



Office of the Procurement
Ombudsman

Bureau de l'ombudsman
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Procurement Practice Review: Review of Non-Competitive Contracting

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Introduction

Context

1. Paragraph 22.1(3)(a) of the *Department of Public Works and Government Services Act* (DPWGSA) provides the Procurement Ombudsman with the authority to review the procurement practices of departments in order to assess their fairness, openness and transparency.
2. The Office of the Procurement Ombudsman (OPO) assesses all written complaints, as well as all issues brought to the Office's attention via procurement-related contacts, to determine if they raise potential systemic issues or risks to fairness, openness and transparency. All issues are classified by OPO using key elements of the procurement process.
3. An analysis of these issues, completed as part of the annual process to develop the Office's Procurement Practice Review (PPR) Plan, identified several potential issues regarding the element of procurement strategy.
4. The Treasury Board (TB) Contracting Policy does not define what a procurement strategy is or what it should contain; however, it does state the manner in which contracting must be carried out. Specifically, Section 2(a) of the TB Contracting Policy 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." For the purpose of this review, procurement strategy is defined as the sourcing and solicitation method used, taking into consideration:
 - A description of the good or service to be procured to address the requirement;
 - An analysis of the market or industry that will be solicited to address the requirement;
 - A definition of the statement of work;
 - Potential socio-economic considerations (such as Aboriginal set-aside or regional development programs);
 - The appropriate procurement instrument to be used; and
 - Justification of whether the procurement will be undertaken using competitive or non-competitive approaches. When making this decision, federal organizations must ensure it is consistent with applicable laws, regulations and policies.
5. A risk assessment of the issues classified by OPO under the procurement strategy element was conducted. The risk assessment considered the likelihood of the issues occurring and the impact on fairness, openness and transparency. The assessment of potential issues within the procurement strategy element revealed the following were most likely to occur and have the greatest impact on fairness, openness and transparency:
 - Inappropriate use of non-competitive contracting;
 - Inconsistent use of non-competitive contracting within and between federal organizations;
 - Confusion among federal organizations regarding non-competitive limits;

- Contracts being awarded and subsequently amended higher;
 - Repetitive contracting; and
 - Contract splitting.
6. In addition, OPO has heard from suppliers that federal organizations may be manipulating requirements to avoid soliciting bids. Two practices OPO heard about were:
- Contract splitting, which involves either a) splitting a requirement that exceeds a level of delegated authority into more than one contract so that each contract is within a delegated level of authority, or b) issuing a contract for an amount within a delegated level of authority and then subsequently amending the contract to avoid soliciting bids or to circumvent a required approval.
 - Repetitively issuing non-competitive contracts to the same supplier.

These risks, should they materialize, would result in federal organizations unnecessarily limiting competition, inappropriately exercising their delegated authority, and increasing risks to the fairness, openness and transparency of procurement processes.

7. The analysis conducted suggested there may be issues with the use of non-competitive contracting. Consequently, and as per subsection 4(1) of the *Procurement Ombudsman Regulations* (the Regulations), the Procurement Ombudsman determined there were reasonable grounds to review non-competitive contracts.

Background

8. Although Section 10.1 of the TB Contracting Policy states competition should be the norm, Section 10.2.1 of the TB Contracting Policy recognizes the four exceptions specified in the *Government Contract Regulations* (GCRs) that allow federal organizations to set aside the requirement to solicit bids through a competitive process. The four exceptions are:
- a) “The need is one of pressing emergency in which delay would be injurious to the public interest;
 - b) the estimated expenditure does not exceed:
 - i. \$25,000
 - ii. \$100,000, where the contract is for the acquisition of architectural, engineering and other services required in respect of the planning, design, preparation or supervision of the construction, repair, renovation or restoration of a work, or
 - iii. \$100,000 where the contract is to be entered into by the member of the Queen's Privy Council for Canada responsible for the Canadian International Development Agency and is for the acquisition of architectural, engineering or other services required in respect of the planning, design, preparation or supervision of an international development assistance program or project;
 - c) the nature of the work is such that it would not be in the public interest to solicit bids; or
 - d) only one person or firm is capable of performing the contract.”

