

Questions submitted to the Office of the Procurement Ombudsman by Kelly McCauley, M.P., Tuesday, March 18, 2022

1. What actions has the govt taken regarding recommendations in last years annual report

The Procurement Ombudsman's 2020-21 Annual Report provided an overview of results and recommendations from systemic reviews of procurement practices completed by the Office of the Procurement Ombudsman (OPO) in two federal departments – Environment and Climate Change Canada (ECCC) and Employment and Social Development Canada (ESDC). The Annual Report also summarized the results from follow-up exercises conducted by OPO to determine whether Elections Canada and the Courts Administration Service (CAS) had implemented the Procurement Ombudsman's recommendations from previously completed procurement practice reviews.

Environment and Climate Change Canada (ECCC)

The final report from the Procurement Ombudsman's procurement practice review of ECCC, dated July 2020, included 4 recommendations to the department to improve its procurement practices in support of the principles of fairness, openness and transparency.

1. establish a mechanism to ensure clarity and accuracy in evaluation criteria, selection methodologies and bidder instructions to avoid discrepancies in its bidding processes
2. establish mechanisms to ensure that relevant information is shared with all suppliers simultaneously, and ensure all relevant communications with suppliers are properly documented
3. establish mechanisms to ensure bid evaluations adhere strictly to the evaluation criteria in solicitations, are carried out in accordance with planned approaches, and are appropriately documented
4. establish a mechanism to enforce the requirement to document every decision of business value and maintain up-to-date and complete procurement files

ECCC agreed with and supported the Procurement Ombudsman's recommendations from the review and recognized the importance of sound procurement practices as a key success factor in delivering its mandate. ECCC prepared an action plan to address the 4 recommendations and set a timeline for implementation that projected all planned actions to be implemented by Q4 2021-22 (January 2022 – March 2022). The ECCC response and action plan was included in the final report, which was posted to the OPO website.

As is its standard practice, the OPO will be conducting a follow-up exercise in 2022-23, i.e. 2 years following completion of the review, to determine whether ECCC has effectively implemented its action plan developed in response to the Procurement Ombudsman's recommendations. Upon completion, the results will be made public by posting a follow-up report on the OPO website.

Employment and Social Development Canada (ESDC)

The final report from the Procurement Ombudsman's procurement practice review of ESDC, dated October 2020, included 3 recommendations to the department to address issues identified in the review.

1. implement measures to ensure that the existing guidance regarding the development of evaluation criteria is implemented by ESDC's project authorities, and that ESDC's Procurement Group exercises the necessary oversight to ensure that evaluation criteria are communicated in a clear, precise, and measurable manner.
2. implement measures to ensure that communications with suppliers support the preparation of responsive bids, including ensuring that suppliers be provided adequate time to prepare and submit tenders.
3. implement measures to ensure evaluations are carried out in accordance with the planned approach and are appropriately documented to support the transparency of the award process.

ESDC agreed with the Procurement Ombudsman's recommendations and recognized the importance of rigorous and well-documented procurement practices as a key factor in delivering its mandate. ESDC prepared an action plan to address the recommendations and reaffirmed its commitment to ensuring its procurement practices are sound and support the principles of fairness, openness and transparency. The timeline for implementation established by ESDC called for all actions to be implemented in 2021.

Similar to what is planned for ECCC, the OPO will be conducting a follow-up exercise in 2022-23 to determine whether ESDC has effectively implemented its action plan developed in response to the Procurement Ombudsman's recommendations. Upon completion, the results will be made public by posting a follow-up report on the OPO website.

Elections Canada

In August 2018, the Procurement Ombudsman released the final report from a procurement practice review that focussed on bid solicitation processes at the Office of the Chief Electoral Officer (Elections Canada). The Procurement Ombudsman recommended that Elections Canada continue to develop and implement its robust procurement and contracting framework by:

1. ensuring that all solicitations meet the Treasury Board Contracting Policy and the Elections Canada Procurement and Contracting Guide requirements for establishing bidding periods, with particular emphasis on those requirements below \$25,000
2. ensuring evaluation criteria and selection methodology are included in the solicitation documents, particularly on those requirements below \$25,000.

