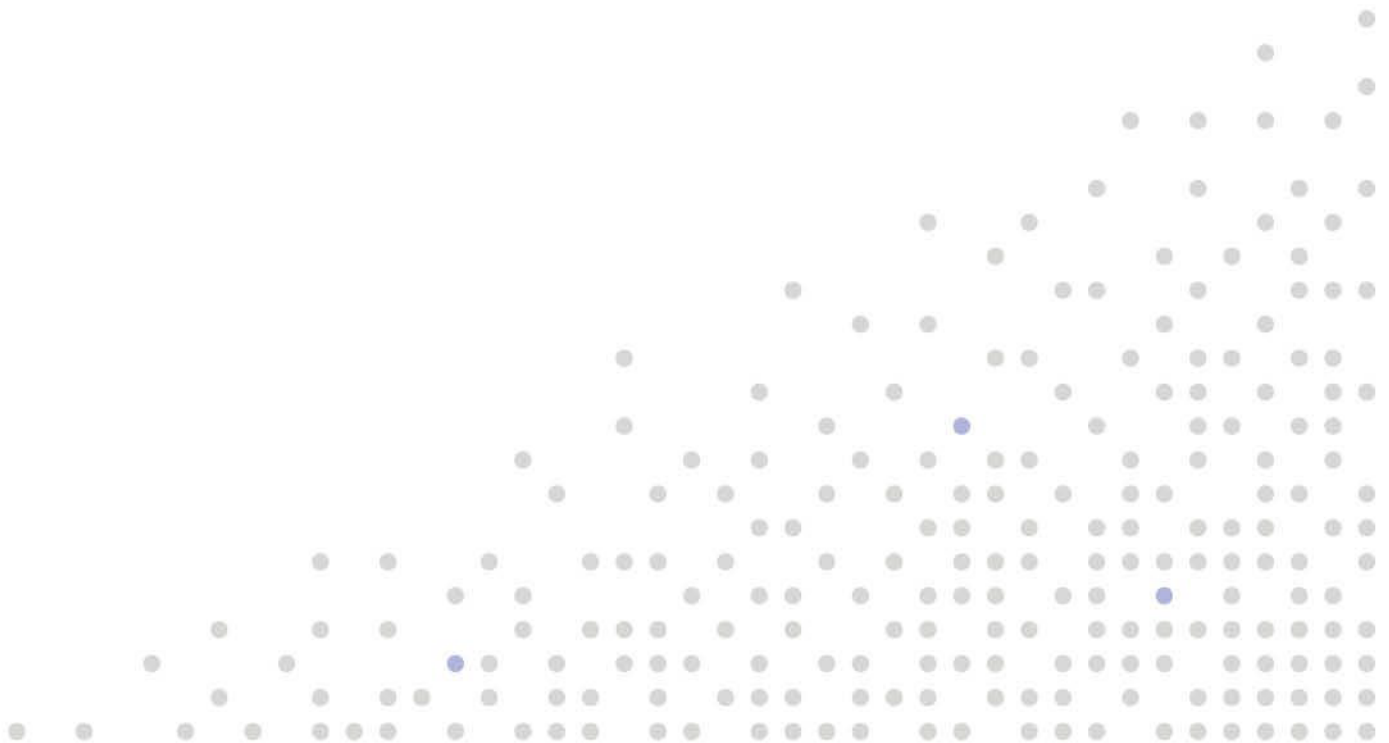




Australian Government
Department of Finance



Department of Finance

**Submission to the
Senate Finance and Public Administration
References Committee**

**Inquiry Into the Management and Assurance of Integrity by
Consulting Services**

April 2023

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Introduction

The Department of Finance (Finance), as policy steward of the Commonwealth Procurement Framework, is committed to supporting the development of a positive procurement culture across the Commonwealth.

The Commonwealth Procurement Framework reflects the Australian Government's expectations for procurement activities. The Commonwealth Procurement Rules (CPRs) are the foundation of the Commonwealth Procurement Framework and enable officials to achieve value for money and promote accountability and transparency.

Commonwealth entities must manage their procurements in a manner that ensures the efficient, effective, economical and ethical use and management of public resources. The CPRs, guidance material and other web-based support provide procuring officials the tools to effectively manage confidentiality in procurement and to support good contract management practices. Further, the engagement of suppliers has recently been streamlined through the introduction of the Whole of Australian Government (WoAG) Management Advisory Services (MAS) Panel for commonly used consultancy services.

