

PROMOTING FAIRNESS, OPENNESS & TRANSPARENCY IN FEDERAL PROCUREMENT

# OFFICE OF THE PROCUREMENT OMBUDSMAN

PROCUREMENT PRACTICE  
REVIEW OF ENVIRONMENT  
AND CLIMATE CHANGE  
CANADA

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Government  
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Gouvernement  
du Canada

Canada

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# I. Background

1. The Office of the Procurement Ombudsman (OPO) conducted a review of procurement activities at Environment and Climate Change Canada (ECCC).

2. In accordance with paragraph 22.1(3)(a) of the *Department of Public Works and Government Services Act*, the Procurement Ombudsman has the authority to review the procurement practices of departments to assess their fairness, openness and transparency.

3. This review is based on issues and complaints brought to OPO's attention by stakeholders, both in general and in regard to specific solicitations by various federal organizations. Based on this information, OPO has identified the 3 highest-risk procurement elements as: (1) the establishment of evaluation criteria and selection plans; (2) the bid solicitation process; and (3) the evaluation of bids and contract award. For the purposes of this review, these elements are defined as follows:

- 1) **Evaluation criteria and selection plans** – the development of mandatory and point-rated evaluation criteria, and the identification of the selection method to determine the successful bid
- 2) **Solicitation** – the design and execution of the solicitation process, including the clarity and completeness of solicitation documents
- 3) **Evaluation of bids and contract award** – the establishment of a process to ensure the consistent evaluation of bids in accordance with the planned approach, including an evaluation plan and instructions to evaluators, and the adequacy of documentation to support the selection of the successful bidder

4. ECCC was selected for review as 1 of the top 20 federal departments/agencies in terms of the value and volume of its annual procurement activity. OPO plans to conduct similar reviews of the other top 20 departments/agencies over 5 years.

5. As the lead federal department for environmental issues, ECCC's activities include but are not limited to environment framework implementation, monitoring, research, policy and regulations, and enforcement of environmental laws. ECCC delivers on its mandate through various acts and regulations such as the *Canadian Environmental Protection Act*, the pollution prevention provisions of the *Fisheries Act*, the *Species at Risk Act*, the *Migratory Birds Convention Act*, and many others.

6. ECCC informed OPO that its Procurement and Contracting Division (PCD) has contracting authority for all ECCC purchases, excluding acquisition card purchases. PCD's operations are decentralized with contracting units in the National Capital Region, Vancouver, Edmonton, Montreal, Dartmouth and 2 in Toronto. According to information provided by ECCC, it awarded 6,905 contracts [excluding contracts managed by Public Services and Procurement Canada (PSPC) or Shared Services Canada (SSC)] worth \$176.6M during OPO's review period of July 1, 2017 to June 30, 2019.

## II. Objective and scope

7. This review was undertaken to determine whether ECCC's procurement practices pertaining to evaluation criteria and selection plans, solicitation documents, and evaluation of bids and contract award, supported the principles of fairness, openness and transparency. To make this determination OPO examined whether ECCC's procurement practices were consistent with Canada's obligations under applicable sections of national and international trade agreements, the *Financial Administration Act* and regulations made under it, the Treasury Board Contracting Policy (TBCP), and, when present, departmental guidelines.

8. The following 3 lines of enquiry (LOE) were used to assess the highest-risk procurement elements identified in paragraph 3 above:

**LOE 1:** Evaluation criteria and selection plans were established in accordance with applicable laws, regulations and policies

**LOE 2:** Solicitation documents and organizational practices during the bid solicitation period were consistent with applicable laws, regulations and policies

**LOE 3:** Evaluation of bids and contract award were conducted in accordance with the solicitation

9. This report also includes a section on other observations identified by OPO through the analysis of the above LOE.

10. OPO's review consisted of an assessment of procurement files for ECCC-awarded contracts between July 1, 2017 and June 30, 2019. This review did not include construction contracts, non-competitive contracts, acquisition card activity, contracts awarded through PSPC or SSC standing offers or procurement activity for which ECCC was not the contracting authority.

11. Based on contracting data provided by ECCC, OPO selected 40 competitive procurement files for assessment from a population of 601 contracts, after excluding the above-mentioned categories. The judgmental sample was developed with consideration to factors including materiality and risk. The risk of selection bias was minimized through random selection of individual files meeting these pre-established factors.

12. The files selected for review included 8 contracts issued pursuant to PSPC professional services supply arrangements, 2 call-ups against departmental individual standing offers (DISO), 4 requests for quotations (RFQ), 24 requests for proposals (RFP), 1 advance contract award notice (ACAN) and 1 directed contract. As the ACAN and the directed contract were identified as competitive procurements in ECCC's contracting data and the solicitation methods were only determined later on during OPO's assessment, these contracts remained in the sample and are reported on in the "Other observations" section of this report.

