

PROMOTING FAIRNESS, OPENNESS & TRANSPARENCY IN FEDERAL PROCUREMENT

OFFICE OF THE PROCUREMENT OMBUDSMAN

PROCUREMENT PRACTICE
REVIEW OF THE
DEPARTMENT OF FISHERIES
AND OCEANS

FEBRUARY 2020



Government
of Canada

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 the Department of Fisheries and Oceans (DFO).

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 three 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. DFO was selected for review as one of the top twenty 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 twenty departments/agencies over five years.

5. DFO's mandate is to ensure the navigability and safety of Canada's waterways, protect aquatic ecosystems and work with coastal and Indigenous communities to enable their continued prosperity from fish and seafood. The Canadian Coast Guard provides marine communications and traffic services in Canada's waterways, icebreaking, conducts scientific research and carries out search and rescue operations. DFO and the Coast Guard (hereinafter collectively referred to as "DFO") are found in over 400 locations across Canada.

6. According to DFO, Public Services and Procurement Canada (PSPC) manages DFO's larger value procurements; DFO manages only those smaller procurement activities within its own authorities. Procurement Hubs in Fredericton and Ottawa manage the procurement processes related to DFO's medium and high risk contracts. Procurement is also conducted across Canada in multiple local offices, but only for low risk contracts. According to information provided by DFO, it awarded 29,318 contracts (excluding PSPC-managed contracts and construction contracts) worth \$500.4 million during OPO's review period of July 1, 2017 to March 31, 2019.

II. Objective and Scope

7. This review was undertaken to determine whether DFO'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 DFO'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 three lines of enquiry (LOE) were used to assess the highest-risk procurement elements identified in paragraph three (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; and

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

9. OPO's review consisted of an assessment of procurement files for DFO-awarded contracts between July 1, 2017, and March 31, 2019. OPO requested 40 procurement files for assessment. This review did not include construction contracts, non-competitive contracts, acquisition card activity, or procurement activity for which DFO was not the contracting authority.

III. RESULTS

10. DFO's procurement practices pertaining to evaluation and selection plans, solicitation documents, and evaluation of bids and contract award were assessed against the three lines of enquiry noted above. OPO made six recommendations to address the issues identified in the review, which are summarized in Annex I of this report. During the period of OPO's review, DFO undertook a transformation of procurement activities; this included reviewing all procurement processes, procurement capabilities, record keeping practices and internal controls. The implementation of these changes began in the final quarter of 2018-19. OPO's recommendations are based on information and documentation provided by DFO to OPO during the course of the review.

Ten Deficient and Non-applicable Files

11. OPO's initial request for documents associated with 40 procurement files was made in late-May, but it was only in early-October when OPO and DFO finalized the documentation available for review for each file. In six cases, OPO could not conduct its review because:

- a. For three files, DFO could not locate documents pertaining to how the contract was awarded - i.e. the file was missing the solicitation documents (two files), proposals (two files) or evaluations (all three);
- b. One file was made up of printed e-mails and attachments, but the file could not be reconstructed by OPO as it was unclear which attachment went with which e-mail; and
- c. For the final two files, DFO indicated it found the necessary documentation. However, it was too late in the schedule to allow OPO to conduct the review within its legislated timelines.

12. There were also four other files which were initially identified by DFO as being competitively awarded, but it was ultimately determined two were amendments to existing contracts and two others were actually directed to a particular contractor; so full contracting processes had not been run. It was only in September/early-October 2019 when DFO provided the information necessary for OPO to determine the directed contracts were not, in fact, competitive; at which time it was too late to replace them with suitable files. Given the awarding of the two amended contracts occurred outside of OPO's review period, OPO did not consider them regarding the LOEs listed above. All 10 files are described in more detail in Annex II of this report.

Recommendation 1

DFO should ensure all procurement records are retained, organized and accessible, for the period of time required by Treasury Board record-keeping standards.

DFO comment:

In reviewing this recommendation we would note that there were only 3 files that did not have any documentation and all three of these files were low dollar contracts (approx. \$25K).

DFO undertook a review of procurement practices in 2018. The department began implementing substantive changes to processes in the last quarter of 2018 and continued to implement these changes in 2019. The three files noted above were processed before these changes had been put in place.

DFO understands the importance of record retention and adherence to TBS standards. As of April 1, 2019, we have implemented GCDocs for our procurement teams. We have also established a number of tools to assist procurement officers including a procurement file checklist. In addition, we are in the process of implementing a quality assurance process that will review procurement files for completeness.

OPO response:

Regarding the "3 files that did not have any documentation" referenced in DFO's response above: Based on the information provided by DFO to OPO during the course of the review, there was one file valued at approximately \$26,000 for which DFO could not produce any documentation. There were five other files, collectively valued at over \$900,000, which OPO could not review due to insufficient documentation on file. Additional information is found in Annex II to this report.

Thirty Reviewed Files

13. Of the remaining 30 files:

- a. 15 were awarded by DFO under PSPC professional services methods of supply;
- b. seven were awarded by DFO under its own competitive contracting processes;
- c. six were call-ups on standing offers; and
- d. two were task authorizations on existing contracts.

14. In the 22 cases where DFO was either using PSPC's methods of supply or awarded the contract under its own competitive contracting processes, DFO conducted a complete contracting process, including: the creation of the requests for proposals; the solicitation of bids; conducting the evaluations as well as the awarding and managing of the resulting contracts.

