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Report of the
**Auditor General
of Canada**
to the House of Commons

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Chapter 3
Contracting for Professional Services—
Public Works and Government Services Canada



Office of the Auditor General of Canada

The December 2008 Report of the Auditor General of Canada comprises Matters of Special Importance—2008, Main Points—Chapters 1 to 8, Appendices, and eight chapters. The main table of contents for the Report is found at the end of this publication.

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Chapter

3

Contracting for Professional Services
Public Works and Government Services
Canada

All of the audit work in this chapter was conducted in accordance with the standards for assurance engagements set by The Canadian Institute of Chartered Accountants. While the Office adopts these standards as the minimum requirement for our audits, we also draw upon the standards and practices of other disciplines.

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Contracting for Professional Services Public Works and Government Services Canada

Main Points

What we examined

To help deliver its departmental programs, Public Works and Government Services Canada (PWGSC) uses the professional services of consultants such as accountants, lawyers, architects, engineers, specialists in data processing, and other technical and professional experts.

We examined two random samples—one of publicly tendered contracts and one of sole source contracts—to determine whether PWGSC's contract award process followed the government's contracting regulations and policies. From the Department's expenditure database we also examined a random sample of financial transactions related to contracts to determine whether they were managed appropriately after they were awarded—that is, whether they were administered in compliance with the *Financial Administration Act*, the terms and conditions of the contracts, and the Department's financial and contracting policies. In addition, we assessed whether PWGSC had adequate management controls and monitoring practices in place.

Our conclusions relate only to the management practices and actions of public servants. The rules and regulations we refer to apply to public servants and not to contractors. We did not audit the records of the private sector contractors. Consequently, our conclusions cannot and do not pertain to any practices that contractors followed or to their performance.

Why it's important

PWGSC spends more than \$1 billion annually on contracts for services to support the delivery of its own programs. Therefore, it is essential that officials at PWGSC protect the interests of the Crown by adhering to key principles of contracting that promote competition, fairness, and transparency. This requires sound processes with appropriate segregation of duties, monitored to ensure that they are followed consistently.

What we found

- PWGSC awarded contracts in a fair, open, and transparent manner and fully complied with the applicable acts, regulations, and policies in 95 percent of the publicly tendered contracts and 96 percent of the sole source contracts that we audited.
- In the administration of contracts after they were awarded, there was an administrative deficiency or weakness of some kind in 30 of the 37 transactions examined—that is, the Department’s management controls were not properly applied. Although no single type of problem was pervasive, the number of problems indicates that the controls are not enforced consistently. For example, in some cases, contracts were amended after they were awarded, significantly changing their nature and value; in some cases, the Department did not enforce terms and conditions of contracts.
- In several cases, the same departmental official who undertook the procurement for services also certified that the services were received. This is not consistent with the Treasury Board’s Policy on Delegation of Authorities, which requires that each of the tasks be carried out by separate individuals.
- The Department had extensive, long-term contractual arrangements with some consultants that could create an employer-employee relationship and a risk of liability to the government.
- In three cases, there was evidence indicating that the contractor who was awarded the contract had been involved in developing the search criteria or had written the statement of work for the contract. In one case, PWGSC used the services of a consultant to assist in developing the request for proposal, while at the same time the consultant was subcontracted with the firm that bid on and was awarded the contract. Each case represented a conflict of interest and a violation of the government’s policy that contracting be fair, open, and transparent.

The Department has responded. PWGSC agrees with all the recommendations and is taking action to address the concerns raised in the chapter. It says it is pleased that the audit found it had followed the rules in its contract award process and complied with the government’s rules when awarding contracts for services. The Department’s responses follow each recommendation throughout the chapter.

Introduction

The importance of contracting for professional services

3.1 The federal government views contracting for services as an effective way to meet unexpected fluctuations in workload, to acquire special expertise not available in the public service, or to fill in for public servants during temporary absences. Contracting is an essential tool for federal departments and agencies in delivering their programs.

3.2 The government spends more than \$7 billion annually on professional and special services. Of this amount, Public Works and Government Services Canada (PWGSC) spent more than \$1 billion in the 2006–07 fiscal year to support the delivery of its programs. These professional services include those of accountants, lawyers, architects, engineers, translators, and doctors, nurses, and other medical personnel. The government also engages a variety of management, data processing, and other technical and professional experts.

3.3 The stated objective of the Treasury Board Contracting Policy is to ensure that the government acquires goods and services in a manner that enhances access, competition, and fairness, and results in the best value or, if appropriate, the optimal balance of overall benefits to the Crown and the Canadian people. Therefore, central to government contracting are the principles of fair and open access to contracting opportunities for businesses and the best value for the taxpayer.

3.4 PWGSC uses a variety of tools or approaches to meet its procurement requirements (Exhibit 3.1). These range from specific contracts that precisely define the deliverables to be provided to a specific client by a specific date, to various procurement frameworks for sometimes less specific or well-defined needs. Included in the latter are standing offers, supply arrangements, Professional Services (PS) Online contracts, and contracts based on task authorizations for specific work.

Focus of the audit

3.5 We examined whether PWGSC awarded publicly tendered and sole source contracts for professional services in compliance with the appropriate legislation, regulations, and policies. The process for awarding contracts consists of all activities from the initial identification of the requirement, the solicitation, and tendering (if required), up to and including the awarding of the contract.

Exhibit 3.1 PWGSC uses a variety of procurement tools or approaches

Publicly tendered contract: A publicly tendered contract is a competitive contract where the process used for the solicitation of bids enhances access, competition, and fairness, and assures that a reasonable and representative number of suppliers are given an opportunity to bid.

Sole source contract: A sole source contract is a non-competitive or directed contract, awarded to a preselected contractor in circumstances where the contracting authority has justifiably set aside the requirement to solicit bids under one or more of the exceptions to competitive solicitation in section 6 of the Government Contracts Regulations. A competitive bidding process is not followed.

Standing offer: A standing offer is not a contract. It is an offer from a potential supplier to provide goods and/or services at pre-arranged prices, under set terms and conditions, when and if required. No contract exists until the government issues an order or “call-up” against the standing offer, and there is no actual obligation on the part of the government to purchase until that time.

