



OFFICE OF THE PROCUREMENT OMBUDSMAN



PROCUREMENT PRACTICES REVIEW

PUBLIC SERVICE COMMISSION

REVIEW OF PROCUREMENT PRACTICES RELATED TO SELECTED ADVANCE CONTRACT AWARD NOTICES (ACANS)

OTTAWA
JUNE 2011

STRENGTHENING THE CONFIDENCE OF CANADIANS IN PUBLIC PROCUREMENT

Office of the Procurement Ombudsman

Constitution Square
340 Albert Street, 11th Floor
Ottawa, Ontario K1R 7Y6

Toll Free: 1-866-734-5169
FAX: 613-947-9800

ISBN: 978-1-100-15962-1
Cat. No.: P114-1/2011E-PDF

This publication is also available in electronic format at:
www.opo-boag.gc.ca

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Introduction

Context

1. In 2009, the Public Service Commission (PSC) published four Advance Contract Award Notices (ACANs) simultaneously for the services of four external members of its Independent Audit Advisory Committee (IAAC). According to the ACANs, the duration of each proposed contract was one year, renewable for three additional one year periods. The estimated annual value of each contract was approximately \$20,000 meaning each contract had a potential value of over \$80,000.

2. After reviewing the details of the four published ACANs, an Office of the Procurement Ombudsman (OPO) stakeholder wrote to this office in the spring of 2010. The stakeholder raised concerns about favouritism and tailoring and disputed the rationale cited in the ACANs, claiming there were four ACANs issued the same day for the same job.

3. The *Procurement Ombudsman Regulations* provide the Ombudsman the authority to review the procurement practices of departments and agencies in order to assess their fairness, openness and transparency and make recommendations for improvement. The Procurement Ombudsman formally advised the President of the PSC in May 2010 that this office would conduct a review of PSC procurement practices related to the awarding of the four contracts.

Why it Matters

4. While ACANs are seen as an effective and efficient instrument for the directed contracting process, this office continues to be concerned that the use of ACANs without strict adherence to the applicable policies could erode supplier, parliamentarian and public confidence in the fairness, openness and transparency of government procurement.

5. The OPO considered the concerns identified by the stakeholder and decided to review in detail the decisions and circumstances that led to the publication of the four ACANs, as well as to further explore some of the issues raised in our 2008-2009 Procurement Practices Review Report *Advance Contract Award Notices*.

Background

6. The *Financial Administration Act* states that the Government of Canada is committed to taking appropriate measures to promote fairness, openness and transparency in the bidding process for contracts. In order to meet this commitment, competition is of key importance.

7. The Government Contracts Regulations (GCRs) set the conditions for entering into a contract. Under section 5 of the GCRs, departments and agencies are required to solicit bids before entering into a contract. The competitive approach in selecting a contractor is expected to be the norm. Because this approach is not always possible,

practical or cost-effective, section 6 of the GCRs contains four exceptions (Exhibit A) that permit the contracting authority to set aside the requirement to solicit bids.

Exhibit A – Excerpt from the GCRs

Section 6

Notwithstanding section 5, a contracting authority may enter into a contract without soliciting bids where

- (a) the need is one of pressing emergency in which delay would be injurious to the public interest;
- (b) the estimated expenditure does not exceed
 - (i) \$25,000,
 - (ii) \$100,000, where the contract is for the acquisition of architectural, engineering and other services required in respect of the planning, design, preparation or supervision of the construction, repair, renovation or restoration of a work, or
 - (iii) \$100,000, where the contract is to be entered into by the member of the Queen's Privy Council for Canada responsible for the Canadian International Development Agency and is for the acquisition of architectural, engineering or other services required in respect of the planning, design, preparation or supervision of an international development assistance program or project;
- (c) the nature of the work is such that it would not be in the public interest to solicit bids; or
- (d) only one person is capable of performing the contract.

Source: Government Contracts Regulations

8. Canada's free trade legislation is founded on the principles of openness, fairness, transparency and non-discrimination. The procurement chapters of free trade agreements contain provisions that allow the government to limit competition. The more stringent of these agreements, the North American Free Trade Agreement (NAFTA), includes, with some wording differences, similar exceptions to competition as those found in the GCRs.