15. Call-ups on standing offers are when DFO orders ("calls up") from an offer from a supplier to provide goods and/or services at prearranged prices or pricing basis and under set terms and conditions for a specified period on an as-and-when requested basis. Standing offers are put in place by either PSPC or by DFO on its own accord. The contract occurs when the call-up is made and DFO orders the goods/services. In five of the six cases, DFO ordered directly from the supplier of its choice. In the other case, the standing offer structure allowed DFO to obtain the goods by either: (1) purchasing goods based on the lowest price between at least two of the three standing offer holders; or (2) going to a preferred standing offer holder for other material management reasons – compatibility with existing inventory, delivery date, etc.

16. Task authorizations (TA) are a structured administrative tool which enables DFO to authorize work by a contractor on an "as-and-when requested" basis in accordance with the conditions of that contract. TAs are not individual contracts. DFO typically identified its requirement in the form of a mini-statement of work/request for quote; to which the company responded by proposing one or multiple resources. These resources were evaluated against a pre-defined grid to ensure they were qualified in terms of experience and education. Once qualified, the TA was approved, signed and the work commenced.

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

17. For this LOE, OPO considered all but the six call-up files. Call-ups do not typically have evaluation criteria or selection methodology, i.e. you are buying pre-defined goods and services from prequalified suppliers, therefore those six files were not reviewed for this LOE. The remaining 24 files were examined to determine whether evaluation criteria and selection methodology were clearly communicated in the solicitation, not overly restrictive, and were aligned with the operational 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. The results of this assessment are presented below. OPO found issues in 12 of these 24 files.

Evaluation criteria were sometimes unnecessarily restrictive and may have precluded an equal opportunity to compete

18. The TBCP states “[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”.

19. In federal government procurement, evaluation criteria are split into two types – mandatory and rated. Mandatory criteria identify the minimum requirements which are essential to the successful completion of the work and they must be met or the bid will be disqualified. Rated criteria allow for marks to be assigned on a scale, so the relative merits of each bid can be used to distinguish one bid from another. Bidders are to be advised of the minimum points required to continue in the evaluation process so they can structure their proposals accordingly.

20. The selection methodology explains how the results of the Crown’s evaluation of the mandatory/rated criteria and price will be used to determine the winning bidder. In a typical process: (1) the bidder must meet all mandatory criteria; then (2) the bidder must score above the listed minimum score for the rated criteria; then (3) the price quoted by the bidder will be factored in to determine the winning bidder. Failure to meet a mandatory criterion or meet the minimum points required for rated criteria means the bid is disqualified and the financial section of the bid is not considered.

21. Regarding the evaluation criteria, OPO found issues with either: (1) the criteria favouring one bidder over others, normally an incumbent; or (2) the mandatory/rated criteria could not be properly evaluated.

22. There were two cases where the criteria favoured one bidder:

- a. In one case, the solicitation originally needed a resource with a “Secret” level security clearance. Upon learning the incumbent supplier could not provide a resource with the required security clearance level, the security level was lowered to “Reliability”. Without records suggesting other factors led to the lowering of the clearance level, it appears likely the change was made to accommodate the specific attributes of the incumbent, demonstrating a bias in favor of a preferred bidder; and
- b. In another case, DFO had a quote from the eventual winning supplier **before** the solicitation had been posted. According to DFO, the technical authority had originally wanted to direct the contract to that supplier, but the contracting authority determined it should be competed. Having the winning supplier’s quote in its possession prior to even posting the solicitation suggests bias in favor of a particular supplier, and does not pass the test of public scrutiny or the requirement to provide an equal opportunity to all firms to compete.

23. In six cases, the wording of the criteria in the solicitation was unclear. Unclear evaluation criteria can cause bidders to submit non-compliant or sub-optimal proposals because the requirements are not well understood.

- a. In four cases, a mandatory criterion required the proposed resource to be fluent, in either English or French or both, in writing, speaking and comprehension. Unless the bidder

submits a resource's certified language levels, e.g. if the resource has taken a standardized test like Test of English as a Foreign Language® (TOEFL), there is no way a written bid could demonstrate which language(s) a resource can speak or read; and

- b. In two cases, one rated criterion in the solicitation said it was for "Bonus" points, which was misleading because, in reality, it was a regular rated criterion. In one of the cases, the maximum number of points a bidder could achieve was 40 points. If these were truly "bonus" points, a bidder could ignore this criterion and still achieve 40 points. However, in this case, if a bidder didn't address this criterion, it could only have scored 30/40. For the other case, there were 10 "bonus" points, but, if not addressed, a bidder could only have obtained 60/70 points.

24. In three cases, the mandatory and rated criteria either did not complement each other or were mixed up, e.g. rated criteria which, by virtue of their language, were actually mandatory criteria:

- a. In one file, a mandatory criterion required the bidder to provide a résumé stating its work experience and undefined "...other relevant details". By not specifying what these details were, bidders wouldn't know what to include and evaluators don't have a mechanism to screen a bidder in or out. This same solicitation also had a rated criterion stating bidders "...must possess a degree in graphic design ... and at least two years of relevant experience". Although points were awarded on a sliding scale for the amount of experience, the requirement to have a degree should have been in the mandatory criteria section;
- b. Another file also included mandatory criteria which provided too much flexibility to bidders, making the determination of compliance difficult. One criterion required the bid to show how the bidder was going to do the work and that "[a]ll points in the Scope of Work, Tasks, and Deliverables sections must be addressed". Without identifying what "points" had to be addressed in the six-plus pages encompassing the Scope of Work, Tasks, and Deliverables, a bidder would not know what to include in its bid. The solicitation's rated criteria also identified two specific software packages which had to be used, meaning they were mandatory; and

- c. In the third file, the criterion required a “minimum” of three herring seasons’ experience, however rated points were also awarded for two years’ or less experience. This could lead to a circumstance where an underqualified proposal (i.e. someone with less than the minimum of three years’ experience) could pass this stage of the evaluation process.