Supply arrangement: A supply arrangement is a non-binding agreement between PWGSC and suppliers to provide a range of goods or, more commonly, services on an “as required” basis. It includes a list of qualified suppliers identified as potential sources from which departments can obtain firm price quotations on specific requirements.

Task authorization: A task authorization (TA) is a structured administrative process enabling a client to authorize work by a contractor on an “as-and-when-requested” basis according to the terms and conditions of an existing contract. Contracts that provide for the use of TAs (TA contracts) are used in contracting situations where a definite need for a category of service exists, but the precise nature and timing of the need cannot be set out in advance. The use of TAs must be specifically provided for in the contract. When the client requires the services, a TA is issued to instruct the contractor to carry out the specified work.

Professional Service Online (PS Online): PS Online is an automated purchasing tool that enables suppliers across Canada to register in a database used by federal government departments and agencies to identify potential suppliers for the government’s requirements for professional services under the NAFTA threshold, which was \$84,000 at the time of the audit.

Sources: Treasury Board Contracting Policy, PWGSC Policy on Task Authorization Contracts, and PS Online Protocol

3.6 We further examined whether, once contracts had been awarded, they were managed and administered in compliance with appropriate legislation, regulations, policies, directives, and guidelines. Contract management and administration consist of the activities that occur once a contract is in place and include such things as commitment of funds, enforcement of the terms and conditions, information management and reporting, amendments to the contract, and payment for work done.

3.7 It should be noted that our conclusions about management practices and actions refer only to those of public servants. The rules and regulations we refer to apply to public servants; they do not apply to contractors. We did not audit the records of the private sector

contractors. Consequently, our conclusions cannot and do not pertain to any practices that contractors followed or to their performance.

3.8 More details on the audit objective, scope, approach, and criteria are in **About the Audit** at the end of this chapter.

Observations and Recommendations

Awarding of contracts

PWGSC Supply Manual—A document that contains PWGSC's departmental purchasing policies and references to relevant government laws and conditions. The Manual explains why and how the Department carries out its supply activities and is used by PWGSC procurement officers.

3.9 We examined the awarding process for a random sample of publicly tendered and sole source contracts from the 2005–06 and 2006–07 fiscal years. These two types of contracts, as defined in Exhibit 3.1, account for 87 percent of the dollar amounts of all contracts for services that Public Works and Government Services Canada (PWGSC) awarded for its own needs during those two years.

3.10 The **PWGSC Supply Manual** is based on one governing principle: integrity. Five sub-principles provide the framework for PWGSC contracting activities (Exhibit 3.2). It is important that the Department respect these principles, along with the policy requirements and regulations, in order to ensure the integrity of the contracting process with respect to fairness, open competition, and transparency in the expenditure of public funds.

3.11 We expected the award process (including defining the work to be done, soliciting bids, and awarding contracts) to be carried out in accordance with Government Contracts Regulations, the Treasury Board Contracting Policy, and the PWGSC Supply Manual.

The Department followed the rules in awarding publicly tendered contracts

3.12 We examined the award process of 43 publicly tendered contracts out of a total of 1,191 contracts over \$10,000 awarded during the 2005–06 and 2006–07 fiscal years. We expected that the Department would have followed the standard competitive process, such as issuing a request for proposal (RFP) and evaluating bids fairly. We determined that 41 of these contracts followed a competitive process that complied with applicable authorities, regulations, and policies.

3.13 For example, we reviewed one contract for specialized architectural services. The award process was complex, yet we found that the contract file was fully documented and included explanations of the issues and the reasoning behind decisions.

Exhibit 3.2 The PWGSC Supply Manual’s five sub-principles provide the framework for contracting activities

<p>Integrity</p> <p>PWGSC supply activities will be open, fair, and honest.</p>	<p>Client service</p> <p>PWGSC will make every reasonable effort to satisfy the operational requirements of its clients, while obtaining best value in each procurement process.</p>
	<p>National objectives</p> <p>PWGSC supply activities will advance established government national socio-economic policies, within the limits imposed by international trade obligations.</p>
	<p>Competition</p> <p>PWGSC procurement will be competitive, with specific exceptions.</p>
	<p>Equal treatment</p> <p>PWGSC will ensure that all potential suppliers of a particular requirement are subject to the same conditions.</p>
	<p>Accountability*</p> <p>PWGSC is accountable for the integrity of the complete procurement process, including all actions taken within the process. This also applies to actions originating from the client that do not comply with the Treasury Board or PWGSC policies, or applicable legislation.</p> <p>*PWGSC deleted this sub-principle on 14 September 2007. All of the contracts in our sample were awarded prior to this date.</p>

Source: PWGSC Supply Manual

3.14 Of the two exceptions we noted, one involved a contract awarded to a company under terms of an existing supply arrangement. When using a supply arrangement, PWGSC requires that the contract be awarded through a competitive tender among the firms on the list. However, in this instance, the Department did not follow a competitive process as it asked only one company to submit a proposal. In our opinion, it awarded the contract, valued at over \$200,000, on a sole source basis. The other exception involved a contract for which the Department did not publicly post the request for bids for the required number of days. No reason for the shortened tendering period was in the file.

3.15 In all the other cases that we looked at, PWGSC correctly notified bidders, managed the RFP process, carried out evaluations and financial analyses, and awarded contracts in compliance with the rules.

3.16 Based on the results of the sample we examined, we concluded that 95 percent of the contracts that PWGSC awarded using a public tendering process complied with the appropriate legislation, regulations, and policies. The tendering process was therefore conducted in a fair and open manner.

The Department followed the rules in awarding sole source contracts

3.17 Whenever possible, contractors are to be selected using a competitive process; however, there are some situations where a competitive process is not possible or does not represent the best value for the government. When a department chooses a non-competitive (sole source) procurement strategy, it must fully justify the decision to use an exception to competitive bidding. Government Contracts Regulations and the Treasury Board Contracting Policy allow a contract to be awarded without a competitive process under one of the following four, well-defined exceptions:

- The need is one of pressing emergency in which delay would be injurious to the public interest.
- The estimated expenditure does not exceed
 - \$25,000;
 - \$100,000, where the contract is for the acquisition of architectural, engineering, and other services required in the planning, design, preparation, or supervision of the construction, repair, renovation, or restoration of a work; or
 - \$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 the planning, design, preparation, or supervision of an international development assistance program or project.
- The nature of the work is such that it would not be in the public interest to solicit bids.
- Only one person is capable of performing the work.

