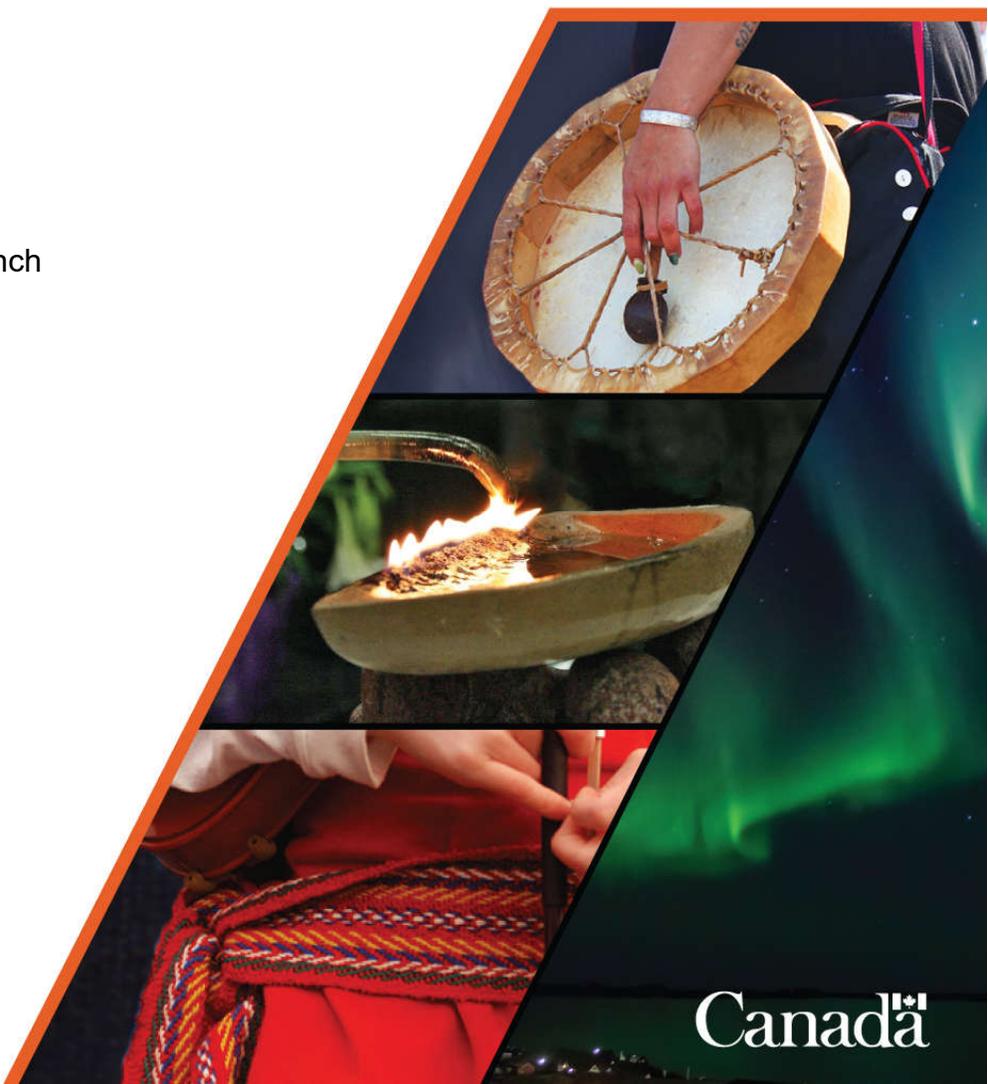




# Audit of Exceptional Contracting Limits Authority

Internal Audit Report  
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Audit and Assurance Services Branch



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## ACRONYMS

CIRNAC	Crown-Indigenous Relations and Northern Affairs Canada
ECLA	Exceptional Contracting Limits Authority
FAA	<i>Financial Administration Act</i>
INAC	Indigenous and Northern Affairs Canada
ISC	Indigenous Services Canada
PSD	Policy and Strategic Direction Sector
TAG	Treaties and Aboriginal Government Sector
TB	Treasury Board

# EXECUTIVE SUMMARY

## Context

Treasury Board has granted the Department the ability to use an Exceptional Contracting Limits Authority (ECLA). This authority allows the Minister to enter into and renew non-competitive contracts with federal negotiators/representatives for negotiations with Indigenous groups, Crown deponents and expert witnesses deemed necessary for litigation.

