaints filed with the Office, 43 (90%) pertained to the award of a contract (e.g., bid evaluation criteria, Statement of Work) while the remaining 5 (10%) pertained to the administration of a contract (e.g., payment, interpretation of a term or condition).

Of the 48 complaints, 42 (88%) fell outside the Procurement Ombudsman's jurisdiction (e.g., contract value exceeded OPO dollar thresholds, related to standing offers) or were withdrawn (e.g., resolved through facilitation within 10 days). In cases where the complaint fell outside the Procurement Ombudsman's jurisdiction, the Regulations require that we provide the complaint to the implicated department.

Assessments of the remaining 6 complaints determined that they met the regulatory criteria. The Procurement Ombudsman is required to review any complaint that is submitted in accordance with, and is determined to have met, the regulatory criteria. In these cases, the implicated department is provided with the complaint and requested to submit its perspective along with documents and records that pertain to the procurement which is the subject of the complaint. The Regulations provide the Ombudsman 120 working days as of the date of the complaint being filed to analyze the submitted material and provide findings and recommendations. The Regulations stipulate that any findings and recommendations are to be provided to the complainant, the Minister of Public Works and Government Services, as well as to the Minister of the implicated department. As a courtesy the Office also provides a copy to the deputy head of the department that was the subject of the complaint.

The following is a summary of the completed reviews of complaints, including one that was carried over from the previous year. The most common issue raised in the complaints reviewed by the Office is the manner in which a department has dealt with a supplier's bid. For example, how a department assessed the supplier's bid or perceptions the department utilized undisclosed criteria to assess the bid, changed the bid evaluation criteria or was inconsistent in its application of the criteria.

Review of Complaint Summaries

Are Subject-Matter Experts Required to Evaluate Proposals?

A supplier complained its proposal for communication services was unfairly and unjustifiably eliminated. The complaint alleged the evaluation team:

- I. failed to take into account all information in the proposal;
- II. lacked the expertise to evaluate the proposal;
- III. consulted amongst themselves; and
- IV. was not prepared to reverse its decision when presented with "clear evidence of unfairness," and that the sum of these concerns demonstrate incompetence or ulterior motives on the part of the department.

After a review of the matter, the Procurement Ombudsman concluded that the issues raised by the supplier could not be substantiated. While there was no evidence indicating whether or not all information in the proposal was considered by the evaluation team, it was concluded the complainant's proposal failed to meet one of the mandatory requirements. In addition, the review cited jurisprudence which held that evaluation teams need not possess subject-matter expertise in order for evaluations to be fair and reasonable. Clear evidence of

unfairness could not be established and no information was found to indicate there was incompetence or ulterior motives on the part of the department.

Did the Department Adhere to the Terms and Conditions of a Standing Offer (SO)?

A supplier filed a complaint concerning the award of two federal contracts using a Standing Offer (SO). The supplier alleged the following:

- I. the department conducted a competitive process which was not allowed under the provisions of the SO;
- II. the department did not provide enough details for suppliers to be able to identify all activities to be performed under the contract; and
- III. the department did not respond to a request for a debriefing to discuss the unsuccessful proposal.

Following a review of the case, the Procurement Ombudsman concluded that although there is no wording in the SO that explicitly permits or prohibits a competitive process, the manner in which the department solicited and compared bids constituted a competitive process. Accordingly, the selection of a supplier based on undisclosed criteria compromised the fairness and transparency of that process. In addition, the SO required the department to provide suppliers with additional information such as details of the work activities to be performed and a description of the deliverables to be submitted, and there was no evidence this additional information was provided. Based on these findings and in accordance with subsection 13(1) of the Regulations, the Ombudsman recommended payment of compensation for bid preparation costs.

DIAGRAM 6

COMPENSATION

Under subsection 13(1) of the Regulations, the Procurement Ombudsman may recommend the award of compensation if certain conditions are met.

The Procurement Ombudsman may recommend compensation for lost profit or bid submission cost. A number of factors are considered before this recommendation is made. For example:

COMPENSATION FOR LOST PROFIT

- Was the complainant's bid fully compliant?
- Did the violation constitute a material breach of the competitive process?
- Would the complainant have won the contract were it not for the actions of the department? OR
- Was the complainant wrongfully denied the opportunity to bid?