9. Exception b) allows federal organizations to enter into non-competitive contracts if the values of these contracts fall within the specified financial thresholds. In instances where exception a), c), or d) are invoked, the value of the non-competitive contract into which a federal organization may enter must fall within the authority delegated to that federal organization. Appendix C of the TB Contracting Policy specifies the basic contracting limits and exceptions for non-competitive contracts and amendments to non-competitive contracts for federal organizations.
10. The authority to enter into a contract on behalf of the federal government is set out in the DPWGSA, the *Financial Administration Act* (FAA) and the enabling legislation of federal organizations.
11. The DPWGSA gives the Minister of Public Services and Procurement the sole authority to purchase goods. The authority to purchase goods has been delegated by the Minister of Public Services and Procurement to the ministers of federal organizations, with most federal organizations delegated the authority to purchase goods up to \$25,000.
12. The minister of a federal organization receives authority to acquire services through the organization's enabling legislation. Procurement officers and program managers, in turn, receive their authority to enter into contracts and make amendments to contracts through an instrument known as the Delegation of Authorities, which is approved by the minister of the federal organization.
13. Maximum delegated authority limits have been specified in Appendix C of the TB Contracting Policy. Some federal organizations have been delegated a higher authority to enter into non-competitive contracts for certain goods or services because of their operational needs. If the value of a non-competitive contract exceeds a department's delegated authority, the department may request that Public Services and Procurement Canada conduct the procurement or it must obtain approval from the Treasury Board of Canada.

Review objective and criteria

14. The objective of this procurement practice review was to determine whether non-competitive contracts and associated amendments were issued in a manner consistent with applicable sections of the TB Contracting Policy, the FAA and regulations made under it, and supported the principles of fairness, openness and transparency, which the OPO defines as follows:
 - Fairness: providing equal treatment to all current and potential suppliers.
 - Openness: providing all potential suppliers with the opportunity to submit bids for government procurement.
 - Transparency: providing information to Canadians in a timely manner that facilitates public scrutiny of the decisions made and actions undertaken.
15. The Procurement Ombudsman's legislated mandate is to review the practices of departments for acquiring materiel and services to assess their fairness, openness and transparency, and make any appropriate recommendations to the relevant department for the improvement of

those practices. Because non-competitive contacts are by their very nature not open, this review focused on fairness and transparency.

16. Non-competitive contracting by select departments was reviewed using the five pre-established review criteria specified below. Departmental contracting practices were assessed against these criteria, which, when in place, should individually and collectively contribute to procurement practices that comply with applicable laws, regulations and policies. Additionally, these practices should help to ensure that contracts and associated amendments are issued in a manner that adheres to the principles of fairness and transparency. The criteria are as follows:

1. Non-competitive rationale is on file and is consistent with policy requirements;
2. Amendment rationale is on file, is consistent with policy requirements and has been appropriately authorized;
3. Contract splitting did not occur;
4. Repetitive contracting did not occur; and
5. Controls were in place to prevent contract splitting and repetitive contracting.

Scope and methodology

17. The scope of the review covered non-competitive goods and services contracts and associated amendments issued between November 30, 2013, and November 30, 2015.
18. The following departments were included in the scope of the review because they were identified as having, compared to other federal organizations, a higher-than-average percentage of amendments to non-competitive contracts, when compared to the value of non-competitive contracts issued. In addition, the following three organizations had not been subject to an OPO procurement practice review in the past five years:
- Agriculture and Agri-Food Canada (AAFC);
 - Immigration, Refugees and Citizenship Canada (IRCC); and
 - Statistics Canada (StatCan).
19. OPO requested these three departments provide contracting data for all non-competitive contracts and amendments issued within the scope of the review. The following is a summary of the data provided.

