Office of the Procurement Ombudsman
Bureau de l'ombudsman de l'approvisionnement

OFFICE OF THE PROCUREMENT OMBUDSMAN

END OF MANDATE REPORT

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JANUARY 2011 - DECEMBER 2015

PROMOTING FAIRNESS, OPENNESS AND TRANSPARENCY IN FEDERAL PROCUREMENT

Canada

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Introduction

Perhaps one of the most difficult questions I faced during my first few meetings with suppliers after being appointed Procurement Ombudsman was "is procurement broken?" I recall my uneasiness, as the new Ombudsman, in trying to respond to what I thought was a loaded question. I took the safe, diplomatic route in answering. I said I didn't believe procurement was broken but some things needed attention.

That was five years ago. Since then I have had the pleasure and honour of speaking to many more suppliers and government officials about federal procurement. And while I can now look back and be assured my response was correct, the time spent investigating complaints and reviewing departmental practices has enabled me to refine and bring some precision to the latter part of what I said... some things really do need attention.

The next few pages touch on some of those things. None should come as a surprise. The issues contained in this document, synthesized from the input of thousands of suppliers and procurement officials from across the country have, in one form or another, been raised in past reports. The sad reality, however, is that despite representing the collective voice of many, little, if anything, has been done about them. Reports are issued, recommendations made, and nothing much else happens.

What I have attempted to do with this document is to position the same issues in the broader context. I also include insight that comes from the vantage point of this position. One of the benefits of being in an independent and neutral position is that it allows one to see things objectively and develop a holistic perspective. The intent here is not to be critical of the system or those who work in it, but to provide observations that are not always apparent to those embroiled in the everyday complicated world of federal procurement; or where the issues are apparent, those involved are not always able to influence an appropriate course correction.

My tenure has also allowed me to monitor procurement innovations taking place in other domestic and international jurisdictions. I touch on some of these to provide perspective on what is being done by other governments facing similar issues. The humbling reality is that many jurisdictions have found ways to do away with a lot of the economically anachronistic procurement practices that continue to be the norm in the federal government. I am quite certain the bureaucracy's view on some of these initiatives will be the typical ossifying reaction... "there is no evidence to support that", "that wouldn't work here", "they have different rules", "we're set up differently"… the point is, there are good ideas out there to deal with very common, everyday procurement issues faced by Canadian suppliers and federal officials. Someone just needs to sit up, stop making excuses and take responsibility.

Much to the chagrin of the many, many suppliers who have contacted the office only to be informed we couldn't help them, the Procurement Ombudsman is legally bound with regard to the type and nature of procurement issues in which he/she can intervene. It was as disappointing for me, as I'm sure it was for the supplier, when I had to inform him/her that the issue they were raising was outside my mandate.

The legal underpinnings of the position are such that what the Ombudsman is allowed to do, and to a great extent, how it is to be done, are prescribed in the *Department of Public Works and Government Services Act* (Act) and the *Procurement Ombudsman Regulations* (the Regulations). So executing this mandate as it is currently framed hasn't been without its challenges. To facilitate the future delivery of

this nascent yet important function and better serve the suppliers the office was created to serve, I outline some needed regulatory adjustments.

It is probably unrealistic to expect all of the issues I am raising in this document to be dealt with. But they all need attention. The danger, I believe, is in continuing to ignore them or in treating them as isolated supplier annoyances and failing to recognize that it is their cumulative effect that has led, and continues to lead, to the common perception that Canadian federal procurement is broken.

Finally, there has been a steady increase in number of contacts to the office since it opened its doors seven years ago. The 74% increase during my five year term is a clear and indisputable indication of a need. It is unfortunate when, without any basis for intelligent comparison, arbitrary comments are made regarding "low" contact volumes, rather than recognizing the office is a valuable and important element in the overall procurement system. The office was intended to be, and has become, a voice for a steadily increasing number of small and medium-sized companies hesitant about or intimidated by the prospect of having to raise concerns directly with "big government". The office is a neutral, independent mechanism to examine the facts when systemic or untoward procurement practices are suspected and it has become a safe, trusted recourse for suppliers experiencing contract disputes with departments. While it is evidently not apparent to some, the office is providing a valuable and needed role. Prodding supine decision makers, again, to take action on issues identified by suppliers and procurement personnel is part of that role.

Frank Brunetta
Procurement Ombudsman

Plenty of splinters in this whole

Generally speaking, the authority to purchase goods and services in the federal government resides with the Minister of Public Services and Procurement. This authority is delegated to ministers of departments and agencies; those ministers in turn authorize bureaucrats who ultimately sign contracts and make purchases on the minister's behalf. How those purchases are made is governed by various treaties and trade agreements, as well as policies established by the Treasury Board, which also sets financial limits on delegations of authorities. Departments with delegated procurement authority are required to exercise it within the legal and policy parameters established by Parliament and the Treasury Board.

Within these regulatory and policy suites, departments are able to adjust their respective policy frameworks to accommodate their specific operational requirements. This has provided deputy heads with flexibility and discretion in allowing them to develop the modalities of how goods and services are to be procured in their organizations. This includes adapting their own procurement operating procedures, processes, forms and approaches to meet their unique operational circumstances. This flexibility has also resulted in an increasingly disparate federal procurement environment for suppliers, especially those who regularly do business with many different departments and agencies.