COMPENSATION FOR BID SUBMISSION COST

- Did the violation constitute a material breach of the competitive process?
- Did the department seek to exclude all bidders except the winning bidder? OR
- Did the department seek to exclude the complainant or a group of suppliers of which the complainant is a part? OR
- Did the complainant not have any prospect of winning the bid? OR
- Had the complainant known the true and complete facts of the solicitation, would it have likely structured its bid differently or not bid at all?

Supplier Whose Bid Was Wrongfully Rejected

A supplier filed a complaint alleging a department had deemed its proposal non-compliant for not meeting the mandatory education requirement of having a secondary school diploma, despite having demonstrated the proposed resource held both Bachelor of Arts and Master of Arts degrees.

During the course of the review the department acknowledged the wording of its solicitation might have caused some uncertainty for bidders, and offered compensation equal to 10% of the value of the contract. The department further acknowledged the merits of the complaint and that the contract would have been awarded to the supplier, but for the mandatory education requirement. Based on the department's acknowledgements the Procurement Ombudsman terminated the review and recommended payment of compensation for lost profit.

Department Did Not Indicate the Basis of Selection to Award a Contract

A supplier filed a complaint regarding the award of a contract by a department using a Standing Offer (SO). The supplier alleged the department:

- I. improperly conducted a competitive process;
- II. failed to indicate the basis upon which the contract would be awarded;
- III. did not provide enough details for suppliers to be able to identify all activities to be performed under the contract;
- IV. provided an unfair advantage to the winning supplier by writing directly to them; and
- V. failed to communicate the result of the process to unsuccessful suppliers.

Upon review of the available information, the Ombudsman found that although bids are not

normally solicited under SOs when an individual requirement arises, the particular SO in question contains no wording that explicitly permits or prohibits the Project Authority from conducting a competitive process and provides the Project Authority discretion to accept or reject proposals.

The department requested and considered proposals from SO holders, evaluated the proposals and utilized price as the determining factor. As this approach to awarding the call-up constitutes a competitive process, the department had a responsibility to, but did not, inform suppliers of the basis on which it would select the winning supplier. Based on these findings and in accordance with subsection 13(1) of the Regulations, the Procurement Ombudsman recommended payment of compensation for bid preparation costs.

Excessive Criteria for the Work to Be Done?

A supplier filed a complaint regarding a Request for Proposal (RFP) for research services. The supplier alleged the department unnecessarily restricted competition by including experience criteria which were excessive for the work to be done.

The Procurement Ombudsman found no evidence to suggest the department unnecessarily restricted competition. The department demonstrated a legitimate requirement for the experience requested in the RFP, as well as how the required experience was directly relevant to the work to be conducted and the operational requirements of the department.

Reviewing Departmental Procurement Practices

The Regulations require the Ombudsman to review the practices of a department for acquiring goods and services where there are “reasonable grounds to do so. . . .” Accordingly, the Office utilizes various means to identify potential systemic or high risk issues that could bring into question the fairness, openness and transparency of federal procurement practices including:

1. the development of a three-year procurement practice review plan; and
2. the assessment of issues brought to our attention concerning specific contracts or departments and agencies.

1. Three-Year Procurement Practice Review Plan

Development of a three-year procurement practice review plan includes, but is not limited to, analyzing the following:

- Supplier complaints received by the Office;
- The number and nature of issues identified by suppliers, federal officials, professional organizations, and parliamentarians through OPO outreach activities; and
- Government priorities and initiatives in relation to these issues.

The issues are sorted into a list of initial topics which are assessed by a multi-disciplinary team of procurement, communications, and quality and risk management specialists. Risk-based assessment criteria are applied to each topic and the largest procuring departments are contacted to obtain their views on potential risks to the procurement system.

In 2013–14, the three-year procurement practice review plan was reviewed by an external advisory committee comprised of a representative of an industry association representing small Canadian businesses, a legal expert in the field of procurement and a former senior public procurement official. The committee reviewed the topics and confirmed the soundness of the plan.

Prior to execution, other oversight bodies are consulted regarding the proposed topics to ensure the Office's planned reviews do not overlap or duplicate their planned work.