Recommendation 2

DFO should ensure evaluation criteria are reviewed to eliminate bias and ensure clarity prior to publication.

DFO comment:

DFO undertook a review of procurement practices in 2018. The department began implementing substantive changes to processes in the last quarter of 2018 and continued to implement these changes in 2019. The files noted in the observations were all processed before these changes were put into place.

DFO agrees that evaluation criteria should be structured in a way that ensures clarity and minimizes bias. Evaluation guidelines and training material has been developed for procurement officers to ensure evaluation criteria are developed appropriately and clearly. Training on these tools is provided on an ongoing basis.

DFO has also increased the capacity and technical expertise of the procurement team over the last 12 months. Since the review period of this report, we have completed staffing of all our vacant positions. In addition, our procurement team is now organized by client group to build more expertise in specific procurement requirements across the Department.

The clarity of the language used to communicate the basis of selection should be improved to ensure all participants understand how bids are to be evaluated

25. Regarding the selection methodology, OPO found DFO often appropriately advised bidders of the manner by which the contract would be awarded. Bidders who met the mandatories and exceeded the minimum rated criteria point threshold proceeded to the next level, in which the technical rated points and the price were combined to determine the highest ranked bidder according to the stated selection methodology.

26. However, in three cases there were discrepancies in the solicitation about how many points were needed to progress to the financial evaluation stage. In one case, the Basis of Selection and the Rated Criteria grid were off by 10 percent – the Basis of Selection stated a bidder needed to obtain 70 percent of the available points (420/500) whereas the Rated Criteria scoring grid indicated only 60 percent was necessary (360/500). In another case, the rated criteria grid stated the bidder needed 21 points, but the Basis of Selection would have allowed a bidder who only scored one point to proceed. In the third case, the rated criteria section stated a passing mark will be set (out of 35 points), but the selection methodology appears to allow someone who scored one point to be considered. Discrepancies such as these 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 fail to meet the

requirement of “transparency in the bidding process” as set forth in section 40.1 of the *Financial Administration Act*.

Recommendation 3

DFO should ensure clarity and consistency in its solicitation documents to avoid discrepancies and ensure transparency in its bidding processes.

DFO comment:

It should be noted that the observations leading to this recommendation focus on the points related to the evaluation criteria. Our response to recommendation #2 is outlined above.

DFO understands the importance of clarity and consistency in solicitation documents. DFO undertook a review of procurement practices in 2018. The Department began implementing substantive changes to processes in the last quarter of 2018 and continued to implement these changes in 2019. These changes included improvements to the development of solicitation documents. A number of guidelines have been developed, templates have been updated and training has been provided. DFO will continue to adopt standard PSPC templates, tools and processes where applicable. A contract management checklist is also under development.

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

Departmental conduct during the solicitation period did not always encourage maximum participation from bidders

27. For this LOE, 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 bidders supported the preparation of responsive bids. OPO considered all 30 of the reviewed files and found issues in nine files.

28. The TBCP states “... the method of procurement used for a particular acquisition must, within the limits of practicality, give all qualified firms an equal opportunity for access to government business”. Article 509(7) of the Canadian Free Trade Agreement (CFTA) also states “... A procuring entity shall make available to suppliers tender documentation that includes all information necessary to permit suppliers to prepare and submit responsive tenders”.^A

^A This report uses excerpts from the CFTA when referencing trade agreement requirements. In general, trade agreements have the same requirements regarding conducting government procurement. There can be variations in the text of the different agreements so, if such a variation exists and is germane to a section of this report, text from another trade agreement may also be quoted.

29. When solicitations are being conducted under PSPC's methods of supply, the bidding period and minimum number of pre-qualified bidders to be invited are specified, typically depending on the value of expected contract:

Method of supply	Value of contract	Minimum Number of invitees	Number of User selections*	Number of System's random selections*	Minimum length of bid period
TBIPS and TSPS	NAFTA to \$2M	15	<10 10 >10	To get 15 5 5	15 days
	\$2M+	All pre-qualified bidders	n/a	n/a	20 days
ProServices	\$0-\$25,000	1	1	n/a	5 days
	\$25,000 to NAFTA	2	2	n/a	
THS	\$0-\$25,000**	1	1	n/a	2-4 days
	\$25,000+**	5 or 6	0-4	5 or 6	

*Depending on the method of supply, the department can select bidders it wishes to invite from a list of pre-qualified bidders in the relevant workstream. This listing is supplemented by random, system-generated selections.

**During the review period, it was \$25,000. In June 2019 it was increased to \$40,000.

30. In cases where DFO was conducting the procurement not using any of the PSPC methods of supply, it either posted the solicitation on the government electronic tendering service (www.buyandsell.gc.ca) for the required number of days, or it conducted a traditional competitive process by contacting a minimum of three bidders and providing them time to submit bids.

31. Solicitations conducted under PSPC's methods of supply use standard template solicitation documents which are a result of industry/government consultations and which establish rules to ease the administrative burden of conducting repetitive service contracting. For those solicitations which DFO posted on www.buyandsell.gc.ca under its own processes, the documents and processes were similar to the standard PSPC procurement processes.

