

**OFFICE OF THE COMMISSIONER
OF OFFICIAL LANGUAGES
FOR NEW BRUNSWICK**



**COMMISSARIAT AUX
LANGUES OFFICIELLES DU
NOUVEAU-BRUNSWICK**

JUNE 2014

INVESTIGATION REPORT

FACILICORPNB

**SENT TO: THE PREMIER
THE PRESIDENT AND CHIEF EXECUTIVE OFFICER OF FACILICORPNB
THE DEPUTY MINISTER OF HEALTH
THE COMPLAINANT**

**IN THE MATTER OF THE NEW BRUNSWICK *OFFICIAL LANGUAGES ACT*,
S.N.B. 2002, C. 0-0.5**

**Subject: Complaint under the *Official Languages Act*
FacilicorpNB
Language of written communication**

INVESTIGATION REPORT

1. Complaint

On January 29, 2014, the complainant contacted our office to inform us of his concerns regarding a request for proposals process issued by FacilicorpNB during the fall of 2012.

Further to a request for information submitted on November 14, 2013 under the *Right to Information and Protection of Privacy Act*, the complainant obtained, among other things, a copy of the request for proposals in question. After reading this document, the complainant contacted FacilicorpNB in January 2014 in order to ask some questions, including whether the document was available in French. He was told that it wasn't and that FacilicorpNB has the practice of including the following mention in its requests for proposals: "*The request for proposals documents are available in both official languages upon request. Les documents de la demande de propositions sont disponibles dans les deux langues officielles sur demande.*"

The complainant also drew our attention to the provisions of a paragraph in the request for proposals that reads as follows:

1.2.2 LANGUAGE OF SUBMISSION

The Working language of the Committee is English. Proponents may submit their response to the proposal in either of New Brunswick's two official languages. Proponents are advised that FacilicorpNB Ltd./Ltée may translate their proposals for the evaluation purposes. The Proponent agrees that it will accept FacilicorpNB Ltd./Ltée's translations as being equivalent to their original proposal.

Should a Proponent choose to submit both an English and French copy they must clearly indicate which copy is to be considered the "Original." If a circumstance arises where there is a substantive difference between the two proposals the proposal identified as the "Original" will be considered the official copy for evaluation purposes.

According to the complainant, this paragraph does not comply with the wording or spirit of the *Official Languages Act* of New Brunswick.

2. Investigation

In accordance with the provisions of paragraph 43(13) of the *Official Languages Act* of New Brunswick (“OLA”), a letter was sent to FacilicorpNB on February 26, 2014 to inform them of the complaint and that an investigation was to be carried out. In our letter, we asked the agency to answer the following questions:

1. Was the [request for proposals document] available in French? If so, please send us a copy.
2. Irrespective of the answer to the above question, paragraph 1.1.2 (sic) of the document does not seem to meet the requirements of the OLA. We would like to know your position on the matter.

On March 12, 2014, we received a letter from FacilicorpNB intended to correct the paragraph number mentioned in our letter (1.2.2 rather than 1.1.2). In addition, the agency asked us to “specify which part of the New Brunswick *Official Languages Act* or which requirement provided by this Act had not been properly respected or observed” in this case.

In a letter sent to FacilicorpNB on March 13, 2014, we confirmed the correction of the paragraph number mentioned and listed the provisions of the OLA relevant to this case, i.e. the sections entitled: “Communication with the public” (sections 27 to 30). The agency responded in a letter dated April 7, 2014. Following is an excerpt:

[Translation]

FacilicorpNB is aware of [the requirements of the OLA] and, in our opinion, it respects both of them, in its day-to-day activities or in the [request for proposals (RFP)] process.

The RFP process involves the request for proposals from specific product and service suppliers. Issuing an RFP to suppliers in order to obtain services or products is not what is normally considered a communication with the public or a communication addressed to the general public.

The method used for posting information concerning an RFP is an electronic billboard named the New Brunswick Opportunities Network (NBON). To access the NBON, the suppliers and any other interested party must become registered users. There are no registration fees for the NBON.

Generally, all RFPs from FacilicorpNB are written in English and the details of the RFP are posted on the NBON. When the incumbent supplier functions in French, FacilicorpNB translates the RFP before starting the RFP process. In both cases, the following statement appears in the NBON regarding any RFP process involving FacilicorpNB:

The RFP documents are available in both official languages upon request. Les documents de la demande de propositions sont disponibles dans les deux langues officielles sur demande.

If such a request is received, the RFP process in question is suspended until the RFP has been translated and is available in French for the supplier who made the request. The RFP process does not resume until the requesting supplier has received the translated RFP. We have carefully examined the wording of paragraph 1.2.2 of the RFP, and we have determined that the statement “The working language of the Committee is English” is possibly both inappropriate and unnecessary, and we propose completely withdrawing it from the template for future RFPs.