3.18 We examined the award process of 72 sole source contracts, out of a total of 491 contracts over \$10,000 awarded during the 2005–06 and 2006–07 fiscal years, to determine if they complied with relevant legislation, regulations, and policies. We expected the awarding of a non-competitive contract to fit one of the four exemptions and the justification to be documented in the file. We also expected that, as required by the Treasury Board Contracting Policy, the proposed bid would be evaluated for price and contractor capacity and assessed for the potential risk of an employee-employer relationship being created.

3.19 We determined that 69 of these sole source contracts complied with applicable authorities and had been awarded in a fair and transparent manner. In each of the 69 contracts, we were able to conclude that PWGSC had justified the use of a sole source contract, ensured that the contractor could do the work at a fair price, and ensured that an employee-employer relationship did not result when contracting the services of an individual. A good illustration is one contract, for which the contracting officer searched a database of contractors several times. As no contractor name came up with each search, the contracting officer used broader criteria in an attempt to locate a contractor. The contracting officer conducted five searches before asking the project officer to recommend a contractor. All of this information was properly documented in the file.

3.20 Three contracts were not compliant:

- Although Treasury Board Contracting Policy requires that documentation of contract files be maintained, the Department was unable to locate one identified file. Accordingly, we consider it non-compliant.
- In one case, we found that the Department did not use a procurement tool appropriately in awarding a contract for architectural and engineering services. PWGSC has designed a procurement tool called “SELECT,” which is a database of prequalified contractors who offer a variety of architectural and engineering services, to identify potential contractors and to ensure fair and equitable access to government work. The procurement tool identified a supplier. However, this supplier was disqualified because it was not available until September. We noted that the contract was awarded in mid-October to a supplier who had submitted a proposal to do the work the previous March. We also noted that this supplier was not identified through a SELECT search. In circumventing its established practice, the Department did not adhere to its principles of fair and equitable access to government work.
- Although required by the Treasury Board Contracting Policy, one file did not have a valid sole source justification. The Department stated that the contractor was the only one available to fulfill an emergency requirement to replace a staff vacancy. In our opinion, the requirement, which was general in nature, did not meet the definition of a pressing emergency.

3.21 Based on the results of the sample we examined, we found that 96 percent of the contracts that PWGSC awarded on a sole source basis complied with the appropriate legislation, regulations, and policies; consequently, we concluded that they were awarded in a fair, open, and transparent manner.

Administration of contracts

3.22 Sound contract management and administration practices are central to ensuring that departments comply with applicable legislation, regulations, and policies after contracts have been awarded. These practices are key to ensuring that contractors have fulfilled their contractual obligations, and that the government has received the services that it paid for.

3.23 We selected a random sample of 37 financial transactions from a total of 3,252 financial transactions over \$60,000, which accounted for 79 percent of the expenditure value of professional and special services from the Department's expenditure database for the 2005–06 and 2006–07 fiscal years. We audited these 37 transactions related to 28 contracts to assess whether PWGSC's administration of contracts after they were awarded met the requirements of the *Financial Administration Act*, Government Contracts Regulations, the Treasury Board Contracting Policy, and guidelines. We expected to see that

- segregation of duties was maintained;
- services rendered matched the original contract requirements, including amendments;
- monitoring mechanisms ensured payments did not exceed contract and financial authority;
- payments had been made in accordance with the *Financial Administration Act*;
- the terms and conditions of the contract were respected;
- the risk of creating an employee-employer relationship was being managed;
- the risk of creating a conflict of interest situation was avoided; and
- information was managed and reported in accordance with the Treasury Board of Canada Secretariat's guidance on proactive disclosure.

3.24 Of the 37 transactions, we found that 30 contained an administrative deficiency or weakness of some kind. While no single problem was noted as being pervasive, the frequency and range of errors signifies a need for greater consistency in the Department's

administration of contracts. The specific issues that we noted are described in the remainder of the chapter.

Segregation of duties was not always maintained

3.25 A key element in the design of a management control process is establishing appropriate segregation of duties. It is important because proper segregation of duties helps to ensure that no one individual can control the entire contracting process from identification of need, to selection of contractor, to approval of payment.

3.26 According to the Treasury Board Policy on Delegation of Authorities, “In assigning responsibility to individuals involved in the expenditure process, a deputy head must ensure that the following functions are kept separate:

- procurement;
- certification of the receipt of goods and the provision of services (section 34, *Financial Administration Act*);
- determination of entitlement, verification of accounts, and preparation of requisitions for payment of settlement; and
- certification of requisitions for payment or settlement pursuant to section 33 of the *Financial Administration Act*.”

3.27 We expected PWGSC to have proper segregation of duties in place to ensure appropriate financial and management controls for the spending of public money.

3.28 In most transactions that we reviewed, the proper segregation of duties was maintained. The project authority specified the requirement; the contract authority procured the services by issuing a contract or task authorization on behalf of the government; and in most cases, the project authority certified, according to section 34 of the *Financial Administration Act*, that the work had been done in accordance with the terms and conditions of the contract.

3.29 However, we found seven transactions where the same individual was responsible for the procurement of services and certifying the receipt of services. This arrangement is not consistent with the Treasury Board Policy on Delegation of Authorities.

3.30 In five of the seven transactions, we found the lack of segregation of duties related to task authorizations. In these cases, the project authority was able to both issue a task authorization to the supplier (procurement) to carry out the specified work and certify

receipt of services (certification of section 34). Combining procurement and certification functions under the responsibility of a single individual is not in keeping with the Treasury Board Policy on Delegation of Authorities.