In an era where consumer expectation is for more standardization and interoperability, federal procurement operations are meandering in the opposite direction; becoming highly protean and variable. And at a cost, hidden and direct, to suppliers, government departments, and the tax payers who ultimately foot the bill. There are numerous examples of this, here are a couple:

Let's all do our own thing

Requirements contained in bid solicitations for similar, oft-purchased, mundane goods and services can vary considerably from department to department. This was brought to my attention during my first supplier meeting as Ombudsman with a communication service provider. He grumbled that he had just spent the better part of a day preparing a bid in response to a department's solicitation for media training; the identical training he provided to bureaucrats regardless of what department they worked in. Yet each department issuing a media training solicitation defined its requirements with such unique specificity that the supplier's bids had to be re-crafted and customized for each department. The supplier was confounded by the mindlessness of such an uncoordinated approach for such a common requirement. But the supplier really only saw a sliver of the overall problem. The reality is that the inefficiency is compounded by departments—and even units within individual departments—each re-defining their requirements and re-crafting criteria to evaluate bids to buy essentially the same goods or services. And all of this is being done using unstandardized requirement statements, clauses, forms and processes.

The end result? Suppliers and departments waste time and money re-writing material to accommodate what often amounts to insignificant, minor variants to deliver essentially the same product or service to different departments. I was taken aback by the reaction of an influential, albeit myopic, senior bureaucrat when I raised this issue: "That's the cost of doing business" was the reaction. Perhaps, but this alarmingly parochial perspective ignores a simple, undeniable reality... the private sector works on a profit basis, meaning the cost of this unnecessary variability is passed on to departments and ultimately the taxpayer. And these inefficiencies are also imposed on procurement personnel—also resulting in a burden on the

taxpayer, as time and money is wasted fiddling with documents to accommodate the same insignificant minor variant for essentially the same product or service.

This issue is certainly not unique to us, but some jurisdictions are finding ways to simplify things. The Institute for Competition and Procurement Studies at Bangor University in the United Kingdom (UK) recently published guidance to introduce standardization and thereby reduce costs to both government and suppliers. The guidance responds to a recognition that distinct practices have arisen in contracting authorities in the UK, with each creating a workflow that suits their own objectives and interests, thereby imposing a compliance cost for suppliers interested in working with them. Much like our own situation, suppliers wanting to compete for contracts in the UK had to comply with the specific rules and practices imposed by each government institution. This lack of standardization increased the cost of participation, and constituted a barrier for suppliers. The resulting Simplified Open Procedure introduces standardization focused on keeping transaction costs for both procurers and suppliers down to a minimum.

One would think that something as important as being compliant with trade agreements would be sufficient motivation to drive some level of uniformity across the federal government. It is certainly considered important enough in some countries where governments have developed a single, uniform and standardized procurement process (and associated documents/forms) that covers all trade agreement requirements from a government-wide perspective. Canada has no statutory procurement framework for undertaking procurements where trade agreements apply. Nor do we have uniform operating procedures. It is the responsibility of each organization to interpret trade agreement requirements and ensure compliance. Migrating to a more standardized and uniform approach to something as important as trade agreement-applicable procurements may be a good place to start forging more consistency and symmetry in the federal procurement framework. It isn't impossible to do. It is being done throughout Europe and in the USA. Here in Canada, Saskatchewan's Bill 188, *The Best Value in Procurement Act 2015* has, among other things, introduced common procurement templates. ... If only someone was responsible for getting it done at the federal level.

You did a terrible job... here's another contract

The manner in which departments and agencies deal with underperforming suppliers is equally uncoordinated and fragmented. There is no government-wide policy or database for vendor performance and no overall approach to vendor performance management within the Government of Canada. While some departments have vendor performance policies, not all do. Even where departments have a policy, its enforcement is uneven; some departments being more diligent in enforcement than others. And even among the diligent departments, there is no requirement or way to share the information on an underperforming supplier across federal departments and agencies. This gap is allowing suppliers identified as underperforming by one department to successfully bid and be awarded contracts from other departments. It is difficult to imagine any major corporation allowing this sort of thing to happen among its franchises. Yet it is going unchecked in the federal government.

Solutions aren't too difficult to imagine… or find... if someone had the responsibility. The USA has established a requirement for US agencies to submit an electronic record of vendor performance in the Past Performance Information Retrieval System, a single government-wide repository for vendor performance information. As of 2009, no contract may be awarded by a federal US agency before the contracting officer has made a "determination of responsibility" including performance history of a supplier. This performance information is available to other agencies contemplating the award of a

contract. Despite the challenges, the US federal government has taken concrete steps to centralize and tackle the vendor performance issue.

Drifting without a rudder

These are merely a couple of examples of the splintered approach which is evident in the Canadian federal procurement system. The examples illustrate an unnecessary variability and lack of harmonization that is inherent in our system of procuring.

With no central pivot responsible for leading the charge to more operating procedure standardization and uniformity in what really amounts to a heavily transaction-oriented function, most departments continue to meander along their own path. No one is clearly accountable for addressing the type of government-wide uniformity that is being demanded by suppliers and expected by procurement personnel and which would be economically responsible for Canadians. This is clearly a lacuna in leadership.

One way of addressing this leadership lacuna might be to look at the changes that have occurred in the federal finance and human resource functions in the past 20 years. In addition to being accountable to the head of their respective departments, employees in these areas also have an accountability to a government-wide functional head; a focal point for policy, compliance and monitoring. The creation of a single leadership focal point was seminal in transitioning these functions to more uniform policies, processes and approaches while providing a level of oversight and enforcement that was previously absent. It also helped to raise their profile and prominence. As a result, not only do these functions have a higher degree of uniformity, they transitioned from being back office service providers, essentially subordinate to program managers, to a more Cerberean role, accountable equally to the deputy head and a central agency functional head for ensuring policy compliance, as well as to program managers for service delivery.

