

**Annex 11.2: Refunds by Contractors of Excess Profits Earned on PWGSC Contracts
(2005-06-10)**

11A.1 All intimations from any source of unreasonably high profits realized from any contract placed pursuant to the *Defence Production Act* or from any contract other than competitive firm price awarded pursuant to the *Department of Supply and Services Act* and the *Department of Public Works and Government Services Act* should be reviewed in consultation with the Director, Acquisition Program Integrity Secretariat (APIS).

11A.2 Negotiated Refunds

- (a) Normally the first step in negotiating a refund is for the contracting officer and APIS to review the evidence available and decide whether the profits realized by the contractor can be recommended for acceptance or are in excess of what is considered to be fair and reasonable. In the event that the evidence is incomplete or inconclusive, consideration is to be given as to whether the contractor will be approached for a statement of its position or whether a request will be forwarded to Consulting and Audit Canada for additional verification. When all the evidence necessary is assembled, a final review will be made to determine what, if any, amount is to be refunded and the method of payment.
- (b) In an attempt to ensure that suppliers are being treated consistently throughout the Department, Contract Audit Group (CAG) will distribute to the Contract Audit Review Committee's members, a contracting officer's proposed action plan in respect to a contractor's excess profit identified through audit. Any comments or concerns with the action plan should be communicated to CAG within (10) working days. CAG will consolidate the input and forward it to the lead contracting authority for consideration.
- (c) In some cases it will be in order to recover excess profits by deduction from current claims or a part recovery may be effected through an assignment of income tax refunds. Ordinarily, however, the contractor will be expected to remit the full amount by cheque. If it appears that this action will create an unreasonable hardship, extended terms of payment may be considered.
- (d) The agreed amount to be refunded and the terms of settlement will be set out in a letter to the contractor approved by Legal Services and signed by the responsible officer of the sector/region. Copies of this letter are to be sent to the Director, APIS.
- (e) After settlement is completed, it may be desirable to release the Contractor from further obligation by detailing, in a formal agreement, the contracts to which the settlement relates. This agreement should be drafted by Legal Services.
- (f) Cheques forwarded by the contractor should be made payable to the Receiver General and mailed to the contracting officer. The contracting officer will pass them to CAG who will forward them to the Chief Financial Officer of the client.

11A.3 Voluntary Refunds

- (a) Where a contracting officer receives notice from a contractor that it desires to return excess profits, or if a contractor voluntarily forwards a cheque in refund of such profits, the contracting officer should request a statement showing:
 - (i) a summary of the excess profits by contracts, and
 - (ii) an explanation of the principal reasons which accounts for the excess and how the amount was arrived at.

- (b) Pending an appraisal of the information given by the Contractor and of the particular circumstances of the case, any cheques received should be sent immediately to the Director, APIS, accompanied where possible by a statement showing the distribution of the refund over the contracts affected. The Director, APIS, will then forward the cheques to the Chief Financial Officer of the client.
- (c) In deciding how extensive a review should be carried out in each case, the determining factors will be:
 - (i) the value of the contracts affected and the total amount of the contracts let to the Contractor;
 - (ii) the explanations given by the Contractor as to the procedure followed in arriving at the amount of the refund;
 - (iii) the Contractor's known capacity for assembly and interpretation of costs in accordance with Contract Cost Principles [1031-2](#), if applicable.
- (d) If there is doubt as to the accuracy of the Contractor's computations or if it appears that there may be other excess profits which have not been declared, then a full inquiry must be instituted.
- (e) A final decision will be agreed upon by consultation between the sector/region concerned and the Director, APIS, and this conclusion will be communicated to the Chief Financial Officer of the appropriate customer department.

11A.4 Refunds from Subcontractors

Refunds from subcontractors will be handled in accordance with the above procedures. In addition, however, it will be necessary for Public Works and Government Services Canada (PWGSC) to keep the prime contractor informed of its negotiations with the subcontractor and in some cases it will be preferable to deal with the subcontractor through the prime contractor. If the refund results from a contractual provision in effect between the prime contractor and the subcontractor then the refund should be effected by the prime contractor. If the refund arises from circumstances not envisaged in the subcontractor's contractual arrangements with the prime contractor, the refund should be effected by PWGSC and should not result in a windfall being realized by the prime contractor.

11A.5 Assignment of Income Tax Refund

- (a) In the event that a settlement from the Contractor is to be financed partly from the proceeds of its income tax refund, the sector/region concerned will endeavour to obtain a voluntary assignment of the income tax refund in the following terms:

"Receiver General of Canada
Ottawa, Ontario.

(Company) _____ of the City of _____ in the Province of _____ does hereby authorize and direct that any amounts presently due or accruing due to it in the future from the Canada Revenue Agency of the Government of Canada, be applied in reduction of its debt to Her Majesty the Queen in right of Canada in the amount of \$ _____ on account of _____".

- (b) In the case of a Corporation, the direction should be under the seal of the Corporation and the signature of duly authorized officers. The form, which should be a separate document and not embodied in a letter, should then be passed by the sector/region to

the Director General, Finance, Corporate Services, for processing in accordance with normal government practice. Treasury Board authorization is not required.

- (c) Whether the assignment is voluntary or pursuant to section 155 (Deduction and set-off) of the *Financial Administration Act*, the Finance Sector assumes the responsibility of notifying Canada Revenue Agency (CRA) of the assignment. The manner in which money is transferred from CRA to PWGSC, or to the Department of National Defence (in the case of refunds to its own votes) is a matter for decision by the Finance Sector. However, the transfer will be made either by means of a Receiver General cheque or an interdepartmental Journal Voucher. Under either method, the transfer advice will be passed to the sector/region concerned who will forward it to the Director General, Finance.