## Why it is important

The audit was identified as a high priority on the basis that Crown-Indigenous Relations and Northern Affairs Canada (CIRNAC) must conduct an audit of this authority to meet the obligation set by Treasury Board (TB) as well as to inform the upcoming renewal of the authority.

## What we examined

The objective of the audit was to provide assurance that CIRNAC is in compliance with the terms and conditions set out in the ECLA documentation, as well as the *Financial Administration Act* (FAA) and TB policies and directives.

## What we found

### Positive Observations

During the audit, many positive observations were identified, such as the following:

- SAP system extracts were readily accessible to demonstrate the existence of commitment authority (FAA Section 32), certification authority (FAA Section 34) and transaction authority (FAA Section 41) for all contracts and contract amendments tested;
- All ECLA contracts and contract amendments adhered to the prescribed financial limits;
- Reports were provided annually to CIRNAC senior management and TB outlining the status and performance of contract federal negotiator work, in alignment with reporting requirements set out in the 2017 ECLA terms and conditions; and
- Documentation included in ECLA contract files demonstrated that required contracting activities were followed and provided a full audit trail of all key decisions and communications related to ECLA contracts (e.g. justification for the use of ECLA, conflict of interest declaration).

## Opportunities for Improvement

The audit team identified an area where management control practices and processes could be improved, resulting in the following recommendation:

1. The Chief Finances, Results and Delivery Officer, in coordination with the Senior Assistant Deputy Minister of Treaties and Aboriginal Government and the Senior Assistant Deputy Minister of Policy and Strategic Direction, should explore revising the existing processes and documentation (e.g. appointment package and re-appointment documentation) to ensure that all FAA *Section 41* approvals are conducted prior to or on the contract date.

## Statement of Conformance

The audit conforms with the Institute of Internal Auditors' International Standards for the Professional Practice of Internal Auditing and the Government of Canada's Policy on Internal Audit, as supported by the results of the Quality Assurance and Improvement Program.

## Overall Conclusion

The audit found that the management of ECLA contracts and payments was generally compliant with the terms and conditions set out in the ECLA documentation, as well as the FAA and TB policies and directives.

There was partial compliance with the FAA *Section 41* requirement (i.e. Transaction Authority). Specifically, there were several instances where contracts or contract amendments were executed prior to FAA *Section 41* approval being obtained.

## Management's 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 the recommendation. The management action plan has been integrated into this report.

# 1. CONTEXT

In 2002, the Department of Indigenous and Northern Affairs Canada (INAC)<sup>1</sup> was granted the ability to use an Exceptional Contracting Limits Authority (ECLA) by the Treasury Board (TB). This authority allowed the Minister of INAC to enter into and renew non-competitive contracts with federal negotiators/representatives for negotiations with Indigenous groups, Crown deponents<sup>2</sup> and expert witnesses deemed necessary for litigation.

To deliver its mandate to re-engage in a renewed nation-to-nation relationship with Indigenous peoples and to move forward with reconciliation and resolution, Crown-Indigenous Relations and Northern Affairs Canada (CIRNAC) continues to require the ability and flexibility to award and amend contracts under the ECLA. The ECLA allows the Department to maintain the continuity of contract federal negotiators, Crown deponents and expert witnesses.

Since the last renewal of the ECLA in 2017, two significant changes have taken place. First, the dissolution of INAC in August 2017 resulted in the formation of two new departments, Indigenous Services Canada (ISC) and CIRNAC. Secondly, as a result of the formation of the two new departments, ISC is no longer able to enter into contracts with contract federal negotiators, Crown deponents and expert witnesses under the ECLA. The authority to use ECLA is presently assigned to the Minister of Crown-Indigenous Relations who can delegate their authority to the Minister of Northern Affairs for contract federal negotiator hired under their purview.

