



Crown-Indigenous Relations and Northern Affairs Canada

Internal Audit Report

Audit of Exceptional Contracting Limits Authority

Prepared by:

Audit and Assurance Services Branch

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ACRONYMS

CD	Crown Deponent
CIRNA	Crown-Indigenous Relations and Northern Affairs
CFN	Chief Federal Negotiator
CFRDO	Chief Finances, Results and Delivery Officer
ECLA	Exceptional Contracting Limits Authority
EW	Expert Witness
HC	Health Canada
ISC	Department of Indigenous Services Canada
LMRB	Litigations Management and Resolution Branch
RCM	Responsibility Center Manager
SRCL	Security Requirements Check List
TAG	Treaties and Aboriginal Governments
TB	Treasury Board
TBS	Treasury Board Secretariat

EXECUTIVE SUMMARY

Background

The *Audit of Exceptional Contracting Limits Authority (ECLA)* was added to the Indigenous and Northern Affairs Canada (INAC) 2017-18 to 2019-20 Risk-Based Audit Plan, as it was identified as a high priority. The Department is required by Treasury Board (TB) to perform an audit of ECLA on a three-year cyclical basis. The audit was initiated in August 2017 and audit fieldwork concluded in January 2018.

Audit Objective and Scope

The objective of the audit was to assess the adequacy and effectiveness of controls in place to support the efficient and effective management of the Exceptional Contracting Limits Authority within the Department. We also wanted to determine whether the exceptional contracts that were active between April 1, 2014 and March 31, 2017 were managed in compliance with TB departmental regulations, policies and guidelines.

The scope of the audit included an examination of the governance and control practices in place to ensure that the Department's objectives with respect to the ECLA were met. We also performed a review of contracts and amendments to ensure compliance with applicable regulations, policies and guidelines.

A risk-based approach was used to select a sample of 27 contracts and 19 contract amendments issued under the ECLA, from April 1, 2014 to March 31, 2017 for review.

SAP, which became the new departmental financial system on April 1, 2014, was not included in the scope of this internal audit.

Statement of Conformance

This audit conforms with the *International Standards for the Professional Practice of Internal Auditing*, as supported by the results of the quality assurance and improvement program.

Observed Strengths

Throughout the audit fieldwork, we observed examples of controls that are properly designed and applied effectively by the Department. This has resulted in several positive findings as follows:

- Monitoring mechanisms are in place to ensure compliance with exceptional contracting limits, policies, and authorities;
- File review demonstrated evidence that the vast majority of the contract files were adequately documented; and,

- Management actions have adequately addressed recommendations made in the 2015 *Audit of Exceptional Contracting Limits Authority* (e.g. security clearance confirmation, timeliness in applying section 41 and 32 of the FAA, updating reference materials).

Conclusion

The audit found that the management action plan from the 2014-15 *Audit of ECLA* was implemented effectively and that the risks associated with the five recommendations identified at the time were addressed.

We found that the controls in place to support the efficient and effective management of ECLA are adequate and that ECLA contracts are managed in compliance with applicable regulations, policies and guidelines.

Minor adjustments to some sections of the business processes would allow for efficiencies. As a result, we consider the risks associated to the management of ECLA contracts to be low.

Finally, we noted that one of the procurement sub-processes requires some refinement to reduce the amount of administrative burden on the procurement team and to allow the responsibility centre managers (RCM) some flexibility in their budget management.

Recommendation

1. The Chief Finances, Results and Delivery Officer (CFRDO) should engage with Health Canada to ensure the implementation of an SAP change request to provide CIRNA/ISC with the ability to manage multi-year contracts in a timely manner through the modification of the budget control levels.

Management Response

Management is in agreement with the findings, has accepted the recommendation included in the report, and has developed a management action plan to address it. The management action plan has been integrated in this report.

1. BACKGROUND

The *Audit of Exceptional Contracting Limits Authority (ECLA)* was added to the Indigenous and Northern Affairs Canada (INAC) 2017-18 to 2019-20 Risk-Based Audit Plan, as it was identified as a high priority. The Department is required by Treasury Board (TB) to perform an audit of ECLA on a three-year cyclical basis.

In order to respond to a specific business requirement of allowing the Department to contract with highly specialized skilled resources within a short timeframe, INAC sought, in 2002, exceptional contracting limits authorities. The ECLA is renewed on a five-year basis and was last extended by TB on February 9th 2017. The current ECLA expires on March 31, 2022.