Table 1.1: Non-Competitive Contracts

Departments	Number of Contracts	Value (\$M)
AAFC	10,432	27.8
IRCC	580	22.3
StatCan	1,338	71.8

20. The review methodology included:

- Interviews with relevant department employees;
- Review and analysis of documentation including the GCRs, the TB Contracting Policy, TB Contracting Policy Notice 2007-04 – *Non-Competitive Contracting*, and departmental policies, directives, guidelines and delegations of authority;
- Data analysis to identify high-risk contracts, amendments, potential repetitive contracting and potential contract splitting; and
- Review of a judgmental sample of files, for contracts awarded by the departments, against relevant criteria.

Why this is important

21. The 2014 Purchasing Activity Report (PAR) states that in the 2014 calendar year, 4,301 non-competitive contracts with a value higher than \$25,000 were awarded by the Government of Canada, accounting for 16.61 percent of the total number of awarded contracts with a value higher than \$25,000. Spending on non-competitive contracts with a value higher than \$25,000 totaled \$2.2B or 8.24 percent of all contracts with a value higher than \$25,000 awarded by the Government of Canada. OPO noted the 2014 PAR did not identify non-competitive contracts with a value less than \$25,000; therefore, the total number and the total value of non-competitive contracts awarded is not publicly available.
22. Section 1 of the TB Contracting Policy states “The objective of government contracting is to acquire goods and services and carry out construction in a manner that enhances access, competition and fairness and results in best value or, if appropriate, the optimal balance of overall benefits to the Crown and Canadian people.” In order to meet the requirements of the TB Contracting Policy, specifically those related to access, competition and fairness, the requirement to solicit bids has been established as the norm. However, under certain circumstances, the GCRs and the TB Contracting Policy make it acceptable to enter into non-competitive contracts. If the circumstances for entering into or amending a non-competitive contract have not been met, or the criteria are being manipulated through unacceptable procurement practices, there may be risks to fairness, openness or transparency.

Observations

Sample of non-competitive contracts

23. A judgmental sample of 30 non-competitive contracts was drawn from AAFC, IRCC and StatCan, for a total sample size of 90 files. The sample selection criteria focussed on non-competitive contracts and amendments to non-competitive contracts with a higher risk of inconsistency with the TB Contracting Policy. Risk considerations included contracts that appeared to exceed delegated authority limits, non-competitive contracts that had been amended numerous times, non-competitive contracts valued at more than \$25,000, and non-competitive contracts that appeared split.

24. The files were reviewed to determine whether non-competitive contracts and associated amendments had been issued in a manner consistent with the TB Contracting Policy. Not all of the files were used to assess each criterion.

Non-competitive contracts

25. Twenty files per department, for a total of 60 files, were assessed to determine whether non-competitive contracts had been awarded in accordance with the TB Contracting Policy.
26. OPO assessed the following sub-criteria to determine whether non-competitive contracts had been awarded in a manner consistent with applicable sections of the TB Contracting Policy and the FAA and regulations made under it, and upheld the principles of fairness and transparency:
 - The decision to set aside the competitive process was included in the file along with the justification;
 - The decision to set aside the competitive process was consistent with the TB Contracting Policy; and
 - The contract was within the department's delegated authority.
27. Subsection 10.2.6 of the TB Contracting Policy states "Any use of the four exceptions to the bidding requirement should be fully justified on the contract file..." OPO assessed each file to determine whether a justification was on file. In 58 of the 60 files reviewed, OPO found justifications to set aside the competitive process on file.
28. Both contracts where justifications were missing came from AAFC. During meetings with the OPO following the file review, AAFC staff acknowledged that the files in these two instances were incomplete, and were able to provide the two missing justifications for setting aside the competitive process. Not having a rationale on file poses a risk to fairness as department officials cannot demonstrate they have issued non-competitive contracts in accordance with the GCR exceptions. Moreover, it makes it more difficult for AAFC to demonstrate its compliance with subsection 10.2.6 of the TB Contracting Policy.
29. Subsections 10.2.2–10.2.5 of the TB Contracting Policy set out the circumstances where each of the four exceptions to the competitive process permitted under the GCRs may be invoked. In addition, TB Contracting Policy Notice 2007-004- *Non-Competitive Contracting* provides examples of acceptable uses of the four exceptions. OPO assessed the rationales on file to determine whether they were consistent with the TB Contracting Policy. In all 60 files reviewed, the rationale for setting aside the competitive process was consistent with the TB Contracting Policy. The commonly used rationales for setting aside the requirement to solicit bids included:
 - Emergency situations where delay may result in an actual or imminent life-threatening situation;
 - Disasters where delay may involve loss of life or quality of life or safety of Canadians;