### III. Results

13. ECCC's procurement practices pertaining to evaluation criteria and selection plans, solicitation documents, and evaluation of bids and contract award were assessed against the 3 LOE noted above. OPO made 4 recommendations to address the issues identified in the review, which are summarized in Annex I of this report. The recommendations are based on the analysis of information and documentation provided to OPO by ECCC during the course of the review.

#### **LOE 1: To determine whether evaluation criteria and selection plans were established in accordance with applicable laws, regulations and policies**

14. This LOE applied to the 36 files where contracts were awarded through competitive processes. Of these, 24 contained both mandatory and point-rated evaluation criteria and 12 contained only mandatory criteria. These files were examined to determine whether mandatory and point-rated evaluation criteria and selection methodologies were clearly communicated in the solicitation, not overly restrictive, and were aligned with the requirement. The method of allocating points to weighted criteria was also assessed to determine whether instructions were clearly communicated and reflected the relative importance of the criteria.

#### **Mandatory criteria**

**Overall, in the files reviewed, mandatory criteria were not overly restrictive and did not unnecessarily favour or penalize any particular bidder or group of bidders. In several files, however, the mandatory criteria were not communicated in a clear, precise or measurable manner. Details from OPO's review of mandatory criteria are presented below.**

15. Section 10.7.27 of the TBCP states that "[c]ompeting firms should be told the measurement criteria and the weighting assigned to them. ...The courts have ruled that the factors and their weighting must be established beforehand and adhered to strictly. ...Fairness to all prospective contractors and transparency in the award process are imperative". Using clear and precise language to define the evaluation criteria helps bidders prepare a responsive proposal and evaluators to apply the same criteria equally to all bidders.

16. A total of 36 solicitations reviewed by OPO contained mandatory criteria. In all 36 files, the mandatory criteria were not overly restrictive and did not unnecessarily favour or penalize any particular bidder or group of bidders. Further, in 24 of 36 solicitations, mandatory criteria were clear, precise and measurable. In the remaining 12 solicitations, mandatory criteria were not communicated in a clear, precise or measurable manner. Such evaluation criteria can undermine the transparency of the bid solicitation process and can cause bidders to submit non-compliant or sub-optimal proposals because the requirements are not well understood. Examples of unclear mandatory criteria included the following:

- a. In 1 file, a mandatory criterion referred to specifications for helicopter windows that would be considered "but with a lower preference". In another file, a mandatory criterion specified that "[p]reference may be given to vehicles with an odometer reading that is less than 80,000 km". As mandatory criteria are to be evaluated on a simple pass/fail basis and strictly as to compliancy, it is not clear how such preference would be factored into the evaluation of a mandatory criterion.

- b. In 2 files, mandatory criteria used “should” to identify information to include to meet mandatory criteria, making it unclear how these would be evaluated.
- c. In 3 files, mandatory criteria contained undefined or subjective wording such as “a **clear and sound** project management approach and methodology” and “must **clearly and concisely** describe how the work will be carried out”. **[emphasis added]** Whether an approach is “clear and sound” or whether something is “clearly and concisely” described cannot be evaluated on a simple pass/fail basis. Using such wording for mandatory criteria makes it more difficult for both bidders and evaluators to understand how these criteria are to be evaluated.

17. Section 10.7.25 of the TBCP states that “... [evaluation] criteria should identify accurately all the performance elements significant to the success of the project...”. OPO found that mandatory criteria were aligned with the requirements stated in the solicitation document in 28 of the 36 solicitations reviewed. The remaining 8 solicitations included mandatory criteria that were not aligned with performance elements significant to the success of the project as described in the solicitation. Some examples included:

- a. In 2 cases, the number of resources required did not correspond to the number of resources bidders had to propose to meet the mandatory criteria.
- b. In 3 cases, there was no clear link between the requirements and the mandatory criteria. In the first case, the security requirements in a mandatory criterion did not align with those described in the solicitation. In the second case, the solicitation required, as a mandatory criterion, that all proposed resources hold a valid driver’s license, but there was no clear need in the statement of work (SOW) for all resources to hold a driver’s license. In the third case, the solicitation required bidders offer a multilingual translation service, whereas the SOW specified English and French only.

### **Point-rated criteria**

**Overall, point-rated criteria and rating scales were appropriate to the requirement, clearly communicated and not overly restrictive in a majority of the files reviewed. Several instances were, however, noted where solicitations contained missing, incorrect or unclear information regarding point-rated criteria. Details from OPO’s review of point-rated criteria are presented below.**

18. Section 10.7.27 of the TBCP requires that competing firms be told the measurement criteria and the weighting assigned to them, which supports fairness in the contract award process.