The ECLA is a special non-competitive contracting authority that authorizes the Minister to appoint chief federal negotiators/representatives (CFN) for negotiations with Indigenous groups as well as Crown deponents (CD) and expert witnesses (EW) deemed necessary for litigation. This process assists the Department in making progress on negotiations, engagements, litigation and other related processes.

In light of the Minister of Crown-Indigenous Relations and Northern Affairs (CIRNA) mandate to re-engage in a renewed nation-to-nation relationship with Indigenous Peoples to make real progress on the issues most important to First Nations, the Métis Nation, and Inuit communities, and to move forward with reconciliation and resolution, the Department continues to require the ability and flexibility to award and amend contracts under this authority.

This authority also allows the Department to maintain the continuity of federal negotiators/representatives, Crown deponents and expert witnesses. This is essential as trust and interpersonal relationships are the keystones to the success of negotiation, litigation activities and other processes.

Within CIRNA, the Treaties and Aboriginal Government (TAG) Sector is responsible for providing guidance and advice and coordinating all departmental requests for CFN appointments, renewals and amendments to appointments. As part of the ECLA process, the responsibility center managers (RCM) who contract with the CFN's as the project authority, are responsible for monitoring the related approval limits under this authority.

The Litigation Management and Resolution Branch (LMRB) in the Policy and Strategic Direction Sector have the responsibility for coordinating the nomination of EWs and CDs pursuant to the ECLA for CIRNA/ISC. This Branch is also responsible for implementing and coordinating all contracts of EWs and CDs. The Material and Asset Management Directorate is responsible for ECLA related procurement activities.

2. AUDIT OBJECTIVE AND SCOPE

2.1 Audit Objective

The audit objective was to:

- assess the adequacy and effectiveness of controls in place to support the efficient and effective management of the ECLA within the Department; and
- determine whether the exceptional contracts that were active between April 1, 2014 to March 31, 2017 were managed in compliance with TB and departmental exceptional contracting policies, regulations and guidelines.

2.2 Audit Scope

The scope of the audit included an examination of the governance and control practices in place to ensure that the Department's objectives with respect to the ECLA are met.

The audit used a risk-based approach to select a sample of 27 contracts and 19 contract amendments issued under the ECLA for review. Sample items selected included contracts and contract amendments that were active over the period between April 1, 2014 and March 31, 2017.

SAP, which became the new departmental financial system on April 1, 2014, was not included in the scope of this internal audit.

3. APPROACH AND METHODOLOGY

The Audit of ECLA was planned and conducted in accordance with the Institute of Internal Auditors *International Professional Practices Framework* and in alignment with the TB *Policy on Internal Audit*. The audit examined sufficient, relevant evidence to provide a reasonable level of assurance in support of the audit conclusion.

The audit was performed from August 2017 to January 2018 and consisted of three phases: planning, conduct and reporting. Based on information gathered during the planning phase, a risk assessment was completed to determine the most significant risks related to the management of ECLA contracts and to develop audit criteria. Refer to Appendix A for the criteria developed for this audit, which were informed by relevant policies, standards, and guidance.

The main audit techniques used included:

- Interviews with key stakeholders involved in ECLA processes;
- Walkthroughs of processes with staff personnel;
- Review of relevant documentation related to the ECLA, including policy guidance, operational procedures and evidence of contract monitoring; and
- Detailed examination of a sample of 27 contracts and 19 contract amendments to test compliance with the applicable policies, regulation and guidelines.

4. CONCLUSION

The audit found that the management action plan from the 2014-15 *Audit of ECLA* was implemented effectively and that the risks associated to the five recommendations identified at the time were addressed.

We found that the controls in place to support the efficient and effective management of ECLA are adequate and effective and that ECLA contracts are managed in compliance with applicable regulations, policies and guidelines.

Minor adjustments to some sections of the business processes would allow for efficiencies. As a result, we consider the risk associated with the management of ECLA contracts as low.

Finally, we noticed that one of the procurement sub-processes requires some refinement to reduce the amount of administrative burden on the procurement team and to allow the responsibility centre managers (RCM) some flexibility in their budget management.

5. FINDINGS AND RECOMMENDATIONS

Based on a combination of the evidence gathered through interviews, examination of documentation and systems, and analysis, each audit criteria was assessed and a conclusion for each was drawn. Where a significant difference between the audit criterion and the observed practice was found, the risk of the gap was evaluated and used to develop a conclusion and to document recommendations for improvement.

Observations below include both management practices considered to be adequate as well as those requiring improvement. Recommendations for corrective actions accompany areas identified for improvement.