Some contract amendments did not fairly reflect the original specifications

3.31 A basic principle of procurement is that the request for proposal (RFP) should reflect the nature of the work to be carried out. This principle ensures fairness and openness in the procurement process. As part of our audit of administrative practices, we reviewed the nature of contract amendments and the reasons for the changes.

3.32 The Treasury Board Contracting Policy recognizes that amending a contract is useful and in fact often necessary. It also cautions that departments should exercise care to avoid inadequate funding or planning, or improper administrative procedures that require amendments to the original contract. We expected to see that amendments to contracts were materially consistent with the original specifications, as stated in the RFP and during the bid evaluation process.

3.33 In our sample of 37 transactions related to 28 contracts, we found that 26 of those contracts had been amended. In most cases, the amendments we reviewed were within the scope of the original contract. The Department used them to implement option years or to extend the term of the contract.

3.34 However, we found four contracts that had been amended to the point where they differed significantly from the original contract and were no longer consistent with the original request for proposal. In these cases, major changes had been made to the types of skill sets or level of effort required. In one case, the RFP had a requirement for 23 different skill sets, defining the types of services to be provided. During the first 20 months, the contract was amended nine times, to include 18 new skill sets. Of the original 23 skill sets, 9 were never used. We also found that the average per diem rate increased by 35 percent. Since the contract was awarded in 2003, the value of the contract has increased from \$48 million to almost \$81 million. In another contract, the spending time frame was shortened from four years (with three option years) to 10 months. The final value of the contract was \$24 million. The shortened time frame required a different proportion of skill sets (at higher per diem rates) than specified in the RFP. We saw similar changes in the other two contracts.

3.35 The Treasury Board Contracting Policy objective is to ensure that goods and services are acquired in a manner that enhances access, competition, and fairness. It is important that any amendments to a contract respect these principles by not significantly changing the nature and extent of work to be performed under the contract as compared with the request for proposal. The statement of work set out in the RFP allows potential bidders to make a decision on whether or not to bid on a contract. In these four cases, the final contracts were significantly different from the original RFP, which had been the basis for soliciting and evaluating bids from suppliers. In our opinion, these amendments were not consistent with the Treasury Board Contracting Policy requirements for fair, open, and transparent tendering.

The Department has a financial system and procedures in place but did not always control spending against contract limits

3.36 A fundamental objective of sound financial management for government departments and agencies is to ensure that they adequately control their expenditures of public funds. This includes controls to ensure that the organization does not exceed its parliamentary appropriation, and to ensure that it does not make payments against a contract that exceed the value of the contract.

3.37 Key controls for managing the financial implications of contracting are primarily based on the *Financial Administration Act* (FAA) and associated Treasury Board policies. The FAA requires that fundamental controls for procuring and paying for goods and services be respected.

3.38 We expected that PWGSC would have adequate financial controls to meet the requirements of the FAA, and to ensure that payments did not exceed the value of the contract and respected its terms and conditions.

3.39 Section 32 (1) of the FAA states that departments shall not enter into a contract or other arrangement unless there is a sufficient unencumbered balance available to discharge the related financial obligation. In addition, section 32 (2) of the Act requires departments to establish procedures and maintain records for the control of financial commitments. According to the Treasury Board Policy on Commitment Control, a department should make commitments in its financial reporting system when it enters into a contract or places an order for goods or services.

3.40 We reviewed the financial control processes and their application in our sample of 37 transactions. We examined when the financial commitment occurred and discussed with Department officials the different approaches used to control the finances.

3.41 We found that PWGSC has procedures and a financial system in place to control financial commitments and that the Department has not exceeded its appropriation.

3.42 However, we noted that the Department was not consistent in recording commitments for task authorization contracts. In some cases, the commitments were recorded based on the contract value, and in other cases it was recorded based on the value of the individual task authorization once the work was requested. We found that when making commitments based on the value of the task authorization, the Department did not have a control in place to ensure that the dollar value of the contract was not exceeded.

3.43 We found one case where the expenditures exceeded the maximum value for the contract. The Department committed funds as it issued the individual task authorizations, without having a control in place to monitor commitments against the total value of the contract. The Department amended the contract in March 2007 by increasing its value by \$10 million. However, before approving this amendment, the Department had actually paid \$840,000 more than the value of the contract and had issued task authorizations that exceeded the authorized value of the contract by more than \$8 million.

3.44 The Department stated that its new financial and material management system, implemented in April 2008, should resolve this issue.

The Department did not always follow contracts' terms and conditions

3.45 The terms and conditions of a contract set out the services to be provided to the Crown and the basis upon which the Crown will pay for those services. They provide the legal basis for the expenditure of public funds related to a contract.

3.46 According to section 34 of the *Financial Administration Act*, no payment shall be made unless work has been performed and the price charged is in accordance with the contract, or where a payment is to be made before completion of the work, the payment is according to the contract.

3.47 We reviewed whether the Department made payments in accordance with the terms and conditions of contracts and properly approved payments under section 34 of the FAA.

3.48 We found that in 21 of the 37 transactions in our sample, the Department had not fully enforced terms and conditions of the contracts. Examples include the following:

- Performing additional work often requires pre-approval according to the terms and conditions of the contract. In 10 of the 37 transactions, we found that a request for payment for additional work was submitted after the work was completed, and this additional work had not been pre-authorized as required by the terms and conditions of the contract. Of the 10 cases, 7 related to payment of overtime where work was for more than 7.5 hours per day. There was no pre-authorization as required in the contract, yet in all cases the invoices were paid.
- In 3 other transactions, payments had been made for work that was outside the scope of the contract. Accordingly, there was no basis for payment as the contract had not been amended to include this additional work.
- In another 6 transactions, there was insufficient documentation to support invoices that were paid. Because most of these contracts are for professional services and paid at a per diem rate, timesheets are sufficient evidence to support payment. We found timesheets in most cases. However, the deliverables or a status report required to accompany the invoice were not in the file for each contract, and the Department was unable to provide us with them.

Some contracts create the risk of an employee-employer relationship

3.49 By using contractors to help in delivering a program, departments face the risk of inadvertently creating an employee-employer relationship between the government and the contractor. Such a relationship could create a significant liability for the government.