19. In 23 of the 24 files containing point-rated criteria, those criteria were appropriate to the requirements stated in the solicitation document and not overly restrictive. In 1 solicitation, a point-rated criterion in the technical evaluation was related to price. Such criteria threaten the integrity of the evaluation process by blurring the separation that should exist between technical and financial evaluations and, in this case, resulted in more weight being given to price than had been indicated in the basis of selection.

20. In 16 of 24 solicitations containing point-rated criteria, the criteria and applicable rating scales were clearly communicated. However, in 8 instances, solicitations either contained

incorrect information or were missing information regarding the point-rated criteria and/or had missing or unclear rating scales for point-rated criteria. Examples include:

- a. In 1 case, the evaluation procedures provided to the evaluators specified that bids receiving a rating of 0 for any of the point-rated criteria would result in the bid being rendered non-responsive. This was not disclosed in advance to potential bidders in the rating scales or anywhere else in the solicitation.
- b. In 1 case, the solicitation provided 2 different rating mechanisms for point-rated criteria. The first was directly in the point-rated criteria table and a second different rating guide was included below the point-rated criteria table. It is not clear how this rating guide related to the point-rated criteria or how it would be used by evaluators.
- c. In 2 cases, there were errors in the rating scales in the point-rated criteria tables. 1 solicitation had a gap in scoring where a bidder would obtain 0 points for “[ ] less than 2 relevant projects” and 10 points for “3 to 9 relevant projects” but there was no indication of how many points would be awarded for 2 relevant projects. Another solicitation’s individual maximum points for multiple point-rated criteria did not correspond to the point totals for each applicable section. For example, 1 section was worth a maximum of 35 points but the individual maximum available points for this section equalled 60 points.

### **Selection methodology**

**Overall, in a majority of files reviewed, the selection methodology was accurate and aligned with the requirements as described in the solicitation document; however, several exceptions were noted. Details from OPO’s review of selection methodologies are presented below.**

21. In 29 of 36 files, the selection methodology was accurate and aligned with the requirements in the solicitation document. The remaining 7 solicitations included selection methodologies that contained inaccurate or contradictory information, or both. Examples included:

- a. In 1 case, the selection methodology stated the responsive proposal with the highest number of rated technical evaluation points would be recommended for contract award, provided the cost did not exceed the maximum budget established. However, this solicitation had no point-rated evaluation criteria nor maximum budget identified. In another case, the selection methodology specified proposals had to obtain the required minimum score for each point-rated criterion and also could not exceed the budget available for the requirement. However, there was no maximum budget or minimum scores for point-rated criteria identified in the solicitation.
- b. In 2 cases, the selection methodology contained contradictory wording. In both cases the solicitations presented a selection methodology of highest combined rating of technical merit and price. However, 1 included wording stating that the contract would be awarded to the lowest bidder and the other included wording stating the contract would be awarded to the responsive bid with the lowest evaluated price. For the latter, the technical and financial score formulas included in the solicitation were also written in a manner that technically made it impossible for a bidder to achieve the minimum total score stipulated to be considered responsive.

- c. In 4 cases, the title of the selection methodology in the solicitation did not correspond to the methodology described. In 3 of those cases, the solicitations identified the selection methodology as “lowest price per point” but then also stated the contract would be awarded to the bidder with the highest combined rating of technical merit and price using a ratio of 70% for technical merit and 30% for price. In the fourth case, the solicitation identified the selection methodology as “highest combined rating of technical merit and price” and also stated the contract would be awarded to the lowest responsive bid.

22. Discrepancies such as these can make it difficult for bidders to know how to construct their bids, and for evaluators to understand the basis upon which the contract will be awarded. Furthermore, these discrepancies may undermine the principles of fairness and openness as outlined in the TBCP.

**LOE 2: To determine whether solicitation documents and organizational practices during the bid solicitation period were consistent with applicable laws, regulations and policies**

23. This LOE applied to the 36 files where contracts were awarded through competitive processes. Of these, 17 were not subject to any trade agreements and 19 were subject to 1 or multiple trade agreements. For these files, solicitation documents (excluding evaluation criteria and selection plans) were assessed to determine whether, among other things, they contained a clear description of the requirement and instructions necessary to prepare a compliant bid. The assessment of organizational practices included factors such as whether the solicitation was open to the appropriate number of bidders and for the required duration, and whether communications with suppliers supported the preparation of responsive bids.

**Solicitation documents**

**Most of the solicitations reviewed included clear and complete information and instructions for submitting bids, though some incorrect or contradictory information was found in certain solicitations. Details from OPO’s review of solicitation documents are presented below. For clarity, the results for solicitations that were and were not subject to trade agreements are presented separately.**

24. The TBCP sets out detailed procedures to ensure that government contracting is carried out in a manner that enhances access, competition and fairness and results in best value. Section 10.7 of the TBCP includes the minimum requirements to be included in the solicitation document as well as mandatory elements related to the design and execution of the process.