In our opinion, the rest of the wording contained in paragraph 1.2.2 of the RFP does not violate the principles of the [OLA] and respects the requirements of sections 27, 28, 28.1, 29 and 30 of the Act [...]. In addition, it is our opinion that the mention “The RFP documents are available in both official languages upon request” appearing in the NBON, perfectly complies with Official Languages - Language of Service Policy and Guidelines (the Policy) of the government of New Brunswick with regard to public purchasing. Under the heading “Public Purchasing”, the Policy stipulates that:

For the purchase of products where the choice is not affected by language considerations, the sellers must be able to sell the product in the official language of their choice. All communication and documentation must therefore be in the official language of choice of the seller.

The posting on the NBON of the statement stipulating that “The request for proposals documents are available in both official languages upon request” clearly indicates to the suppliers that they can sell their products in the official language of their choice and offers the suppliers the opportunity to indicate their choice of official language.

Please let us know whether you have concerns or whether you disagree with our position as set out in this letter. Our aim is to fully meet the requirements of the Act and ensure that equal quality service is offered in both official languages.

Considering the position expressed by FacilicorpNB in this letter, we felt it was necessary to know more about the New Brunswick Opportunities Network (NBON). First, we visited the Website for this network whose home page contains, among other things, the following information:

Official tender documents for goods and services, as well as tender notices for transportation and building construction issued on behalf of the province are available free of charge on this site.

This site also contains some tender opportunities issued by other public sector bodies such as municipalities, hospital corporations, Crown corporations, universities, regional landfill corporations and the Atlantic Lottery Corporation.

We then decided to meet with representatives of the Procurement Operations Branch of the Government Services Department (“Department”) in order to obtain information on the management and operation of the New Brunswick Opportunities Network (NBON). This meeting took place on May 26, 2014.

We were told that by listing all tender notices issued by various public sector bodies, the NBON acts as a one-stop point of access for potential tenderers who may read the current requests for proposals (RFPs). Besides tenders by invitation (invitations to tender issued to a small group of contractors who are invited to tender) that are issued for low-value products or services, the RFPs are accessible for everyone through the NBON's Website. However, only businesses registered with the NBON may consult the attachments of the RFPs and present tenders electronically.

The NBON's Website was created with a bilingual interface, which allows Internet users to access it in the official language of their choice and allows agencies issuing the RFPs to place their notices online in one or both of the official languages. There are no guidelines regarding the use of the official languages; this choice belongs to the issuing bodies. Having said that, the Department may have the RFPs translated when the potential suppliers request this. In such circumstances, the invitation to tender process is not suspended, but the closing date is extended.

Based on the information gathered above, we are in a position to draw substantive conclusions without having to continue our investigation any further or invoke additional powers as conferred on a commissioner by the *Inquiries Act*.

3. Analysis and observations

As we mentioned in our letter dated March 13, 2014, the complaint that is the focus of this case pertains to the alleged non-application of the provisions of the OLA dealing with the communication with the public. Section 29 is of particular importance in this context:

29 Institutions shall publish all postings, publications and documents intended for the general public in both official languages.

As a public sector agency of New Brunswick, FacilicorpNB is subject to the OLA. Having said that, the agency is of the opinion that it respects the requirements of the Act, including the section noted above. According to FacilicorpNB, RFPs do not fall into the category of publications and communications intended for the general public, as they are addressed to "suppliers of specific services or products" who, in order to access the NBON, "must become registered users". In other words, FacilicorpNB considers that RFPs have an exclusive nature, which calls into questions the relevance of section 29.

However, we did not have to register with the NBON in order to consult the tender notice issued by FacilicorpNB in October 2012. Therefore, the general public had access to it. Moreover, the Department of Government Services confirmed that the general public can read current business possibilities by visiting the NBON Website. Certainly, it is necessary to be a registered user to see the full RFPs, but the registration conditions do not seem to be restrictive.

While perusing the tender notice related to this case, we were able to note that the information appearing in the heading “Tender Details” were only written in English, even in the French version of the notice. Certainly, as the agency pointed out to us, FacilicorpNB’s tender notice includes the following bilingual statement:

The RFP documents are available in both official languages upon request. Les documents de la demande de propositions sont disponibles dans les deux langues officielles sur demande.