32. For the 24 reviewed files for which DFO either used PSPC methods of supply, conducted its own competitive process or issued TAs under a contract, OPO found five issues regarding events taking place within the bid solicitation period. In these cases, DFO appears to have either purposely limited the bidder pool or created circumstances to ensure a particular bidder had greater access to the solicitation:

- a. In one case, according to e-mails between the Technical and Contracting authorities, DFO modified the requirement to remain within the ProServices method of supply and below the TSPS threshold. Under ProServices, only two bidders need to be invited to bid. Under TSPS, 15 bidders are invited **and** it is subject to the North American Free

Trade Agreement (NAFTA). Note that Articles 1001(4) and 1002(4) of NAFTA both state you cannot structure a procurement to avoid obligations under NAFTA;

- b. In another case previously described in LOE 1, DFO had a requirement for which the supplier had to provide a resource who was cleared to “Secret”. DFO lowered the security requirement to the benefit of the incumbent. This same file was also missing information to confirm whether a second bidder was even invited to participate in the process, even though this was a requirement under ProServices;
- c. In two cases, DFO invited the winning supplier to bid, and also invited that same supplier to bid in a joint venture with another firm. In both cases, bidding was limited to a set number of pre-qualified bidders, so inviting the same bidder in more than one capacity effectively reduced the bidding pool; and
- d. In one case, DFO had a quote from the winning supplier dated February 12, 2018, but other bidders were not officially notified of the requirement until the request for proposal was posted on March 20, 2018. This was the file noted above where OPO observed the contracting authority challenged the technical authority’s request to direct the contract.

33. In 23 of the 24 files, DFO properly followed the applicable rules and all the solicitations were posted for at least the minimum required length of time and, in that one other case, it was only short of the minimum by a couple of hours. During the solicitation period, DFO also managed communications with bidders properly. When questions were asked, they were answered and the responses were provided to all bidders.

34. In three cases, however, OPO does not consider the information provided to bidders to have been of benefit in submitting responsive proposals:

- a. In one case, a mandatory criterion stated: “**If** the course is under the supervision of more than one instructor, the proposed assistant instructors must hold qualifications...” [emphasis added]. According to the evaluation notes, one bidder was disqualified for only proposing one instructor because Transport Canada, the “owner” of the course to be taught, “... requires that the # of participants in a class should not exceed 12 per instructor for any practical demonstration & must not exceed 24 per instructor for lectures...our requirement is for 36 participants”. It is unclear why DFO included the word “if”, thereby inferring only a single instructor might suffice;
- b. In another case, a bidder asked if there was an incumbent, to which DFO advised there was not. In fact, there had been a contracted resource doing the work at DFO for six months leading up to the solicitation. It is unclear why DFO did not identify that there was an incumbent, as misinformation such as this can impact a bidder’s decision on whether or not to submit a bid; and
- c. In the third case, bidders asked DFO to clarify two rated criteria, which was done via an amendment. However, the response regarding one of the criteria did not adequately clarify the issue, as it was still unclear how maximum points could be achieved.

DFO staff did not follow the appropriate standing offer protocols when issuing three of the six reviewed call-ups

35. Six of the files in OPO's sample were call-ups against standing offers. They were considered under this LOE as, for the most part, there are no evaluation criteria or selection methodology (as examined under LOE 1) and there are no evaluations (as examined under LOE 3).

36. In two cases, the standing offers required DFO to do more than just call-up the goods/services. In one case, the value of the requirement (\$99,000) required DFO to choose a supplier based on which of the three standing offer holders had the lowest price for the required goods. Otherwise, the standing offer was set up so, if DFO wanted to only go to one supplier based on another rationale – e.g. compatibility with existing stock, delivery date requirements, etc. – the call-up limit was \$40,000. The file does not contain any information indicating DFO contacted any supplier other than the company which was issued the call-up. In the second case, work was supposed to be shared on a proportional basis between multiple standing offer holders. The file indicated there was a question about whether the call-up would be within the preferred standing offer holder's portion. The file did not confirm if the standing offer holder ultimately awarded the call-up was entitled to receive it. DFO subsequently advised the call-up total was shared between five standing offer holders on a rotational basis, but it did not confirm that the rotation met the proportional requirements.

37. In another case, DFO obtained two quotes, however, the quote from the supplier awarded the call-up was not in the file when it was reviewed by OPO. There was, however, a quote from a second, lower-priced bidder on file. DFO indicated that at the time the call-up was raised, this second bidder was not on the list of standing offer holders for those commodities, and it was mandatory to use an existing standing offer holder,^B DFO did not explain why it had sought a quote from an ineligible bidder. DFO indicated that it would have had to have requested an exemption from using the (more expensive) standing-offer-holder quote. The file does not include any documentation indicating if such an exemption was contemplated for the \$30,000-cheaper quote. The file does include an e-mail from PSPC stating the more expensive quote was acceptable.

38. Section 12.3.1 of the TBCP states "...procurement files shall be established and structured to facilitate management oversight with a complete audit trail that contains contracting details related to relevant communications and decisions...". OPO noted that in three of the six call-up files, it was only after OPO shared its findings with DFO that the latter was able to explain: why signatures were missing from two call-ups; and that the rotational aspect of the other call-up was done. The challenge faced by DFO, and other departments, is ensuring that all procurement documentation, whether hard-or soft-copy, is accessible and available.

^B There are multiple types of standing offers – some are mandatory, some are not; some are for only one Department, some are for all of Government; some are for one geographical region, some are across Canada. In this case, the goods being purchased had to be purchased via one of the across-Canada standing offers in place at the time.

Procurement Hub staff must increase their efforts to allow all eligible bidders to access procurement opportunities

39. Overall, of the 30 files which OPO reviewed, there were six cases where DFO appears to have manipulated the number of bidders invited to bid, and three cases where it did not provide proper information to bidders.