There is no similar procurement locus in the federal government. Despite being critical to government operations, procurement continues to find itself cast as an archaic back office service provider. It is not uncommon for program managers to describe procurement as a subservient rule-infested quagmire that, more often than not, impinges on their ability to deliver programs. Complicating the situation is the fact that most procurement personnel do not have the rank or authority to thwart or influence what can often be obvious and blatant attempts by some program managers to circumvent or by-pass processes they view as overly complicated and cumbersome. The federal procurement "business model" needs to change. And a critical first step in transforming this model is by filling the leadership vacuum—a vacuum that is the culprit for several of the procurement issues raised in this report.

Guided by voices

Within an inconsistent and unpredictable procurement operating environment there seems to be an ingrained stubborn streak of strict and steady, almost blind, conformity, when a dose of common courtesy and common sense should prevail. For example, some departments refuse to explain to unsuccessful suppliers where and why proposals fall short. Departments often do not provide unsuccessful suppliers the minimum information required by trade agreements or suggested in policy, but instead provide only the name of the successful firm and the contract value. When suppliers ask for the opportunity to understand the shortcomings of their bid so as to avoid repeating them in the future, they are often informed that the information which has been provided is their debriefing. Many suppliers consider being

given the opportunity to understand the shortcomings of their bid is not only a good business practice, but the right thing to do. Evidently policy doesn't instruct departments to do the right thing. Opportunely hiding behind minimum requirements is trumping doing the right thing.

Or how about instances where departments include extraneous mandatory criteria in solicitations, such as criteria or requirements not germane to, or that have no bearing on, a supplier's ability to perform the required service or delivery of a quality good? Departments blindly list a hockey sock of requirements and are then obligated to reject bids which do not meet all of these requirements. In some cases rejections are made on the basis of ill-conceived administrative criteria rather than on a thoughtful, policy-compliant approach that includes only those criteria that are genuinely necessary to assess the capability of suppliers to deliver the goods or services required… the right thing to do.

Despite being offered a level of policy pliability which should translate into discretion to omit senseless administratively burdensome requirements, most departments default to the low risk common denominator—asking for more than required, often unnecessary, criteria. Rather than taking a calculated and reasoned approach that would manage potential risks, departments are taking unnecessary steps in an attempt to avoid all risk; all under the guise of "protecting the Crown".

And through this process of blindly conforming in the name of "protecting the Crown", the Crown is developing a nasty reputation for being a difficult organization to do business with. The monikers are abundant—fraught with red tape, bureaucratic, wasteful, legalistic, difficult, unresponsive.... Perhaps the communication service provider said it best when he said to me "it's easier to do business with the governments of the US and the EU than with the government in my own country".

Frozen in the digital age

Let's try to keep up

Electronic procurement (e-procurement) has become fairly commonplace in many countries and even in some Canadian Crown corporations. These entities are transforming their entire procurement process, from planning to vendor payment and performance review, by moving to electronic means to process and manage procurement. In these jurisdictions, authorized employees have access to a Web-based application representing a single portal for the acquisition of goods and services. This enables them to issue purchase orders to suppliers in electronic format and conduct electronic invoicing. In some cases, the applications allow payments to suppliers to be generated once the employee has acknowledged the receipt of a good or service and payments to then be made via Electronic Funds Transfer.

Entities with e-procurement have experienced increased efficiency, lower transaction costs, heightened public procurement monitoring, reduced opportunity for fraud and corruption and, ultimately, increased transparency.

By contrast, Canadian federal e-procurement has been a prism of quiescence. In the absence of a government-wide effort or central leadership, some departments have ventured out on their own, introducing elements of what should be part of an overall, government-wide approach. And whatever pulse of a government-wide effort one might have detected has, to date, been uncoordinated, torpid and inept.

Mounds of data, not a hill of beans of information

Here's a challenge... using on-line federal government procurement information, determine how much of your taxes were spent purchasing motor vehicles last year. How about determining what department/agency spent the most on motor vehicles? The province in which most motor vehicles were purchased? How about delivered? Good luck. And it isn't just motor vehicles. Attempting to do any type of procurement expenditure analysis is an exercise in futility and frustration. Yet, here's the catch, the manner in which departments and agencies publically report their procurement activity is compliant with Treasury Board rules.

So why can't the average Canadian determine something as mundane as how much of his/her taxes was spent on motor vehicles? The simple answer is that there is no single system, report or summary capturing all federal government procurement data. Most procurement information is reported in three independent and distinct ways. Each captures and reports on a specific set of data for a specific purpose. One reports quarterly but only on contracts valued at more than $10,000. This data is made publicly available within one month after the close of each quarter, meaning by the time information is released it could be 3-4 months old. The second reporting method is nearly useless, as the most recent information is published 2 years after purchases were made. And while the third is updated monthly, it does not provide information on contracts issued by all departments and agencies. As a result, even if one had the time, inclination and technological savvy to somehow undertake the necessary contortions, the comparison or amalgamation of data would still not result in a complete record of all contracts awarded by the federal government or a department during a given period. Simply stated, it is impossible to obtain details regarding the total volume and value of federal procurement activity.