However, this statement implies that the RFP documents are not offered in both official languages immediately, since the prospective suppliers must submit a request in order to obtain them in the official language of their choice. FacilicorpNB indicates that in such cases the tender process underway “is suspended until the RFP has been translated and is available in French for the supplier who made the request.” This information differs from the information we were given by the Department of Government Services, according to which, the process is not suspended, but rather extended. In any event, there is every reason to believe that English is the default language in the tender processes and that suppliers who wish to obtain information in French have to wait. We believe that this practice gives a certain advantage to sellers presenting a tender in English, as they do not have to wait to prepare their files. Consequently, this situation does not guarantee equal treatment of bidders whether they be francophones or anglophones.

FacilicorpNB maintains that the mention regarding the availability upon request of the RFP documents in both official languages “perfectly complies with Official Languages - Language of Service Policy and Guidelines (the Policy) of the government of New Brunswick with regard to public buying.” In this regard, the agency relies on the application of the Policy concerning “the purchase of products where the choice is not affected by language considerations.” In such a context, the Policy provides that “All communication and documentation must be in the official language of choice of the seller.” As an example of products and services that fall into this category, the Policy mentions items such as paper, pencils or tools.

It should be noted that in this same section dealing with products and services purchased by the government, the Policy also refers to “Products and services directly affected in availability and nature by linguistic considerations, e.g. educational services.” For this type of purchase, the Policy provides that “where the product or service purchased must by its very nature be in one language or the other ..., the choice of language associated with the product or service is at the discretion of the purchasing department or agency. The purchasing process (tendering, contract, invoice payments) must be available in both official languages.”

In its RFP, FacilicorpNB presents the aim of its call for tenders as follows:

2.3 OBJECTIVE

It is the intent of [the] Office of Health System Renewal [OHSR] to instill a new approach to health care management in NB. Consequently, OHSR have determined that there is a

requirement to review and understand all product lines that we have in the health system. They intend to begin with the largest partners, the regional health authorities, who are responsible for more than 60% of total health spending and activity. The CEOs of the RHAs are supportive of this process.

To this end, the OHSR seeks to engage a firm to analyze the operations and implement process and tools that will support a performance focused organization with metric-based thinking. The goals of the work are [...]:

- To compare RHA operations with like operations who operate more efficiently
- To identify and implement health innovations and best practices that are most promising to health renewal in New Brunswick and will improve operating performance
- To move closer to being a better performer in operating efficiencies
- To work toward a sustainable budget position for healthcare in New Brunswick
- To have tool and process for monitoring and accountability of health renewal results.

Accordingly, the services for which FacilicorpNB issued the call for tenders go well beyond a simple order for material. Moreover, it is important to point out in this case that we are dealing with an exhaustive study on the two regional health authorities of New Brunswick, one of which has adopted French as its language of operation and the other, English. Each of the authorities is, however, subject to the OLA and must take its linguistic obligations into account in the day-to-day management of its operations. This leads us to disapprove of the wording of paragraph 1.2.2 of the RFP quoted above that states that “The Working language of the Committee is English” (“La langue de travail du Comité est l’anglais”). We take note of the fact that this statement will no longer be part of FacilicorpNB’s RFPs, as they have deemed it “possibly both inappropriate and unnecessary.”

4. Conclusions and recommendations

The notion of equality of the status and rights of French and English in New Brunswick as to their use in all institutions of the Legislature and the government of New Brunswick is essential in this case. This matter gives the impression that priority is always given to English, while French comes in second position or is simply ignored.

In light of all of the information obtained in the handling of this complaint, we have to conclude that we do not share FacilicorpNB’s point of view that section 29 does not apply in this case; that is to say that RFPs are not “publications and communications intended for the general public.” We have demonstrated above that the general public can easily access the calls for tenders issued by the NBON. Consequently, as a public sector agency subject to the OLA, FacilicorpNB should have issued its RFP in both official languages, without waiting for a potential supplier to request this. As for the RFP documents, they reveal the scope and complexity of the study that FacilicorpNB wanted to carry out regarding the New Brunswick health system. Given the specifics of this system in matters of official languages, it is

unfortunate that it was deemed appropriate to declare English as the only working language of the committee. We are pleased to note, however, that FacilicorpNB corrected this faux pas.

We therefore conclude that the complaint is founded and make the following recommendations:

- 1. That from now on, FacilicorpNB issue its calls for tenders in both official languages at the same time.**
- 2. That in its day-to-day practices, FacilicorpNB recognize the equality of the status and rights of French and English in New Brunswick.**

In accordance with subsection 43(16) of the OLA, we respectfully submit this report to the Premier, to the President and Chief Executive Officer of FacilicorpNB, to the Deputy Minister of Health, and to the complainant.

[Original signed by]

Katherine d'Entremont, M.P.A.
Commissioner of Official Languages for New Brunswick

Signed at Fredericton,
in the Province of New Brunswick
this 20th day of June, 2014