40. In seven of these nine cases, i.e. all but the call-ups, the Fredericton and Ottawa Procurement Hubs were managing the files. The Procurement Hubs, as the Departmental contracting specialists, should be aware of the requirement that **all** qualified firms be given an equal opportunity to access government business, and should not be involved in trying to minimize access to the requirements.

Recommendation 4

DFO should properly document its files to demonstrate how its contracting personnel are giving all qualified firms an equal opportunity for access to government business, and how its contracting personnel are decreasing any possible bias or incumbent advantage.

DFO comment:

DFO understands the importance of equal opportunity for access to government business. DFO undertook a review of procurement practices in 2018. The Department began implementing substantive changes to processes in the last quarter of 2018 and continued to implement these changes in 2019. These changes included improvements to processes, guidelines and tools as well as increased training and capacity. Quality assurance processes are also being implemented.

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

41. Of the 24 competitive solicitation processes reviewed, i.e. not including the call-ups, two were awarded on the basis of being the lowest-priced bid that met mandatory requirements, and the remaining 22 included a rated technical evaluation. These 22 were examined to determine whether a process had been established, complete with guidance for evaluators, 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. OPO found issues in four of the 22 files.

Bid evaluation was occasionally brought into question due to DFO staff not declaring a possible conflict or through not following the evaluation instructions

42. The TBCP states that contracts should be awarded based on the unaltered, pre-defined evaluation criteria found in the solicitation. Article 515(5) of the CFTA states:

... the procuring entity shall award the contract to the supplier that ..., based solely on the evaluation criteria specified in the tender notices and tender documentation, has submitted:

- (a) the most advantageous tender; or
- (b) if price is the sole criterion, the lowest price.

43. In the case of DFO's 24 competitive solicitation processes, there was only one case where the file did not contain evidence of the contracting authority providing evaluators with a set of forms to ensure the bids were properly, unbiasedly and consistently evaluated by all evaluators. In that case, it appeared a project authority performed the procurement process and there were no forms or guidance on the file.

44. Overall, the necessary forms were typically packaged together by the DFO contracting authority and sent to the technical evaluation team once the bid period closed. Once signed by the evaluation team, the bid evaluation commenced. The instructions normally contained three aspects:

- a. A Non-disclosure/Confidentiality form, to be signed by the evaluators, in which they state they will not disclose or discuss the information contained in the bids with anyone outside of the evaluation team;
- b. Instructions to Evaluation Team Members on Bid Handling, including blank evaluation forms – typically two sets – one for each individual evaluator and one for the final consensus report – and instructions on how to fill out those forms; and
- c. Conflict of Interest provisions, embedded in the Instructions to Evaluation Team Members on Bid Handling which, when signed by the evaluators, declare that none of the evaluators are in a conflict of interest position.

45. In 11 cases, OPO observed that DFO took an extra step to demonstrate that the evaluators not only were not in a conflict position vis-à-vis the bidders, but that they were also free of internal conflict or pressure. In these cases, the following clause was inserted at the top of page one of the Instructions to Evaluation Team Members on Bid Handling form:

"The evaluation should be conducted by a team of at least three (3) individuals at least one of which is not in a direct reporting relationship with the Project Authority..."
(OPO emphasis)

46. DFO's conflict guidelines state:

"Individuals must declare any real or perceived conflict of interest prior to commencing a bid evaluation. Potential Team Members are expected to apply the highest standard when considering if a potential Conflict of Interest exists."

47. In three cases, the files did not contain signed conflict of interest forms. As noted above, in one case, it appears the project authority conducted the whole solicitation process and may have been unaware such forms existed. In another case, there were no conflict of interest forms on file despite the real possibility of a conflict. It was a THS requirement for a procurement policy resource and the evaluators were Ottawa Procurement Hub procurement officers. The resource being proposed by the winning bidder had spent the previous 16 months working in

the Ottawa Procurement Hub as a procurement officer. In the third case, only one of the three evaluators signed the conflict of interest forms. That evaluator, however, knew the resource being proposed by the winning bidder quite well and had been supervising that resource's work since 1996. According to the resource's resume, that evaluator was listed as the contact reference for 14 of the 25 projects in his resume, including the project on which he had been working for the year prior to the solicitation.

48. In the last two cases, where the winning bidders and evaluators were former colleagues or had long-term working relationships, the evaluators should have declared any real or perceived conflict of interest prior to commencing bid evaluation. The failure to do so falls short of the TBCP requirement that government contracting shall be conducted in a manner that will stand the test of public scrutiny in matters of prudence and probity.

Recommendation 5

DFO should ensure that a standard "evaluation package" including a Confidentiality form and Conflict of Interest form are signed by all evaluators and recorded on file prior to providing evaluators access to bids.

DFO comment:

Management agrees with the recommendation and Materiel and Procurement Services (MPS) has already begun implementing elements of this finding:

Actions needed to close recommendation:

1. MPS has drafted an Evaluation guide for use by contracting officers in the Procurement Hub. The Guidelines contains all elements identified in paragraph 44 of the OPO report. Once approved, it will be released to the Procurement Hub staff and managers issuing contracts.
 - Implementation date: Q4 FY 19/20
2. Training to occur in support of the Evaluation Guidelines.
 - Implementation date: to start upon release of document/be ongoing

49. OPO found two cases where DFO evaluators did not properly follow or document their evaluation results. In one case, the prescribed TA evaluation process was not followed. After the supplier had submitted its proposal, the technical authority interviewed the proposed resource before evaluating the supplier's proposal, something not contemplated by the TA process described in the contract. Subsequent to the interview, the technical authority advised the contracting authority he was "...go[od] to go and hire..." the resource, and asked if the evaluation should then be done. This effectively pre-concluded the results of the bid evaluation.