The Future Made in Australia Office, established within Finance to deliver the Buy Australian Plan, leads and coordinates initiatives to build public sector procurement and contract management capability. Initiatives being implemented through the Office are outlined in this submission.

Finance welcomes the opportunity to make a submission to the inquiry.

Commonwealth Procurement Framework

Commonwealth Procurement Rules

Procurement is the expenditure of public money to obtain goods or services for Government or third-party use. It enables Commonwealth entities to acquire the goods and services needed to deliver the Government's policies, programs and services. Government procurement achieves value for money through competitive, open, transparent, efficient, ethical and publicly accountable processes.

Commonwealth procurement under the CPRs is both expansive and diverse. It is utilised to source the broad range of goods and services required to support administration of Commonwealth entities and deliver outcomes and services to the Australian public. In 2021-22, there were 92,303 contracts awarded to 12,901 unique businesses, with a combined value of \$80.8 billion¹. By volume, this equates to approximately 369 procurement contracts being awarded each working day.

Finance is responsible for policy stewardship of the Commonwealth Procurement Framework, which forms part of the wider Commonwealth Resource Management Framework. The *Public Governance, Performance and Accountability Act 2013 (PGPA Act)* is the cornerstone of the Commonwealth Resource Management Framework and governs how officials use and manage public resources, including proposals to spend relevant

¹ Contracts valued under \$10,000 are not required to be reported on AusTender. In addition, there may be other contracts that are exempt from reporting on AusTender, due to national security or other exemptions

money. The Commonwealth Procurement Framework applies to all non-corporate Commonwealth entities (NCEs) and those prescribed corporate Commonwealth entities (CCEs) listed in section 30 of the *Public Governance, Performance and Accountability Rule 2014* (PGPA Rule).

The CPRs are the core of the Commonwealth Procurement Framework, which also includes:

- web-based guidance, developed by Finance to assist entities to implement the Commonwealth Procurement Framework;
- Resource Management Guides (RMGs), which advise of key changes and developments in the Commonwealth Procurement Framework;
- templates, such as the Commonwealth Contracting Suite (CCS), which simplify and streamline processes, creating uniformity across Commonwealth contracts to reduce the burden on businesses when contracting with the Commonwealth; and
- individual entities Accountable Authority Instructions (AAIs) which include instructions that the accountable authority expects officials to follow when exercising powers and carrying out functions and duties under the PGPA Act, including procurement activities under the Commonwealth Procurement Framework.

Finance is responsible for maintaining the Commonwealth Procurement Framework however, it does not have a compliance role in Commonwealth procurements. Commonwealth procurements are audited by the Australian National Audit Office (ANAO) as part of their compliance program to ensure entity compliance with the CPRs. Entities own internal audit teams may also audit their entities procurement processes.

Devolved Framework

The Commonwealth Procurement Framework is devolved. Each entity is responsible for its own procurement processes and decisions in order to meet its purpose and objectives. Under the devolved framework, it is the responsibility of the procuring entity to undertake due diligence activities, commensurate with the scale, scope, risk, and nature of the procurement.

The devolved nature of the Commonwealth Procurement Framework provides entities the flexibility they need to meet their business needs. As a result, entity procurement governance structures and the operations of their central procurement teams vary widely amongst entities. Procurement governance varies from decentralised models, where individual business areas have more responsibility for procurements and central procurement teams conduct more supporting activities such as providing guidance, advice and conducting assurance activities, to more centralised procurement models where the central procurement teams have responsibility for conducting most of the procurements. The appropriate procurement model is adopted by the Accountable Authority based on various factors such as entity size, business needs, risk, operational complexity, volume and value of procurements, and the type of goods and services required by the entity.

Commonwealth Official Obligations

The PGPA Act and the CPRs place obligations on officials when carrying out their duties in relation to procurement. When undertaking a procurement process, officials are required to collect and consider a range of information regarding suppliers' past practices, including unethical behaviour, failure to abide by confidentiality provisions and deficiencies in past performance.

