

MANITOBA OMBUDSMAN



*Report on Flood-Fighting Equipment for the
Interlake Emergency Operations Centre:
The Tiger Dams Proposal*

January 2016

*Prepared by
Manitoba Ombudsman*

January 2016



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INTRODUCTION

In June 2015, I was asked by the province to review the process undertaken by the Manitoba government in committing to and procuring flood-fighting equipment for the Interlake Reserves Tribal Council (IRTC) in 2014 and 2015. This issue of purchasing flood-fighting equipment first came to the ombudsman's attention through a whistleblower disclosure in November 2014 and was subsequently deemed resolved by this office. The complaint raised a number of issues, including some very specific allegations concerning decisions of elected officials. The details of the complaint were made public in the media in June 2015.

While it is not unheard of for a department or provincial government to seek the assistance of an independent office to review an issue, I am not aware of a case where the government of the day has publicly asked the Manitoba Ombudsman to investigate a matter, particularly one that has already been deemed resolved under another act (*The Public Interest Disclosure (Whistleblower Protection) Act*) under which the ombudsman has jurisdiction. This made for a unique circumstance.

The decision about whether to undertake this investigation took into consideration many factors. These included:

- the political nature of the discussions and any potential impact they could have on my office's ability to investigate and report outcomes in a way that would be received as neutral and fact-based
- legislative limitations that would prohibit an investigation of several of the allegations that had been raised, and
- whether there was an administrative issue that merited review

Ultimately I chose to initiate an investigation under *The Ombudsman Act* into whether the provincial civil service had followed all applicable law and policy in committing to and procuring flood-fighting equipment for IRTC, which is a partnership of five First Nation communities in the Interlake. Our investigation focused primarily on the timeframe between July 2014 and March 2015.

In deciding to undertake the investigation, I strongly considered the limitations on my office's ability to investigate all concerns that had been raised in relation to the purchase of flood-fighting equipment. Section 18(a) of *The Ombudsman Act* states:

Restriction on jurisdiction

18. Nothing in this Act authorizes the Ombudsman to investigate

(a) any decision, recommendation, act, order or omission of the Legislature, the assembly, the Lieutenant Governor, a committee of the assembly, the Lieutenant Governor in Council, the Executive Council, or a committee of the Executive Council; [...]



Our mandate under *The Ombudsman Act* is to review matters of administration which, broadly defined, could include any practice, procedure, action or decision that public bodies make as they implement or administer laws and policies. To further emphasize the distinction: once the political direction has been set, it is the carrying out of that direction that could be considered a matter of administration.

Sometimes this distinction is clear and roles and responsibilities are well understood. However, in some cases administrative functions and political decision making can be closely aligned or overlap and this can make the duties of civil servants more challenging to carry out, as well as make investigating administrative issues and concerns challenging for my office.

In December 2013, Manitoba Ombudsman released a report titled “Report on Complaint of Alleged Partisan Action by Civil Servant”¹. While our current investigation was not concerned with partisan activities, that report provides some useful analysis regarding management of political and administrative overlap. Some of the themes found in that report were observed in this investigation as well.

Administrative processes exist within the Manitoba civil service that must be followed in order to carry out any decision or direction related to funding and procuring flood-fighting equipment. I initiated this investigation because I believed that reviewing whether those administrative processes were followed would help provide some clarity about how the process unfolded, who was involved and why the procurement was undertaken. The intent of this investigation is to provide a fuller picture of what happened in this case and will, I hope, be of benefit to both the province and the public.

This report focuses on the processes related to the initial commitment to fund equipment, the process to seek funding approval from Treasury Board and the procurement process. While the scope of this investigation did not include the decision making of cabinet, cabinet committees, members of the Legislative Assembly of Manitoba, the Interlake Reserves Tribal Council or other levels of government as it relates to this issue, we did make several observations with respect to the interaction of the political and administrative levels of government in this process. Due to the nature of this issue, it is almost impossible not to comment on this interaction inasmuch as it provides relevant context to the facts and findings in the report. We have been judicious to ensure that our investigation and report respect the jurisdictional limitations of our office.

It should also be noted that the role of this office and the objective of this report are not to comment on the appropriateness of any political decisions or commitments related to flood-fighting in Manitoba, nor are we commenting on decisions by First Nations or the federal government in this matter.

Lastly, I would not want the findings of this report to be seen as a deterrent to any public bodies in working with flood-affected communities in either an emergency capacity or preventative manner. The aim of this report is to look at whether there are any administrative improvements

¹ <https://www.ombudsman.mb.ca/uploads/document/files/report-on-complaint-of-alleged-partisan-action-by-civil-servant-en.pdf>



that can be made to strengthen processes and help prevent similar issues from being raised in the future.

Acknowledgments

The investigation team was made up of five staff who reviewed hundreds of pages of documents and interviewed over a dozen current and former provincial staff.

I would like to acknowledge the full cooperation my office received from all who participated in this investigation and for the efforts and contributions of the investigation team.

OMBUDSMAN JURISDICTION AND ROLE

Manitoba Ombudsman is an independent office of the Legislative Assembly of Manitoba, reporting to the assembly through the Office of the Speaker. The responsibilities and authority of the ombudsman are set out in *The Ombudsman Act*, *The Freedom of Information and Protection of Privacy Act*, *The Personal Health Information Act*, and *The Public Interest Disclosure (Whistleblower Protection) Act*.

Under *The Ombudsman Act*, Manitoba Ombudsman investigates administrative actions and decisions made by government departments and agencies, and municipalities, and their officers and employees. Investigations may be undertaken on the basis of a written complaint from a member of the public, or upon the ombudsman's own initiative.

Ombudsman investigations typically assess administrative actions taken or decisions made against a benchmark established by government. Sometimes that benchmark is provincial legislation. On other occasions, it is written policy or established procedures implemented to give effect to legislative purpose. In cases concerning an impact on individual rights or benefits, we also examine the fairness of the action or decision.

THE INVESTIGATION

On November 10, 2014, our office received a whistleblower disclosure that alleged wrongdoing by Manitoba Infrastructure and Transportation (MIT). It focused on concerns related to the absence of tendering for a \$5 million contract to purchase "Tiger Dam" equipment, which is a specific brand and type of flood-protection equipment, for an Emergency Operations Centre in the Interlake region of Manitoba. At that time, pursuant to section 13 of *The Public Interest Disclosure (Whistleblower Protection) Act*, the former acting ombudsman used his discretion to take steps to resolve the matter by referring it to the clerk of the executive council. The clerk subsequently informed the acting ombudsman that the contract for the equipment was going to be tendered. The contract was then put out for public tender in December 2014. As the tendering of this contract effectively dealt with the substantive alleged wrongdoing at issue, our office deemed this file resolved.



On June 23, 2015, the clerk wrote to our office and indicated that the premier had directed him to request that our office “consider conducting a fulsome review of the concerns raised by the whistleblower on the matter, including the commitment to and procurement of flood-fighting equipment for the Emergency Operations Centre, to ensure that all appropriate processes had been followed.”

Given that the original alleged wrongdoing did not transpire and no new disclosure was received, our office did not re-open this file as a whistleblower investigation. However, the information provided to our office and discussed publicly did relate to matters of administration within the jurisdiction of *The Ombudsman Act*.

Given the administrative matters involved, and the ongoing public interest in this issue, an investigation was opened under section 15(a) of *The Ombudsman Act*, which states the following:

15. The Ombudsman may, on a written complaint or on his own initiative, investigate

(a) any decision or recommendation made, including any recommendation made to a minister, or any act done or omitted, relating to a matter of administration in or by any department or agency of the government, or by any officer, employee or member thereof, whereby any person is or may be aggrieved; [...]

KEY ISSUE

Our office investigated the following issue:

- **Were provincial administrative actions and decisions regarding the commitment to and procurement of flood-fighting equipment for the Interlake Reserves Tribal Council consistent with requirements in legislation and policy?**

BACKGROUND

The province of Manitoba is vulnerable to seasonal flooding and experienced particularly major flooding in 1997, 2009, 2011 and 2014.