Transparency, information disclosure as a means of holding public officials accountable, is opaque in Canadian federal procurement. And anyone suggesting otherwise is inflicted with a severe case of credulity, is misinformed or is just plain dishonest.

One does not have to strain to see what procurement transparency could look like. The US federal government has a website allowing users to search all government contracts valued at more than $3,000 by department, by state, by fiscal year, by congressional district and by commodity. Through a topic browsing system, users can automatically organize queried information by relevance, last modified, alphabetical or latest information publicly available on that selected topic. Information is updated on a daily basis.

The Australian federal government website provides a centralised publication of government business opportunities, annual procurement plans, multi-use lists and contracts awarded. Advanced searches can be performed by category for contract notices, contract status (current or closed), date type (published date, start date and end date, date range), supplier name, value range and commodity. Data sets can be filtered by dates and titles. Information is updated on a daily basis.

Suppliers to the federal government in these two countries have access to basic procurement information to allow them to make informed business decisions. Citizens in these two countries have access to information to know who, what, when and how their governments are procuring. It is appalling that Canadians would have better success determining how much these foreign governments spent on purchasing virtually any commodity, including motor vehicles, last year (week, month or quarter if desired) than in determining how much was spent by their own government.

It wasn't long ago that Canada boasted about being the most wired country in the world. Whether fact or fiction, not only was the status fleeting — we have gone from leaders to laggards in very short order — in the process we not only squandered an opportunity to increase efficiency and lower costs but severely hampered citizens' ability to hold public officials accountable for public procurement decisions and expenditures.

Steering a $20B ship without a license

But I want… that

In the federal public service the procurement of goods and services is a shared responsibility. The responsibility for describing what and how much is to be purchased usually rests with non-procurement personnel who deliver programs and services to Canadians. Once the program manager has determined what and how much, the modalities of how the purchase is to be made generally rest with personnel who have a more intimate knowledge of procurement policy and procedures. These are procurement officers and materiel management personnel working in support of program delivery. This division of labour, program personnel deciding and describing "what" and "how much" while procurement personnel interact with suppliers, is an important control element in the federal procurement process. The segregation of duties is, among other things, intended to prevent a single person from controlling and manipulating the process to nefarious ends. Key to this process working optimally, however, is a sound working knowledge of procurement legislation, policy and procedures by both parties and a balance of power/authority between them to prevent undue influence.

Whether as a result of the lack of planning, a sudden unforeseen need or a contemptuous attitude toward procurement or procurement personnel, many of the issues raised by suppliers can be attributed to decisions made well before procurement personnel become involved in the process—decisions made by program managers. Most of the issues raised in complaints point to two contributing factors: 1) managers who do not have a sufficient understanding of procurement rules, or if they do, may be complacent and indifferent about following the rules, and 2) managers and others having limited to no training in writing statements of work or in developing evaluation criteria for solicitation documents.

Many non-procurement personnel are being authorized to purchase without the commensurate training. With the exception of the in-house training taking place in some departments, the current formal mandatory training consists of a module which forms part of a broader on-line course for managers to obtain signing delegation in procurement among other areas. Participants are required to read text and answer multiple choice questions. Leaving aside the elementary nature of the course content and associated questions, there is no limit to the number of times questions can be attempted, nor any restriction preventing participants from toggling between the online text and questions, in effect making the test an assessment of the participant's effectiveness in conducting online research. The reality is that most personnel learn procurement on the job. And while there is some suggestion that the current level of training is sufficient, owing to the fact that the financial element of the purchases is regularly monitored, this monitoring is not designed to reveal procurement anomalies.

There is a dire need for comprehensive mandatory training of personnel who are responsible for articulating and describing goods and services which make their way into critical procurement documents such as statements of work and bidder evaluation criteria—two facets of the process which investigations and practice reviews have confirmed to be particularly vulnerable. This is not a novel idea emanating from

hours of laborious analysis of five years of OPO cases; it was raised in 2005 by a Parliamentary Task Force established to conduct a Government-Wide Review of Procurement. The Task Force noted that, for more than a decade, audit observations had highlighted the fact that many senior managers and program officials lack a full understanding of contracting rules and processes. With little central leadership in this area, nothing of any significance has been done.

The jiggered technocracy

Program managers are supported by roughly 4,300 procurement personnel and more than 10,000 employees involved in materiel management and real property. These are staff whose part- or full-time responsibility is purchasing goods and services on behalf of the Crown. Purchasing for the federal government is a tad more complicated than asking the clerk down the hall to run to the local office supply retailer to buy pens. The legislative, regulatory and policy framework of Canada's federal procurement regime is complex, including over 15 Acts of Parliament, more than 35 policies and various trade agreements. Layered onto this framework are implied duties, strata of departmental policies and a labyrinth of rules governing numerous un-standardized and often complicated procurement processes and tools. Given the complex and intricate underpinnings of the procurement function and the volume of fluid, shifting rules and conventions that frame it, one would expect procurement personnel, entrusted with spending billions of tax payer dollars annually, to be provided not only with unparalleled, formal structured training, but to be professionally licensed and certified. They are not.

The licensing/certification/accreditation of procurement personnel and staff responsible for purchasing must be made mandatory. Past certification efforts have been underfunded, anemic and shamefully inadequate. Perhaps indicative of the priority given to federal procurement personnel, the best that could be mustered was an optional certification program introduced in 2006. The result? By March of 2015, nearly a decade after the program was introduced, less than 20% of the approximately 4,300 procurement personnel in the federal public service had enrolled in the program. Less than 50 specialists had completed level I or level II. Inattentive central leadership is directly responsible for this plodding and anemic uptake.