Through its use of the ECLA, CIRNAC must comply with relevant legislation and TB policies, including the *Financial Administration Act* (FAA) and *TB Contracting Policy*. To enable compliant activities, the Department has established its own set of procedures and guidelines, which include specific processes for establishing and managing contract federal negotiator, Crown deponent and expert witness contracts.

## CIRNAC's Exceptional Contracting Limits Authority

The ECLA was renewed and amended in February 2017. It set out the following authority limits<sup>3</sup> for the Department:

- a) Enter into and amend non-competitive contracts for contract federal negotiator/representatives up to a cumulative total value of \$2,000,000 per contract, with the following conditions:
  - Entry level authority limit is a maximum of \$550,000;
  - Amendments do not exceed \$500,000 in a 12-month period; and
  - Fees for professional services do not exceed \$300,000 in a 12-month period.

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<sup>1</sup> In 2002, INAC was referred to as Indian and Northern Affairs Canada.

<sup>2</sup> A Crown deponent is a representative of the Crown for the purposes of an examination for discovery in the civil litigation process.

<sup>3</sup> Approved 2017 ECLA terms and conditions and outlined in the *TB Contracting Policy*.

- b) Enter into and amend service contracts for the services for all Crown deponent and expert witness up to a total cumulative value of \$800,000 per contract, with the following conditions:
- Crown deponent and expert witness (former federal public servants in receipt of a public service pension) cumulative values do not exceed \$225,000;
  - Crown deponent and expert witness (former federal public servants in receipt of a public service pension) entry level authority limit is a maximum of \$150,000;
  - Crown deponent and expert witness (former federal public servants in receipt of a public service pension) individual amendments do not exceed \$75,000; and
  - All contracts are subject to the application of the TB *Contracting Policy* with regard to the application of the fee abatement formula.
- c) Amend contracts with federal negotiators/representatives that were entered into under the exceptional contracting limits to extend the period of the explicit indemnification provisions.

## 2. ABOUT THE AUDIT

The Audit of ECLA is included in the CIRNAC and ISC Risk-Based Audit Plan for 2020-2021 to 2021-2022.

### 2.1 Why it is important

The audit was identified as a high priority on the basis that CIRNAC must conduct an audit of this authority to meet the obligation set by TB as well as to inform the upcoming renewal of the authority.

### 2.2 Audit Objective

The objective of the audit was to provide assurance that CIRNAC is in compliance with the terms and conditions set out in the ECLA documentation, as well as the FAA and TB policies and directives.

### 2.3 Audit Scope

The scope of the audit included an examination of whether the Department is in compliance with the requirements of its ECLA. The audit criteria were developed based on a review of the following sources:

- Approved 2017 ECLA terms and conditions;
- *Financial Administration Act*;
- *TB Contracting Policy*; and
- *TB Directive on Delegation of Spending and Financial Authorities*.

Refer to Appendix A for the criteria developed for this audit, which were informed by the sources previously listed.

To conduct file testing, the audit team examined evidence gathered based on a sample of contracts and contract amendments issued under the ECLA. File testing focused on required FAA *Section 32, 34 and 41* approvals, financial limits and contracting documentation. The audit team also examined annual reports issued for contract federal negotiators.

Due to ISC's litigation units not being able to enter into exceptional contracts after April 1, 2019, the scope of the audit focused on INAC-managed and CIRNAC-managed exceptional contracts and payments during the period April 1, 2017, to March 31, 2020.

The following sectors and region were identified to be managing ECLA contracts during the audit period and therefore were included in fieldwork: Policy and Strategic Direction Sector (PSD), Treaties and Aboriginal Government (TAG), Resolution and Partnerships Sector, Northern Affairs Organization, and Yukon Region.

## 2.4 Audit Approach and Methodology

### Audit Approach

The audit was conducted in accordance with the requirements of the Treasury Board *Policy on Internal Audit* and followed the Institute of Internal Auditors International Professional Practices Framework. The audit examined sufficient, relevant evidence and obtained sufficient information to provide a reasonable level of assurance in support of the audit conclusion.