9. Once it has been established that a non-competitive approach to fulfill a requirement is justified under one of the exceptions of the GCRs (Exhibit A) and applicable trade agreements, departments and agencies may, in accordance with the Treasury Board (TB) Contracting Policy, use an ACAN. Departments and agencies are required to publicly post the ACAN to alert the supplier community to the department's or agency's intent to award a non-competitive (directed) goods, services or construction contract to a pre-identified contractor.

10. Under the TB Contracting Policy, the information contained in a published ACAN is, amongst other things, to:

- provide the exception invoked under the GCRs;

- define the requirements or the expected results of the contract so that other potential suppliers can determine if they possess the capability to satisfy the requirements or provide the results;
- identify the proposed contractor; and
- if possible, provide an estimate of the cost of the proposed contract, where this will not prejudice negotiations with the proposed contractor.

11. If, during the publication period, the ACAN is challenged by way of a statement of capabilities received from another supplier and found to meet the requirements set out in the ACAN, a competitive process is required to take place. However, if no supplier comes forward who meets the requirements, the department or agency may proceed with contract award to the pre-identified contractor and the contracting process is deemed competitive. The contracting authority limits set for open bidding then become the highest available to the department or agency.

12. The Values and Ethics Code for the Public Service is a policy of the Government of Canada that “sets forth the values and ethics of public service to guide and support public servants in all their professional activities.”

13. The Code stipulates: “Deputy Heads and senior managers have a particular responsibility to exemplify, in their actions and behaviours, the values of public service. They have a duty to infuse these values into all aspects of the work of their organizations. It is expected that they will take special care to ensure that they comply at all times with both the spirit and the specific requirements of this Code.” Both the Foundation Framework for Treasury Board Policies and the Treasury Board Secretariat Statement of Values – Procurement Community of the Government of Canada provide further guidance relating to the Code.

14. There is thus a clear institutional imperative to promote fairness, openness and transparency in federal government procurement through adherence to the Code and related policies.

Focus of the Review

Review Objectives

15. The objectives were to assess the following:
1. whether PSC contracting activities for the four contracts in question supported the principles of fairness, openness and transparency under the applicable federal acts, regulations and trade agreements; and

2. whether the PSC complied with TB policies and procedures related to:
 - i) the selection of ACANs as the instrument for the procurement of the services of external members for the PSC's Independent Audit Advisory Committee;
 - ii) the awarding of the four contracts for which the ACANs were used.

Exhibit B – Office of the Procurement Ombudsman definitions of fairness, openness and transparency

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 actions undertaken.

Scope and Period of the Review

16. The scope was limited to the four ACANs published in September 2009 and the contracts subsequently awarded by the PSC in November 2009. More specifically, the review focused on the first two phases (pre-contract and contract) of the procurement process.

Review Methodology

17. The OPO and the PSC agreed in May 2010 that the OPO would collaborate with the PSC's Internal Audit Division. After working in tandem in the planning and fact-gathering stages, the OPO carried out its own analysis and independently prepared this report.

18. The OPO reviewed the federal legislative, regulatory and policy framework related to the four contracts in question; conducted interviews with management and procurement personnel; and examined the procurement files of the four contracts awarded.

Review Observations

The PSC had no basis for choosing to direct the four contracts or for selecting the ACAN instrument

19. The PSC maintains an Independent Audit Advisory Committee (IAAC) that meets twice per year. Its primary role is to provide the PSC President with independent, objective advice on critical control points of the audits, evaluations, studies and other activities carried out by the Audit, Evaluations and Studies Branch. The IAAC, established in 2006, is chaired by the President and is made up of three internal and up to six external members.

20. The four individuals identified in the ACANs in question were external members of the IAAC under PSC contract since 2006. According to the PSC response to an *Access to Information* request in April 2010, all four external members' contracts ended November 8, 2009.

21. Evidence provided to the OPO in July 2010 indicates that PSC Procurement Services presented two options to PSC senior management to satisfy its ongoing requirement for external advisors.

22. **Option 1 – Section 10** of the *Public Service Employment Act* (PSEA). The PSEA provides PSC with the following authority:

The Commission may retain on a temporary basis the services of experts or other persons having technical or special knowledge to assist it in an advisory capacity and, subject to the approval of the Treasury Board (TB), fix their remuneration.