Elections Canada agreed with and supported the Procurement Ombudsman's recommendations. Elections Canada recognised the importance of sound procurement practices as a key success factor in achieving its business objectives. It committed to review procurement processes below \$25,000, enhance applicable procurement operating instructions and increase training and tools provided to business owners to ensure they take all steps necessary to fully address the Procurement Ombudsman's recommendations.

In August 2020, OPO asked Elections Canada to provide information regarding actions taken in response to the recommendations in the above-noted review.

Elections Canada organized its activities taken in response to the Procurement Ombudsman's recommendations as (1) completed activities, (2) ongoing activities, and (3) planned activities.

- (1) Completed activities included:

- Developed an action plan to address both recommendations
- Received approval from senior management to develop and implement a Low Dollar Value Business Owner Toolkit (LDV Toolkit)
- Completed drafting of some of the required LDV Toolkit documents (e.g. a guideline document, operating instructions, solicitation and evaluation templates)
- Conducted usability testing sessions pertaining to the LDV Toolkit

(2) Ongoing activities included:

- Collating business owner responses from usability testing into implementable modifications to the LDV Toolkit for rollout
- Elections Canada identified mandatory training for its functional specialists in procurement. Training had been included within new employee integration plans and employee learning plans. Progress and completion were being actively tracked
- Templates, operating instructions and checklists were being updated and implemented to incorporate adjustments identified in both recommendations as required

(3) Planned activities (projected for completion in summer 2021) included:

- Achieve full implementation of the LDV Toolkit
- Publish the LDV Toolkit in English and French on the Agency's intranet and create a quick reference guide to increase LDV Toolkit content accessibility
- Continue tracking the training of functional specialists in procurement to ensure successful completion
- Create and facilitate training sessions for business owners
- Maintain communication to convey enhancements to the Agency's procurement and contracting framework and documentation from the LDV Toolkit
- Monitor LDV Toolkit feedback from business owners and put forward any measures for further enhancement.

OPO found the Agency's self-assessment of actions taken in response to the Procurement Ombudsman's recommendations to be reasonable and credible. Documentation provided by Elections Canada was sufficient to demonstrate its reported level of implementation of the recommendations and that actions have been both planned and taken to strengthen the fairness, openness and transparency of its procurement practices.

Courts Administration Service (CAS)

In September 2018, the Procurement Ombudsman published the final report from a review of the procurement management control framework of the CAS. From the review, the Procurement Ombudsman made 6 recommendations. The CAS agreed with the recommendations made in the final report and provided an action plan to respond to each of the 6 recommendations. In September 2020, OPO asked the CAS to provide information regarding actions taken in response to the recommendations in the review.

Below is a listing of the 6 recommendations made in the 2018 report and a summary of actions taken in response to those recommendations that were validated by OPO in the follow-up exercise conducted in 2020.

1. Recommendation: Amend the Contract Review Committee's Terms of Reference to clearly describe the Committee's role, responsibilities of members, membership, and processes and procedures, including the methods by which the Committee will report to Senior Management on its activities and results

Action taken: CAS updated the Contract Review Committee's Terms of Reference with respect to its members' roles, responsibilities, procedures, and reporting to senior management.

2. Recommendation: Formally document, approve and implement departmental procurement guidance, including procedures and guidelines. Consideration should also be given to documenting the process and controls for contracting for legal services

Action taken: CAS formally approved its Policy on Procurement, Policy on Contracting for Legal Services and Legal Services Contractual Procedure.

3. Recommendation: Document the process for assessing procurement risk and the use of risk information to support decision making

Action taken: CAS shared its Guidelines on Procurement Risk Management with Contract Review Committee members and procurement officers. The Guidelines on Procurement Risk Management broadly lists the risks that may appear at each step in the Department's procurement process, and the associated actions a procurement officer must complete.

4. Recommendation: Develop, implement and maintain a departmental procurement plan

Action taken: CAS developed a new, more strategic plan that outlines how procurement can support CAS and its ambitious transformation agenda, and identifies the procurement needs that will require interface with Public Services and Procurement Canada (PSPC).