First Nation communities in Manitoba were extensively affected by the 2011 flood, which was the largest spring runoff in provincial history. According to Aboriginal Affairs and Northern Development Canada (AANDC), the flood resulted in the evacuation of individuals from 18 First Nation communities in the province. As of June 26, 2015, approximately 1,300 First Nation residents had returned to their home communities, but 1,926 individuals remained evacuated. Of



those, more than 1,700 people were from four First Nation communities in the Interlake region of Manitoba: Lake St. Martin, Little Saskatchewan, Dauphin River and Pinaymootang.

Peguis First Nation, which is located in the Interlake and is the largest First Nation community in Manitoba, also experienced flooding in 2011. Six hundred and ninety-three (693) residents of the community were evacuated that year. There were also partial evacuations of the community due to flooding in 2004, 2009, 2010 and 2014. In 2014, there were 135 individuals evacuated from the community in the spring flood and 50 additional evacuees that summer due to heavy rain.

Both the Canada and Manitoba governments support flood-fighting on First Nation communities. AANDC is the federal government department that supports First Nation communities with emergency management, including flooding emergencies. Manitoba Infrastructure and Transportation (MIT) is also involved. The MIT Water Management and Structures division and MIT's Emergency Measures Organization work with AANDC to communicate flood forecasting to First Nations and coordinate access to provincial resources and support.

Manitoba Aboriginal and Northern Affairs also works with First Nation communities and other levels of government to support Manitoba First Nation communities on a variety of issues, including flood-fighting efforts.

The province has an assortment of equipment in its inventory to fight floods in Manitoba, including sandbags, sandbag machines, mobile pumps, icebreakers, ice-cutting machines, heavy-duty steamers, cage barriers and water-filled barriers.

Some of this equipment, including water-filled barriers, can be deployed quickly. This is called "rapid response" equipment.

Water-filled barriers are a type of flood protection equipment that, when deployed, can be filled with water in order to protect property without the need for sandbags. They are a complex product that require training to effectively deploy. An advantage of water-filled barriers (also known as flood tubes) is that they can be deployed quickly and with less labour than equipment like sand bags may require. Various companies produce water-filled barriers. One brand of water-filled barriers is the Tiger Dam system (Tiger Dams), which is produced by a company called International Flood Control. The company supplies Tiger Dams in different sizes and formats, including Standard Emergency Response Trailers, which are trailers equipped with Tiger Dams and equipment needed for rapid deployment that can be towed by a pick-up truck.

On February 25, 2014, the Assembly of Manitoba Chiefs (AMC), an organization that advocates on issues that affect the First Nations of Manitoba, submitted a proposal to the province and the federal government to initiate a discussion on a coordinated rapid response flood protection plan through the establishment of Emergency Operations Centres in First Nation communities in Manitoba. The proposal was that these centres would be regional hubs of flood prevention equipment and trained personnel, and would build flood prevention capacity for First Nation communities in the province.



The AMC proposed to establish the first of these Emergency Operations Centres in the Interlake region of Manitoba. This regional centre was inspired by the establishment of the North Red Waterway Maintenance consortium, which is a group of municipalities along the Red River that provides a centralized flood response for their region and received a grant from the provincial government for flood prevention equipment.

The evidence indicates that while the province is of the view that the federal government is responsible for emergency management on First Nation communities, the province supported the AMC approach to increase emergency management capacity for First Nation communities in Manitoba and wanted to participate in some way.

SCOPE OF THE INVESTIGATION

Our investigation included the following:

- Review of documentary evidence provided by the (now former) clerk of the executive council, Manitoba Infrastructure and Transportation (MIT), Manitoba Municipal Government, Manitoba Aboriginal and Northern Affairs, Treasury Board Secretariat and the Procurement Services Branch.
- Review of relevant legislation and policy, including *The Financial Administration Act*, *The Government Purchases Act*, *The Municipal Taxation and Funding Act*, the Procurement Administration Manual, the General Manual of Administration, the Treasury Board Handbook, and MIT departmental policies related to procurement.
- Interviews with several individuals, including the (now former) clerk of the executive council, as well as former and current senior staff of MIT, Manitoba Municipal Government, Treasury Board Secretariat, the Procurement Services Branch and the government of Manitoba comptroller's office;
- Interviews with the minister of MIT and the minister of Aboriginal and Northern Affairs.
- An interview with the former chair of IRTC. We also attempted to consult the current IRTC chair.

FACTS AND ANALYSIS

1. Commitment to fund flood-fighting equipment

On July 25, 2014, the Manitoba government issued a news release in which the minister of MIT and the minister of Aboriginal and Northern Affairs publicly announced that discussions were



underway regarding an Emergency Operations Centre for First Nation communities in the Interlake region:

The Manitoba government is [...] undertaking discussions with the federal government to establish an Emergency Operations Centre to provide First Nations in the Interlake with a rapid flood-fighting arsenal, Infrastructure and Transportation Minister Steve Ashton and Aboriginal and Northern Affairs Minister Eric Robison announced today following a tour of flood-affected areas in the Interlake. [...]

“The increased severity and frequency of flooding create a serious challenge in the Interlake and First Nation communities have been disproportionately and most significantly affected,” said Minister Robison. “Working with the federal government to create a permanent Emergency Operations Centre will help address current flood protection vulnerabilities, while we also work together on long-term solutions.”

The minister said such a centre would be the first Emergency Operations Centre for First Nations in Canada. The idea was proposed by the Interlake Reserves Tribal Council and Assembly of Manitoba Chiefs after the success of the North Red Waterway Maintenance consortium, which centralizes flood response for communities along the Red River north of Winnipeg. Initial plans for the centre include rapid-response flood equipment stationed centrally in the Lake St. Martin area.

Prior to this news release, on July 18, 2014, the minister of MIT wrote to the chair of IRTC and confirmed that the Manitoba government was committed to fund up to \$5 million of flood-fighting equipment for the creation of an Emergency Operations Centre in the Interlake. The equipment was a component of the AMC proposal for emergency management in Manitoba First Nation communities.

While the news release stated that the initial plan was for the equipment to be stationed in the Lake St. Martin area, IRTC subsequently indicated that it wanted the equipment stored at Peguis First Nation. We reviewed evidence that Peguis First Nation had experience with flood protection in its community and had individuals who were trained on the use of Tiger Dams (which it had in its inventory) and wanted to help support other First Nation communities in the Interlake by sharing its expertise and helping them build flood protection capacity.

The evidence we reviewed from the province indicates that in addition to providing support to First Nation flood-fighting and mitigation, the funding was also committed in order to obtain support from First Nations located around Lake St. Martin to open the Lake St. Martin emergency outlet to full capacity.

We asked the minister of MIT for written comments that we could share in this report regarding what factors contributed to the funding commitment. He indicated the following:



In July 2014 Manitoba was faced with significant flooding on Lake Manitoba and Lake St. Martin. As a result, the Department began to open up the Lake St. Martin emergency outlet that was built and operated during the 2011 flood.

A protest was initiated by fishers and a Councillor with Pinaymootang and was soon supported by the Assembly of Manitoba Chiefs and the Interlake Reserves Tribal Council. They identified the need for improved flood mitigation and compensation for fishers as key issues.

Given the flood, emergency government officials immediately met with the First Nations in July in an effort to resolve this impasse. Manitoba was already committed publicly to compensating fishers and formally committed to this in principle.

The Department recognized the fact that AMC and the Interlake First Nations had put forward a proposal to both the Federal and Provincial governments in the spring of 2014 to establish First Nations Emergency Operation Centres in the most flood impacted areas. The offer of the \$5 million reflected the desire to make a significant offer of commitment to flood mitigation while at the same time recognizing the potential for significant funding from the federal government. \$5 million would be one third of the original \$15 million proposal.

The minister advised our office that the province's response to issues regarding the Lake St. Martin emergency outlet was similar to its response to other flood issues. He stated that the province identified the specific issues involved, developed a negotiating response, and then engaged in negotiations with the First Nations to reach an agreement in principle. He also advised that the province needed to operate the emergency outlet to its full capacity, which could not be done without resolving the dispute with the First Nations.