23. The OPO found evidence indicating that the PSC had been in discussions with the TBS on the use of this option. The OPO found no rationale to explain why this apparently viable option was not pursued. Despite the OPO's request for information to assist in understanding the rationale for the decision not to proceed with this option, the PSC, claiming in part solicitor-client privilege, chose not to disclose the full nature, substance or outcome of the TBS discussions.

24. **Option 2 – Competitive Request for Proposal (RFP)**. The OPO found evidence demonstrating PSC Procurement Services had contracted with a supplier to develop a draft RFP to initiate a competitive contracting process for fulfilling the long-term requirement for a number of executive level advisory services, including external members of the IAAC.

25. The OPO found information indicating the competitive RFP option was to have been presented to and discussed by senior management at its February 2009 meeting. Having found no minutes on the files, the OPO requested information concerning the meeting. PSC officials informed this office that no minutes were kept, but later provided a copy of internal correspondence confirming both the competitive RFP and use of Section 10 of the PSEA were presented to senior management. PSC officials also

informed this office that it was a senior management decision not to pursue these options.

26. **Choosing ACANs.** Despite being aware of the risk of being challenged, senior management decided the most expeditious method of procuring the advisory services was by using ACANs. The OPO expected an explanation on the contract files for proceeding with a directed contracting process and the publishing of ACANs, but found none.

27. The PSC issued the four ACANs using exception (d) of the GCRs. Concerning that exception, the TB Contracting Policy states the following:

10.2.5 Exception (d) sets competitive bidding aside when only one person or firm can do the job. This exception is quite definitive and should be invoked only where patent or copyright requirements, or technical compatibility factors and technological expertise suggest that only one contractor exists. This exception should not be invoked simply because a proposed contractor is the only one known to management.

28. TB Contracting Policy Notice 2007-04 – Non-competitive Contracting requires that the use of exception (d) be fully justified. Accordingly, a number of questions are to be answered to assist departments and agencies in justifying the exception. The questions prompt departments and agencies to document the assessment and the reasoning behind decisions. For example, question 4 asks: “Are there alternative sources of supply for the same or equivalent material/support? If no, explain. If yes, what other options were considered and why were they not recommended?” These answers are to be documented on file before proceeding with a directed contracting process.

29. The OPO found no justification or rationale on file for the use of exception 6(d) to demonstrate unique expertise on the part of the four existing external members. Based on the available information, it was not possible to reconcile the services and requirements described in the ACANs to the conditions necessary to invoke the GCR exception 6(d). The OPO found no evidence of “unique expertise” associated with any of the contracted external members to support the application, and no evidence that any one of the external members was the only person capable of performing the contract. PSC’s Internal Audit Directorate also provided evidence indicating the PSC was aware there were “no justifications to set aside the requirements.” In fact, given the nature and role of the committee, it seems clear that should one of the existing external members no longer be able to continue, PSC would find a suitable replacement.

30. Besides the inability to establish “uniqueness” among the external members, the OPO also noted the PSC had, prior to publishing the ACANs, identified two other potential candidates in addition to the four individuals to whom contracts were eventually awarded.

31. By identifying up to six potential suppliers and subsequently publishing four ACANs to fulfill the identical requirement for IAAC external members, the PSC recognized the existence of more than one person capable of performing the contract.

32. Having reviewed the available information, the OPO concludes that the PSC:

- had no basis for invoking GCR exception 6(d);
- did not comply with applicable acts, regulations and policy for directed contracting and did not meet the exceptions to competition under NAFTA. The PSC was therefore not authorized to use ACANs and take advantage of the associated higher delegated contracting authority limits and expedient contracting process;
- did not have authority to approve the awarding of the contracts. In fact, according to the TB Contracting Policy, “the Treasury Board cannot approve a directed contract which does not meet at least one of the four exceptions. In such cases, an exception to the Regulations by means of an Order in Council would be required”; and
- did not meet the requirements for transparency, due to insufficient documentation on file to support its decisions.

33. PSC officials informed this office that posting ACANs was viewed by PSC management as an improvement over simply awarding sole-source contracts without the notice, as had been done in the past. However, we note that neither of these options was allowable under the GCRs for the contracts in question

PSC favoured existing contractors and tailored requirements

34. In order to demonstrate fairness, openness and transparency of the federal procurement process, the OPO expected the ACANs would respect the principles stated in the TB Contracting Policy:

- “Government contracting shall be conducted in a manner that will... stand the test of public scrutiny in matters of prudence and probity, facilitate access, encourage competition, and reflect fairness in the spending of public funds;” and
- “An ACAN is to define the requirements...so that other potential suppliers can determine if they possess the capability to satisfy them.”