5. Recommendation: Establish formal documented mechanisms for monitoring procurement activities

Action taken: CAS outlined the roles for monitoring procurement activities in its *Policy on Procurement*, which were further detailed in its Account Verification Sampling Plan.

6. Recommendation: Review controls in place to ensure proper disclosure of contracts under the Treasury Board Secretariat Guidelines on the Proactive Disclosure of Contracts, which came into effect January 1, 2018

Action taken: CAS performed a review of its internal processes in place for reporting contracts over \$10,000 on a quarterly basis, and made changes to its procedures for managing proactive disclosures. These actions were supported by the review report, a process flowchart, and a control matrix.

CAS self-assessed the implementation of each of its six actions as "full implementation", however OPO assessed five of the six actions as having met this definition. The actions required to be taken in response to Recommendation 4 remained outstanding at the time of the follow-up review.

OPO was encouraged by the fact the CAS had responded positively to the recommendations and had taken many significant steps to strengthen its procurement practices.

2. With regards to the OGGO report on SME's and procurement, which of the recommendations are most important for govt to act on immediately

The House of Commons Standing Committee on Government Operations and Estimates (OGGO) report titled "Modernizing Federal Procurement for Small and Medium Enterprises (SMEs), Women-Owned and Indigenous Businesses" (June 2018) contained 6 chapters which examined the rules of federal procurement, alternative approaches to procurement, and challenges faced by SMEs, women-owned and Indigenous businesses. Through the report, OGGO made 40 recommendations to improve the federal government procurement process.

All 40 recommendations included in the OGGO report are well thought out and supported by extensive research and consultation conducted over a 5 month period in 2017-18. Given the scope of coverage of the report's 40 recommendations, it is challenging for the Procurement Ombudsman to identify certain ones that are most important for the government to act on immediately due to a concern that this would imply others are less important to act upon. The Procurement Ombudsman recognizes the improvements would come from the government implementing each and every of OGGO's 40 recommendations. However, in an effort to respond directly to the member's question, the Procurement Ombudsman will highlight his key priority areas and draw linkages between those priorities and specific recommendations from the OGGO report.

The 2020-21 Procurement Ombudsman's Annual Report reaffirmed the importance of the 4 priorities that were established at the beginning of his mandate in 2018 – those being: simplification, transparency, knowledge deepening and sharing, and growth in dispute resolution services. The Annual Report also reaffirmed OPO's commitment to promote and advance diversity and inclusion in federal procurement, brought attention to the need for improved procurement related data and called for regulatory changes to enhance the effectiveness of the office.

To respond to the member's question, we will focus on five OGGO recommendations made in each of the two important areas for the Procurement Ombudsman – those being (1) Simplification and (2) Diversity and Inclusion.

Simplification

The complexity of the federal procurement process is something that the Procurement Ombudsman repeatedly hears about from suppliers and federal officials alike. It can be notoriously lengthy, burdensome, and hard to navigate. This often creates barriers to entry for small and inexperienced suppliers, and deters suppliers from bidding on opportunities. As was highlighted in the Procurement Ombudsman's 2020-21 Annual Report, OPO has seen some progress in this area and we are encouraged by some PSPC initiatives such as e-procurement and the simplification of terms and conditions of contracts to improve readability and understanding.

While progress has been made in the area of simplification, more can be done. With this in mind, and to respond to the Member's question, the Procurement Ombudsman believes recommendations focussed

on simplifying federal procurement are among the most important for government to act on immediately. The OGGO recommendations brought attention to important areas where federal procurement could be simplified, thereby encouraging greater participation by small and less experienced suppliers. These included recommendations focussed on:

- Streamlining requirements and updating terms and conditions (4)
- Updating policies, processes, procedures and practices to improve the supplier experience across government departments (5)
- Introducing a simplified and consistent processes for procurements below trade agreement thresholds (9)
- Simplifying the invoicing process and accelerated payment timelines (12)
- Increased transparency through feedback provided to unsuccessful bidders and information on procurement outcomes (23)

Diversity and Inclusion

An important theme of the Procurement Ombudsman's 2020-21 Annual Report was OPO's continued focus on diversity and inclusion. The office continued its commitment in this area by hosting the third annual Diversifying the Federal Supply Chain Summit, with the fourth such summit being held in January 2022. The Diversifying the Federal Supply Chain Summit is focussed on connecting diverse business owners with organizations that can help them successfully bid on and obtain federal contracts. At the summit, we heard directly from diverse suppliers about the barriers they face in doing business with the federal government, and the need for more diversity and inclusion in the federal procurement process. The importance of having good procurement data was a topic raised at the most recent Diversifying the Federal Supply Chain Summit hosted by OPO in January 2022.