2. Issues

It is not uncommon for the Office to obtain information, sometimes anonymously, alleging abuse or mismanagement in the awarding of contracts by a department. In these cases the information made available to us along with any publicly available information on the subject is analyzed to assure ourselves of the veracity of the issues. Where there are reasonable grounds to believe the fairness, openness and transparency of the procurement process may have been compromised, a practice review can be initiated.

In some cases our preliminary assessment of the situation revealed the department or agency was in the process of auditing or investigating the matter. In these cases the review was put on hold consistent with paragraph 4(1)(d) of the Regulations which requires the Ombudsman to take into consideration “the observations or findings of any previous audits or assessments”. In other cases, our assessment determined the Procurement Ombudsman did not have jurisdiction to proceed with a review. The following is a summary of a completed review and reviews which were put on hold or terminated due to lack of jurisdiction.

Review of Departmental Procurement Practices Summaries

Dental Services

The Office received several complaints regarding the contracting practices of the Manitoba Region of the First Nations and Inuit Health Branch (FNIHB Manitoba), Health Canada, with regard to the provision of dental services. Analysis of the complaints revealed potential systemic issues which established the necessary reasonable grounds to launch a review.

The review found the following:

- I. FNIHB Manitoba is operating in a unique contracting environment. For example,
 - the demand for dental services exceeds the availability of dentists;
 - some communities are remote and designated as “fly-in” which can impact the scheduling of services; and
 - dentists may not be aware of the government electronic tendering service as a source of contract opportunities in the federal government.
- II. Some of FNIHB Manitoba's procurement practices differed from both government-wide and Health Canada procurement policy requirements.

Among the Procurement Ombudsman's recommendations was that the department:

- take appropriate steps to ensure that employer-employee relationships are not created; and

- confirm whether Treasury Board approval is required prior to the release of future solicitations for dental services.

The department accepted the recommendations.

Persistent Allegations

The Procurement Ombudsman, along with a number of other federal organizations, received anonymous letters alleging contract abuses, irregularities, fraud and kickbacks at a federal organization. The Procurement Ombudsman sought additional information from the organization to assess the authenticity of the issues raised. The organization responded by providing detailed information of various activities undertaken to address the allegations. In addition, the organization indicated an audit was being undertaken by an external party regarding the contracts at the centre of the allegations. The Procurement Ombudsman put the review on hold until the results of the audit, expected in 2014–15, are available.

Transcription Services

A procurement stakeholder raised concerns regarding the procurement practices of a federal organization in acquiring transcription services. The Procurement Ombudsman wrote to the organization to obtain information and responses to the concerns raised. The organization's responses and supporting information were assessed against the Regulations to determine if the Ombudsman had jurisdiction to launch a review. Although the assessment revealed the Ombudsman did not have the authority to review the matter, it was brought to the attention of the deputy head who was encouraged to ensure adherence to the contract terms and conditions.

Subsequently, the same stakeholder brought additional information forward suggesting similar issues may have been occurring with the same supplier on a much broader scale in other departments. While an assessment of this additional information once again revealed the matter fell outside of the Procurement Ombudsman's jurisdiction, as a precautionary measure, the Office undertook research of publicly available information to identify all federal departments and agencies that had contracted for these services. The Procurement Ombudsman wrote to the deputy heads of these organizations alerting them to this potential issue and reminding them of the importance of ensuring that the terms and conditions of all contracts are respected.

Program Review Services

The Office received allegations suggesting favouritism in the award of a contract by a federal organization. While the complaint about the award of the contract could not be reviewed as it had been submitted past the deadlines prescribed in the Regulations, the assessment of the complaint determined there were reasonable grounds to review the procurement practices of the department.

During the process of planning the review, the Office became aware of a recent audit by the Office of the Comptroller General (OCG). The OCG made findings related to procurement and in response, the organization developed a Management Action Plan. The review of the organization's procurement practices will be reconsidered once the organization has implemented its Management Action Plan.

“Blacklisting”

The Office was informed by a company that it had been “blacklisted” or “barred” from obtaining contracts by a federal organization as a result of previously having filed a complaint against it with OPO. The complainant indicated that the company had previously been regularly invited to submit bids for contracts, and had routinely won contracts to provide services to the federal organization. The complainant claimed that this changed after complaining to the Office.