The situation is even bleaker for employees involved in materiel management and corporate functions. Since these employees are often the office factotum, with responsibilities beyond purchasing, they don't always handle a procurement volume to warrant being provided procurement training or that enables them to develop the on-the-job intimate knowledge. And yet they are often a key element in the procurement function in most small and medium-sized federal organizations.

Shouldn't there be consequences?

But training of non-procurement personnel and licensing/certification/accreditation of procurement personnel is only part of the equation. I am aware of only a very few instances where OPO investigations finding untoward activity resulted in those responsible receiving any sort of reprimand. In most departments it seems violating procurement rules is not considered on par with or as serious as breaching financial or human resource rules. Violations of procurement rules must be addressed. As is the case in other professionally designated and self-governing professions, violations of rules need to be addressed through commensurate consequences. For example, procurement personnel who breach the rules or knowingly allow them to be breached would do so with the full knowledge that their certification, in essence, their license to buy goods and services in the federal government, was at stake. Likewise, at a

minimum, delegations of contracting authorities of non-procurement personnel could be suspended, maybe even withdrawn, from program managers who aren't willing or able to follow the rules.

Using a chisel to drill a hole

Even the most casual perusal of supplier statistics collected by my office reveals an undeniable fact. A disproportionate amount of supplier angst is generated from a very distinct swath of government procurement expenditures: those related to service contracts. Of all the reviews of complaints completed by my office since it opened its doors in 2008, every single one examined a service contract.

Attempting to understand why services contracts are the topic of the vast majority of complaints to my office is no small feat. Possible explanations include:

- A considerable increase in the number of service contracts issued by the federal government over the past two decades. In 1996 about 10% of the total number of contracts was for services. Today it is about 40%.
- Unlike suppliers of goods (products) who are typically manufacturers/distributors, service providers, generally speaking, have less capital investment. This means these suppliers are more likely to be small and medium enterprises (SMEs), meaning the service area is more heavily populated and extremely competitive.
- Unlike goods, services being purchased by departments are not tangible; they are not personal property type items like a boardroom table whose ownership is being transferred. Accordingly, there is a certain indefiniteness to articulating service requirements which is not as prevalent in defining a good, where, for example, a boardroom table can be described in precise, prescriptive and tangible terms. As a result, statements of work for services tend to be written as a "general description" of what is required by the department, since the required service is more difficult to detail and cannot be as conclusively described as goods/supplies.
- Goods can be inspected and objectively (some would say easily) assessed. This is not always the case for services, where the definition of "acceptable" is rarely, and almost never sufficiently, articulated by departments at the request for proposal/statements of work stage. This may result in assessments of proposals that are more subjective in nature.
- In attempts to reduce the level of subjectivity in selecting from among prospective service providers, departments typically screen on education and experience, both of which can be, and usually are, arbitrarily quantified, as well as on technical competence, which also tends to be subjective. While these selection criteria are used as proxies for a supplier's ability to deliver an "acceptable" final product, they are rarely anything more than an indication of a supplier's potential ability to deliver the service and of little use to departments for the purpose of objectively assessing the final "product" when it is delivered.

The University of Ottawa was asked by my office to examine the issue and attempt to identify the inherent differences in contracting for services (as opposed to goods) and to determine what factors or reasons may be contributing to the observed disproportionality.

The research confirmed that annually, since 2006, the ratio in the number of complaints to my office related to service contracts as compared to goods has been roughly 80:20. US jurisdictions participating in the research experienced similar ratios.

Unfortunately, the research was inconclusive with regard to causality and suggests further investigation is required. It does, however, venture a potential reason for the dichotomy—a structural incompatibility between the current procurement system designed to procure goods and the "complexities" associated with procuring services; in other words, an incompatibility between the current goods-oriented procurement system and an outcome-oriented service procurement.

Observations stemming from the administration of this office and the results of an academic examination of the issue both make it difficult to deny that something about the current approach to soliciting for services is disjointed. When one considers that most departments are delegated authority to spend up to $25K for goods, which are usually straight-forward, but can spend up to $2M on services, which are more complex, identifying precisely what that problem is and correcting it will go a long way toward ameliorating the current anachronistic approach. The problem is, with the current state of government-wide procurement governance, no one is clearly responsible to carry out this type of important analysis.

Is bigger really better?

If the cacophony of commentary can be considered a barometer of supplier discontent about any particular aspect of federal procurement, one need look no further than Standing Offers (SOs) and Supply Arrangements (SAs). Some years accounting for one in five (i.e. 20 percent) of procurement-related contacts and representing half of all written complaints reviewed by my office (i.e. reviews of contracts issued against these tools), these procurement tools generate a unique chorus of supplier bellicosity.

SOs and SAs are two distinct methods of supply established to facilitate the procurement of frequently purchased goods and services where demand is not known in advance. Among the constellation of purported attributes, SOs and SAs should reduce paperwork, lower the cost of goods and services, expedite the procurement process and reduce the number of solicitations. They are claimed to expedite the procurement process and reduce costs by leveraging the Government's purchasing power. That's the premise. The problem is that there is little evidence to demonstrate that these tools are actually effective in achieving any of these things. Yet they continue to be rolled out. And no one can tell you how many there are across the government, nor is there a central repository outlining which department have issued these tools or for which commodities.