35. The OPO also expected TBS guidance to govern the ACAN content. For example:

- the 2004 TBS Guide for Managers – Best practices for using Advance Contract Award Notices (ACANs) states: “ACANs must not be structured in a way that discourages submissions of statements of capabilities from potential suppliers.”
- the 2007 TBS directive to all Deputy Heads on the use of GCR exception 6(d) states: “It is implicit that requirements and specifications deliberately and narrowly written so that only one supplier can meet them circumvent the policy.”

36. The PSC had developed a document entitled “Rationale for Selection of External Members for the IAAC”, which was based on the qualifications of the existing external committee members. The “Experience” section lists seven experience criteria and stipulates that a member must meet at least three of the seven.

37. The PSC used the Rationale document to set the required qualifications specified in each ACAN to the respective experience profile of each of the four existing external members who became the subject of these four ACANs. Once this was completed, in August 2009, the PSC contacted each of the four external members of the committee who became the subjects of the ACANs. The PSC provided a draft of the ACAN text derived from the Rationale, and asked the members to carefully review the criteria and confirm in writing that they met the requirements.

38. In addition to the ACANs not being legitimate, the OPO found shortcomings in the contents of the ACANs. The missing information would have assisted other potential suppliers to make an informed decision as to whether they were capable of performing the contract:

- Despite having established seven experience criteria and stipulating in internal documents that meeting any three of the seven would be acceptable, the PSC chose not to include this information in the four ACANs and did not make clear why only the respective elements of experience of the proposed external member were being called for in each ACAN.
- The PSC had, but did not include, information on level of effort, total potential value, number and duration of meetings, travel requirements and nature of specific deliverables.

39. Having reviewed the available information, the OPO concludes the following:

- Tailoring the experience requirements in each of the ACANs to the respective experience of the existing external members restricted competition and is counter to the principle of fairness. Tailoring requirements amounts to deliberately structuring the ACAN “in a way that discourages submissions of statements of capabilities.” By doing so, the PSC favoured current suppliers.
- Having the pre-identified existing contractors review draft qualification requirements to be published in the ACAN for the contract about to be issued to them is not in keeping with the principles of fairness, openness and transparency. By doing this, the PSC has left itself vulnerable to the perception that committee members who would benefit from the contracts influenced the outcome of the procurement process.

Conclusion

40. The evidence we found demonstrates the PSC:
- knew there was more than one supplier who could do the job;
 - favoured the four existing external committee members; and
 - tailored the requirements in each ACAN and created the potential for conflict of interest by having existing external members review the draft ACAN text prior to publishing.
41. After careful review of the information made available to this office, the OPO has found significant evidence to conclude that the stakeholder concerns received in regard to the four ACANs published by the PSC have merit. Moreover, our findings are consistent with the findings in our 2008-2009 report.
42. The Office of the Procurement Ombudsman finds that the procurement practices on the files reviewed:
- did not comply with the letter or intent of applicable federal acts, regulations, trade agreements, and TB policies and procedures for the selection of the directed contracting process and the use of ACANs to award the contracts to its Independent Audit Advisory Committee external members;
 - did not support the principles of fairness, openness and transparency; and
 - showed favouritism.

Recommendations

43. The Office of the Procurement Ombudsman recommends the PSC:
- seek TBS direction as to whether retroactively obtaining appropriate approval for these directed contracts is warranted;
 - develop a plan for fulfilling long-term requirements such as those for the Independent Audit Advisory Committee external members and ensure the requirements are executed in compliance with applicable acts, trade agreements, regulations and policies;
 - undertake a review of directed contracting practices, including use of ACANs, to ensure procurement decisions are well documented and can withstand public scrutiny;

- have its Contract Review Board review all requests for directed contracts proposing the ACAN instrument to ensure they are consistent with relevant policies and properly documented;
- consider providing senior management and other personnel involved in procurement with refresher training on the key acts, regulations and policies, relating to procurement.

44. The OPO intends to follow up on the recommendations.

45. The PSC was given an opportunity to review this report, and its comments were taken into consideration when the report was finalized. In its comments, PSC informed OPO the options to renew the four contracts for an additional year were not exercised and the existing contracts expired on November 9, 2010.