In an attempt to assess the merits of the allegation, the Office contacted the organization and provided it the opportunity to provide its perspective and supporting evidence.

The OPO assessment of the evidence revealed the federal organization’s spending in the type of consulting services provided by the complainant had substantially declined between 2009–10 and 2013–14, resulting in a reduction of business for all suppliers involved in providing this service. Evidence supported the organization’s assertion that significant changes to its program were the primary factor in the reduced need for consulting services. No evidence was uncovered to substantiate the blacklisting allegation.

Studies and Analysis

While the assessment of issues brought to the Office’s attention is intended to determine whether there are reasonable grounds to launch a procurement practice review, it can also lead to other actions. In some instances, the Office may undertake an exploratory study or analysis. This year, an analysis on vendor performance was completed.

Vendor Performance

One of the issues repeatedly brought to the Office’s attention is vendor performance. This was the subject of a 2009–10 study and was highlighted in the Message from the Procurement Ombudsman in the 2011–12 Annual Report. Departments and suppliers alike have been questioning why suppliers known to provide inferior goods or services continue to obtain government contracts. Given the persistence of the issue, the Office analyzed some of the measures used by other jurisdictions (i.e., United Kingdom, United States, and Province of Ontario) to address the issue of vendor/ supplier performance.

The analysis revealed three common themes across the above-mentioned jurisdictions. Firstly, vendor performance management is commonly part of a framework for mitigating risks associated with government procurement. The framework is generally designed to hold suppliers and public servants accountable for the procurement process and to determine minimum standards of supplier reliability. Second, contract performance history is only one of the components used to determine a supplier’s reliability. In most cases, governments also take into account factors such as whether there is a criminal record or history of fraud. Finally, vendor performance management measures invariably include the following components:

- I. the creation of a repository of supplier performance history;
- II. the option to temporarily deny contracts to a supplier; and
- III. the importance of continuously improving supplier performance and the relationship between suppliers and government purchasing organizations.

Examples of vendor performance measures in the above-mentioned jurisdictions include:

- In the United Kingdom, suppliers are assessed in accordance with past performance. If a supplier has delivered in a satisfactory manner, they receive a certificate of performance which is accessible to all government organizations.
- In the United States, agencies are required to submit an electronic record of contractor performance to a government-wide repository. In addition, a contract cannot be awarded before the supplier has been evaluated based on seven criteria, two of which are the supplier's integrity/ethics and performance history.
- In the Province of Ontario, Infrastructure Ontario (IO) has developed the Vendor Performance

Program (VPP) which evaluates vendor performance at the end of the contract by means of a scorecard. Suppliers are then designated an overall performance rating. The VPP also outlines escalation procedures for vendor performance issues that arise during the term of a contract, including notices, infraction reports and suspensions.

OPO's analysis indicates vendor performance is the combined responsibility of everyone involved in the procurement process, and that both public servants and suppliers are accountable for the effectiveness of government procurement.

ADVANCE CONTRACT AWARD NOTICES ARE TRANSPARENT—BUT ARE THEY CLEAR?

An article in a prominent Canadian newspaper referred to a government department's plan to acquire surveillance technology from a specific company using the Advance Contract Award Notice (ACAN) contracting process. An ACAN is a public notice informing suppliers a department intends to purchase a good or service from a pre-identified supplier, believed to be the only supplier capable of meeting the department's need. ACANs allow other potential suppliers to signal they are also capable of meeting the specifications outlined by the department. If no other supplier steps forward, the department may then purchase the good or service from the pre-identified supplier. The article mentioned the department had previously bought a less expensive model of this type of technology from other companies.

Many suppliers have complained that an ACAN is nothing more than a directed contract. Others have said they don't bother advising departments they can meet the required specifications, believing the contract is targeted to a pre-determined supplier.

The ACAN in the newspaper article was posted on MERX (the electronic tendering service used by the federal government at the time), and then cancelled as a result of suppliers asking questions. The department subsequently posted a second ACAN for the same requirement, which was also cancelled without explanation. To make the matter even more interesting, the department had launched a competitive process in another region of the country for similar surveillance technology around the time the first ACAN was issued.

The peculiarities of this particular ACAN once again raises questions on whether the policies governing the use of ACANs are clear enough to allow ACANs to be used as intended.