5.1 Governance

The use of ECLA authority comes with expectations of monitoring to ensure compliance with applicable policies, regulations and guidelines. We found evidence that:

- Well-functioning monitoring controls were in place for CFN's contracts. This included an annual review of all negotiation tables, quarterly reports on results to Senior Management and annual performance evaluation for individual CFN's. The current monitoring framework is deemed to be in compliance with exceptional contracting policies and authorities;
- Periodic reviews and monitoring of exceptional contract limits against thresholds are performed for EW and CD.

Up to date guidance and reference materials are made available to potential users either through the Intranet or shared folders. The LMRB *ECLA Process Guide*, the *Selection and Review Guidelines for Contract Federal Negotiators* and the *Procurement and Contracting Desk Guide* detail the roles, responsibilities and accountabilities of the various departmental officials involved in the establishment and management of ECLA contractual arrangements. The guidelines provide detailed steps to be completed from preliminary work to requesting,

completing, and amending ECLA contracts.

Roles and responsibilities of CFNs, EWs and CDs on the other hand are detailed in the appointment packages, SOWs, contracts and annual evaluations (for CFNs). We found that financial delegation of authorities with respect to ECLA is well defined and documented in the *Delegation of Financial Signing Authorities*, which was last updated in March 2016.

SAP is the main tool used by the contracting authorities to obtain the financial data to manage their contractual arrangements. As not all case managers or RCMs have access to SAP, financial information is mostly obtained from the business management units (BMU) or a specific individual within the group. This structure results in a minimal number of SAP licenses and therefore a reduced need for training. We noted that in some instances, the SAP data were not providing timely financial information mainly as a result of delays in processing budget transfers (whether from a fiscal year for multi-year contracts or from a ledger to another).

Given the level at which budgetary controls are currently delegated in the department, case managers and RCM must submit a contract amendment request to the procurement team to have funds transfers performed in the financial system for their contracts. The volume of contract amendment requests to process (+-300 yearly) contributes to an increased workload for the procurement team resulting in a gap between the financial system information and the program's tracking tool used to manage their contracts. These processing delays reduce the ability of ECLA users to optimize the use of their budget while they are waiting for their funds to be released by the financial system, especially at year-end.

We were able to gather evidence that management identified the situation as a larger issue that affects all procurement activities (not only ECLA's). In August 2017, management submitted a change request to address this situation with Health Canada (HC), the hosts for CIRNA/ISC's financial system. The departments will engage with HC during fiscal year 2018-19 to streamline the process and improve alignment to the CIRNA/ISC business processes. Given the current context of the transformation of CIRNA/ISC, there is a risk that competing priorities might delay the implementation of the requested system modification. We therefore recommend:

Recommendation

1. The Chief Finances, Results and Delivery Officer should engage with Health Canada to ensure the implementation of the SAP change request to provide CIRNA/ISC with the ability to manage multi-year contracts in a timely manner through the modification of the budget control levels.

In the event where the implementation of the SAP change request is delayed due to competing pressures arising from transformation, we suggest that management consider implementing a temporary solution (on an exceptional basis). To reduce the pressure on the procurement team to process the high volume of amendment requests coming from ECLA contracts, and to allow key ECLA users some flexibility in the management of their budgets, we suggest that the authority to process contract amendments is delegated to a member of LMRB and TAG. Controls should be put in place to ensure that such authority would be limited to contract amendments that involve no increase in the value, and that an adequate segregation of duties is maintained.

5.2 Stewardship

The objective of the ECLA is to allow the Minister, through a non-competitive process, to appoint specific individuals, where the sensitivities of a particular file or the complexities of the issues at stake require highly specialized skills. This process is in place to meet special operational requirements that cannot be met by using the Department’s standard contracting practices.

With respect to the ECLA, the Minister, had, at the time of the audit, the authority¹ to:

- Enter into and amend non-competitive contracts up to a cumulative total value of \$1,500,000 for the duration of a contract for Chief Federal Negotiators/Representatives. Entry level approval limit to a maximum of \$500,000; amendments not to exceed \$500,000 in a 12-month period; and fees for professional services not to exceed \$250,000;
- Enter into and amend service contracts for the services of Crown Deponents and Expert Witnesses up to total cumulative value of \$600,000; and,
- Enter into and amend service contracts of Crown Deponents and Expert Witnesses who are former public servants in receipt of a pension, up to a total cumulative value of \$225,000, with the following condition: entry level authority limit to a maximum amount of \$150,000, each amendment not to exceed \$75,000, and all contracts must be subject to the application of the TB *Contracting Policy* with regards to the application of the fee abatement formula that defines financial limitation for former public servants.