- Contracts to alleviate a socio-economic disparity;
 - Contracts where only one supplier was capable of providing the good or service because of copyright or patent rights;
 - Contracts where only one supplier was capable of providing the good because of technical compatibility or specifications;
 - Contracts where only one supplier was capable of providing the service; and
 - Contracts below the \$25,000 threshold required to solicit bids.
30. Of the three departments reviewed, AAFC was the only department delegated more than the standard authority (i.e. \$25,000) to purchase the following goods non-competitively: livestock, feed and bedding for livestock. In these instances, AAFC can enter into non-competitive contracts with a maximum value of \$40,000.
31. When OPO reviewed whether contracts had been awarded within a department's delegated authority, 59 out of 60 contracts fell within the departments' delegated authority. One contract issued by AAFC exceeded the \$25,000 delegated for the purchase of goods. The delegation was exceeded by \$154. During meetings with OPO following the file review, AAFC stated this was due to a miscalculation by an employee.
32. Of the 60 files assessed to determine whether non-competitive contracts had been issued in accordance with the TB Contracting Policy, 57 out of 60 met the criteria; thus supporting a fair and transparent procurement process. All three files containing errors came from AAFC.

Amendments to non-competitive contracts

33. For each department, 12 files where non-competitive contracts had been amended one or several times were reviewed. A total of 36 files where amendments had been made were assessed.
34. OPO assessed the following sub-criteria to determine whether amendments to non-competitive contracts had been issued in a manner consistent with applicable sections of the TB Contracting Policy, the FAA and regulations made under it, and supported the principles of fairness and transparency:
- The amendment rationale was documented and included in the file;
 - Every effort had been made to avoid inadequate initial funding, inadequate pre-planning and improper administrative procedures; and
 - The amendment approval was within the department's delegated authority.
35. Section 2.6 of the TB Contracting Policy's *Appendix H – Approval of Contractual Proposals* states "A full explanation of why costs will exceed the original contract level must be provided when requesting approval to increase the value of a contract (e.g., additional client requirement, underestimation of cost, additional work not included in the original contract)...." OPO assessed whether the amendment rationale had been documented and

included in the file. In all 36 files reviewed, OPO found a rationale explaining why an amendment was required on file.

36. Section 12.9 of the TB Contracting Policy states “Every effort should be made to avoid inadequate initial funding, inadequate pre-planning and improper administrative procedures resulting in amendments. Furthermore, all additional work that is foreseeable should be included in the original contract value.”
37. To determine whether amendments were consistent with the requirements of the TB Contracting Policy, OPO assessed the rationale for each amendment to determine the foreseeability of the need to amend. Unforeseeable amendments were assessed as consistent with the TB Contracting Policy. All amendments assessed as foreseeable were expected to be included in the initial contract as an option. Where an option was not used for an amendment assessed as foreseeable, errors were identified because the contract was not properly planned or inadequate funding was allocated. Often, amendments were administrative in nature. Any administrative amendments that had implications for fairness or transparency were also identified as errors.
38. Thirty-one of the 36 files that contained amendments were assessed as being consistent with the TB Contracting Policy. The following is the distribution of the five files containing errors:
 - AAFC: 4
 - IRCC: 1
39. Four files from AAFC were identified as having errors because the amendments associated with each file were assessed as foreseeable when the contracts were entered into. As such, the value of the goods or services acquired using the amendments should have been included in the original contracts. During meetings with OPO following the file review, AAFC staff informed OPO that all four files originated from one regional office. This office used a practice where a purchase order (i.e. a contract) was amended numerous times over a period of several months to purchase more of the specific goods or services resulting in increased value of the contract. The purchase order was closed before it exceeded \$25,000. Although the threshold required to solicit bids was not exceeded in the individual contracts reviewed, the total value of all contracts awarded to each supplier exceeded the \$25,000 threshold. In three of four AAFC files reviewed, the value of the total amendments was more than 100% of the original contract value. The magnitude of the amendments and the total value of all contracts awarded to each supplier raises questions as to whether AAFC was justified in not soliciting bids in accordance with the GCRs.
40. One file from IRCC was identified as having an error due to an improper administrative procedure. During execution of the contract, which had been awarded using a Standing Offer (SO), IRCC became aware that additional services were required. IRCC verbally requested the additional services, which could be provided by the supplier under the SO, from the supplier; however, the contracting unit was not informed that an amendment to the contract was required. The contract was amended several months after the additional services were requested and provided. Verbal agreements and amendments made after the fact pose