3.50 The Treasury Board Contracting Policy requires contracting authorities to ensure that an employee-employer relationship will not result when contracting for the services of individuals, in accordance with criteria established by the Canada Revenue Agency and pertinent court rulings (Exhibit 3.3).

3.51 An employee-employer relationship can be created through the wording of the contract. PWGSC has developed standardized wording for contracts to help minimize this risk. In addition, contracting officers review contract wording to ensure that clauses that could create such a relationship are not used.

3.52 A contract for services that is initially sound should not develop over time into a work situation that would constitute an employee-employer relationship, according to either the *Public Service Employment Act* or common law.

Exhibit 3.3 Canada Revenue Agency criteria for determining an employee-employer relationship

Indicators that the worker is an employee include the following:

- The payer directs and controls many elements of how the work is performed (such as what, who, where, when, and how).
- The payer controls the worker's absences, such as sick leave or vacation leave.
- The payer controls the worker with respect to the results of the work and the method used to do the work.
- The payer creates the work schedule and establishes the worker's rules of conduct.
- The worker must perform the work.
- The worker must remit activity reports to the payer.
- The worker's activities are reserved to a single payer (exclusivity of services).
- The payer can impose disciplinary actions on a worker.
- The worker receives training or direction from the payer on how to perform the work.
- The worker accepts to be integrated in the payer's business to have the latter benefit from his work.
- The parties have inserted a non-competition clause in their written contract.

Indicators that the worker is self-employed include the following:

- The worker is usually free to work when and for whom he or she chooses and may provide his or her services to different payers at the same time.
- The worker does not have to perform the services personally. He or she can hire another party to either complete the work or help complete the work.
- The worker can generally choose the time and the manner the work will be performed.
- The worker does not need to be at the payer's premises.
- The worker can accept or refuse work from the payer.
- The working relationship between the payer and the worker does not present a degree of continuity, loyalty, security, subordination, or integration, all of which are generally associated with an employee-employer relationship.

Source: Canada Revenue Agency—Tax Guide RC4110

3.53 We expected that PWGSC would have taken the steps necessary to mitigate the risk of an employee-employer relationship developing during the period of a contract or over several contracts. We reviewed statements of work, timesheets, the relationship between the project authority and the contractor, and work conditions to determine whether there was a risk that an employee-employer relationship might have been created.

3.54 In our sample of 37 transactions, we noted that in 19 cases, there were indicators of an employee-employer relationship, as described in Exhibit 3.3. In particular, these indicators include specified hours of work, supervisory relationships, requirements for reporting progress, listing in the government phone directory, and/or provision of office space.

3.55 In 16 cases, we saw consecutive contracts issued to retain the services of the same consultant, often using different procurement vehicles and stretching over several years. We also saw cases where consultants appeared to be working full-time since they billed for at least 220 days per year for successive years.

3.56 These factors could indicate a potential employee-employer relationship. If such a relationship is created, the Crown could be exposed to a significant liability for such things as pension or health benefits and employer contributions. However, it is ultimately only a court of law that can determine whether such a relationship exists.

3.57 PWGSC has developed practices to reduce the risk of creating an employee-employer relationship in awarding a contract; however, the Department does not formally monitor whether the same consultant had been retained through a series of consecutive contracts within branches.

3.58 PWGSC staff are aware of the risks. We noted that they encountered difficulties in trying to staff positions, especially in information technology. They stated that using consultants was one way they could get the people they needed to deliver their programs.

3.59 Department officials explained the particular challenges they face. The primary reason for using flexible contracting practices is the lack of long-term, stable funding. We noted that about one third of the Department's activities in providing information technology services are paid for through cost recovery from clients. This uncertain funding poses difficulties in staffing full-time positions because managers need to certify that a secure source of funds exists before they begin the staffing process.

3.60 Notwithstanding the explanations offered by the Department, the creation of an employee-employer relationship is contrary to the Treasury Board Contracting Policy and represents a significant risk for the Department. Its extensive and long-term contractual arrangements with consultants have an associated risk to the government.

3.61 Recommendation. Public Works and Government Services Canada should develop and implement a framework to ensure quality and compliance, on a consistent basis, with appropriate legislation, regulations, and policy. This would address such issues as enforcement of the terms and conditions, amendments to the contract, and payment for work done, as mentioned in this section of the report. This framework should include a monitoring program that incorporates lessons learned.

The Department's response. The observations noted in the chapter regarding inconsistencies in the administration and management of contracts after they are awarded are important. The Department accepts the recommendation and is taking corrective measures to address these observations. PWGSC is currently developing the Contract Management Control Framework, which will further strengthen its consistency in the administration of contracts in compliance with existing and appropriate legislation, regulations, and policies. The Framework is composed of key elements such as governance, controls, risk management, policies and procedures, tools and templates, management information systems, training and communications, monitoring, and reporting. These elements form the basis for several actions that together will help manage the risks related to managing consultants and administering contracts appropriately and consistently.

One of these key actions entails the development of the comprehensive Contract Management Guide that will provide employees with detailed guidance on the management of consultants and administration of contracts. The Framework will also include an ongoing program to monitor department-wide compliance with key contract requirements and controls, as well as mechanisms to help ensure that lessons learned are incorporated department-wide. Finally, the Framework will include an ongoing program to monitor the use of procurement tools, including an analytical review to determine areas of potential concern. The full implementation of all actions supporting the Framework by December 2008 will place the Department at the forefront of best practices in contract management.

Inappropriate use of a consultant can create a conflict of interest

3.62 In three cases, there was evidence that the incumbent contractors had participated in developing the search criteria or the statement of work for contracts that were subsequently awarded to them. This is a conflict of interest and does not comply with the policy that contracting be fair and open.

3.63 In one case, we found that the Department had permitted a conflict of interest as a result of the way that it used the services of a consultant in developing the request for proposal (RFP). We also noted that the consultant was paid amounts that were not in accordance with the terms of the contract.