The audit fieldwork was performed from June 2020 to September 2020 and consisted of three phases: planning, conduct and reporting. The main audit techniques used included:

- Interviews with key stakeholders involved in ECLA processes;
- Process walkthroughs of ECLA contract and financial management processes;
- Review of relevant documentation related to the ECLA, including policies, operational procedures and guidelines;
- File testing of a sample of contracts and contract amendments to test compliance with the applicable requirements; and
- Follow up requests/meetings to validate preliminary testing observations.

### Overview of Sampling Methodology

The sample selected was based on the population of all ECLA contracts that were active during the audit period. Three main approaches were used as part of the sampling methodology:

- 1) Top 10 percent of total dollar value of all contracts from each sector were selected based on highest cumulative contract value. Cumulative contract value was chosen as a specific selection attribute due to the specific limits/requirements authorized for ECLA contracts.
- 2) On a judgemental basis, additional contracts were selected based on the parameters below:

- Contracts approaching ECLA limits (i.e. exceeding 50 percent of the defined limits);
- Vendors with multiple SAP Purchase Order numbers;
- Contracts with numerous contract amendments;
- Representation across relevant cost centres; and
- Highest contract amendment values for additional testing of FAA *Section 32* and FAA *Section 41* approvals.

Table 1 provides a breakdown of the population of ECLA contracts, by contract type and dollar value (\$), and a summary of how many files were selected for testing:

**Table 1**

<b>Breakdown of Contract Population</b>	<b>Contract Federal Negotiator Contracts</b>	<b>Crown Deponent and Expert Witness Contracts</b>
Total number of contracts in population	23	140
Number of contracts selected for testing	10	25
Number of amendments selected for testing	23	29
Total amount of contracts	\$5.4 M	\$13.4 M
Total amount of selected contracts	\$3.6 M	\$5.3 M

### **3. KEY FINDINGS AND RECOMMENDATIONS**

#### **3.1 Contracting and Payment Authorization**

As defined in the FAA and TB *Directive on Delegation of Spending and Financial Authorities*, there is a requirement that all:

- ECLA contracts and amendments are approved for expenditure initiation and commitment authority (FAA *Section 32*). A pre-contract control to confirm that sufficient funds are available to cover all applicable costs, authorize the planned expenditure is to be conducted before entering into the contract, and make a commitment against the appropriation.
- ECLA contracts and amendments are approved for transaction authority (FAA *Section 41*). A pre-contract control that acts as the legal authority to enter into contracts is to be conducted. Further, this control serves to confirm that the most suitable procurement tool for the proposed expenditure has been chosen, confirm commitment authority has been completed and signed by the appropriate authority, and provide the authority to proceed with contract.

- ECLA expenditures are approved for certification authority (FAA Section 34). A pre-payment control that serves to verify that the work has been performed, terms and conditions of the contract have been met, ensuring that the payee is entitled to or eligible for the payment, and the planned transaction is accurate and not a duplicate.

## Findings

### Expenditure Initiation and Commitment Authority (FAA Section 32)

File testing demonstrated that ECLA contracts and contract amendments were initiated and authorized per FAA Section 32 requirements. In addition, the audit examined the first invoice issued under each selected contract as a proxy for work commencement and did not find any instances where work began under a contract prior to obtaining FAA Section 32 approval.

### Transaction Authority (FAA Section 41)

File testing demonstrated that FAA Section 41 was obtained for all ECLA contracts and contract amendments. However, the audit found exceptions related to the timing of work as it related to obtaining the Section 41 approval. As noted, the TB Directive on Delegation of Spending and Financial Authorities outlines that ECLA contracts and contract amendments are not to be entered into or actioned prior to obtaining FAA Section 41 approval.

For contract federal negotiators, there were two instances where the date related to FAA Section 41 approval in SAP was over three months after the contract date. There was also one instance where FAA Section 41 approval was obtained almost a month after the contract amendment date. It was felt by the sectors that since the Minister has FAA Section 41 authority, their approval of the decision note for the contracts implied FAA Section 41 approval.

For Crown deponents and expert witnesses, there were two instances where FAA Section 41 approval in SAP was obtained over a month after the contract date.

The results of the testing on the timing of FAA Section 41 approval are summarized in Table 2.