potential risks because they may result in disputes regarding services provided or delays in payment.

41. When amendments to non-competitive contracts were reviewed to determine if they were issued within a department's delegated authority, OPO found the amendments to all 36 contracts fell within the departments' delegated authorities.

Contract splitting

42. Section 11.2.7 of the TB Contracting Policy 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." Requirements that may have been potentially split into more than one contract were identified and selected in the sample of 30 files per department. OPO focused on the following indicators of potential contract splitting:
 - A contract was issued below a threshold, above which an additional approval would have been required, then subsequently amended higher. OPO identified:
 - i. Contracts issued under the \$25,000 threshold, then subsequently amended to more than the \$25,000 threshold because it would exceed the financial threshold established by the GCRs under one of the exceptions; and
 - ii. Service contracts issued under the \$100,000 threshold, then subsequently amended to more than the \$100,000 threshold because it could exceed the delegated authority of a department.
 - Two contracts were issued to the same supplier simultaneously, consecutively or at regular intervals.
43. A total of 17 instances of potential contract splitting were identified per department, which consisted of 12 instances of potential contract splitting by using amendments and five instances of potential contract splitting by issuing a second contract to the same supplier. In total, OPO assessed 51 instances of potential contract splitting. To determine whether contract splitting had occurred, OPO assessed whether the goods or services authorized in the amendment or the second contract should have been included in the initial contract.
44. In 50 of 51 instances, no evidence of contract splitting was found. OPO determined that contract splitting was not occurring because, in most cases, the goods or services authorized in the amendment were unforeseeable at the time of the initial contract, the amendment was exercised through the use of an option year that had been included in the initial contract, or two contracts that appeared related were for unrelated goods or services.
45. One instance of contract splitting was identified at StatCan. OPO identified two non-competitive contracts issued consecutively to the same supplier for furniture moving services. The request for both contracts came from the same project manager and were both awarded using the non-competitive rationale that the contract value was less than \$25,000. Because the services rendered under both contracts were identical, OPO concluded the contracts should have been combined. StatCan contravened Section 11.2.7 of the TB

Contracting Policy by splitting the requirement and awarding two non-competitive contracts where one competitive contract would have addressed the requirement. By splitting the contract and awarding two non-competitive contracts, StatCan failed to respect the principle of openness by denying other bidders the opportunity to compete.