25. Solicitation documents must contain work descriptions or specifications defined in terms of clear outputs or performance requirements, the objectives to be attained and time frame for delivery, in the case of service contracts, and the assessment and award criteria. Section 4.10.15h of PSPC’s Supply Manual, which ECCC indicated it uses as guidance, also stipulates that a bid solicitation should include as a minimum: a clear definition of the requirement; bidder instructions; bid preparation instructions; clear evaluation procedures; certification requirements; security and financial requirements; validity of the bid; resulting contract clauses; and instructions informing bidders that they may request information on the results of the RFP and how their bid was evaluated. Clarity of information provided is key in supporting the Government of Canada’s obligations laid out in the TBCP.

26. In 13 of 17 files that were not subject to any trade agreements, the solicitations contained clear instructions for submitting bids. However, in 4 files, solicitations contained



incorrect or contradictory information in the solicitation documents or invitation e-mails to suppliers. In 1 case, a solicitation stated that e-mail submissions were preferred but only provided a physical mailing address for bid receipt. This solicitation document also requested that enquiries be submitted to a physical mailing address and not an e-mail address. In 2 other cases, the timeframe for submitting questions according to the invitation e-mail did not correspond to the timeframe for submitting questions stipulated in the solicitation document. For 1 of these solicitations, the solicitation e-mail was sent 2 days after the date of bid solicitation, effectively shortening the length of the solicitation period. Since the solicitations were e-mailed to suppliers in all cases, these appear to be errors in the drafting of the solicitation documentation. Discrepancies such as these reduce the clarity of solicitation documents and can lead to avoidable questions from suppliers which must then be responded to, placing an unnecessary burden on both suppliers and contracting authorities.

27. Minimum requirements for solicitations increase for those subject to the trade agreements. For instance, the *Canadian Free Trade Agreement* (CFTA) requires tender documentation to include all pertinent details concerning: a) the evaluation criteria and methods of weighting and evaluating those criteria; b) the requirement to be fulfilled including any applicable technical specifications, servicing or warranty requirements, transition costs, certifications, plans, drawings, or instructional materials, and requirements related to the submission of the tender. When establishing the date of delivery of goods or the supply of services, procuring entities must also take into account factors including the complexity of the procurement, anticipated sub-contracting, and the realistic time required for the production of goods and the supply of services. The CFTA also prescribes certain mandatory elements related to the design and execution of the solicitation process, such as the establishment of a reasonable period of time for suppliers to prepare and submit responsive bids. Under the *North American Free Trade Agreement* (NAFTA) and the *World Trade Organization Agreement on Government Procurement* (WTO-AGP), the open tender period must be no less than 40 days.

28. For the 19 competitive solicitation processes and related documents subject to 1 or more trade agreements, with 1 exception, ECCC complied with key aspects of the TBCP and trade agreement provisions. For example, solicitations contained clear and complete information, which included instructions necessary to prepare a compliant bid. The solicitation documents consistently contained clear and complete instructions for posing questions and seeking clarification, including the timeframe within which questions could be submitted. For the contracts awarded through PSPC-established supply arrangements, the number of invited suppliers met or exceeded the minimums established in the master agreements. 15 of the 19 solicitations were subject to NAFTA. Of those 15 files, 14 met the 40-day requirement for the duration of the bid solicitation period.

29. In 1 case, the solicitation period for a process that was subject to NAFTA was only open for a period of 36 days. ECCC responded that this was a human error that occurred when dates were entered on the government electronic tendering service.

**Recommendation 1:**

ECCC should establish a mechanism to ensure clarity and accuracy in evaluation criteria, selection methodologies and bidder instructions to avoid discrepancies in its bidding processes.

## Communication with suppliers

**In a majority of solicitations reviewed, where applicable, there was evidence of appropriate communication with suppliers during the solicitation period. In some cases, however, communications with suppliers did not support the preparation of responsive bids. Details of OPO's review of communications with suppliers during the solicitation period are presented below.**

30. The TBCP states "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". It further states that "procurement files shall be established and structured to facilitate management oversight with a complete audit trail that contains details related to relevant communications and decisions...". These requirements apply to all aspects of the procurement process, including interactions with suppliers. During the bid solicitation process, suppliers may communicate with federal organizations to obtain clarifications or explanations of the content of the solicitation. For procurements subject to the CFTA, NAFTA and the WTO-AGP, the TBCP requires contracting authorities to ensure that all communications with bidders are supported by complete documentation and records to demonstrate that the procurement process was carried out in accordance with the agreements. Any significant information given by a contracting authority to a supplier with respect to a particular procurement must also be given simultaneously to all other interested suppliers.