**SPECIAL
INITIATIVES**

SPECIAL INITIATIVES

Formative Evaluation Action Plan: Mandate Assessment

A formative evaluation of the effectiveness of the Office in its first three years of operation was completed in the 2012–13 fiscal year. Based on supplier input, the evaluation recommended analysis be undertaken to assess the advantages and disadvantages of expanding the Ombudsman's mandate to include:

- the ability to review complaints about the award of a contract with higher dollar-value thresholds; and
- measures requiring departments to address the recommendations made by the Procurement Ombudsman.

The independent analysis concluded that no persuasive reason existed for changing the monetary thresholds that underpin the Procurement Ombudsman's mandate. It was noted the original policy rationale – that the Procurement Ombudsman fills a gap in the dispute resolution system for low dollar value contracts – remains compelling and that a modest increase in thresholds would also not likely have an impact on the number of complaints that meet the criteria for review by the Ombudsman.

The analysis of whether departments should be required to address the Ombudsman's recommendations concluded the current process works well, as most recommendations made by the Ombudsman are agreed to and action plans are developed and implemented by departments. The report concluded that requiring departments to address recommendations would be inconsistent with OPO's status as an ombudsman organization and with the powers of other federal oversight organizations.

Inclusion of OPO Clauses in Procurement Documents

In June 2013, the Minister of Public Works and Government Services wrote to her Cabinet colleagues seeking assistance in ensuring that suppliers dealing with their organizations were made aware of the services offered by the Procurement Ombudsman. To that end, the Minister encouraged her colleagues to work with their respective deputy heads to include information related to the Office of the Procurement Ombudsman in their organization's procurement documents, namely:

- solicitations for goods and services;
- resulting contracts; and
- regret letters to unsuccessful bidders.

To facilitate this process, the Minister stated that standard clauses available for inclusion in these documents would be provided to the deputy heads by the Procurement Ombudsman. Deputy heads have the delegated authority to purchase goods and services within certain financial thresholds. Commensurate with this authority is the full discretion to adjust procurement documents to meet the operational requirements of their organizations.

The Procurement Ombudsman provided the clauses to the deputy heads of organizations falling within his mandate (i.e. schedules I, I.1 and II of the *Financial Administration Act*) and requested responses on whether organizations would include the clauses in procurement documents. Follow-up with organizations that had not responded was done in December 2013.

In March 2014, the Procurement Ombudsman provided deputy heads the opportunity to confirm their respective organization's response to the Office.

The vast majority agreed to include the clauses with some organizations agreeing to include OPO information in regret letters and on the solicitation pages of websites.

Access to Documents and Information

The Issues

The following question was raised: When undertaking a review should OPO assess the merits of a complaint in accordance with the requirements of the *Department of Public Works and Government Services Act* (the Act) and the Regulations using the:

- documents and information provided by the complainant and the documents and information deemed relevant by the department?; OR
- documents and information provided by the complainant and the documents and information deemed relevant by the department, as well as other documents and information deemed relevant by OPO related to any part of the entire procurement process for the award of the contract in question?

In addition, it was suggested that

- since the Regulations were modeled on the *Canadian International Trade Tribunal (CITT) Regulations*, the OPO complaint review process should essentially emulate that of the CITT; and
- a department should only be required to submit documents and information the department believes are relevant to a complaint based on its own “objective standard” rather than documents which are determined by the Procurement

Ombudsman to be necessary to carry out a review of a complaint in accordance with the requirements of the Act and the Regulations.

Analysis

The Office conducted a detailed analysis of the issues raised. The analysis revealed the following.

- I. On the question of what documents and information should be provided:

Neither the Act nor the Regulations limit the review to a part of the procurement process or to examining only the facts and grounds on which the complaint is based. Rather the Regulations require the Procurement Ombudsman, when conducting a review of a complaint respecting the award of a contract, to take certain factors into consideration. Specifically, subsection 12(1) of the Regulations outlines the minimum factors to be taken into account including the following:

- whether the complainant would have had a reasonable prospect of being awarded the contract, but for the actions of the contracting department;
- the seriousness of any deficiency in complying with the regulations made under the *Financial Administration Act*;
- the failure or refusal of the complainant to provide information about its goods and services at the request of the contracting department;
- the degree to which the complainant was prejudiced;
- the degree to which the fairness, openness or transparency of the procurement process was prejudiced; and
- whether any of the parties acted in bad faith.