Furthermore, the proposed resource's resume did not meet the administrative requirements of the prescribed TA process and should not have been accepted.

50. The other file for which OPO could not confirm the evaluation process was properly followed was where one of the evaluators had been supervising the resource's work since 1996; documentation was missing from the file provided to OPO. The file contained no drafts of any documentation, nor any of the normal exchanges between contracting and technical staff when discussing or drafting the solicitation. Neither the individual evaluations of the winning proposal nor any evaluation of the second, less expensive bid was on the file. Regarding evaluation, all OPO was able to review was the consensus scoring for the one bid, which merely included check marks for the mandatory criteria, presumably to indicate the bid had met them, and the overall scores for the rated criteria, e.g. "20/20", "30/30", for each of the six rated criteria with no explanation of how those marks were achieved. Given the lack of information on file, it was unclear why the contract had been awarded to the more expensive bidder.

51. Overall, except for the above-noted two files, DFO evaluators properly documented their evaluation results.

Recommendation 6

DFO should put a mechanism in place to ensure evaluation processes are adhered to and contracts are awarded to the appropriate, qualified bidder.

DFO comment:

Agreed. Through the implementation of the Evaluation Guidelines, firmer rules surrounding the evaluation of bids should lead to more standardized procedures and ensuring that all relevant TB and departmental procurement practices are followed.

Actions needed to close recommendation:

1. The Contract Review Committee (CRC) through the development and tracking of the Departmental Procurement Plan (DPP) will monitor adherence to procurement rules and assist in increasing contract award transparency
 - Implementation date: Q1 FY 20/21
2. Deployment of the Evaluation Guideline documents.
 - Implementation date: Q4 FY 19/20
3. Team Lead or Senior Manager in Procurement Hub peer reviews.
 - Implementation date: Ongoing

IV. Simplification

52. OPO regularly hears from both Canadian businesses and federal officials who believe the contracting process is unnecessarily complex. In reviewing DFO'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.

Standardization of procurement documents/processes to streamline procurement processes

53. DFO consistently uses federal government "standard" solicitation documents and processes. In doing so, DFO eases the burden on bidders by not requiring them to learn any DFO-specific solicitation processes/rules or have to institute a specialized DFO protocol when they bid on DFO opportunities. All 30 reviewed files used standard documents to some extent:

- a. The 15 method-of-supply files used the PSPC-templated solicitation documents;
- b. For the seven files for which DFO awarded the contract on its own, a standard solicitation process was followed which used documents similar to ones used by PSPC when it conducts procurement for all Departments;
- c. The six call-up files used the standard PSPC call-up form; and
- d. The two TA files also used standard forms.

54. Internally, as noted above, DFO consistently uses a set "package" of evaluation documents – the Evaluation Guide, the Conflict of Interest Declaration (including the additional step of attempting to address internal conflict situations) and the Non-Disclosure form. Such a standardized approach ensures all evaluations are conducted similarly and DFO staff don't have re-learn the process every time they are involved in a procurement. Ideally this will speed up evaluations and be fairer to bidders as all DFO evaluations will result in consistent, supportable contract awards.

V. Conclusion

55. DFO'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 Treasury Board Contracting Policy (TBCP) and departmental guidelines, in order to assess if they supported the principles of fairness, openness and transparency.

Documentation

56. DFO was unable to produce documentation in a timely manner regarding how six of the 40 contracts were awarded. There were 24 files from the two Procurement Hubs, which OPO staff were able to review, *in situ*, in Ottawa and Fredericton. However, even recognizing DFO's cross-Canada presence requires a de-centralized approach to its procurement needs, it is cause for concern that over 37 percent of these de-centralized files (six of the 16 remaining files) could not be reviewed for lack of documentation. The lack of documentation means DFO is

unable to refute any challenges from bidders and reviewers/auditors as to how its procurements met its fairness, openness and transparency obligations.

Overall, OPO found issues in 18 of the 30 reviewed files, including seven which had issues in two LOEs

57. Regarding LOE 1, which reviewed the evaluation criteria and selection plan, OPO found issues with 12 of 24 procurement files. In two cases, i.e. lowering the security requirement and getting a quote from one supplier before posting the solicitation, one bidder was favoured over the rest. In the other cases, it was the criteria themselves, or the selection methodology, which were either not clear or contained discrepancies. Issues such as these can lead to incorrect bids and improper evaluations, thus impacting the fairness of the procurement process.

58. Regarding LOE 2, which reviewed the solicitation documents and DFO's conduct during the solicitation process, OPO found issues with nine of 30 procurement files, including the one case where DFO purposely modified the requirement to remain within the ProServices method of supply and below the TSPS threshold. In six cases, DFO favoured one bidder over others or found ways to limit the bidder pool, thereby affecting the openness of those procurements. In four other cases (one where the rotation/proportion was unclear and three where DFO did not provide correct information during the solicitation process), the transparency and fairness of the processes were negatively impacted by DFO's actions.

59. Regarding LOE 3, which reviewed the evaluation of bids and contract award, OPO found issues with four of 24 procurement files. Overall, DFO more-than-adequately informed its evaluators of how to conduct those processes. DFO also sought to ensure possible internal conflict could be mitigated by requiring one of the evaluators to be outside the span of control of the project authority. This is significant because this stage of procurement has the greatest potential to affect the overall competitive process given its importance vis-à-vis actually awarding the contract to the correct bidder in a fair, open and transparent manner. Of concern were the two cases where the evaluators appeared to be in a conflict position, especially the case where the evaluation of the cheaper bid, and the individual evaluations of the winning bidder, were missing.