The evidence indicates that this commitment was made before the department obtained official spending approval from Treasury Board. Our understanding from the senior civil servants we interviewed is that they were aware of the province's support for the Emergency Operations Centre strategy for First Nations, but were not aware of the \$5 million commitment before it was made on July 18, 2014.

We note that the proposal for the strategy was also discussed at the Aboriginal Issues Committee of cabinet. The role of this committee is to review government programs, initiatives and issues related to First Nations. It supported working with Manitoba First Nations' groups on increasing emergency management capacity among Manitoba's First Nation communities. We note that this committee has a policy role and does not have the authority to approve funding requests.

Applicable requirements

Treasury Board is a committee of the provincial cabinet that is responsible for the overall fiscal management and financial reporting of the Manitoba government. Its responsibilities include making decisions on in-year departmental submissions to augment or vary proposed spending



plans. Treasury Board consists of the minister of Manitoba Finance and other ministers appointed by the Lieutenant Governor in Council.

The role of the Treasury Board Secretariat is to provide financial and analytical support and advice to Treasury Board. Departments must forward a submission to the Treasury Board Secretariat in order to have an item addressed by Treasury Board. It must be signed by the minister and deputy minister of the department providing the submission.

Section 1.3 of the province's General Manual of Administration states that approval requirements for the expenditure of public funds must be in place before making arrangements for the commitment of public funds. However, the General Manual of Administration defines "commitment" as "any obligation, by way of contract, purchase order, standing order or agreement, for which payment will be made when the goods are received, services rendered or the obligation otherwise fulfilled."

Individuals we consulted at the Treasury Board Secretariat indicate that this is understood to essentially mean that the required approval must be in place before there is a commitment to purchase specific goods or services. In this case, the commitment was to fund up to \$5 million of rapid response flood-fighting equipment for the creation of an Emergency Operations Centre, but there was no indication at that time of what specific equipment would be funded and when the funding would be provided.

As such, while Treasury Board approval was required before MIT would be able to implement the commitment and pay for the equipment, we are not aware of any legislation or policy that requires a minister to obtain Treasury Board approval before making a funding commitment like the one the MIT minister made to IRTC on July 18, 2014. The previous chair of IRTC indicated to us it was understood that the commitment in July 2014 was made in principle and that further approval of the expenditure was required. The evidence also demonstrates that MIT always intended to seek Treasury Board approval for this funding and there was no evidence that the department attempted to circumvent this process through the Aboriginal Issues Committee of cabinet or other means.

However, the evidence we obtained also indicates that when commitments involving dollar amounts are made before the necessary Treasury Board approval is provided, it can complicate the administrative processes required to carry out a direction, including the process of identifying an appropriate funding source. Senior central government staff we interviewed indicated that while it is not common that such political commitments are made before obtaining any necessary Treasury Board approval, it is not unheard of. As well, while such commitments will not guarantee funding approval, they can be perceived to put pressure on government to meet the commitment.

In this case, because the decision to commit funding for equipment prior to obtaining Treasury Board approval was a ministerial, or in effect, a political decision and not an administrative one, it is not within our jurisdiction to comment on this matter. However, we document this evidence to provide context for the commitment and to reference the relationship between political decision making and the administrative approval process in this instance.



2. Initial funding and equipment choice

After the minister of MIT made the commitment to IRTC to fund up to \$5 million of flood-fighting equipment, MIT staff proceeded to ask IRTC what equipment it felt should be purchased. We were told that the minister subsequently directed MIT to prepare a Treasury Board submission that recommended purchasing \$5 million of Tiger Dams for IRTC through an untendered contract.

A Treasury Board submission was required in this file because the General Manual of Administration requires Treasury Board spending approval for any untendered purchase above \$50,000. We note that the General Manual of Administration also requires Treasury Board approval for tendered purchases above \$500,000 if the low bid is accepted (and for tendered purchases above \$100,000 if the lowest bid is not accepted).

Document labelled “invoice”

On August 5, 2014, IRTC sent the province a letter regarding what equipment it felt should be purchased as a result of the commitment to fund flood-fighting equipment. IRTC enclosed a document that International Flood Control sent it on July 30, 2014. The document was labelled as an invoice, signed by IRTC and indicated that 33 Standard Emergency Response Trailers containing Tiger Dams and equipment needed for Tiger Dams deployment would cost \$5 million.

All the current and former civil servants we spoke with who saw this document indicated their surprise and concern regarding this document and immediately questioned its purpose. The evidence we reviewed indicated that there was confusion regarding the intent of the document and why IRTC provided it to the province, including concerns that the equipment had been purchased and that the province would be contractually liable based on the initial commitment made.

There is evidence that on September 2, 2014, the minister of MIT spoke with the chair of IRTC to discuss this document and we were advised that IRTC was told that the province did not think the invoice was appropriate or reflective of discussions to that point. While we could not accurately confirm the details of this conversation, the evidence we obtained demonstrated that the document was a request from IRTC for a specific list of the equipment it wanted the province to purchase with the \$5 million commitment. The former chair of IRTC told us that there was no intention or plan to have IRTC purchase the equipment and subsequently ask the province to reimburse it. Despite the fact that the document was labelled “invoice” and that there was some suggestion that the equipment had been ordered by IRTC, we were not provided with any evidence that confirmed IRTC had actually purchased the equipment prior to sending this document to the province.

On September 3, 2014, the minister of MIT wrote a letter to the chair of IRTC acknowledging receipt of the invoice for the purchase of flood-fighting equipment, and indicating that Emergency Measures Organization staff would work with IRTC to finalize the details and



provide financial support towards the purchase of the flood-fighting inventory. We note that this letter acknowledges the International Flood Control document as an “invoice.” However, the evidence we reviewed indicates that ultimately the department viewed the document as a request for specific equipment and not as an actual invoice or a request for payment.

MIT’s proposal

On September 17, 2014, MIT put forward its Treasury Board submission seeking spending approval for \$5 million of flood prevention equipment from International Flood Control for IRTC that would be owned by the province and therefore funded with the provincial capital budget. It was proposed that 33 trailers of Tiger Dams would be purchased and stored at a First Nation Emergency Operations Centre in the Interlake region of Manitoba. It was further proposed that the province would negotiate a bilateral agreement with IRTC for use and maintenance of the equipment. We understand that the province’s intent was that while the equipment would be stored at the Interlake Emergency Operations Centre and be for the use of First Nations, the equipment could also be deployed elsewhere in the province when needed.

MIT departmental policy requires that the assistant deputy minister (ADM) of finance and administration review a Treasury Board submission before it goes to the deputy minister for signature. Given that the submission proposed that \$5 million for the equipment be taken from the department’s capital budget, the ADM at that time stated that when he was reviewing the submission he contacted the comptroller’s office to see if the capital budget could be used for this purchase. His recollection is that the comptroller’s office identified a number of criteria that had to be met for the equipment to be purchased as a capital asset. He said MIT’s responsibility was to ensure that if it used its capital budget for this purchase, the right criteria for the equipment needed to be in place.

The evidence we reviewed indicates that departmental staff felt the capital budget was not an ideal funding source for the equipment and a grant for the equipment would have been a more appropriate arrangement, but that grant funding within MIT was not available to fulfill the \$5 million commitment. We understand that if Treasury Board approved the use of capital funding for this equipment, the department would initiate discussions with IRTC about an agreement for the care and custody of the equipment. We were also told that the department did not want to start these discussions until it was sure that a funding source was in place. The ADM for MIT’s Emergency Measures Organization indicated that the negotiation of such an agreement for the care and custody of equipment purchased with the province’s capital budget was a new idea and in his experience, had not been tried before. However, his understanding was that it was not impossible to do in the framework of capital spending.

Concerns raised

When the Treasury Board Secretariat receives a submission, it prepares an analysis that highlights issues or concerns with the submission and provides a recommendation for Treasury Board to consider.



When Treasury Board Secretariat analyzes a submission, it will often ask the requesting department that submitted it various questions and will review the department's position from a corporate perspective. In this case, the secretariat asked the department questions about the submission and the department provided further information.