The OPO methodology in conducting the review of a complaint respecting the award of a contract explores these factors.

- II. On the suggestion that the OPO review process should emulate that of the CITT:

Consistent with the International Ombudsman Association defined role of an ombudsman, the nature of an ombudsman requires that reviews be conducted using an inquisitorial process. Under an inquisitorial process there are no strict rules of evidence and procedure and neither party to the complaint has a burden of proof. As such, an inquisitorial process revolves around a decision maker (the ombudsman) who animates the review. Given the Regulations are silent on the process to follow for conducting a review, OPO has implemented a process that respects an inquisitorial approach to conducting reviews consistent with the role of an ombudsman.

Subsection 9(2) of the Regulations authorizes the Procurement Ombudsman to request any documents or information “necessary for the review”. There is no role specified in the Regulations for a department in determining what documents or information are “necessary for the review”. Nor are there any restrictions or qualifications on the Procurement Ombudsman’s right to request documents or information the Procurement Ombudsman believes are necessary for the review.

- III. On the suggestion that a department should only be required to submit documents and information the department believes are relevant:

In its 2011 decision of *Alberta (Information and Privacy Commissioner) v. Alberta Teachers’ Association*, the Supreme Court of Canada, quoting *Dunsmuir*, held that “there is authority that ‘deference

will usually result where a tribunal is interpreting its own statute or statutes closely connected to its function, with which it will have a particular familiarity”.

The question of what documents and information are required for a review of the award of a contract, taking into consideration those matters identified under subsection 12(1) of the Regulations, is clearly within the Procurement Ombudsman’s area of expertise: it does not raise matters of legal importance beyond administrative aspects of the statutory scheme; it is not a constitutional question; it is not a question of law that is of central importance to the legal system as a whole; and it is not a question regarding the jurisdictional lines between competing specialized tribunals. Accordingly, the referenced Supreme Court of Canada decision supports the position that a measure of deference should be afforded to the Procurement Ombudsman’s interpretation of subsection 9(2) of the Regulations (i.e., the Procurement Ombudsman’s own statute) under the standard of reasonableness.

Conclusion

To comply with the requirement to consider elements listed in subsection 12(1) of the Regulations, all aspects of the procurement process which “begins after an entity has decided on its procurement requirements and continues through the contract award” must be considered. To accomplish this, the Regulations provide that the Procurement Ombudsman may request any document or information necessary for the review.

The rules of interpretation require that we give words their ordinary meaning within the context of the overall purpose of the legislation. The Procurement Ombudsman’s interpretation of subsection 9(2) of the Regulations is that it is in the independent

Ombudsman's discretion and his/her discretion alone, to determine what documents and information are necessary for the review of the award of a contract. This interpretation is more consistent with promoting the overall purpose of the legislation than the more restrictive interpretation that the department (a party to the procurement process being reviewed) should decide what documents and information are necessary for the review by the Procurement Ombudsman of the award of a contract made by that department.

Furthermore, based on the Supreme Court of Canada decision, deference should be given to the Procurement Ombudsman in interpreting his/her own statute.



APPENDIX

APPENDIX

Statement of Operations for the Year Ended March 31, 2014

Statement of Operations

EXPENSES	2013–14
	(\$000)
Salaries and Employee Benefits	2,843
Professional Services	380
Operating Expenses	58
Information and Communication	32
Materials and Supplies	26
Corporate Services provided by PWGSC (See Note 3)	356
TOTAL	3,695

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, 2014

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 mission is to promote fairness, openness and transparency in federal procurement.

2. Parliamentary authority

The funding approved by 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

CORPORATE SERVICES PROVIDED BY PWGSC	(\$000)
Finance	89
Human Resources	122
Information Technology	142
Other	3
TOTAL	356

4. Comparative figures

EXPENSES	2013–14 (\$000)	2012–13 (\$000)
Salaries and Employee Benefits	2,843	3,072
Professional Services	380	400
Operating Expenses	58	56
Information and Communication	32	13
Materials and Supplies	26	28
Corporate Services Provided by PWGSC	356	311
TOTAL	3,695	3,880