And a good chunk of change is spent using these things. Of the $14.6B in reported procurement expenditures for 2013, at least $3.4B was through the use of these tools. I say "at least" because this is the only amount known. No one really knows the actual amount because departments are not required to report spending against these tools. So there is no means of knowing for certain.

Perhaps the most prominent of the litany of issues raised by suppliers is that these tools often create exclusivity in government contracts. Suppliers unsuccessful at vying for this exclusivity are, in the absence of a refresh, often excluded from supplying the government for the lifespan of the tool, with no recourse. Conversely, depending on how the tools are structured, they can be lucrative for successful firms. In some cases they create a monopoly for a single firm, in others a quasi-cartel for a limited number of firms. And this is where suppliers point to a fallacy with regard to the cost savings assertions being made of SOs; the idea that these tools will leverage a lower price. Suppliers who have been unsuccessful in qualifying for a SO/SA report that they are being subsequently hired by firms who have been successful. These suppliers challenge the purported cost savings, pointing out that the firms who qualified on the tool are charging the government the tool's negotiated price, which includes the firm's "cut" and overhead, in addition to

the rate of the supplier providing the service—the rate the supplier would charge if he supplied to the government directly. Likewise, it isn't unusual to hear government officials complaining they are required to use mandatory tools when they can obtain the good/service cheaper directly from suppliers.

A similar point can be made regarding the claim that these tools reduce solicitations and paper work. The reality is that SAs require some form of secondary assessment of the qualified firms, while some SOs provide the option for a secondary assessment. For example, when departments have a specific requirement which is available through a SA, they must issue a second stage solicitation to some or all of the suppliers from the SA's pre-qualified pool. From the firm's perspective, not only was it required to invest time and money pre-qualifying on the SA, it now must make a further investment to complete the necessary proposal. That is, if a firm is even called. Since neither SOs nor SAs are contracts, they guarantee no level of business to suppliers. Despite the time, resources and effort invested in responding to, and qualifying for, SOs or SAs, some suppliers never get called.

Intuitively it is difficult to dispute that creating a commodity/service demand critical mass and an associated short list of suppliers should result in volume discounts and reduce solicitation time and effort. But the reality is that the government simply does not know if these benefits are being realized. In a quarter of the files we reviewed in a recent examination of SO/SAs, there was no way of knowing if departments had paid the tool's negotiated price. Suppliers have suggested these vehicles may in fact be artificially inflating prices... but no one really knows for sure. Yet despite all that is not known, they continue to proliferate.

It isn't how little you've paid, it's how much you actually got!

One of my favorite anecdotes to lighten up a presentation yet focus an audience is about the American astronaut John Glenn. The story goes that at a news conference following Mr. Glenn's successful orbit of the earth he was asked what was going through his mind as he sat strapped in the tiny capsule waiting to be hurled into space. Story has it that his response was that he couldn't help but to think "every part of this rocket was supplied by the lowest bidder."

While Mr. Glenn may have been referring to the American space program procurement system of 50-plus years ago, selecting a winning bid based on lowest price is just as endemic today here in Canada. Whether it is attributable to sustained constrained budgets or the simplicity and convenience of having a low risk, objective, defensible selection criterion, low price often rules when departments purchase goods and services. And at first glance, most would believe this is a prudent approach to spending tax dollars. In reality, this is not always the case. Signing a contract with a supplier who submitted the lowest bid does not always result in a wise or economical expenditure. This is because the cost of owning and maintaining the item or the ongoing auxiliary costs of the service are often not calculated and factored into the total cost. This approach to purchasing is akin, for example, to making the decision to buy the family car based exclusively on the negotiated price while ignoring such things as differences in ongoing carrying, maintenance and operating costs. The current obsession with lowest cost bids may be ensuring the least expensive purchases are being made, but it may be resulting in the worst value.

With the exception of some large multi-million dollar purchases made by a few select departments, best value and the associated total cost of ownership are foreign concepts to most personnel making the purchasing decisions. Foreign, because best value is not defined, and even if it was, there really is no

incentive to consider it. Generally speaking, on the off chance a department even thinks about potential procurement needs as part of their operational planning, most purchases of goods and services, if not afterthoughts, are treated as "one-off" decisions within a specific annual budget allocation. The funds required to run and maintain that item are derived from a separate pot of money which is replenished annually. So using the car example, why consider any cost beyond the up-front when there is an annual investment annuity available from a deceased aunt to pay for the ongoing carrying, maintenance and operating costs?

The Scottish Government is tackling this issue by introducing a Best Value concept in procurement. Their Value for Money triangle sums up the Scottish Model of Procurement; it is not just about cost and quality, but about the best balance of cost, quality and sustainability. And to be sure the approach has some teeth, the duty of best value is a formal duty on Scottish public sector accountable officers.

Here at home, one only has to look at Bill 188, *The Best Value in Procurement Act 2015*, introduced by the province of Saskatchewan. The bill requires decisions based on best value as the basis for procurement. It amended legislation that required contracts to be awarded strictly on the basis of lowest price.