The evidence we obtained indicates that there were several concerns with the initial proposal. Concerns raised to the department included: the use of the capital budget to purchase the equipment and assurance that the ownership, care and custody arrangement was consistent with accounting standards; the justification for proposing a sole source, untendered contract, given that there was more than one supplier the department has used in the past for this kind of equipment and no compelling reason provided to not tender; and that the information provided by the department did not clarify that purchasing this equipment was the optimum solution for preventing further flooding, ensuring safety and providing support and training to the First Nation communities.

Analysis

Requirements for Treasury Board submissions

Our office was provided a verbal description of the content of the department's submission. We are satisfied that we obtained a sufficient understanding of the content and intent of the submission from the individuals we interviewed as well as from other documentary evidence we reviewed related to the proposal.

The Treasury Board Secretariat has guidelines for the preparation of Treasury Board submissions that set out specific format and content requirements. However, the evidence we reviewed indicated that the secretariat's concerns and questions about the submission did not focus on the format of the submission. Rather, the concerns focused on the justification for purchasing this type of equipment and the request to waive a competitive tendering process, as well as the funding source and ownership structure for the equipment (as explained above).

Research and analysis

The Procurement Administration Manual (the PAM) sets out policies, guidelines and procedures for the minimum requirements and standards for provincial government procurement. The province's Procurement Services Branch (PSB) is responsible for the development of the PAM.

The PAM indicates that the first stage of procurement is the planning phase and that the first step of this phase is to undertake "requirements planning." The PAM lists the various steps that occur throughout this stage, including "verify past usage and quantities to be ordered, updating of specifications, review of supplier performance" and "research and analysis including [...] undertake a cost benefit analysis (value-for-money) for the goods or services being selected over alternates in the market." The PAM states that it is also during the "requirements planning" step that a department obtains necessary pre-approvals, such as Treasury Board approval. The PAM indicates that once the "requirements planning" step is complete, the next step is to define the requirement and then determine the procurement strategy by assessing methods of solicitation.



No MIT staff we interviewed knew of research the department had conducted or considered regarding the flood protection needs for First Nation communities in the Interlake region of the province or for the purchase of \$5 million of Tiger Dams, despite the guidance in the PAM to do “research and analysis” in the first stage of the procurement cycle.

However, we note that the department had experience using this product and found that while there were limitations to it, it was useful in certain situations. This is supported by technical analysis reports completed in 2009 and 2011, which indicated some limitations with the stability of the product and the terrain on which the flood tubes could be deployed, and offered solutions as to how to best deploy the tubes. While this research was available in summer 2014, there is no evidence it was considered in preparing the Treasury Board submission.

Our understanding is that the department did not conduct this research and analysis because IRTC had already stated to the department that it wanted a specific brand of water-filled barriers and because it was directed to prepare a submission accordingly. IRTC’s request for this specific equipment is reflected in the documentary evidence that we reviewed. The previous chair of IRTC indicated that IRTC wanted this specific product because Peguis First Nation (which was the proposed location of the Emergency Operations Centre) had worked with it, had training on the equipment, and found it could be deployed quickly and efficiently with less labour than can be required for other types of equipment, like sand bags. He also noted that if deployed, sand bags require disposal and this involves additional costs and labour.

We acknowledge the importance of a community determining its needs and putting forward what it felt was the best solution for flood protection. We also recognize that the department wished to respect IRTC’s request and not force an equipment purchase that IRTC did not support.

However, this approach must be balanced with the requirements in the PAM. We are not satisfied that IRTC requesting specific equipment is sufficient justification for the department not to follow the guidance in the PAM that encourages departments to provide research and analysis regarding what goods or services should be purchased. Research and analysis would have been particularly important given the value of the contract, that the request was for an untendered contract, and that the submission proposed that the province own the equipment.

Recommendation 1

- ***We recommend that in the future, MIT follow the PAM guidance and conduct or consider relevant research and analysis in the first stage of procurement unless sufficient rationale exists to not include it.***

Capital budget

The Treasury Board Handbook indicates that when preparing a Treasury Board submission, accounting policies should be kept in mind. It provides the following guidance for tangible capital assets:



For instance, tangible capital assets are amortized and departments must pick up the annual amortization as well as interest costs related to this asset [...] Departmental financial officers should be consulted where there is uncertainty. If there is a potential accounting issue, consult with the Provincial Comptroller's Office prior to submitting [the submission] so that accounting issues are addressed up front.

The evidence demonstrated that the submission was reviewed by MIT's ADM of finance and administration and he indicates that he consulted the provincial comptroller's office about classifying the equipment as a capital asset. While the evidence does not demonstrate a common recollection of what consultation occurred, this process follows the guidance in the Treasury Book Handbook about how to approach a potential accounting issue.

Untendered contract

The department initially proposed to Treasury Board that the \$5 million of flood-fighting equipment be spent entirely on Standard Emergency Response Trailers equipped with Tiger Dams and equipment needed for Tiger Dam deployment because this was the equipment IRTC had requested. As noted previously, the evidence we reviewed shows that Peguis First Nation had worked with this type of flood-fighting equipment in the past, they were familiar with it and they felt this equipment was effective. MIT departmental staff we spoke with indicated that while there was merit to the idea of having an Emergency Operations Centre for First Nation communities in the Interlake with dedicated flood-fighting equipment, they did not believe that purchasing only water-filled barriers was the most effective use of funds. The evidence we reviewed indicates that the position of the MIT administration was that a variety of equipment was needed to prepare for flooding and it felt that both the First Nation communities involved and MIT already had a sufficient amount of water-filled barriers in their inventories. MIT staff indicated to us that the department attempted to discuss alternative equipment options with IRTC. Also, the view of the department's administration was that IRTC had not provided enough justification for why only this brand of water-filled barriers should be purchased.

The PAM indicates that the province has a duty to conduct a fair, transparent and competitive procurement process. However, the PAM also states that it is permissible to waive a competitive process if the purchase meets at least 1 of 4 of circumstances, which are explained in the table below, along with examples provided in the PAM. The information in this table is reproduced from a table in chapter 10 of the 2014 Annual Report of the Office of the Auditor General of Manitoba regarding the waiving of competitive bids.



Acceptable circumstance	PAM policy guideline	Examples <i>*Additional examples are available in the Procurement Administration Manual</i>
Sole source	Only one supplier is permitted to provide goods or services and an assessment verifies that any other supplier is precluded.	<p>To ensure compatibility with existing products, to recognize exclusive rights, such as licences, copyright and patent rights, or to maintain specialized products that must be maintained by the manufacturer’s representative.</p> <p>Supplier has a statutory monopoly over the goods or services to be procured.</p>
Single source	Only one supplier is considered to meet all the operational, technical or performance requirements and that other suppliers providing similar goods or services are precluded from supplying.	<p>When a standard has been established for the goods or services and only one supplier is capable of providing the goods or services.</p> <p>When the goods must be compatible with existing equipment and only one supplier can provide those goods.</p>
Emergency	An unforeseen situation that poses a threat to life, health, property, public security or order, and the goods or services must be obtained as soon as possible to mitigate the associated risks. The urgent nature of the requirement does not permit a standard competitive bidding process.	<p>There is a real or imminent threat to Manitoba’s ability to protect the life or health of people, property, or to maintain security or order.</p> <p>Emergency Measures Organization has identified an emergency situation that requires the procurement of goods or services.</p>
Urgent	Only one supplier is contacted to provide the goods or services to meet an immediate need and an assessment verifies that any other supplier is not feasible or practical.	<p>Failure to obtain certain goods or services in a timely manner will result in significant disruption to the program.</p> <p>Quantity of goods ordered or length of time an interim service is arranged with a supplier must be sufficient only to meet the immediate need. Issuing a long term contract or ordering additional inventory to meet future needs is not permissible.</p>



As noted by the Office of the Auditor General's 2014 report, waiving a competitive procurement process may unnecessarily deny competing suppliers the opportunity to access government contracts and therefore may result in the province not receiving the best value for money. We note that the submission proposed to waive a competitive procurement process despite the fact that on July 4, 2014, MIT purchased two Standard Emergency Response Trailers from International Flood Control at a significantly lower price than the price per trailer that International Flood Control provided on July 30, 2014. We were not provided with an explanation for the price difference, nor is there any indication that, despite staff having noticed this change in price, the department assessed reasons for the price difference prior to submitting the request to Treasury Board.