31. Of the 36 competitive solicitation processes reviewed, 24 contained communications (i.e. questions and answers) with suppliers during the solicitation period. In 20 of these 24 solicitations, communications with suppliers met requirements, which support the preparation of responsive bids. In the remaining 4 solicitations, evidence of supplier questions and responses provided was not available or communications did not meet expectations. Examples of these are provided below:

- a. In 1 case, in a solicitation using a PSPC supply arrangement subject to CFTA, NAFTA and the WTO-AGP where 15 suppliers were invited, there were 6 questions from suppliers during the solicitation period on file. There was no evidence of a response for 2 of the questions and the response was sent only to 1 supplier for the remaining 4 questions. The responses to these questions should have been sent to all 15 suppliers invited to bid, as the responses could have had an impact on suppliers' decisions to bid or how to structure their bid.
- b. In 1 case, there were 8 supplier questions on file with no evidence of any responses.
- c. In 1 case, in a RFP sent to 6 suppliers, 2 questions were received from a supplier pointing out perceived errors in the solicitation. Internal departmental e-mails confirmed the errors identified by the supplier; however, there was no evidence of responses to these questions and the solicitation was not amended to correct these errors.

32. In the first case cited above, ECCC's actions did not meet trade agreement requirements to share significant information simultaneously to all suppliers. In the other instances, interactions with suppliers and related file documentation could be improved to demonstrate that communications with suppliers facilitate access, encourage competition and comply with the TBCP's documentation requirements.

**Recommendation 2:**

ECCC should establish mechanisms to: 1) ensure that relevant information is shared with all suppliers simultaneously; and 2) ensure all relevant communications with suppliers are properly documented.

**LOE 3: To determine whether the evaluation of bids and contract award were conducted in accordance with the solicitation**

33. Of the 36 competitive solicitation processes reviewed, 34 included a technical evaluation and 2 were awarded on the basis of price alone. The 34 files that included a technical evaluation were examined to determine whether a process had been established to ensure: the consistent evaluation of bids; that the evaluation of bids had been carried out in accordance with the planned approach; and that files were adequately documented.

**Bid evaluation**

**Bids were evaluated consistently and in accordance with the planned approach in a majority of the applicable files reviewed. Observations related to the files that showed inconsistencies in the evaluation of bids and deviations from the planned approach are detailed below.**

34. In order to ensure the fairness and defensibility of evaluation processes, the TBCP requires that evaluation criteria be adhered to strictly and applied equally to all bidders. Failure to ensure the consistent evaluation of proposals increases the risk that ambiguities in the selection process result in the contract being wrongly awarded. Inconsistent evaluations may also call into question the integrity of the procurement process.

35. ECCC has developed its own “Guidelines for Evaluating Bids from Suppliers” and guidance on evaluation criteria, which include instructions for evaluating bids as well as seeking clarifications from bidders. These guidelines identify the minimum documentation requirements to be adhered to by evaluators, as well as the steps an evaluation should follow.

36. OPO’s review of the 34 files for which a technical evaluation was conducted found that 23 files contained bids that were evaluated consistently and in accordance with the planned approach, and resulted in the winning bidder selected as per the selection methodology. However, OPO found inconsistencies and irregularities in the evaluations for the remaining 11 files. Key observations from these files included:

- a. In 2 cases, non-responsive bids were incorrectly deemed compliant and the contract was awarded to a bidder that failed to meet mandatory criteria. For example, in a solicitation for snow removal services, among other requirements, the mandatory criteria required bidders to demonstrate a minimum of 5 years as a legal entity providing similar services and to provide 3 reference letters. The bid from the successful bidder did not demonstrate that it met either requirement. The consensus evaluation was incomplete, but it did include some questions about whether the bidder met all mandatory criteria.
- b. In 1 case, the evaluation of 1 of 5 bids occurred after the contract had been awarded.
- c. In 2 cases, evaluators used an evaluation grid that did not correspond to the mandatory and point-rated evaluation criteria in the solicitation document or there was no evidence

of a complete evaluation on file. For example, in 1 case, the grid used by evaluators did not include the mandatory criteria from the solicitation and point-rated criteria wording and rating scales did not fully correspond with the wording used in the solicitation.

- d. In 7 cases, evaluations awarded partial points in the technical evaluation in a manner not in accordance with the established rating scales in the solicitation documents.
- e. In 4 cases, there were no explanations or insufficient evaluator comments to substantiate the awarding of less than full points for point-rated criteria. In 1 of these cases, the evaluation of mandatory criteria was also incomplete in the consensus evaluations of 3 of the bids.

37. The Standard Instructions – Goods or Services – Competitive Requirements from PSPC’s *Standard Acquisition Clauses and Conditions Manual* are incorporated by reference and form part of ECCC’s competitive solicitations. In situations where only 1 responsive bid is received, these instructions require bidders to provide, on Canada’s request, 1 or more price justifications to support that the bidder’s price is fair and reasonable. Section 10.8.9 of the TBCP further specifies that once “the contracting authority determines that fair value to the Crown will be obtained, the contract may be awarded to the 1 valid bidder and considered competitive”. Depending on the situation, the fairness of a single valid bid can be determined using market prices; the previous price paid for similar work; a reasonable combination of cost, overhead, and profit; and, in certain instances, comparison with the price of an invalid bid. Of the 36 competitive solicitation processes reviewed, 15 resulted in only 1 bid received. In all 15 cases, there was no financial evaluation on file to demonstrate that the evaluation of bids had followed the planned approach of evaluating the financial proposal nor were there any price justifications or other information on file to support that bidder prices were fair and reasonable.