**Table 2**

	Contracts were entered after obtaining FAA Section 41 approval	Contracts amendments entered after obtaining FAA Section 41 approval
Contract Federal Negotiators	<b>Partially compliant</b> (two exceptions out of three contracts tested)	<b>Partially compliant</b> (one exception out of 19 contract amendments tested)
Crown Deponents / Expert Witnesses	<b>Partially compliant</b> (two exceptions out of 19 contracts tested)	<b>Compliant</b>

Upon following up on the FAA *Section 41* exceptions, the audit team observed that ECLA contracts were at times being entered as soon as the Minister or the Senior Assistant Deputy Minister (for Crown deponent and expert witness contracts under a \$100,000 threshold) provided approval to appoint, amend or renew.

The previous Audit of ECLA, published in March 2018, also noted several exceptions related to the timing of contract and contract amendment execution as it related to obtaining FAA *Section 41* approval.

## Recommendation

1. The Chief Finances, Results and Delivery Officer, in the Senior Assistant Deputy Minister of Treaties and Aboriginal Government and the Senior Assistant Deputy Minister of Policy and Strategic Direction should explore revising the existing processes and documentation (e.g. appointment package and re-appointment documentation) to ensure that all FAA *Section 41* approvals are conducted prior to or on the contract date.

## 3.2 ECLA Financial Limits

Per the TB *Contracting Policy* and 2017 ECLA terms and conditions, ECLA contracts and contract amendments must be managed to adhere to multiple financial limits. These financial limits include maximum cumulative value, maximum entry level authority limit, maximum amendment value, and maximum fees for professional services.

The applicability of the specific financial limit amounts, previously noted in the context section on CIRNAC's Exceptional Contracting Limits Authority, varied based on whether the ECLA contractor is a contract federal negotiator, Crown deponent or expert witness. Further, there are lower defined financial limits for Crown deponents and expert witnesses who are former public servants in receipt of a pension.

The audit team expected that ECLA contracting authority financial limits were complied with across all contracts and contract amendments.

## Findings

Upon reviewing SAP system data that captured the entire population of ECLA contracts and contract amendments, the audit team was able to confirm all contract federal negotiator contracts and contract amendments were within defined thresholds for maximum cumulative value, maximum entry level authority limit, and maximum amendment value. For contract federal negotiator professional service fees, the audit team reviewed the annual contracts for all 10 sampled contract federal negotiators and found that all approved professional service fees were within the defined threshold for 12 months.

Moreover, the audit team reviewed the population data provided and confirmed that all non-former public servant Crown deponents and expert witnesses are within the defined threshold for maximum cumulative value.

Regarding Crown deponent and expert witness former public servants with pension, the audit team was informed that there are few instances of former public servants being hired under ECLA, and all instances would fall under Crown deponents (as opposed to expert witnesses). Accordingly, the audit team examined all Crown deponent contracts and contract amendments within the population data and confirmed that they were within defined thresholds for former public servants receiving a pension, including maximum cumulative value, maximum entry level authority limit and maximum amendment value.

### 3.3 ECLA Reporting

As per the approved 2017 ECLA terms and conditions, there is an annual reporting requirement to provide an overview of the status and performance of contract federal negotiators, which in turn supports decision-making on whether to renew contracts.

As such, the audit team expected to see evidence of annual reviews and reports to support compliance with the reporting requirements outlined in the 2017 ECLA terms and conditions.

#### Findings

Documentation provided demonstrated that the Department reports annually to the Treasury Board of Canada Secretariat on the status of contract federal negotiator performance evaluations and appointments. To fulfill the specific requirements set out the ECLA terms and conditions, the Department conducts a Table Review on an annual basis to evaluate the performance of contract federal negotiators and assist the Minister in determining the renewal of contract federal negotiator contracts.

### 3.4 Contracting Documentation

Based on the requirements outlined in the approved 2017 ECLA terms and conditions and *TB Contracting Policy*, a range of supporting documents must be submitted in order for the contracting process to commence.