In this case, the department's submission proposed to waive a competitive bidding process because it felt the sole source exception applied.

Section 13.14 of the PAM states that the rationale for permitting the waiving of competitive bids in sole source procurement is "to accommodate the procurement of requirements where only one supplier is permitted to provide the goods or services." It also indicates that sole source procurement is only permitted if an assessment verifies that any other supplier is precluded from providing the goods or services and that a sole source procurement strategy must not be used for the purpose of avoiding competition between suppliers or to discriminate against any supplier, good or service. The PAM sets out acceptable circumstances when sole source procurement may be undertaken, including "to ensure compatibility with existing products."

Individuals we spoke with at MIT indicated that departmental staff did not agree with waiving a competitive procurement process. However, as noted previously, the department was directed by the minister of MIT to draft a submission that proposed an untendered contract for Tiger Dams. The department indicates that the direction supported IRTC's request for this equipment because IRTC had this equipment in its inventory and had experience using it.

As noted before, we understand that the department wished to respect IRTC's request and not force an equipment purchase that IRTC did not support. However, this approach must be balanced with procurement policy requirements. In this case, we did not review any evidence that the PAM requirements for "sole source" procurement were met. For instance, there is no evidence that the equipment proposed in the department's submission was needed to ensure compatibility with IRTC's existing products or that other suppliers would be precluded from providing water-filled barriers. As indicated above, the Treasury Board Secretariat was not satisfied with the department's justification for proposing sole source procurement, given that there was more than one supplier the department has used in the past for this kind of equipment and there was not a compelling argument in the submission for not tendering.

Recommendation 2

- ***We recommend that MIT ensures it fully develops and considers the most appropriate procurement strategy, including always providing justification for the selected strategy, that consistently follows the requirements of the PAM.***



We asked departmental staff involved in this procurement if they had any concerns about the administrative process that was followed in this file, including if they had any ethical concerns. Some individuals had very strong concerns about the direction to waive a competitive procurement process and the justification for purchasing this quantity of one type of equipment rather than a variety of equipment. Staff indicated that they questioned whether there was a justification for waiving a competitive process that met the intent of the province's procurement policy.

We note that the province's Values and Ethics Guide for civil servants indicates that if civil servants question whether an action is consistent with relevant legislation, policies and guidelines, they should seek advice before they act. The staff who indicated to us that they had serious concerns about whether the submission followed policy had discussed their concerns with their superiors and appropriate colleagues before taking action. As such, we are satisfied that the Values and Ethics Guide for civil servants was followed in this regard.

Administrative improvement by the Treasury Board Secretariat

We note that as a result of the Office of the Auditor General's 2014 report on the province's waiving of competitive bids, the Treasury Board Secretariat implemented an administrative change to the process a department must follow if it wishes to provide a submission to Treasury Board that proposes waiving a competitive procurement process. Effective October 21, 2014, a new "Financial Overview" form must be completed and signed by the department's executive financial officer to accompany all Treasury Board submissions. The form includes a section on competitive procurement that asks whether a request for the purchase of goods or services will be competitively tendered. If the submission proposes to not tender the purchase, the form asks whether PSB was consulted on this purchase, what recommendations PSB provided and the outcome of the department's consultation with PSB. The secretariat indicates that the goal of this procedural change is to have departments discuss their rationale for not tendering with PSB to see if there is a way to procure competitively while ensuring that departments obtain the goods and services they need.

Individuals we consulted at PSB indicated that this procedural change has resulted in departments frequently consulting it about procurement strategies.

In our view, this is a positive change to the Treasury Board submission process. However, while this new process is reflected in the Financial Overview form, it is not in any written policy guidelines.

Recommendation 3

- ***We recommend that written policy such as the PAM include an expectation for departments to consult PSB when they intend to provide submissions to Treasury Board that propose waiving a competitive procurement process. This can help reinforce the expectation that PSB be consulted in such circumstances.***



There also seems to be a lack of clarity in written policy for the other circumstances in which departments are required to consult PSB on procurement strategies.

Recommendation 4

- ***We recommend that Manitoba Finance review the current role of PSB and develop clear guidance to departments regarding when and under what circumstances they are expected to consult PSB regarding their procurement strategies.***

Administrative improvements by MIT

The evidence we reviewed also indicates that MIT is working on two administrative changes related to waiving competitive procurement of goods or services.

First, department staff indicated to us that MIT is developing a pre-qualification and bid process for equipment the province might need during a flood event. Because this process is in development, we asked the minister of MIT for written details that we could share in this report. He indicated the following:

This process would see the Department contact suppliers prior to flood season to ask them for quotes, technical information and delivery time frames if the government needed the equipment during a flood event. If we needed equipment we would then use the provided quotes and technical assessment. This would establish a purchasing process in advance of a flood while ensuring that the government would continue to be able to obtain the equipment needed to protect Manitobans.

We note that in the province's response to this report it refers to this pre-qualification and bid process in explaining the development of an approved products list.

MIT staff also advised us that the department is drafting a policy to clarify its procurement process in emergency situations, which would supplement the guidance in the PAM about waiving competitive procurement in emergencies.

While we see this as a positive step in clarifying procurement in emergency situations, this does not appear to directly deal with proactive approaches that intend to increase the capacity of communities to address their own needs. This is particularly relevant for initiatives that may require partnerships with communities or other levels of government and that may require solutions not easily developed within the current policy and funding framework (such as the proposal for the Emergency Operations Centre discussed in this report).

Recommendation 5

- ***We recommend that Manitoba Finance review the province's financial policies, procedures and guidelines to ensure they provide adequate guidance to departments working on initiatives with external partners (i.e. communities). We also recommend***



that key principles of financial accountability be drafted and communicated to departmental staff to assist with all stages of administrative decision making. This communication should ensure that departmental staff are aware of areas of government they can contact for advice in designing and implementing initiatives, particularly those involving external partners.

3. Tendering process

On October 6, 2014, Treasury Board reviewed the submission and issued a minute approving the spending allocation, but declining the untendered purchase and directing the department to develop a detailed proposal with specific requirements, a plan to tender for suitable equipment and a plan for custody, care and use of equipment. Based on the evidence we reviewed, Treasury Board approved the \$5 million spending in principle, but it did not approve a funding source because of the outstanding issues noted above.

As a committee of cabinet, Treasury Board minutes are ratified by cabinet. When cabinet approval has been obtained for Treasury Board's minutes, the secretary to Treasury Board notifies departments in writing of the applicable decisions.

On October 8, 2014, the Treasury Board minute regarding the submission was held by cabinet and MIT was directed to provide further information. The effect of cabinet holding the minute was that there was no ratified decision on the submission and therefore Treasury Board's decision was effectively in abeyance.

The former clerk of the executive council indicates that on October 8, 2014, he was directed by the premier to work with MIT and Treasury Board to ensure that proper procurement procedures were followed. On October 9, the clerk met with the secretary to Treasury Board and the MIT deputy minister to discuss the implementation of the premier's direction. We were advised that at this meeting they discussed the parameters of a fair tendering process to procure equipment for IRTC.

On November 13, 2014, the MIT deputy minister withdrew the Treasury Board submission that proposed an untendered contract.

After direction was given to the department to issue a tender for the purchase of equipment, MIT contacted IRTC to involve them in the procurement process and started drafting a Request for Proposals (RFP).

We note that the Procurement Administration Manual states that during "Requirements Planning," which occurs prior to the commencement of a tendering process, a department should obtain pre-approvals such as Treasury Board approval to tender. At this point, given that the government directed that the equipment be tendered, we were advised that it would not have been logical to require the department to obtain separate pre-approval to tender from Treasury Board in these circumstances. We were also advised that is not uncommon for a department to



issue an RFP and return to Treasury Board to obtain approval for the expenditure if it is above the department's delegated authority.

The province issued the RFP on December 19, 2014. We note that there was a two month delay between the direction to tender and the release of the RFP. We were told that part of the delay in finalizing the RFP for the equipment was that it took time for IRTC and the department to come to some agreement on it. IRTC representatives were involved in developing the RFP and reviewing bids. The previous chair of IRTC indicated to us that IRTC did so reluctantly because it wanted to have the autonomy to determine what equipment would be purchased.