The private sector has taken it a step further, with some firms adopting total cost of ownership costing models which calculate end-to-end costs. Meaning, not only is the firm's cost of buying goods and services factored into the model, but so is the seller's cost of selling them. The model has merit, in that the financial implications of the current approach to federal procurement are not restricted to the government side of the equation. They extend to suppliers who are forced into a futile, costly and labour intensive process of responding to solicitations which require reams of criteria to be addressed when the ultimate departmental consideration is price. This is particularly acute in low dollar value (LDV) procurements. Whether a similar requirement is valued at $10,000 or $1,000,000, the cost and effort for a supplier to submit a proposal can often be comparable. It is naive to think that firms are not factoring this government-inflicted additional cost into their price structure when selling to departments. Yet federal procurement continues to stumble along with an economically anachronistic, simplistic and crude approach to purchasing called lowest cost.

The legal stuff

Without a doubt the most common question I have faced when discussing the governance of my office with officials from other jurisdictions, whether domestic or international, has been how the Procurement Ombudsman can be truly neutral and independent when the position reports to the minister responsible for procurement.

The reality is that it just works. Being part of the Minister of Public Services and Procurement's portfolio or subject to the rules applicable to the Department of Public Services and Procurement has not constrained or impeded my ability to execute the mandate. Whether this has been due to the personalities, a common understanding of how the arrangement should work, a respect for each other's roles and responsibilities or some combination of all these things, it just works.

That is not to say that the role does not have its challenges. Being responsible for any organization has its challenges. But having to execute the mandate of a position intended to be neutral, independent and operate at arm's length from the rest of government presents some unique hurdles when the position is but phantomly independent and arm's length. And the vast majority of these hurdles stem from the

position's enabling legislation. Ambiguities and omissions, intentional or otherwise, make executing the mandate a bit more complicated than it needs to be.

This section of the document, while not exhaustive, highlights some of the hurdles I have faced during my five years in the position.

Can I see your documents... please... if you don't mind?

A perennial challenge to executing the legal mandate conferred on the Procurement Ombudsman by Parliament has been in obtaining the documents necessary for reviews from federal organizations.

The Procurement Ombudsman is required, among other things, to review supplier complaints related to the award of certain contracts, as well as to review departmental procurement practices. The *Procurement Ombudsman Regulations* are fairly prescriptive on how this is to be done and what is to be taken into consideration. For example, in a complaint on a contract award, the Ombudsman is to assess whether a complainant would have had a reasonable prospect of being awarded the contract, but for the actions of the contracting department and the degree to which the complainant was prejudiced. To undertake these assessments one needs to have access to relevant documents and records held by departments. The fly in the ointment is that, while the Regulations provide the Ombudsman with the authority to request documents and information, there is no corresponding obligation on the part of departments to provide anything...the classic makings of a toothless tiger. I experienced this with one department, when its recalcitrance resulted in my being impeded from delivering on my statutory duties. And the only recourse available is to name and shame. Not terribly effective.

Any person or entity involved in the procurement process being reviewed by the Ombudsman needs to be legally obligated to provide the documents and information necessary for the review.

Deadlines schmeadlines

The Regulations establish deadlines for the three parties involved in a review: the Ombudsman, the supplier and the federal organization. But in practice deadlines seem to apply only to two of the players: the Ombudsman and the supplier. The Regulations impose timeframes on the Ombudsman within which he is permitted to accept a complaint, conduct a review and produce the resulting report. Likewise, the Regulations require suppliers to file complaints within certain timeframes. The Regulations prohibit the Ombudsman from reviewing a complaint that has not respected the timeframe. And departments are required to respond to complaints within certain timeframes. And the consequences for departments not respecting those timeframes? Zilch. Yet the consequences of a department dragging its feet or simply ignoring the imposed regulatory deadlines are transferred to, and become the accountability of, the Ombudsman, who is at risk of missing the deadline or issuing an incomplete report. And the only recourse available to the Ombudsman is to name and shame. Once again, not terribly effective.

Confidentiality – isn't it a fundamental tenet of ombudsing?

Confidentiality is a core concept of an ombudsman's role. It is a concept that is front and centre in the International Ombudsman Association's *Standards of Practices.* Yet the Regulations are devoid of any hint of this fundamental tenet, and that is a problem.

The Procurement Ombudsman is not legally permitted to maintain the confidentiality of information provided to him by suppliers. On the contrary, the Ombudsman is required by law to disclose the information on an access request and to forward a copy of the complaint, which the Regulations require to include information on the identity of the complainant, to the department in question, regardless of whether or not the Ombudsman can review the complaint. This latter legal requirement was at the heart of a complaint directed at my office by a supplier and investigated by the Office of the Privacy Commissioner (OPC).

A supplier complained to OPC that my office had contravened the *Privacy Act* in providing the department in question with a copy of his complaint. While, ultimately, the OPC dismissed the complaint and concluded that my office acted in accordance with the Regulations and the *Privacy Act*, the case highlighted the friction that exists between the public perception and expectation of how an ombudsman should conduct his work and Regulations that are out of kilter with the inherent role of an ombudsman.

Likewise, it isn't unusual for suppliers to be reluctant to divulge details of an issue they are experiencing with a department, knowing that the office is subject to the *Access to Information Act* (ATI Act). They call to register a complaint but stop short of formally filing it, knowing the office has no means of protecting what they feel is sensitive or potentially damaging details. The Ombudsman needs a mechanism to maintain the confidentiality of supplier information similar to that of the Integrity Commissioner, who is protected from being required to disclose information under the ATI Act.