38. The procurement practices highlighted above do not meet the requirements of the TBCP or ECCC’s “Guidelines for Evaluating Bids from Suppliers” pertaining to the evaluation of bids and the equal treatment of all bidders. These practices indicate that ECCC had not implemented effective supervision and review mechanisms to ensure evaluations are carried out in accordance with the planned approach and appropriately documented to support the transparency of the award process. Incomplete evaluations or evaluations completed after contract award can call into question the integrity of the procurement process and provide grounds for unsuccessful bidders to challenge the contract award.

**Recommendation 3:**

ECCC should establish mechanisms to ensure bid evaluations: 1) adhere strictly to the evaluation criteria in solicitations; 2) are carried out in accordance with planned approaches; and 3) are appropriately documented.

**Procurement documentation**

**In several files, procurement case file documentation was incomplete. OPO’s observations regarding file documentation are detailed below.**

39. Section 12.3.1 of the TBCP requires that procurement files facilitate management oversight with a complete audit trail containing details related to relevant communications and decisions, including the identification of the involved officials and contracting approval

authorities. The requirement to ensure adequate file documentation extends to the actions undertaken during the solicitation period as well as the evaluation of proposals.

40. File documentation was reviewed to determine whether a complete audit trail was retained to support consistent and transparent decision-making. In general, ECCC's documentation was not complete, as 18 of 40 files were missing key documents:

- a. 16 files missing key information and documentation: identity of evaluator(s) not documented (4 cases); missing individual evaluations (4 cases); missing consensus evaluations (1 case); missing financial evaluations when multiple bids were received (5 cases); unsigned individual or consensus evaluations (2 cases); and an incomplete record of communications with suppliers including solicitation e-mails, amendments and questions and answers during the solicitation period (5 cases).
- b. 1 file, a call-up against a DISO, exceeded the standing offer's call-up limitation. There was no evidence on file to show if approval to exceed that limitation was obtained from the Standing Offer Authority.
- c. 2 other files, 1 of which is identified above as missing a financial evaluation, were missing rationales for certain actions taken and decisions made. In the first file, the solicitation was issued twice, approximately 3 months apart. File documentation did not explain the outcome of the first solicitation and the rationale for re-issuing it. In the second file, in a solicitation for a service that is excluded from trade agreements, the resulting contract was amended and doubled in value 3 days after it was awarded. There was no justification on file for the price increase and there was no evidence the amendment was reviewed by ECCC's Contract Review Committee, as required by the ECCC Approvals Process.

41. Incomplete procurement files resulted in inadequately supported procurement actions that risk undermining the integrity, fairness and transparency of the procurement process. Keeping complete and detailed evaluation records is crucial for demonstrating that evaluation criteria have been applied equally to all competing bids, and demonstrating that the procurement has been carried out in a manner consistent with ECCC's obligations under the TBCP and applicable trade agreements.

**Recommendation 4:**

ECCC should establish a mechanism to enforce the requirement to document every decision of business value and maintain up-to-date and complete procurement files.

## IV. Simplification

42. OPO regularly hears from both Canadian businesses and federal officials who believe the contracting process is unnecessarily complex. In reviewing ECCC's procurement practices, OPO sought to identify opportunities to alleviate unnecessary administrative burdens placed on bidders and federal procurement officials, and draw attention to good practices for simplifying the procurement process.

43. ECCC generally uses federal government "standard" solicitation documents and processes. This contributes to simplification by improving consistency and uniformity across procurement processes. Care should be taken when drafting and reviewing solicitation

documentation to ensure consistent alignment of all information provided in solicitations including bidder instructions, evaluation criteria, selection methodology, requirements and all related details.

## V. Conclusion

44. ECCC's procurement practices pertaining to evaluation and selection plans, solicitation, and evaluation of bids and contract award were assessed for consistency with Canada's obligations under applicable sections of national and international trade agreements, the *Financial Administration Act* and regulations made under it, the TBCP, departmental guidelines, and to determine if they supported the principles of fairness, openness and transparency.

45. Regarding LOE 1, OPO found that evaluation criteria and selection plans met requirements set out in applicable laws, regulations and policies mentioned above in the majority of procurements reviewed. Of note, in all files reviewed, mandatory criteria were not overly restrictive and did not unnecessarily favour or penalize any particular bidder. For the most part, mandatory and point-rated criteria were clearly communicated in a manner supporting a fair and transparent procurement process.