3.64 In 1999, CGI Information Systems and Management Consultants Inc. was awarded a four-year contract for providing professional IT resources in support of PWGSC's Standard Payment System. Between May 2002 and December 2003, PWGSC paid \$193,000 to CGI for a consultant at a per diem rate of \$1,100. At the time, there was no category, rate, or classification in the contract for this type of consulting service. The maximum per diem rate in the contract was \$830. Despite the absence of the category or rate in the contract, PWGSC officials approved payment of invoices under section 34 of the *Financial Administration Act*, at a daily rate of \$1,100. In doing so, they did not comply with the Act.

3.65 We noted that the contract had not been amended to permit the payment at the higher rate. Officials initially told us that they expected there should have been a task authorization for this consultant. However, they were unable to locate many of the documents related to this contract. In our view, even if there was such a task authorization, it would not have been sufficient to authorize work or a rate of compensation that was not included in the scope of the contract.

3.66 The contract ended in December 2003. While the consultant was paid as a sub-contractor under the CGI contract from March to July 2003, he assisted PWGSC in developing the request for proposal for a new publicly tendered contract for the Standard Payment System. During this period, he also helped PWGSC respond to bidders' questions. The Department should have reasonably expected CGI to bid on this RFP. It did and subsequently won the contract. The contracting process is intended to be fair, open, and transparent. These objectives were clearly at risk when PWGSC permitted this situation to occur. In our opinion, such an arrangement constitutes a conflict of interest as defined in the Treasury Board Contracting Policy (Exhibit 3.4).

3.67 It should be noted that we found no evidence to indicate that the consultant or CGI acted inappropriately. Nor did we find evidence that the consultant worked on the bid evaluation process.

3.68 PWGSC obtained a signed non-disclosure and conflict of interest agreement with the consultant. Officials explained that the agreement showed that they were aware of the possible issue and took steps to mitigate it. In examining the agreement, we noted that it did not meet the requirements set out in the Treasury Board Contracting Policy; nor had it been reviewed by the Department's contracting authority or legal counsel.

3.69 The new CGI contract began in January 2004. The maximum daily rate in this contract was set at \$785. In that same month, PWGSC issued a task authorization under this contract for the services of an application architect at \$780 per day. Under this task authorization, CGI supplied the same consultant who had worked on the RFP.

3.70 In reviewing the details of this task authorization, we found that in February 2004, CGI submitted its invoice for \$1,100 per day for the technology architect. This category and rate were not in the contract and, therefore, there was no basis for payment; however, the invoice was paid. As soon as PWGSC became aware of the error,

Exhibit 3.4 The Treasury Board Contracting Policy clearly states what constitutes a conflict of interest in the administration of consulting and professional services contracts

A consultant or professional, by virtue of the kind of service provided, may be in a position to exercise a bias toward a third party that could put the latter in a favoured position for future business with the Crown. If the consultant, professional or principals have a financial interest in the business of this third party, the possibility of a conflict of interest should be considered. To avoid a conflict of interest, contracting authorities should, before signing a contract, require the selected consultant or professional to sign a declaration, either as part of the contract or separately, stating that no pecuniary interest in the business of any third party exists that would affect objectivity in carrying out the contract.

There are also situations where, in meeting its obligations to a contracting authority, a contractor may be in a position of potential conflict with competing or opposing interests of the contractor's other clients, either during the period of or subsequent to this particular contract. Contractors are expected to inform the contracting authority of these potentially competing services and interests, and explain why the situation would not represent a conflict of interest. Where appropriate, a contracting authority should require a contractor to sign a declaration, either as part of a contract or separately, that the contractor has no [conflict], and will not have, during the course of the contract and subsequent to it, any conflict arising from competing or opposing interests of other clients of the contractor. The possible wording for such a declaration is included in Appendix G.

Source: Treasury Board Contracting Policy

it took corrective action to recover the overpayment. It also amended the contract, creating the classification of a technology architect with a daily rate of \$1,100. The services of the consultant were then obtained through CGI when PWGSC issued a task authorization under this new classification and rate.

3.71 PWGSC has taken corrective action. When we brought this series of events to their attention, senior management issued a comprehensive direction to all staff in the branch concerned, explaining their roles and responsibilities. Instructions to staff included that consultants should not participate in developing any component of an RFP without the specific and written approval of the Assistant Deputy Minister. We noted that these instructions were directed only to this branch.

3.72 Recommendation. Public Works and Government Services Canada should

- take reasonable steps to determine whether any similar cases to the one described above have occurred and to ensure that appropriate action has been taken;
- investigate the circumstances surrounding this particular case in order to ensure that any lessons that can be learned are understood and acted upon; and
- monitor the implementation of the instructions to provide management with assurance that they are being complied with and apply these instructions throughout the Department.

The Department's response. PWGSC accepts this recommendation. As acknowledged by the Auditor General, the Department took immediate corrective action to address the issue as soon as the matter was brought to its attention in February 2008. Such actions included the issuance of two separate directives within the appropriate branch, reminding staff of their obligation to administer contracts in accordance with established contract requirements. Similar directives have been integrated in the Contract Management Control Framework to ensure implementation of best practices department-wide. In addition, the Department will take reasonable steps to determine if similar cases have occurred and, where appropriate, take corrective measures to address such cases.

Further, PWGSC has engaged a private firm to conduct an independent third-party review of the circumstances surrounding this particular case. The Department will ensure that appropriate action is

taken, and any lessons that can be learned are understood and acted upon immediately.

Finally, a detailed review of contracting activity within the appropriate branch is under way. This review will examine the extent to which contracts managed by the branch comply with regulatory requirements, as well as Treasury Board of Canada Secretariat/PWGSC policies and directives. It will also determine the extent to which contracting behaviours within the branch respect departmental best practices and the branch directive issued in February 2008. Corrective measures will be taken to address any weaknesses, and lessons learned will be incorporated into the Contract Management Control Framework.

There is a significant gap in the information reported to the public

3.73 The Treasury Board of Canada Secretariat's guidance document titled Proactive Disclosure of Contracts contain details on how and what departments are to publicly disclose for all contracts with a value of more than \$10,000. The guidelines note that it is important that all required information be presented accurately and completely in order to maintain the public's confidence.