The audit team expected to see that documentation included in ECLA contract files demonstrated that required contracting activities were followed and provided a full audit trail of all key decisions and communications related to ECLA contracts. More specifically, the audit assessed the existence of the following:

- Justification for contractor selection and the use of ECLA was documented;
- Requirements for the contract federal negotiators, expert witnesses and Crown deponents were clearly articulated and defined (including outputs and timelines for work to be performed);
- Budget/cost estimate for work to be performed (including estimate of professional service fees) were defined;
- Explicit indemnification clause for contract federal negotiator contracts was included;
- Former public servant documentation was in place (only applicable to Crown deponent and expert witness contracts);

- Conflict of interest declaration was completed; and
- Contractor security clearance was defined and in place.

## Findings

Across all contract and contract amendment files sampled for contract federal negotiators, Crown deponents and expert witnesses, there were no exceptions found related to required contracting documentation.

## 4. CONCLUSION

The audit found that the management of ECLA contracts and payments was generally compliant with the terms and conditions set out in the ECLA documentation, as well as the FAA and TB policies and directives.

There was partial compliance with the FAA *Section 41* requirement (i.e. Transaction Authority). Specifically, there were several instances where contracts or contract amendments were executed prior to FAA *Section 41* approval being obtained.

The audit team identified an area where management control practices and processes could be improved, resulting in the following recommendation:

1. The Chief Finances, Results and Delivery Officer, in coordination with all sectors/regions that manage ECLA contracts, the Senior Assistant Deputy Minister of TAG and the Senior Assistant Deputy Minister of PSD should explore revising the contract initiation and amendment workflow to ensure that all FAA *Section 41* approvals are conducted prior to or on the contract date.

## 5. MANAGEMENT ACTION PLAN

Recommendations	Management Response / Actions	Responsible Manager (Title)	Planned Implementation Date
<p>1. The Chief Finances, Results and Delivery Officer, in coordination with the Senior Assistant Deputy Minister of Treaties and Aboriginal Government and the Senior Assistant Deputy Minister of Policy and Strategic Direction, should explore revising the existing processes and documentation (e.g. appointment package and re-appointment documentation) to ensure that all FAA <i>Section 41</i> approvals are conducted prior to or on the contract date.</p>	<p>The appointment documentation package has been updated to include a certification that by signing the package, the Minister is explicitly approving FAA <i>Section 41</i> under their delegated authority.</p> <p>For PSD appointment documentation packages which are approved by PSD Senior Assistant Deputy Minister, PSD will work with the Material and Assets Management Directorate of Chief Finances, Results and Delivery Officer to develop a solution to ensure that all FAA <i>Section 41</i> approvals are completed prior to the contract date.</p>	<p>Director, Material and Assets Management Directorate</p> <p>Senior Director, Litigation Management Oversight Directorate</p>	<p>October 2020</p> <p>January 2021</p>

## APPENDIX A: AUDIT CRITERIA

To ensure an appropriate level of assurance to meet the audit objective, the following audit criteria were developed.

AUDIT CRITERIA
1.1 ECLA contracts and contract amendments are initiated and authorized, and payments are certified and authorized, as per applicable authorities defined in the <i>Financial Administration Act</i> (for FAA sections 32, 34 and 41) and TB policies and directives.
1.2 ECLA contracts and contract amendments are within the authorities granted to the Minister responsible for CIRNAC, including: <ul style="list-style-type: none"><li>• Cumulative value;</li><li>• Amendment limits;</li><li>• Entry level limits;</li><li>• Professional service fee limits; and</li><li>• Former public servant limits.</li></ul>
1.3 ECLA contracts and payments are reported in accordance with TB requirements, including: <ul style="list-style-type: none"><li>• Table Review reporting to senior management (defined in Exceptional Contracting Limits Authority documentation); and</li><li>• Annual report to TB on contracting activities (defined in TB <i>Contracting Policy</i>).</li></ul>
1.4 ECLA contract files demonstrate that required contracting activities were followed and provide a full audit trail of all key decisions and communications related to ECLA contracts, including but not limited to: <ul style="list-style-type: none"><li>• Justification for contractor selection and the use of ECLA;</li><li>• Requirements for the contract federal negotiators, expert witnesses and Crown deponents are clearly articulated and defined;</li><li>• Indemnification clause included in all exceptional contracts;</li><li>• Conflict of interest declaration completed; and</li><li>• Contractor security clearance defined and appropriate.</li></ul>