Repetitive contracting

46. The TB Contracting Policy does not contain explicit statements prohibiting repetitive contracting. However, Sections 4.1.3 and 10.7.1 of the TB Contracting Policy state that “all qualified firms should be provided with an equal opportunity to access to government business.” Non-competitive contracts are restrictive by nature, and as such must only be used when the exceptions set out in the TB Contracting Policy have been satisfied.
47. OPO analyzed the data provided by the three departments regarding non-competitive contracts in order to identify suppliers awarded multiple contracts. Five suppliers awarded multiple non-competitive contracts were identified at each department for a total of 15 suppliers. OPO sought to determine why multiple contracts had been awarded to the same suppliers, and asked the three departments to provide answers to the following questions:
 - Why is this a supplier of choice?
 - Are there other suppliers that can provide the same good or service?
 - What efforts are being made to provide equal opportunity to other suppliers?
 - Have you thought of issuing a standing offer? If not, why?
48. The questions were asked to determine whether there were valid reasons for awarding multiple non-competitive contracts to these suppliers and what efforts were being made to provide other potential suppliers with an equal opportunity for access to government business in accordance with Sections 4.1.3 and 10.7.1 of the TB Contracting Policy. OPO asked whether the departments had considered using standing offers as this could provide opportunities for other potential suppliers to access government business in accordance with the TB Contracting Policy.
49. The three departments provided answers to the questions for each supplier. The answers allowed OPO to conclude that repetitive contracting using non-competitive contracts had occurred; however, no cases were found to be inconsistent with the TB Contracting Policy. The answers provided by the departments included:
 - All three departments stated that in some instances goods or services had been acquired from suppliers who held a SO or a supply arrangement (SA). In some cases, additional items not included on the SO or SA were needed. For compatibility reasons, these items had to be purchased from the supplier who held the SO or the SA. The departments informed OPO that efforts were made to include frequently used items in the SO or SA.

- All three departments stated that in some instances the goods or services had been acquired from a specific supplier because there was only one supplier capable of providing the goods or services because of copyrights, patents or technical compatibility.
- StatCan and IRCC both stated that as part of the contracting process, quotes were required for contracts valued at more than \$1,000 and \$5,000, respectively. However, for low-value transactions under \$1,000 and \$5,000, respectively, it was not always cost-effective to solicit quotes. For contracts falling below the thresholds, StatCan and IRCC stated that certain suppliers were used because they had historically provided the most competitive prices when quotes were solicited.
- AAFC stated that in the case of some of the suppliers selected by OPO, a conscious effort had been made to distribute purchases to other qualified suppliers if they were able to provide the same services. OPO verified the contracting data to test this assertion and found that non-competitive contracts had also been awarded to other suppliers, as stated by AAFC.

Controls to prevent contract splitting and repetitive contracting

50. Section 5.1.1 of the TB Contracting Policy states “It 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.” Section 11.1.1 of the TB Contracting Policy encourages 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.
51. OPO found that all three departments had established controls for preventing contract splitting and repetitive contracting. OPO did not review whether the controls established by departments were operating as intended. Nonetheless, the findings of this review related to contract splitting and repetitive contracting for the files examined by OPO are an indication that the controls established were, with one exception, effective in preventing these practices from occurring.
52. The following is a summary of the controls that the three departments established, which, if working as intended, should prevent repetitive and split contracts from being awarded:
 - All three departments had established internal procurement policies and guidelines. The policies and guidelines were reviewed and found to contain the principles these organizations were to apply when procuring goods and services. Specifically, the policies and guidelines required departments to procure in a manner that stands the test of public scrutiny in matters of prudence and probity, facilitates access, encourages competition and reflects fairness in the spending of public funds. If these principles were adhered to, contract splitting and repetitive contracting would not occur. AAFC and IRCC explicitly prohibit contract splitting in their internal policies and guidelines.