3.74 As part of our audit, we examined whether PWGSC met the requirements for proactive disclosure. We determined that 28 of our sample of 37 transactions should have been reported on the proactive disclosure website, as required effective 1 April 2004. The other 9 transactions were awarded prior to the requirement for reporting proactive disclosure.

3.75 We found that PWGSC had disclosed only 13 of the 28 transactions (contracts or task authorizations). Of the 15 that were not disclosed, 9 were task authorizations.

3.76 Treasury Board of Canada Secretariat guidelines suggest that departments report task authorizations as they issue them. We found that there was inconsistent reporting of task authorization contracts. In some cases, the contract was reported, while in other cases, the task authorization was reported.

3.77 For example, in our sample of 37 transactions, we found 3 task authorizations related to one contract that were not reported on the proactive disclosure website. Furthermore, we found that only 8 of the 235 task authorizations pertaining to this same contract were reported. Overall, we determined that task authorizations valued at \$72.6 million were never disclosed for this contract.

3.78 The Secretariat's guidelines also state that departments are not required to report contract amendments. As the intent of the proactive disclosure process is to make information available to the public on all contract awards greater than \$10,000, the lack of a requirement to also report amendments presents a significant gap in the information provided on the final value of the contract. In many instances, the nature and extent of contract amendments can be significant. For example, in one contract, only the initial value of \$1.75 million was disclosed by PWGSC, not its final amended value of \$24 million.

3.79 Treasury Board of Canada Secretariat officials told us that the requirement to disclose both contracts and contract amendments valued over \$10,000 has been approved and is contained in its updated Contracting Policy, effective 1 September 2008. Secretariat officials also advised us that the guidance will be updated.

3.80 Further, in auditing our sample of contract awards, we found that almost 10 percent were incorrectly coded as either competitive or non-competitive. Incorrectly coding contracts affects departmental reporting on the number and value of sole source contracts. This information is provided to Parliament through the Treasury Board of Canada Secretariat on an annual basis.

3.81 Recommendation. Public Works and Government Services Canada should ensure that it reports all task authorizations as they are issued.

The Department's response. Public Works and Government Services Canada accepts this recommendation. The Department will seek clarification from the Treasury Board of Canada Secretariat on the Department's obligation as it relates to the reporting of task authorizations, and ensure that Department employees review, understand, and follow the guidance outlined in the Treasury Board of Canada Secretariat's guidance document titled Proactive Disclosure of Contracts. In the meantime, the Department has implemented a new financial management and materiel management system (SIGMA). This new system will allow the Department to ensure accuracy and completeness of task authorization reporting, as task authorizations will be captured in SIGMA at the commitment stage of the payment process.

3.82 Recommendation. The Treasury Board of Canada Secretariat should update its guidance document on the treatment of amendments to contracts.

The Secretariat's response. Agreed. Recent changes to the Treasury Board Contracting Policy, which came into effect 1 September 2008, now require the disclosure of contract amendments over \$10,000. The Secretariat plans to issue new guidance to departments regarding the proactive disclosure of contract amendments no later than January 2009.

Conclusion

3.83 We determined that Public Works and Government Services Canada complied with the government's rules when awarding contracts for services. This finding is significant because the Department spends more than \$1 billion annually on professional services to support the delivery of its programs.

3.84 However, the Department needs to improve the consistency with which it administers and manages contracts after they have been awarded. Although the examples we looked at did not indicate systemic weaknesses in the application of management controls, they did highlight the inconsistent application. We also found some gaps in the application of financial controls, segregation of duties, contract amendments, and adherence to contractual terms and conditions.

3.85 Although the Department is aware of the risk of creating an employee-employer relationship and has policies in place to mitigate that risk, we found that a number of contracts had indicators of a possible relationship.

3.86 We found a series of related transactions that involved placing a contractor in a conflict of interest and making payments to the same consultant at a rate well above the maximum rate specified in the contract. The Department has already begun to take steps to prevent a recurrence of this kind of situation.

3.87 We also found a significant gap in the information reported to the public on issuing task authorizations and amending contracts.

About the Audit

Objective

The objective of the audit was to determine if Public Works and Government Services Canada carries out its contracting activities for professional and special services in a manner that respects access, competition, and fairness, in compliance with authorities.

Scope and approach

We examined how Public Works and Government Services Canada contracts for services on its own behalf. To carry out this audit, we performed the following tasks:

- We conducted interviews with Public Works and Government Services Canada officials to better understand the contracting processes and related operations, and we reviewed relevant documents to understand the contract management framework, roles and responsibilities of the parties, and the risks, controls, and practices.
- We audited a random sample of 43 publicly tendered contracts awarded by PWGSC for professional and special services. These contracts were from a total of 1,191 contracts over \$10,000 from the contracting databases (AIS and AMMIS) for the 2005–06 and 2006–07 fiscal years. We audited these contracts to assess whether the award process adhered to applicable appropriate legislation, regulations, and government policy requirements. Based on our findings, we are 90 percent confident that the non-compliance rate in the population is no more than 12 percent.
- We audited a random sample of 72 sole source contracts awarded by PWGSC for professional and special services. These contracts were from a total of 491 contracts over \$10,000 from the contracting databases (AIS and AMMIS) for the 2005–06 and 2006–07 fiscal years. We audited these contracts to assess whether the award process adhered to applicable appropriate legislation, regulations, and government policy requirements. Based on our findings, we are 90 percent confident that the non-compliance rate in the population is no more than 9 percent.
- We selected a random sample of 37 financial transactions from a total of 3,252 financial transactions over \$60,000, which accounted for 79 percent of the expenditure value of professional and special services for the 2005–06 and 2006–07 fiscal years from the Department's expenditure database. We audited these 37 transactions, which were related to 28 contracts, to assess whether PWGSC's administration of contracts after they were awarded met the requirements of the *Financial Administration Act*, regulations, and the Treasury Board Contracting Policy. Based on our findings, we are 90 percent confident that the non-compliance rate in the population is no more than 89 percent.
- We also examined information databases and proactive disclosure reports from our sample of 37 financial transactions to assess the completeness and accuracy of the Department's information management and reporting.