46. Several issues regarding unclear or inconsistent evaluation criteria, instructions for awarding points for point-rated criteria and selection methodologies were identified. Issues such as these can lead to incorrect bids and improper evaluations, thus impacting the fairness of the procurement process.

47. Regarding LOE 2, OPO found that solicitation documents and actions taken by ECCC during the solicitation process were, in the majority of cases, consistent with applicable rules. These included, for example, solicitations that included clear and complete information and instructions for submitting bids and appropriate communication with suppliers during the solicitation period. However, several issues regarding clarity and consistency of instructions to bidders, documentation and the communication of information to suppliers were identified. Certain files contained incomplete records and did not demonstrate relevant information had been shared with suppliers to ensure fairness and encourage competition.

48. Regarding LOE 3, OPO found that a majority of files reviewed demonstrated evaluation of bids and contract award were performed in accordance with the solicitation. The consistent evaluation of proposals supports the integrity of the procurement process and reduces the risk that results of those processes would be called into question. Issues were identified in that several evaluations were not consistently carried out in accordance with the planned approach, including 2 contracts that were awarded to bidders that should have been deemed non-responsive. File documentation was also found to be incomplete in several files. Maintaining well documented files enables departments to demonstrate fairness and transparency in their procurements and provides support for procurement decisions taken should those decisions be challenged.

49. In order to address issues identified, OPO made 4 recommendations. These recommendations can be found in Annex I of this report.

50. A 2016 ECCC Audit of the Management and Delivery of Procurement found that substantive improvements were needed in the area of procurement documentation as approximately 26% of files reviewed (18 of 70) did not meet the requirement for documentation or file organization. The scope period of the ECCC audit covered the period from April 1, 2013

to March 31, 2014, a period that ended over 3 years before the beginning of the scope period of this review. With respect to the ECCC audit findings, and similarly to this review, the ECCC audit recommended enhancements to ECCC's procurement management framework "to ensure that... files are maintained such as to include a complete audit trail of key documentation". Given these findings, OPO recommends that ECCC focus its efforts on implementing improvements and strengthening its file documentation practices.

## VI. Other observations

### **Advance contract award notice (ACAN) process**

51. Of the 40 selected files for review, 1 was an ACAN. As specified in section 4.1.5 of the TBCP, the *Government Contracts Regulations* (the Regulations) require that "bids must be solicited from potential contractors before any contract is entered into unless 1 or more of the exceptions in Section 6 of the Regulations are applicable". An ACAN allows organizations to post a notice to inform the public of the intention to award a contract to a pre-identified contractor and is appropriate when 1 of the Section 6 exceptions applies to the contracting situation. If, during the posting period, no other suppliers submit a statement of capabilities (SOC), the contract may then be awarded to the pre-identified contractor. If 1 or more potential suppliers submit a SOC but it does not meet all requirements set out in the ACAN, the contract may then be awarded to the pre-identified contractor after those suppliers have been notified that their SOC was not successful. If other potential suppliers submit a SOC that meets the requirements set out in the ACAN, a full tendering process must be launched.

52. According to the Treasury Board of Canada Secretariat's (TBS) Guide for Managers – Best Practices for Using Advance Contract Award Notices, an ACAN should not be used where work has already begun. In such cases, the rationale underlying the decision not to publish an ACAN should be well documented on the procurement file.

53. In this case, exception (d) of Section 6 of the Regulations potentially applied (i.e. "only one person is capable of performing the contract"). An ACAN was posted and a supplier submitted a SOC. When the SOC was sent to the project authority for assessment by e-mail, the pre-identified contractor was included in the e-mail and appears to have received a copy of the SOC. This is confidential information that should not have been shared with the pre-identified contractor. The SOC was assessed as not meeting the requirements of the ACAN and the supplier was informed of this result on March 5, 2019. The contract with the pre-identified contractor was awarded on March 13, 2019 with a contract end date of March 29, 2019. A December 7, 2018 letter from the pre-identified contractor was on file and accepted Terms and Conditions outlined in a SOW previously provided by ECCC and also stated a first invoice for the first deliverable of the work (approx. 50% of the value of the contract) would be submitted to ECCC by December 24, 2018. This timeline suggests work started before a required contract authorization and before the related ACAN was published, severely impacting the fairness and openness of this process. These actions are in breach of the TBCP and the Regulations since ECCC could not have confirmed that only 1 person was capable of performing the contract until the ACAN process was completed.