Perilous job with a teeny tiny safety net

The Ombudsman does not have immunity from court challenges or even legal reprisals. Although the Procurement Ombudsman is not an officer of Parliament like the Auditor General, Privacy Commissioner, Access to Information Commissioner, Official Languages Commissioner and Integrity Commissioner, the Ombudsman has many of the same functions and is exposed to all of the same risks and, therefore, should have the benefit of the same protections: immunity from appearing as a witness, protection from criminal or civil proceedings, and immunity from defamation claims.

Independently dependent?

In order to effectively execute his/her mandate with credibility, as well as gain and keep the trust of suppliers, the Procurement Ombudsman must be, and must be perceived to be, independent. The concept of independence is, frankly, a hard sell. Most people are quick to point to the inherent contradiction of a neutral and independent Procurement Ombudsman who reports to the minister responsible for procurement. Beyond that, it is difficult to rationalize the concept of independence when every aspect of the office operations is, from a legal perspective, the responsibility of the Deputy Minister of Public Services and Procurement Canada as the accounting officer. This responsibility extends from the office budget being provided through the department to each and every expenditure, trip, staffing action and contract—all making the concept of independence dubious. Yet the Procurement Ombudsman position is intended to operate and be perceived to operate independently and without any direct or indirect interference. I started this section by saying the arrangement has worked in the past. But the importance of ensuring the role of the Procurement Ombudsman functions as intended make it essential that it should not be left to an informal understanding and the goodwill of those involved, but should be based on clear, categorical and objective parameters.

Suppliers see the value of Procurement Ombudsman... but wish it was worth more

During my five year tenure, far too many suppliers have contacted the office only to be informed that I couldn't help them because their issue was outside the Procurement Ombudsman mandate. Since the early days, suppliers have routinely complemented the informal and expeditious manner in which we resolve issues and in the same breath lamented what they see as a restricted and narrow mandate.

For example, complaints regarding the establishment of Standing Offers (SOs) and Supply Arrangements (SAs). Given that the establishment of SOs and SAs are not contracts *per se*, the Procurement Ombudsman cannot examine supplier complaints regarding the process used by departments to establish them; the Regulations only permit the review of complaints related to call-ups or contracts issued against those tools. Since the establishment of SOs and SAs, in some cases, create a monopoly for a single firm and in others a quasi-cartel for a limited number of firms, providing assurance that these tools are established in a fair, open and transparent manner would go a long way to alleviating supplier angst surrounding the use of these tools.

Similarly, the dispute resolution provisions contained in the Regulations are intended to provide a government-wide dispute resolution service. But the regulatory provisions are hollow, since departments are not obliged to participate and many supplier requests for the service are simply declined by departments. Suppliers have complained that they are forced to utilize department-dictated processes, only to discover that the departments do not follow the process, thereby negating any effort to use alternative dispute resolution to resolve the dispute. Moreover, despite the availability of a no-fee OPO service, some departments are requiring suppliers to use departmental ADR services and charging suppliers for the cost of mediators, a financial burden which is seen by suppliers as a tactic on the part of departments to make it more difficult for suppliers to have their dispute resolved.

As the ADR regulatory provisions are intended to provide a government-wide dispute resolution service, all departments should be required to utilize the ADR service provided for in the Regulations and participate in ADR when requested by a supplier.

The train has left the station

Suppliers have often raised concerns regarding the fact that the Ombudsman's only tool to address departmental procurement shortcomings is to make recommendations. Recommendations are just that, recommendations. Departments have the discretion to accept a recommendation or ignore it without explanation. The Procurement Ombudsman has no ability to stop a procurement process, cancel the award of a contract, or award the contract to other suppliers in instances where the department in question has made significant errors from a procurement perspective.

This issue is further exacerbated, in the mind of many suppliers, by the fact that the only real remedy available to them is that the Ombudsman can recommend compensation. Once again, the Ombudsman can recommend, and departments have the discretion to take, or leave, the recommendation. Even when a recommendation for compensation is accepted, the compensation amount is symbolic, token at best. The Ombudsman can only recommend a maximum compensation of 10% of the value of the contract; that translates to a maximum amount of $9,999 for a service contract and $2,499 for a goods contract, regardless of the financial impact suffered by the supplier.

Conclusion

This document summarizes recurrent, and in some cases incessant, issues which, more often than not, have been the catalysts for the perception and associated procurement frustration expressed by suppliers and procurement personnel. It is certainly not all-encompassing. It provides examples to illustrate why the procurement "noise" exists. Addressing the issues will go a long way in reducing the noise. But the reality is that the nature of public procurement is such that some level of noise will always be there.

The public procurement environment is competitive and can be lucrative. It is a key economic driver being brushed, pushed and pulled by various, sometimes competing, political, regional, economic and policy priorities and competing private sector interests—a dynamic that is always bound to generate some noise. Likewise, a jaundiced eye has an innate talent for finding cracks where they don't exist and for describing caverns from those that do; a human trait that also tends to generate noise.

The problem arises when issues are brought to decision makers' attention and are ignored, justified, rationalized away or summarily dismissed. The issues raised in this document fall into those categories. They have all been raised before. They have appeared in past reports because suppliers or procurement personnel, or both, have taken the time and made the effort to bring them to my attention as the Procurement Ombudsman. As startling a revelation as it may be to some, that is why Parliament created the position and it is one of the primary roles and benefits of an ombudsman; to represent the interests of the public he/she serves and bring their issues to the attention of decision makers for action.

The key, however, is for decision makers to optimize the benefits of an ombudsman's office by taking the issues seriously and addressing them in a meaningful way; two things that could go a long way in helping to reduce some of the current noise.