60. In order to address issues identified, OPO made 6 recommendations. These recommendations can be found in Annex I of this report.

VII. Organizational Response

61. DFO has been undergoing a large transformation of procurement activities. This has included reviewing all procurement processes, procurement capabilities, record keeping practices and internal controls. The implementation of these changes began in the last quarter of 2018.

62. DFO notes OPO has identified a number of improvements related to DFO's procurement practices. These observations are, in large part, addressed by the work DFO already has underway. DFO is committed to ensuring its procurement practices are sound and support the principles of fairness, openness and transparency.

VIII. Acknowledgment

63. OPO wishes to express its appreciation to the staff of the Ottawa and Fredericton Procurement Hubs for the assistance and cooperation extended to the reviewers during this assessment.

Alexander Jeglic
Procurement Ombudsman

Annex I

Status of Review Recommendations

Procurement Practice Review of Evaluation and Selection Plans, Solicitation, and Evaluation of Bids and Contract Award at DFO

Record Number	Recommendation	Critical ^c / Important ^d	DFO Response
1	DFO should ensure all procurement records are retained, organized and accessible, for the period of time required by Treasury Board record-keeping standards.	Critical	<p>In reviewing this recommendation we would note that there were only 3 files that did not have any documentation and all three of these files were low dollar contracts (approx. \$25K).</p> <p>DFO undertook a review of procurement practices in 2018. The department began implementing substantive changes to processes in the last quarter of 2018 and continued to implement these changes in 2019. The three files noted above were processed before these changes had been put in place.</p> <p>DFO understands the importance of record retention and adherence to TBS standards. As of April 1, 2019, we have implemented GCDocs for our procurement teams. We have also established a number of tools to assist procurement officers including a procurement file checklist. In addition, we are in the process of implementing a quality assurance process that will review procurement files for completeness.</p>
2	DFO should ensure evaluation criteria are reviewed to eliminate bias and ensure clarity prior to publication.	Important	<p>DFO undertook a review of procurement practices in 2018. The department began implementing substantive changes to processes in the last quarter of 2018 and continued to implement these changes in 2019. The files noted in the observations were all processed before these changes were put into place.</p> <p>DFO agrees that evaluation criteria should be structured in a way that ensures clarity and minimizes bias. Evaluation guidelines and training material has</p>

^c Critical recommendations address significant and/or pervasive deficiencies or weaknesses in procurement practices, such that procurement activities are inconsistent with applicable regulations and rules and do not support the principles of fairness, openness and transparency.

^d Important recommendations address deficiencies or weaknesses in procurement practices, such that there may be a risk that procurement activities do not support the principles of fairness, openness and transparency.

			<p>been developed for procurement officers to ensure evaluation criteria are developed appropriately and clearly. Training on these tools is provided on an ongoing basis.</p> <p>DFO has also increased the capacity and technical expertise of the procurement team over the last 12 months. Since the review period of this report, we have completed staffing of all our vacant positions. In addition, our procurement team is now organized by client group to build more expertise in specific procurement requirements across the Department.</p>	
3	DFO should ensure clarity and consistency in its solicitation documents to avoid discrepancies and ensure transparency in its bidding processes.	Important	<p>It should be noted that the observations leading to this recommendation focus on the points related to the evaluation criteria. Our response to recommendation #2 is outlined above.</p> <p>DFO understands the importance of clarity and consistency in solicitation documents. DFO undertook a review of procurement practices in 2018. The Department began implementing substantive changes to processes in the last quarter of 2018 and continued to implement these changes in 2019. These changes included improvements to the development of solicitation documents. A number of guidelines have been developed, templates have been updated and training has been provided. DFO will continue to adopt standard PSPC templates, tools and processes where applicable. A contract management checklist is also under development.</p>	
4	DFO should properly document its files to demonstrate how its contracting personnel are giving all qualified firms an equal opportunity for access to government business, and how its contracting personnel are decreasing any possible bias or incumbent advantage.	Critical	<p>DFO understands the importance of equal opportunity for access to government business. DFO undertook a review of procurement practices in 2018. The Department began implementing substantive changes to processes in the last quarter of 2018 and continued to implement these changes in 2019. These changes included improvements to processes, guidelines and tools as well as increased training and capacity. Quality assurance processes are also being implemented.</p>	
			DFO Response	Timeframe
5	DFO should ensure that a	Important	Management agrees with the recommendation and MPS	

	standard “evaluation package” including a Confidentiality form and Conflict of Interest form are signed by all evaluators and recorded on file prior to providing evaluators access to bids.		has already begun implementing elements of this finding: <ol style="list-style-type: none"> 1. MPS has drafted an Evaluation guide for use by contracting officers in the Procurement Hub. The Guidelines contains all elements identified in paragraph 44 of the OPO report. Once approved, it will be released to the Procurement Hub staff and managers issuing contracts. 2. Training to occur in support of the Evaluation Guidelines. 	<ol style="list-style-type: none"> 1. Q4 FY 19/20 2. To start upon release of document/be ongoing
6	DFO should put a mechanism in place to ensure evaluation processes are adhered to and contracts are awarded to the appropriate, qualified bidder.	Critical	Agreed. Through the implementation of the Evaluation Guidelines, firmer rules surrounding the evaluation of bids should lead to more standardized procedures and ensuring that all relevant TB and departmental procurement practices are followed. <ol style="list-style-type: none"> 1. The CRC through the development and tracking of the DPP will monitor adherence to procurement rules and assist in increasing contract award transparency. 2. Deployment of the Evaluation Guideline documents. 3. Team Lead or Senior Manager in Procurement Hub peer reviews. 	<ol style="list-style-type: none"> 1. Q1 FY 20/21 2. Q4 FY 19/20 3. Ongoing