In order to assess the administration of the contract files and compliance with requirements, we used a risk-based approach to select and examine a sample of contracts (27 in total) and contract amendments (19 in total) issued under the ECLA. Contracts selected were active over the period April 1, 2014 to March 31, 2017. Factors such as the number and nature of amendments, total contract value and in-year expenditures, and overall risk of exceeding ECLA limits were considered in the selection of the sample². Table 1 shows the sample selection.

Table 1

Chief Federal Negotiators (CFN)	Expert Witnesses (EW)	Crown Deponents (CD)
6 contracts	15 contracts	6 contracts
11 contract amendments	6 contract amendments	2 contract amendments

¹ Increased in authorities were granted by TB, effective April 1st 2017.

² In order to assess the current monetary value of the contracts and the risk of exceeding the authorities, we by default had to select contracts that were originally signed prior to the beginning date of the scope of the audit. We excluded transactions that occurred prior to April 1st 2014 from our assessment as they were susceptible to have been audited in the 2014-15 Audit of ECLA.

5.2.1 Contract documentation

Typically, the Department follows a standard contracting process for entering into and amending service contracts for the services of EWs and CDs. As stipulated in the reference materials, a range³ of supporting documents must be submitted in order for the contracting process to commence.

Almost all contracts reviewed included appropriate supporting documentation and very few (3) minor exceptions were noted. We found that the supporting documentation was complete and sufficient to demonstrate that requirements for CFNs, EWs and CDs were clearly articulated and defined. The evidence collected also allowed us to determine that those requirements were in accordance with the *Contracting Policy*. Evidence was obtained that programs use checklists to ensure all steps of the nomination process and requirements have been defined.

An indemnification clause is a standard clause included in many Government of Canada contracts. The clause clarifies the liabilities of the appointee and the Government. Given that issues were observed in the last audit on ECLA (2014-15) around those clauses, the audit team reviewed the contracts and contract amendments to ensure that such a clause was included in the contractual documents. This was included and we noted no exceptions.

We noted a significant improvement in the timeliness of the completion and documentation of the contractor's security clearances compared to the last audit. In fact, we found no exceptions to the documentation of security clearance prior to the commencement of the work. Audit evidence demonstrated that management had amended business processes (early security check, internal security verification process etc.) since the last audit to respond to operational requirements.

5.2.2 Selection Process and Approvals

We were also able to gather evidence that the CFN/CD/EW selection processes complies with TB and departmental policies and guidelines for the 27 contracts reviewed. Multiple interviews conducted at various levels of the organization indicated that a recommendation from Department of Justice and ministerial acceptance were two *sine qua non* conditions to put forward a contract with an EW/CD.

All the files reviewed were approved by a person adequately delegated under the departmental *Delegation of Financial Signing Authorities* as expected. This demonstrates that management has taken actions to address recommendation five of the 2014/15 Audit on ECLA. We also found that appropriate delegated expenditure initiation (as per section 32 of the FAA) authority was obtained prior to the commencement of the work for the vast majority of contracts (20/21) and contract amendments (10/11) reviewed⁴. Through the integration of the procurement

³ Depending on the type of function (CFN, EW or CD).

⁴ We could not fully assess this sub-criterion as we needed original invoices to demonstrate the start of the work. In 9 cases, original invoices were recorded in OASIS, the former departmental financial system, which we did not have access to. In two cases, we were not able to conclude as no invoices were received at the time of reviewing the files. In three cases, this sub criterion was not applicable as they consisted of non-monetary value amendments.

workflow within the SAP system, automated controls have been built in the process to prevent a contract requisition to be moved forward prior to obtaining appropriate approvals.

File testing demonstrated that all selected ECLA contracts and amendments were properly approved by an individual holding authority delegation and signed by the contractor in a timely manner, with one exception. Moreover, contract awarding for EWs and CDs follows the standard departmental process defined.

We concluded based on our review that Section 41 was performed prior to the contract date for 14/19 contracts and for 3/4 amendments applicable⁵. We acknowledge a significant improvement in the department's level of compliance in the management of the contracting authority. We also observed that the delays (between contracting authority approval and the commencement of the work) for the exceptions noted considerably diminished since the last audit. However management should continue to monitor this issue to ensure to mitigate the risk of work being initiated without the necessary contracting clauses in place.