The audit did not assess either the performance or the qualifications of the suppliers. No comments in the report should be construed as criticism of any supplier.

Criteria

Listed below are the criteria that were used to conduct this audit and their sources.

Criteria	Sources
We expected that PWGSC would be carrying out activities for awarding contracts (requirements, procurement, solicitation, and award) in accordance with the Treasury Board Contracting Policy and the Government Contracts Regulations.	<ul style="list-style-type: none"> • Government Contracts Regulations (2004), Section 3 • Treasury Board Contracting Policy (2006), Section 3 • Public Works and Government Services Canada, Supply Manual (2007), Chapter 1
We expected that PWGSC would be administering contracts properly in compliance with appropriate legislation, regulations, policies, directives, and guidelines.	<ul style="list-style-type: none"> • <i>Financial Administration Act</i> (2004), Schedule 1 • Treasury Board Contracting Policy (2006), Section 3 • Treasury Board of Canada Secretariat, Policy on Delegation of Authorities (1994) • Treasury Board of Canada Secretariat, Policy on Commitment Control (1996) • Treasury Board of Canada Secretariat, Proactive Disclosure of Contracts (2004) • Public Works and Government Services Canada, Supply Manual (2007), Chapter 1 • Public Works and Government Services Canada, Policy and Procedures on Commitment Control (2004) • Public Works and Government Services Canada, Policy on Task Authorization Contracts (2005) • Canada Revenue Agency, Employee or Self-Employed? (2006)

Audit work completed

Audit work for this chapter was substantially completed on 30 April 2008.

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Appendix List of recommendations

The following is a list of recommendations found in Chapter 3. The number in front of the recommendation indicates the paragraph where it appears in the chapter. The numbers in parentheses indicate the paragraphs where the topic is discussed.

Recommendation	Response
Administration of contracts	
<p>3.61 Public Works and Government Services Canada should develop and implement a framework to ensure quality and compliance, on a consistent basis, with appropriate legislation, regulations, and policy. This would address such issues as enforcement of the terms and conditions, amendments to the contract, and payment for work done, as mentioned in this section of the report. This framework should include a monitoring program that incorporates lessons learned. (3.22–3.60)</p>	<p>The observations noted in the chapter regarding inconsistencies in the administration and management of contracts after they are awarded are important. The Department accepts the recommendation and is taking corrective measures to address these observations. PWGSC is currently developing the Contract Management Control Framework, which will further strengthen its consistency in the administration of contracts in compliance with existing and appropriate legislation, regulations, and policies. The Framework is composed of key elements such as governance, controls, risk management, policies and procedures, tools and templates, management information systems, training and communications, monitoring, and reporting. These elements form the basis for several actions that together will help manage the risks related to managing consultants and administering contracts appropriately and consistently.</p> <p>One of these key actions entails the development of the comprehensive Contract Management Guide that will provide employees with detailed guidance on the management of consultants and administration of contracts. The Framework will also include an ongoing program to monitor department-wide compliance with key contract requirements and controls, as well as mechanisms to help ensure that lessons learned are incorporated department-wide. Finally, the Framework will include an ongoing program to monitor the use of procurement tools, including an analytical review to determine areas of potential concern. The full implementation of all actions supporting the Framework by December 2008 will place the Department at the forefront of best practices in contract management.</p>

Recommendation	Response
<p>3.72 Public Works and Government Services Canada should</p> <ul style="list-style-type: none"> • take reasonable steps to determine whether any similar cases to the one described above have occurred and to ensure appropriate action has been taken; • investigate the circumstances surrounding this particular case in order to ensure that any lessons that can be learned are understood and acted upon; and • monitor the implementation of the instructions to provide management with assurance that they are being complied with and apply these instructions throughout the Department. <p>(3.62–3.71)</p>	<p>PWGSC accepts this recommendation. As acknowledged by the Auditor General, the Department took immediate corrective action to address the issue as soon as the matter was brought to its attention in February 2008. Such actions included the issuance of two separate directives within the appropriate branch, reminding staff of their obligation to administer contracts in accordance with established contract requirements. Similar directives have been integrated in the Contract Management Control Framework to ensure implementation of best practices department-wide. In addition, the Department will take reasonable steps to determine if similar cases have occurred and, where appropriate, take corrective measures to address such cases.</p> <p>Further, PWGSC has engaged a private firm to conduct an independent third-party review of the circumstances surrounding this particular case. The Department will ensure that appropriate action is taken, and any lessons that can be learned are understood and acted upon immediately.</p> <p>Finally, a detailed review of contracting activity within the appropriate branch is under way. This review will examine the extent to which contracts managed by the branch comply with regulatory requirements, as well as Treasury Board of Canada Secretariat/PWGSC policies and directives. It will also determine the extent to which contracting behaviours within the branch respect departmental best practices and the branch directive issued in February 2008. Corrective measures will be taken to address any weaknesses, and lessons learned will be incorporated into the Contract Management Control Framework.</p>
<p>3.81 Public Works and Government Services Canada should ensure that it reports all task authorizations as they are issued. (3.73–3.80)</p>	<p>Public Works and Government Services Canada accepts this recommendation. The Department will seek clarification from the Treasury Board of Canada Secretariat on the Department’s obligation as it relates to the reporting of task authorizations, and ensure that Department employees review, understand, and follow the guidance outlined in the Treasury Board of Canada Secretariat’s guidance document titled Proactive Disclosure of Contracts. In the meantime, the Department has implemented a new financial management and materiel management system (SIGMA). This new system will allow the Department to ensure accuracy and completeness of task authorization reporting, as task authorizations will be captured in SIGMA at the commitment stage of the payment process.</p>

Recommendation	Response
<p>3.82 The Treasury Board of Canada Secretariat should update its guidance document on the treatment of amendments to contracts. (3.73–3.80)</p>	<p>The Secretariat’s response. Agreed. Recent changes to the Treasury Board Contracting Policy, which came into effect 1 September 2008, now require the disclosure of contract amendments over \$10,000. The Secretariat plans to issue new guidance to departments regarding the proactive disclosure of contract amendments no later than January 2009.</p>

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