Annex II

Ten Deficient and Non-Applicable Files

1. The TBCP requires procurement files be structured to facilitate management oversight, including a complete audit trail containing contracting details related to relevant communications and decisions. It specifically notes, as part of Canada's obligations under international and national trade agreements, "...[c]ontracting authorities shall guarantee that complete documentation and records...are maintained to allow verification by the Canadian International Trade Tribunal that the procurement process was carried out in accordance with the [applicable sections of the trade] agreements".
2. The Canadian International Trade Tribunal (Tribunal) is the administrative body with the authority to inquire into complaints by potential suppliers of goods or services to the federal government and decide whether the federal government broke its procurement obligations under certain trade agreements to which Canada is party. OPO also plays a role in the bidder complaint process; it can hear complaints about awarded contracts which, if not excluded from coverage by legislated exceptions or value, would have been covered under the CFTA.
3. In addition to the fact these are financial records and are required to be kept for audit purposes, Treasury Board Information Management Guidelines require all public servants to:
 - a. document business activities and decisions;
 - b. organize, file and store information resources within the corporate repository, ensuring easy access when needed to make decisions, and to support program and service delivery;
 - c. share and reuse information resources to support collaboration and facilitate business operations, respecting all legal and policy requirements;
 - d. be informed of and apply retention periods for information resources; and
 - e. protect and preserve information resources of business value critical to business resumption.
4. OPO selected its 40 review files from a comprehensive listing of awarded contracts DFO provided at the outset of this practice review. The files selected came from across Canada: 24 were awarded by DFO's two main Procurement Hubs; and the remaining 16 from local offices across Canada.

Six Deficient Files

5. There were six files for which OPO could not conduct a proper review:
 - a. In three cases, DFO could not locate documents instrumental in determining how the contract was awarded - i.e. the file was missing the solicitation documents (two files), proposals (two files) or evaluations (all three). It was also noted, in one case, the file appeared to consist of information provided by the supplier three months after OPO had originally requested the file. It is unclear what records DFO actually had at the time OPO's review commenced;

- b. In one case, the (printed) e-file consisted of e-mails and attachments but the file could not be reconstructed as OPO staff were uncertain which attachment went with which e-mail. There was also one e-mail stating no evaluation was possible because none of the bidders were able to meet the entire work requirement – so it was unclear how a contract could be awarded if there was no evaluation; and
- c. In two cases, DFO indicated it found the missing information which had prevented OPO from conducting a complete review. This information should have been on the files originally to allow OPO to conduct the review within its legislated timelines.

6. OPO considers the inability to demonstrate and document decisions which ultimately led to the awarding of contracts valued at over \$900,000 to be a significant concern, and a breach of the TBCP and Treasury Board Information Management Guidelines. Without proper records, DFO cannot document its business decisions, leaving it unable to demonstrate good stewardship of Crown resources or that the procurements were conducted in a fair, open and transparent manner.

Non-Applicable Files – Two Directed Contracts

7. It was found two contracts were directed to suppliers. As this type of contract was outside the scope of OPO's review, neither were considered when assessing DFO's overall procurement practices. However, due to the difficulties in obtaining information about these files, it was only in September/early-October when OPO staff were able to determine their non-applicability and, at that stage, it was too late to replace them with suitable files.

8. In one case, DFO used an appropriate contracting method. The other one, however, raised concerns about whether DFO was properly using the ProServices method of supply. If using the ProServices workstreams, Departments are allowed to only go to a single pre-qualified bidder if the requirement is less than \$25,000. If it is more, then a minimum of two bidders must be invited to bid. Prior to DFO finalizing the work requirement, it had exchanged e-mails with the eventual supplier and, in those e-mails, that supplier quoted a price of \$24,900, specifically noting it was a not-for-profit organization and, therefore, it did not charge taxes on its quoted price, which left it below the \$25,000 threshold and able to be directed. Due to the lack of documentation provided to OPO, it cannot be ascertained who was determining the level of effort and prices – DFO or the supplier.

Non-Applicable Files – Two Contract Amendments

9. There were also two files which were amendments to existing contracts. Such transactions appear as "competitive" in DFO's contract listing, as they are related to the original competitive contract. In the case of OPO's selected files, the actual contract was awarded outside of OPO's review period and, thus, was not reviewed. The amendment processes were examined, to ensure they had been exercised properly, but any findings were not considered as part of this review.

10. An amendment is an agreed addition to, deletion from, correction or modification of a contract. In one case, the contract holder was an individual (e.g. Mr. John Smith) who had

changed to a corporate entity (e.g. John Smith Enterprises Inc.). The amendment was raised to assign the contract from the individual to the corporate entity and update the contract number. There were no other changes.

11. In the other case, which was to exercise the fourth of five option years of a multi-year contract, the file indicates DFO did not exercise the option in time, i.e. the third option year had expired in September without the fourth option year being exercised. Three months later, in December, the amendment to add the fourth year was issued. This amendment is a completely separate, non-competitive contract which requires a higher level of authority to enter into than a competitive procurement. Unless this was considered an “Emergency” contract, no one in DFO had the authority to enter into a non-competitive contract of this value (\$500,000).