5.2.3 Compliance with ECLA limits

We tested the sample of exceptional contract and contract amendment files to ensure that exceptional contracting authority limits as detailed in Table 2 were complied with:

Table 2

	Maximum Cumulative Value	Maximum entry level authority limit	Maximum amendment value	Maximum fees for professional services
CFN	\$1,500,000.00	\$500,000	\$500,000 in a 12-month period	\$250,000 in a 12-month period
EW/CD	\$600,000	N/A as long as it stays under the \$600,000	N/A as long as cumulative value stays under \$600,000	N/A as long as cumulative value stays under \$600,000
EW/CD (Former public servant with pension)	\$225,000	\$150,000	Each amendment can't exceed \$75,000	N/A as long as cumulative value stays under \$225,000

We found that with the exception of one contract, all the agreements were managed within the authorized thresholds. Management provided evidence that supplementary exceptional authority was sought for the contract that exceeded the usual limits of ECLA. We could then conclude that all sampled contracts were managed in compliance with the authority.

⁵ Non applicable contracts and amendments were either contracted outside the period under the scope of this audit or there was not sufficient evidence to make a conclusion due to the absence of information prior to 2014 due to the conversion from OASIS.

6. Management Action Plan

Recommendations	Management Response / Actions	Responsible Manager (Title)	Planned Implementation Date
<p>1. The Chief Finances, Results and Delivery Officer should engage with Health Canada to ensure the implementation of an SAP change request to provide CIRNA/ISC with the ability to manage multi-year contracts for Litigation Management and Resolution Branch (LMRB) and Treaties and Aboriginal Government (TAG) Sector in a timely manner through the modification of the budget control levels.</p>	<p>a) The Chief Finances, Results and Delivery Officer Sector will raise the organizational budget controls levels for vote 1 and vote 5 across the department as a temporary measure to streamline fiscal year-end financial transactions while maintaining an acceptable level of control.</p> <p>b) The Chief Finances, Results and Delivery Officer Sector will continue to work with Health Canada on the SAP change request to allow the Business Management Units of LMRB and TAG to execute contract amendments on multi-year contracts provided there is no change to the overall dollar value of the contract and no triggering of section 41 approval by the procurement officers.</p> <p>c) The Chief Finances, Results and Delivery Officer Sector must ensure that proper controls are in place and close monitoring is carried out once the LMRB and TAG Business Management Units are in a position to execute money shuffles.</p>	<p>a) Director, Financial Systems and Training, and Director, Planning and Resource Management</p> <p>b) Director, Financial Systems and Training</p> <p>c) Director Materiel and Assets Management Directorate.</p>	<p>a) March 2018</p> <p>b) Request made to Health Canada (to be implemented by Health Canada) 2019-2020</p> <p>c) Once SAP change request is effective. 2019-2020</p>

Appendix A: Audit Criteria

To ensure an appropriate level of assurance to meet the audit objectives, the following audit criteria were developed to address the objectives:

Governance and Strategic Direction	
1.1	Monitoring mechanisms are in place to ensure compliance with exceptional contracting policies and authorities.
1.2	Authority, responsibility and accountability for Chief Federal Negotiators, Expert Witnesses and Crown Deponent exceptional contracts are clearly defined and communicated.
1.3	Employees are provided the necessary tools and training to support their exceptional contracting responsibilities.
Stewardship	
2.1	Requirements for the Chief Federal Negotiators, Expert Witnesses and Crown Deponents are clearly articulated and defined.
2.2	Exceptional contracts and amendments are approved for expenditure initiation and for FAA Section 32.
2.3	The selection process for Chief Federal Negotiators, Expert Witnesses and Crown Deponents complies with TB and departmental policy and guidelines.
2.4	Exceptional contracts comply with exceptional authority limits.
2.5	TB approval is obtained for any exceptional contracts that exceed the limits prescribed by TB in the TB Contracting Policy.
2.6	An explicit indemnification clause is included in all exceptional contracts.
2.7	The exceptional contract is approved by the departmental Contracting Officer for FAA Section 41 approval and by the Contractor.
2.8	The SAP ECLA dataset is complete, integer and accurate.

Relevant Acts, Policies, Regulations and Directives

The following authoritative sources were examined and used as a basis for this audit:

- Treasury Board *Contracting Policy*
- Treasury Board *Exceptional Contracting Limits Authority*
- Financial Administration Act
- Public Services and Procurement Canada Standard Acquisition Clauses and Conditions Manual