The Annual Report also spoke about the results of a knowledge deepening and sharing study conducted by OPO on the topic of social procurement. This study drew attention to the importance good data plays in the government's ability to measure progress towards achievement of objectives. A key issue raised in this study was that data collection is a known challenge and hurdle for most organizations. Yet data is crucial to establishing baselines, setting meaningful targets and measuring progress against these targets. As the Government of Canada moves to adopt a formal policy for engaging in social procurement, it is crucial that we prioritize the collection and analysis of data on diverse communities across the country.

The Government of Canada's response to the OGGO report spoke about building a modern procurement foundation strongly anchored on its commitment to fair, open and transparent procurement processes that promote competition and value for Canadians. It also spoke about investments being made in an Electronic Procurement Solution that would automate and streamline procurement. OPO is optimistic that an Electronic Procurement Solution will enable federal organizations to compile useful data on the diversity of suppliers both bidding on, and obtaining, federal contracts.

With this in mind, the Procurement Ombudsman recognizes the recommendations from the OGGO report that are specifically targeted towards improving the quality of procurement data as among the most important to implement without delay. These include recommendations to:

- Collect and measure contract data on the proportion of procurements that are currently awarded to different types of small and medium enterprises (17)
- Collect, evaluate and track gender-based data and diversity-based data for socially-disadvantaged groups for all federal procurement contracts (28)
- Develop a multi-departmental approach for the administration of the Procurement Strategy for [Indigenous] Business (33)
- Publish on an annual basis a centralized report on the number and value of contracts awarded under the Procurement Strategy for [Indigenous] Business (35)
- Require large-scale contractors and suppliers to report on the use of diverse subcontractors (39)

3. What is best way to stop departmental practice of splitting contracts in order to sole source them to a preferred vendor

Contract splitting is defined by the Treasury Board Contracting Policy as “the practice of unnecessarily dividing an aggregate requirement into a number of smaller contracts, thereby avoiding controls on the duration of assignments or contract approval authorities.” Contract splitting is prohibited by the Policy, which states that “contracting authorities must not split contracts or contract amendments in order to avoid obtaining either the approval required by statute, the Treasury Board Contracts Directive or appropriate management approval within the department or agency.”

For insight into the best way to prevent contract splitting, we should refer back to direction provided by the Treasury Board Contracting Policy (and its successor the Directive on the Management of Procurement). Under the Contracting Policy, “[i]t is the responsibility of departments and agencies to ensure that adequate control frameworks for due diligence and effective stewardship of public funds are in place and working.” The Policy encouraged departments to “establish and maintain a formal challenge mechanism for all contractual proposals.” An effective control framework can prevent unwanted procurement practices from occurring, improve consistency with procurement policies and procedures, and thus encourage fair, open and transparent procurement practices.

The new Directive on the Management of Procurement is more explicit with respect to procurement control frameworks. It requires departments that are subject to the directive to identify a senior designated official who is responsible for establishing, implementing, and maintaining a departmental procurement management framework, consisting of processes, systems and controls. The senior designated official is responsible for ensuring that the departmental procurement management framework includes oversight, planning and reporting mechanisms, clearly defined roles, responsibilities and accountabilities for the various governance committees, and maintains the integrity of the procurement process, among other requirements. It is conceivable that one requirement that the senior designated official be asked to certify is in relation to no contract splitting having occurred on contracts awarded during a defined period.

It is through effective implementation and maintenance of departmental procurement management frameworks that include appropriate risk management, control activities and monitoring (which should include a warning notice when contracts are awarded to the same supplier in close succession) and oversight of procurement that contract splitting and other activities that threaten fairness, openness and transparency can best be eliminated from federal procurement.