The RFP

The evidence we reviewed showed that due to the type of flood-fighting equipment IRTC requested, the department agreed to limit the RFP to water-filled barriers. Starting in early November 2014, MIT worked with the Procurement Services Branch (PSB) to develop the RFP. PSB is responsible for most central government procurement of goods and services and helps departments navigate procurement requirements. The contract administrator, project lead, and technical experts were identified and assigned their respective roles. In this case, PSB developed the contractual requirements of the RFP and MIT staff were involved in developing the technical specifications of the RFP and ensuring the equipment procured would meet the needs of IRTC. IRTC agreed to the technical specifications in the final RFP. This is supported by evidence of collaborative discussion between MIT and IRTC in developing the RFP.

The final RFP was for "water-filled barrier rapid deployment systems" comprised of self-contained pull-type trailers that carry all material and equipment needed to deploy the water-filled barriers. The RFP specified that the province was seeking two different sizes of rapidly deployable water-filled flood barriers, totaling approximately 15,000 lineal metres. MIT and PSB indicate that the tender quantity was set at this amount in case the cost of the winning bid was more than they expected. MIT states that its intention was that if the cost was less than it expected, the department would have discussions with IRTC about purchasing more equipment in order to spend up to the \$5 million it had committed.

The RFP indicated that 25 percent of the product must be delivered by March 15, 2015, and that the remaining 75 percent must be delivered by March 31, 2015. The evidence we reviewed confirms that this delivery timeline was chosen based on IRTC wanting the equipment in time for potential flooding in spring 2015.

Section 15.1 of the PAM states that in exceptional circumstances, it is permissible to notify vendors of upcoming or current tender opportunities posted to MERX, which is an electronic tendering service. The rationale for this policy is that, if used appropriately, this notification maximizes the competition for a tender while maintaining a fair and open procurement process. The PAM states that it is only permissible to notify vendors of a tender opportunity in the following circumstances:

- *a procurement occurs infrequently and the potential for vendors to overlook a tender opportunity on MERX is high, such as seasonal*



contracts (ex: grass cutting contract) or the renewal of long term contracts (ex: bi-annual contracts)

- *a procurement that is a repeat purchase (ex: renewal) but is delayed by Manitoba beyond the time it could reasonably be expected to be publicly advertised*
- *requirements are not planned (ex: urgent, not cyclical) and vendors could not reasonably anticipate Manitoba advertising a tender for these requirements*

In this procurement process, MIT provided PSB with a list of known suppliers of water-filled barriers and on December 29, 2014, PSB notified all suppliers who had not already downloaded a copy of the RFP from MERX. In this case, PSB states that it felt notices were appropriate because of the short delivery timeline required in the RFP. We did not review any evidence that a potential proponent was not aware of the tender opportunity.

The RFP stated that the province could amend or clarify the RFP by one or more addenda issued before the submission deadline of January 28, 2015.

PSB issued four addenda to the RFP. The first one (dated January 6, 2015) clarified that the water-filled barriers must be a bladder type and it amended the specifications for the trailers in which the barriers would be transported. The second addendum (dated January 12, 2015) stated that the price evaluation was changing from a “price per point” model to a “price comparison” model. The evidence we reviewed is that both these addenda were issued due to direction from MIT.

The third and fourth addenda (issued on January 16 and 21, respectively) stated questions PSB had received from potential bidders regarding the delivery date and location and the answers PSB had provided.

PSB states that when it issues an addendum it is posted to MERX and automatically distributed to each proponent who downloaded the RFP and asked to receive subsequent information about it. An addendum is also automatically included with an RFP downloaded after the addendum is posted to MERX.

Our understanding is that it is unusual for an addendum to be issued that changes an RFP’s price evaluation model, but we are not aware of any policy that precludes this. The evidence we reviewed indicates that MIT felt the price comparison model was a simpler evaluation method. We also note that no potential proponents or any individuals involved in the RFP process were concerned about the change to the price evaluation model in this case.

Part of the RFP process is the selection of individuals to sit on the committee that evaluates the bids. PSB’s guidance to departments is that people on the committee should have the technical knowledge to assess the quality of bids (“subject matter experts”).



MIT determined that half the committee should be comprised of its representatives and half the committee should be comprised of IRTC representatives. PSB states that normally before it undertakes procurement, it wants to know which individuals will sit on the evaluation committee because typically the committee is consulted on the draft RFP, including the evaluation criteria. The evidence we reviewed indicates that PSB started seeking the names of the IRTC representatives in early January 2015, so that those individuals could sign Pledge of Conduct forms declaring that they did not have a conflict of interest by participating in the evaluation process, that they would maintain confidentiality, and that they would evaluate the tenders fairly. On January 19 and 20, 2015, PSB received signed Pledge of Conduct forms from the two IRTC representatives, who were staff from Peguis First Nation in the emergency management sector. It also received signed Pledge of Conduct forms from the two MIT representatives.

Once proposals were received, PSB reviewed them to ensure they met the mandatory requirements. Only the proposals that complied with the mandatory requirements were forwarded to the committee, with pricing information removed. Each evaluator then scored the proposals independently based on the technical requirements. PSB compiled the scores and a group discussion was held where evaluators could share opinions and change their scores on the technical considerations if they wished, and then the average of the scores was taken to arrive at a final score of the technical aspects of the RFP. The committee then reviewed the pricing information of each proposal and PSB calculated a price score for each proposal. Seventy percent of the final score of each proposal was based on technical requirements and thirty percent on price, and the recommended supplier was the one that received the highest score overall.

Although the evaluation committee had selected a recommended supplier, MIT could not award the contract until Treasury Board approved doing so, given that the amount of the contract would exceed MIT's delegated spending authority.

Analysis

PSB states that typically members of the evaluation committee are consulted on the draft RFP, which includes the evaluation criteria. PSB also indicates that it ensures that every member of the evaluation committee signs a Pledge of Conduct form prior to the evaluation of bids. The form includes a declaration that the committee member will ensure that he or she has no conflict of interest or perceived conflict of interest relating to any proponent.

As indicated above, IRTC representatives were involved in developing the RFP. PSB indicates that it is not common to have individuals outside the provincial government involved in developing an RFP and evaluating bids, but it does happen. For example, there might be federal government representatives on an evaluation committee for a joint provincial-federal procurement. MIT staff we spoke with indicated that in this case, the department felt it was appropriate to have IRTC representation on the evaluation committee.

The evidence indicates that a consultant hired by IRTC was involved in developing the RFP and the evaluation criteria despite later declining to sit on the evaluation committee because he could not sign the Pledge of Conduct form due to a conflict of interest relating to a potential proponent.



PSB states that this IRTC representative was involved because PSB had not yet confirmed which IRTC representatives would be sitting on the RFP evaluation committee.

The evidence we reviewed confirms that various suppliers of water-filled barriers were eligible to bid on the RFP. We have not reviewed evidence that the input of the IRTC consultant resulted in the RFP being unfair or biased in favour of one proponent. However, this raises an overall concern that in cases like this, there is a risk of perceived or actual unfairness if individuals are involved in developing an RFP who have an undeclared conflict of interest relating to a potential proponent.

PSB has recently developed tendering guidelines that reflect its procurement practices and principles in order to assist departments and agencies with basic tendering procedures. These guidelines were not yet in place when PSB was involved in this procurement, but PSB indicates that the guidelines reflect the practices and principles that PSB was following at that time.

These guidelines indicate that a Pledge of Conduct form must be signed by each RFP team member, and that the RFP team is comprised of the contract administrator, the project lead and subject matter experts who may be consulted on the RFP and form part or all of the evaluation committee. One of the obligations on the form is that the person signing the form has “no conflict of interest or perceived conflict of interest relating to any Proponent” and that if the person discovers a conflict, he or she “will promptly advise the other members of the RFP Team”, including the PSB consultant assisting with the procurement. The guidelines do not specify if the form must be signed before someone becomes involved in developing the RFP.