- All three departments provided training for their employees. Training was available for employees, as it is for all federal employees, through the Canada School of Public Service. Additionally, AAFC and IRCC developed internal procurement training. This training covered the importance of acquiring goods and services in a manner that enhances access, competition, and fairness.
- Transaction checklists used were used by all three departments. These checklists allowed departments to ensure certain steps were taken prior to awarding a non-competitive contract. For example, IRCC and StatCan required staff to consider whether the contract was a repetitive or split contract. IRCC also required that the past contract history be included on the checklist for contracts with a value higher than \$10,000. This type of control would allow a procurement officer to detect contract splitting or repetitive contracting, prior to awarding the contract.
- StatCan required the approval by a senior officer of all non-competitive contracts over \$1,000 and related amendments before they are issued. The review and approval by a senior officer may reduce the likelihood of repetitive or split contracts occurring.
- Contract Review Boards (CRB) existed in all three departments. A CRB typically consists of several department employees who provide oversight for procurement. CRBs have a mandate to review certain contracts defined in the Board's terms of reference. All CRBs in the departments had a mandate to review non-competitive contracts based on pre-determined criteria. For example, if potential contract splitting was detected at IRCC, the CRB would have a mandate to review the contract before it was awarded. Checklists used by IRCC would help the officer issuing the contract determine whether the CRB was required to review the contract prior to awarding it. The CRBs at AAFC and StatCan have a mandate to review any amendment to a non-competitive contract that raises the contract value to more than \$25,000.
- IRCC and StatCan both conduct regular quality assurance of procurement files. Quality assurance activities are conducted by an officer other than the procurement officer who handled the file, and the results are reported to management. The quality assurance procedures used at IRCC required the officer to assess key risk indicators, which if present, could signal potential contract splitting or repetitive contracting: indications of preferential treatment of a specific vendor; request for amendments for out-of-scope work; and indications of requirement splitting and contract amendments made without any rationale provided. The quality assurance procedures used at StatCan required the procurement officer to review the total number and value of the amendments made to a contract, the original value of a contract and the total value of a contract, the rationale for the contract and any resulting amendments. This information could be used to assess whether contract splitting was occurring. In addition to the procedures related to contract splitting and repetitive contracting, both IRCC and StatCan included procedures to assess whether contracts awarded were consistent with the TB Contracting Policy. The quality assurance procedures may account for the low rates of errors found during the review of the files.

Conclusion

53. StatCan and IRCC were able to demonstrate that nearly all non-competitive contracts and amendments to non-competitive contracts reviewed were awarded and issued according to the requirements of the TB Contracting Policy and therefore supported the principles of fairness and transparency.
54. Of the 30 files reviewed at AAFC, seven were not awarded in a manner consistent with the TB Contracting Policy. Errors observed included:
 - One file exceeded the \$25,000 delegated authority
 - Four files from one specific regional office pertained to amendments to non-competitive contracts which were inconsistent with the TB Contracting policy
 - Two files were initially missing the non-competitive justification
55. Of the 51 files assessed for potential contract splitting, one file from StatCan was assessed as a split contract. OPO did not identify any instances where suppliers were awarded multiple (i.e. repetitive) non-competitive contracts in a manner inconsistent with the TB Contracting Policy.
56. All three departments reviewed had implemented controls that could prevent the occurrence of contract splitting and repetitive contracting. Some of these controls, particularly quality assurance of procurement files, are important in helping to ensure that non-competitive contracts are awarded according to policy requirements.

Recommendations

57. AAFC should increase its oversight of non-competitive contracts and associated amendments, particularly in its regional offices, to ensure that procurement practices are consistent with the requirements of the TB Contracting Policy.

Department Response

58. In accordance with section 5 of the Regulations, the Procurement Ombudsman provided AAFC opportunities to comment on the proposed recommendation in this review and the reasons for it. All three departments reviewed were given opportunities to comment on the review's findings, and the comments were taken into consideration prior to the final drafting and release of the report.
59. In response to the recommendation, AAFC provided the following comment:

AAFC will review opportunities and augment its procurement oversight function for

non-competitive procurement and associated amendments to ensure alignment with the requirement of the TB Contracting Policy.

Other observations

As part of the review, OPO created a judgmental sample of 30 files per department for a total of 90 files. All files were drawn from contracting data provided by the departments that was to contain only non-competitive contracts.

Six contracts awarded by AAFC were selected as part of the judgmental sample because they met the following sample selection criteria:

- Four contracts potentially exceeding the limit for goods specified in Appendix C of the TB Contracting Policy; and
- Two contracts were selected to be assessed for potential contract splitting because they were awarded on the same day to the same supplier.

All six contracts were related to the purchase of livestock. During initial discussions between OPO and AAFC regarding the non-competitive livestock contracts, four of which appeared to exceed the non-competitive limit, AAFC stated that the non-competitive limit, and by extension their delegation of authority, had not been exceeded for the following reasons:

- AAFC considered the six livestock contracts to be competitive in nature. The Department has the authority to enter into competitive contracts for livestock purchases up to \$400,000.
- A livestock purchase may involve the acquisition of numerous animals. AAFC viewed the purchase of each animal or “lot” of animals as a unique procurement; therefore the value of each animal or “lot” was below the non-competitive threshold.