54. The Canadian International Trade Tribunal (CITT) made a determination on a case with many similarities (File No.: PR-99-035). In this case, a department published an ACAN for services that were already underway and being performed by the pre-identified contractor without a contract in place. The CITT found that although the project was approaching completion and that a contract could not realistically have been awarded to a new supplier, the

department pursued the ACAN process as if it were a valid exercise. Given that the department knew the work was well underway, the CITT determined that departmental actions ran “counter to both the letter and the spirit of the trade agreements”. In another case (File No.: PR-2011-041), the CITT noted that “ACANs were created... to provide suppliers with an opportunity to challenge a limited tendering procedure before a contract was in place, while there was still time to implement an appropriate remedial measure”. In ECCC’s case, the work should not have commenced until the ACAN process had been completed.

### **Directed contract**

55. Of the 40 files selected for review, 1 was a directed contract to a supplier for the purchase of ammunition under \$25,000. The file, which was incorrectly identified as a competitive procurement in the contracting data, was incomplete as it did not include a sole source justification, as required by the TBCP.

56. ECCC’s contracting data shows that 7 directed contracts totaling \$117,000 were awarded to this supplier over a 9-month period during the scope period of this review. 4 of these contracts were for weapons or ammunition, each valued at \$24,558. This creates the perception that the total requirement for these goods was known in advance and unnecessarily divided into a number of smaller contracts, thereby avoiding contract approval authorities, i.e. contract splitting. This practice is explicitly prohibited by the trade agreements and the TBCP.

## **VII. Organizational response**

57. In accordance with section 5 of the *Procurement Ombudsman Regulations*, the Procurement Ombudsman provided ECCC with the opportunity to comment on the proposed recommendations in this review and the reasons for them. ECCC was further given the opportunity to comment on the review’s findings, and many of these comments were taken into consideration and integrated into the final version of the report.

58. ECCC is in agreement with and supports the recommendations contained in this report and recognizes the importance of sound procurement practices as a key success factor in delivering its mandate. ECCC will address these recommendations in accordance with the action plan provided below.

59. ECCC thanks OPO and the review team for its thoroughness and the professionalism extended during the review period.



## VIII. Acknowledgment

60. OPO wishes to express its appreciation to the staff of ECCC's PCD for the assistance and cooperation extended to the reviewers during this assessment.

Alexander Jeglic  
Procurement Ombudsman

## Departmental response and action plan

Procurement practice review of evaluation and selection plans, solicitation, and evaluation of bids and contract award at Environment and Climate Change Canada (ECCC)

No.	Recommendation	ECCC response / Action plan	Timeline for implementation
1	ECCC should establish a mechanism to ensure clarity and accuracy in evaluation criteria, selection methodologies and bidder instructions to avoid discrepancies in its bidding processes.	<p>ECCC will develop and implement training to procurement officers, which will cover statements of work, evaluation criteria, selection methodologies and key aspects of the bid solicitation.</p> <p>ECCC has already implemented a management review process for bid solicitations. This process will be reviewed, modified as required and communicated as part of procurement officer training.</p>	<p>Procurement officer training: to begin in Q3 2020-21 and ongoing</p> <p>Review of procedures: Q1 2021-22</p>
2	ECCC should establish mechanisms to: 1) ensure that relevant information is shared with all suppliers simultaneously; and 2) ensure all relevant communications with suppliers are properly documented.	<p>ECCC understands the importance of sharing information with suppliers simultaneously. This will be emphasized in training identified under item 1 above.</p> <p>ECCC will implement a revised quality assurance program with respect to file documentation. This will be implemented as per the action plan under item 4 below, and will include documentation of communications with suppliers.</p>	<p>Procurement officer training: beginning Q3 2020-21</p> <p>Quality assurance program: refer to item 4 below, Q4 2021-22</p>

<b>No.</b>	<b>Recommendation</b>	<b>ECCC response / Action plan</b>	<b>Timeline for implementation</b>
3	ECCC should establish mechanisms to ensure bid evaluations: 1) adhere strictly to the evaluation criteria in solicitations; 2) are carried out in accordance with planned approaches; and 3) are appropriately documented.	<p>ECCC will implement evaluation guidelines and instructions, which will be shared with evaluators prior to release of bids.</p> <p>As part of its training for procurement officers under item 1 above, ECCC will include training on the evaluation process, and the need to award contracts in accordance with planned approaches.</p>	<p>Evaluation guidelines and instructions for evaluation teams: Q4 2020-21</p> <p>Training for procurement officers on evaluation process: beginning in Q3 2020-21 and ongoing</p>
4	ECCC should establish a mechanism to enforce the requirement to document every decision of business value and maintain up-to-date and complete procurement files.	<p>ECCC understands the importance of file documentation, maintenance of up-to-date procurement files, and adherence to TBS standards.</p> <p>In 2016, ECCC originally implemented a quarterly quality assurance process to support proper file documentation.</p> <p>In order to address OPO findings and gaps identified, ECCC will implement a revised quality assurance and monitoring program, which will include a more robust file documentation checklist.</p>	<p>Revised file documentation checklist: Q2 2021-22</p> <p>Development and implementation of quality assurance program: Q4 2021-22</p>