We reviewed evidence that the four members of the evaluation committee signed Pledge of Conduct forms prior to reviewing bids, but we were not provided evidence that any other individuals on the RFP team had signed the form.

Recommendation 6

- *We recommend that PSB clarify its written guidelines for which individuals involved in the RFP development and/or bid evaluation process must sign the Pledge of Conduct form. We further recommend that clear guidelines be provided to RFP team members about how and when to declare a conflict of interest, including a conflict involving a potential proponent.*

In our view, individuals should sign the form before becoming involved at any point in the RFP process so they are aware of their obligations at that time.

We recognize that PSB is not always involved when departments develop the technical requirements for an RFP. Therefore:

Recommendation 7

- *We recommend that PSB share these guidelines with departments to assist them in preventing undeclared conflicts of interest at this stage of the RFP process.*



Lastly, while some aspects of the tendering process were unusual (such as the composition of the evaluation committee and the addendum that changed the price evaluation model), other than the issue related to the involvement of the IRTC consultant, we are satisfied that legislation and policy were followed during the development of the RFP, the release of the RFP and subsequent addenda, and the evaluation of bids. As mentioned above, PSB has developed tendering guidelines as well as RFP templates that reflect PSB's procurement practices and principles to assist staff of departments and agencies with basic tendering procedures. Given that written procedures contribute to a more transparent and consistent process, in our view this is a positive administrative improvement to PSB's communication with civil servants regarding the province's procurement procedures.

4. Building Manitoba Fund

In November 2014, MIT began discussions with Manitoba Municipal Government about the possibility of proposing to Treasury Board that the Building Manitoba Fund (BMF) be the funding source for the equipment.

The BMF provides funding support to address municipal infrastructure maintenance and capital asset renewal needs, including streets and bridges, water and sewer systems, bike paths, recreation and other municipal facilities, and public transit. The authority for the fund arises from *The Municipal Taxation and Funding Act*, which indicates that the BMF can be a source of grants to municipalities and First Nation reserves and sets out a formula for the portion of provincial tax revenue that is credited to the BMF each year.

Given that the BMF is a source of grants to municipalities and First Nations, using this funding source would result in IRTC owning the equipment. We were advised that MIT staff supported this because it would not require a potentially complex negotiated agreement with IRTC regarding the care and custody of provincially-owned equipment. A BMF grant could still result in the province issuing a tender for the purchase of the flood-fighting equipment, but IRTC would have sole ownership and responsibility for the equipment, including insurance, maintenance, and storage. In contrast, the implication of using the capital budget to purchase the equipment is that the province would own the equipment and require an agreement with IRTC regarding the care and custody of the equipment, which would be stored at the IRTC Emergency Operations Centre.

Manitoba Municipal Government was concerned that using the BMF to purchase this equipment would be inconsistent with government policy on how the fund had been used in the past. Previously the BMF had been used for permanent infrastructure, such as establishing permanent dikes around communities. It had not previously been used to fund flood mitigation equipment used on a temporary basis, such as water-filled barriers.

Although using the BMF to fund this equipment would be a new use of the fund that could result in a change to the government's policy on the scope of what can be funded with the BMF, the departments were of the view that the BMF legislation did not prevent using the fund in this



manner. However, both departments acknowledged that since this change in use would mean a change in policy direction, it would need to be endorsed by government.

Analysis

The evidence we reviewed indicated that from November 2014 to February 2015, MIT and Manitoba Municipal Government were in discussions about developing a Treasury Board submission that would include BMF as a possible funding source for the equipment. While MIT preferred that BMF be the chosen funding source, the view of Manitoba Municipal Government was that the alternative to using BMF (which was MIT's capital budget) was preferable to potentially expanding BMF. The evidence we reviewed confirms that regardless of the funding source, the equipment to be purchased would be chosen from a competitive tendering process and the expenditure would require Treasury Board approval. As such, there is no evidence that MIT pursued BMF as a funding source in order to avoid a competitive procurement process or circumvent the Treasury Board approval process.

5. Current status of the file

We were advised that work on determining a funding source is currently in abeyance because IRTC announced its purchase of 20 Tiger Dam Standard Emergency Response Trailers in late March 2015 with funding from the federal government. The previous chair of IRTC indicates that the federal government contribution would be in addition to, not replace, the commitment the provincial government had made to purchase equipment for the Interlake Emergency Operations Centre.

Given that IRTC had procured these flood tubes, in mid-May, 2015, the province and IRTC began new discussions about how to spend the provincial commitment of \$5 million for flood-fighting equipment. At present, these discussions with IRTC are ongoing.

The evidence we reviewed confirms that the province remains committed to the \$5 million of funding for flood fighting. The current deputy minister states that when MIT decides what it wishes to fund with the \$5 million commitment, it will return to Treasury Board to obtain approval.

The department has not cancelled the tender it issued in December 2014. We were advised that decisions regarding the RFP are pending the outcome of discussions between the province and IRTC.

Analysis

Section 17.1 of the PAM states that the province has a fiduciary duty and responsibility to award a contract to the winning bidder. PSB states that while contracts should be awarded to the winning bidder, there are circumstances in which no contract is awarded following a tendering process. PSB provided us information stating that the courts have held that if a purchaser includes a provision in its tender documents that allows it to bypass the winning bidder or cancel



the tender process, this can take precedence over the duty to award a contract to the winning bidder.

The province's RFP for the purchase of water-filled barriers for IRTC stated that "Manitoba may cancel this RFP at any time, with no liability whatsoever to any proponent" and that "Manitoba is under no obligation to accept any Proposal or to select the Proposal offering the lowest price for the Services." The RFP also stated that the province's acceptance of a bid was conditional on "Manitoba obtaining all necessary internal approvals" and that the province "has no obligation to enter into the agreement unless this condition has been met."

Given the above, we did not review any evidence demonstrating that the absence of a contract award for this RFP is inconsistent with legislation or policy.

CONCLUSION

The goal of this report is to articulate the processes involved in the commitment and procurement of flood-fighting equipment for the Interlake Emergency Operations Centre. The observations, findings and recommendations in this investigation report are intended to help strengthen existing processes and support better accountability, transparency and decision making. We do not judge the appropriateness of the Emergency Operations Centre initiative or a specific flood protection product. This report should not be viewed as an obstacle to moving forward on supporting First Nations flood mitigation.

In undertaking this review, it became evident that flood fighting in Manitoba is a complex effort requiring many players and technical expertise, not only in flood forecasting, but in all types of efforts for prevention, mitigation and assistance before, during and after a flood event. Major floods in Manitoba, particularly in 2009, 2011 and 2014 have put a lot of pressure on individual communities as well as the province. Adding to this complexity are the intergovernmental relationships that are required between the province, federal government and First Nations in terms of flood prevention, evacuation and compensation. We were advised throughout this investigation that the province has a commitment to, over time, increase the capacity of First Nation communities to directly assist in flood-fighting efforts in their communities. The evidence we have reviewed indicates that this is something that is also being sought by First Nation organizations and that discussions to date involved both the provincial and federal levels of government.

While we recognize that government needs to be responsive to communities and innovative in its approaches, established procedures and policies still need to be followed. In this investigation, while we found that the overall process of seeking Treasury Board approval was undertaken and an RFP was eventually issued, we identified some issues with the administrative steps taken in this matter and we observed that the process from commitment to procurement did not follow a typical path. We found several points in this process where differences of opinion and expectation were present. In our view this contributed to the department's inability to provide a solid justification for its initial proposal and has added to the delay in implementing this initiative.



Through the course of evidence gathering we saw broad support for the concept of building flood-fighting capacity in First Nation communities. However, we also heard concern from several senior public servants regarding the direction to purchase only one type of flood-fighting equipment (Tiger Dams) for IRTC. Some public servants believed that the \$5 million would have been better spent on a range of equipment. Concerns about the source of the required funding were also raised.

This case also highlighted the role of political decision making in the funding and procurement process and revealed some tensions between the political direction that was set and the administrative actions required to carry out that direction. In this case, direction was given to civil service staff to seek approval to waive a competitive tendering process for the procurement of Tiger Dams despite concerns, including that doing so was inconsistent with the government's procurement policy. The evidence indicated that the political level of government did not just set the policy direction in this case, but also initially directed the manner in which the procurement of flood-fighting equipment should occur (i.e. an untendered contract). This could be viewed as an overlap between the political and administrative levels of government.