In addition, AAFC stated the six livestock contracts had been miscoded and should have been coded as competitive contracts because the livestock was purchased at auction, and an auction was considered by AAFC to be a competitive purchase. AAFC suggested to OPO that since the contracts were, in the Department’s view, competitive contracts, they should be excluded from the scope of this review.

Before deciding to exclude the contracts from this review, OPO requested documentation from AAFC that would support its assertion that the livestock purchases were competitive. The documentation provided by AAFC did not clearly demonstrate whether the contracts had been awarded competitively or non-competitively. To resolve the impasse, and to ensure this review would be completed within the timeframes specified in the *Procurement Ombudsman Regulations*, OPO selected six other contracts to replace the livestock contracts. The findings of this review therefore do not include the six livestock contracts.

Following the examination phase of the review, and in response to OPO questions, AAFC sought to clarify its livestock purchasing practices, stating “Although the bidding process at auction is itself

very competitive in nature, from the perspective of the [*Government Contracts Regulations*], the trade agreement [sic] and delegations, these are considered non-competitive procurements as the language in these regulations do not specifically address this unique commodity.” AAFC also stated that “Each transaction is considered its own procurement contract—a transaction is defined as an offering of a “lot” of animals for bidding and acceptance. A “lot” may consist of one or more animals depending on the auction. At the end of an auction event, transactions are consolidated in our financial system (SAP) for payment efficiency. Since identifying the individual transactions (contracts) that are greater than 10k once they have been consolidated in SAP would require significant effort, moving forward AAFC will proactively disclose all livestock purchases as part of [proactive disclosure], regardless of the total dollar value of the SAP entry.”

AAFC’s proposed actions related to proactive disclosure may increase the transparency of its reporting relating to the purchase of livestock. However, AAFC’s livestock procurement practices pose risks to the Department given the potential for inconsistencies with the TB Contracting Policy. More specifically:

- AAFC’s position that each transaction, whether defined as individual animal or a “lot” of animals, is considered its own procurement appears inconsistent with Section 11.2.7 of the TB Contracting Policy, which specifies that “contracting authorities must not split contracts or contract amendments...”. The TB Contracting Policy, under Appendix A, further defines contract splitting 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” (emphasis added). In this regard, it is unclear how AAFC defines its requirements, nationally or regionally, related to livestock purchases. When coupled with treating each transaction as its own procurement, such an approach raises potential risks to AAFC.
- It is unclear what control mechanisms AAFC has in place to ensure the purchase of livestock is done in a manner consistent with the delegations of authorities for contracting. If the six livestock contracts that OPO selected were considered non-competitive (and OPO notes documents in each of the six files indicated livestock was purchased via “private sales”, which implies non-competitive contracting), four contracts exceeded the Department’s delegated authority and two could be considered a split contract.
- It is unclear, based on the information provided by AAFC, how the Department will ensure all public reporting related to livestock purchases accurately reflects the competitive or non-competitive nature of the procurements, in accordance with proactive disclosure requirements and Section 1.2 of Appendix K of the TB Contracting Policy.

Recommendations

AAFC should:

1. Document its rationale for treating each livestock transaction as a separate procurement, and ensure the rationale is aligned with, as applicable, the TB Contracting Policy, *Government Contract Regulations* and Canada's trade agreements.
2. Clarify and document whether livestock purchased at auction is deemed by the Department to be competitive or non-competitive.
3. Determine whether targeted monitoring of livestock purchases is required, so as to ensure staff with delegated authority to purchase livestock are correctly exercising competitive and non-competitive authorities.
4. Ensure all public reporting related to livestock purchases accurately reflects the competitive or non-competitive nature of each procurement.

In response to these recommendations, AAFC provided the following comment:

AAFC will consult with PSPC (Public Services and Procurement Canada) and TBS (Treasury Board of Canada Secretariat) in order to clarify, document and implement any required process adjustments to ensure the procurement of livestock is aligned with the TB Contracting Policy and Government of Contract Regulations and reporting obligations are met.