We must recognize, however, the right and responsibility that elected officials have in making commitments and setting direction. Civil servants are responsible for providing expert advice where possible to support sound decision making, and for implementing the commitments and direction established by elected officials.

It is worth noting that in response to a recommendation in the December 2013 Manitoba Ombudsman report (referenced at the beginning of this report), the province developed a document titled "Guidelines for elected officials and political staff on ensuring a non-partisan civil service", dated October 2015. The document provides some relevant information regarding the roles of elected officials, political staff and civil servants. For the purposes of this investigation, those distinctions are meaningful as they also speak to the importance of considering public perception in decision making and provide several considerations in assessing whether direction to the civil service is appropriate. We have been advised that this document has been distributed to cabinet, political staff and senior civil servants and we encourage the province to continue to communicate this information at all levels.

This case highlights that public perception matters when carrying out the duties of government, and that the actions of elected officials and civil servants can reflect on each other when either are called into question. Concerns about poor administrative practices at any level can erode the public's confidence in government as a whole.

Ultimately, this case is a cautionary tale; a reminder that the civil service and elected officials need to work together for the common goal of providing fair, accountable service to the public.



RESPONSE TO RECOMMENDATIONS

The province provided our office with the following responses to the recommendations in this report. The province advises that prior to the start of this investigation it had begun a series of changes to the manner in which it records, monitors and reports government contracts and that it recently implemented many of these changes. The province states that while many of the changes are outside the scope of this investigation, they have a direct bearing on our recommendations. As such, the province's response includes details about action it has taken to address some of the concerns we have raised.

We note that some of the applicable changes the province has implemented are also mentioned in the Office of the Auditor General's follow-up on its 2014 report on the province's waiving of competitive bids, which was released in December 2015 on the auditor general's website.

Recommendation 1

- *We recommend that in the future, MIT follow the PAM guidance and conduct or consider relevant research and analysis in the first stage of procurement unless sufficient rationale exists to not include it.*

Response: Agree. MIT has strong procurement practices in place consistent with the Procurement Administration Manual (PAM), however, processes will be reviewed to ensure that appropriate research and analysis is undertaken and documented to confirm compliance with this requirement.

The principle of fair market value appears throughout the PAM and is woven into almost every procurement process including untendered contracts. We recognize the benefit of providing further guidance in the area of value analysis and are developing guidance information to assist all departments in analyzing fair market value on contracts that are not subject to a competitive procurement process. The information will include analysis methodology and research tools that can be used in the determination of fair market value for many common goods or services purchased by government. In instances where a more complex analysis is required, the PAM will recommend consultation with PSB.

It should also be noted that MIT has already begun the development of an Approved Products List (APL) for various categories of Temporary Flood Protection products, including for water-filled barriers. The intention of the APL is to identify products that meet pre-established technical specifications and other field performance criteria. When a product need has been identified during an emergency, vendors with "Approved Products" may be contacted during emergent circumstances to provide price and delivery information for evaluation with delivery by a certain date considered a mandatory criterion. MIT already has APLs for a number of technical products in a variety of product categories such as asphalt, cement, and dust control products.



Recommendation 2

- *We recommend that MIT ensures it fully develops and considers the most appropriate procurement strategy, including always providing justification for the selected strategy, that consistently follows the requirements of the PAM.*

Response: Agree. All departments – including MIT – are required to document information which demonstrates adherence to the requirements of the PAM.

In May 2015, government introduced a requirement for all contracts greater than \$1,000 to be entered into SAP (the government’s enterprise resource management system); this ensures that all critical information is captured at time of contract creation. All contracts now require the mandatory inclusion of key data elements such as the sourcing method used (Tendered, Direct Award, Sole Source, Emergency, and Continuing Service Agreement), the rationale for the sourcing method, and the full history leading up to the decision (i.e. the Business Case). These process improvements provide critical information for the Record of Procurement and support the effective review and approval of high risk procurements. All such procurements are monitored and reviewed on a monthly basis.

Recommendation 3

- *We recommend that written policy such as the PAM include an expectation for departments to consult PSB when they intend to provide submissions to Treasury Board that propose waiving a competitive procurement process. This can help reinforce the expectation that PSB be consulted in such circumstances.*

Response: Agree. Steps have already been undertaken to address this recommendation.

Treasury Board Secretariat implemented a change to its Financial Overview Form which accompanies all Treasury Board submissions made by departments. Effective October 21st, 2014, the Financial Overview Form includes a requirement for consultation with Procurement Services Branch (PSB) when the intention is to award a contract without a competitive bidding process. This establishes a further control mechanism to ensure departments are consulting with PSB on all contracts that exceed their delegated authority and provides Treasury Board with additional information in evaluating these requests.

In addition, effective December 21st, 2015, a new procedure was introduced to validate contracts that are deemed “sole source.” When it is asserted that only one provider is able to provide a specific good or service that is valued at \$10,000 or greater, departments will be required to consult with PSB prior to awarding a sole source contract. In some instances, departments may be required to issue a “Notice of Intent” on MERX to validate that no other vendor is able to provide the good or service. This is a mandatory process and changes to the PAM will be implemented to reflect this.



Recommendation 4

- *We recommend that Manitoba Finance review the current role of PSB and develop clear guidance to departments regarding when and under what circumstances they are expected to consult PSB regarding their procurement strategies.*

Response: Agree. Departments have been reminded that a competitive process (i.e. tender) should be used for any goods or services being procured on behalf of government. If there is any question about the application of procurement policies, the PSB is the authority on procurement processes within government and should be consulted in advance of any decision to waive a competitive process. As previously communicated, the PAM outlines circumstances when it may be appropriate to waive competitive bidding.

Recommendation 5

- *We recommend that Manitoba Finance review the province's financial policies, procedures and guidelines to ensure they provide adequate guidance to departments working on initiatives with external partners (i.e. communities). We also recommend that key principles of financial accountability be drafted and communicated to departmental staff to assist with all stages of administrative decision making. This communication should ensure that departmental staff are aware of areas of government they can contact for advice in designing and implementing initiatives, particularly those involving external partners.*

Response: Agree. We concur on the imperative to maintain strong financial accountability and transparency in the use of funds, and that this must be supported by clear guidance that is communicated consistently across government.

While we believe the current suite of financial policies, procedures and guidelines can be effectively applied to initiatives involving community partners, we will review these to ensure they are clearly articulated and updated, where necessary, in light of this recommendation.

With respect to communication, we note that significant communications to and within departments regarding their financial accountabilities already takes place on a regular and ongoing basis. This has been augmented by the development of additional training materials developed by the Provincial Comptroller which will be launched early in 2016. Furthermore, we will take additional measures to bolster communications with staff so they may be better aware of the resources and contacts that are available to them in fulfilling their fiduciary responsibilities.

Recommendation 6

- *We recommend that PSB clarify its written guidelines for which individuals involved in the RFP development and/or bid evaluation process must sign the Pledge of Conduct form. We further recommend that clear guidelines be provided to RFP team members about how and when to declare a conflict of interest, including a conflict involving a potential proponent.*

In our view, individuals should sign the form before becoming involved at any point in the RFP process so they are aware of their obligations at that time.

Response: Agree. It should be noted that the province has a conflict of interest policy in place and civil servants are required to declare potential conflicts. The Civil Service Commission and the PSB will review this further to ensure it is adequate and/or updated to address the concerns noted here. Furthermore, PSB has developed and included further direction in the Request for Proposal guidelines regarding a required Pledge of Conduct form for individuals involved in the preparation and evaluation of RFPs. The instructions and content of the Pledge of Conduct form will be reviewed to determine if further changes are required in light of this recommendation.

Recommendation 7

- *We recommend that PSB share these guidelines with departments to assist them in preventing undeclared conflicts of interest at this stage of the RFP process.*

Response: Agree. Information to this effect will be prepared and circulated.



Appendix: Timeline of key dates