When undertaking a procurement, procuring officials determine the appropriate eligibility criteria for that procurement. This includes requesting information from tenderers on any convictions. CPR paragraph 6.7 requires that relevant entities not seek to benefit from dishonest, unethical or unsafe supplier practices and should seek confirmation from tenderers that they do not have unsettled orders against them. Officials can exclude a potential supplier's tender response from consideration on various grounds, including if the supplier's practices are dishonest, unethical or unsafe. Examples of dishonest, unethical or unsafe supplier practices may include tax avoidance, fraud, corruption, exploitation, unmanaged conflicts of interest and modern slavery practices.

When conducting a procurement process, officials should engage in thorough planning to facilitate the protection of confidential information throughout the life of the procurement. The management of confidentiality does not end with the procurement process and extends into the management of a contract. CPR paragraphs 7.22 – 7.25 describe the obligations on officials to protect the Commonwealths confidential information by including confidentiality provisions in request documentation and contracts.

CPR paragraph 10.18 indicates that a relevant entity may exclude a tender based on sufficient deficiencies in performance under a prior contract. Officials should conduct appropriate due diligence, including assessing suppliers' prior performance, such as seeking references.

Finance Guidance for Officials

A key element of the support that Finance provides to entities is through web-based guidance. Finance's guidance details procurement policy and process information and advice that Commonwealth officials can use to inform their procurements activities, deliver best practice and ensure their procurements are not inconsistent with the Commonwealth Procurement Framework. Finance is currently undertaking a whole-of-guidance refresh of the Procurement website that will include additional resources to support entities in their procurement activities.

Ethics, Probity and Confidentiality

Finance provides [guidance²](https://www.finance.gov.au/government/procurement/buying-australian-government/ethics-and-probity-procurement) to support good practice in the management of ethics and probity in procurement processes. The guidance material outlines the key principles underpinning ethics and probity, including that probity and conflict of interest requirements should be applied in an appropriate and proportionate manner and that confidential information must be treated appropriately during and after a procurement process. The guidance provides procuring officials with advice on the identification and management of

² <https://www.finance.gov.au/government/procurement/buying-australian-government/ethics-and-probity-procurement>

actual, potential and perceived conflicts of interest and the considerations around engaging probity experts.

Probity experts can be an effective source of advice for procuring officials, particularly when undertaking large and/or complex procurements. For smaller, less complex procurements, a probity advisor may not be necessary, where such capability is available within the procuring entity. When used, probity experts should be independent, free from conflicts of interest and have a sound knowledge of all relevant government policies and procedures. These persons should also have an ongoing obligation to disclose any conflicts that may arise during the entire procurement process.

To support the management of confidentiality in Commonwealth contracts, the CPRs direct officials to *Confidentiality Throughout the Procurement Cycle*³. The guidance indicates that entities, when planning a procurement, should consider the nature of the procurement and whether it is likely to raise confidentiality issues for the Australian Government.

Contract Management

The *Australian Government Contract Management Guide*⁴ provides guidance to support effective contract management at a practitioner level for entities. Key elements of the guide include:

- general advice related to contract management planning;
- key contract management activities;
- managing performance;
- closing a contract; and
- contract management for standing offer arrangements.

The guide describes the obligations of procuring and contract management officials to behave ethically including complying with relevant laws, declaring conflicts of interest and not acting fraudulently. Similarly, if a supplier does not uphold their obligations within the contract, it may result in a termination of the contract due to a breach.

The guide is currently being updated to support further capability development of contract management officials.

Contract Management Capability Uplift

The Future Made in Australia Office (the Office) leads initiatives to build public sector procurement and contract management capability, strengthen partnerships with the business community and encourage innovation and best practice processes to drive value for money outcomes for the Australian Public Service (APS). The existing Centre of Procurement Excellence, which has been expanded beyond procurement to now include contract management, has been incorporated into the Office.

The Office is developing a comprehensive procurement and contract management training package to uplift the capability of procurement officials across the APS. The training includes contract management courses that will cover ethical behaviour, conflict management and performance management for contract managers. This training program will be regularly

³ <https://www.finance.gov.au/government/procurement/buying-australian-government/confidentiality-throughout-procurement-cycle>

⁴ <https://www.finance.gov.au/government/procurement/contract-management-guide>

delivered to all APS staffing levels and offered in a range of formats, both in-person and online, to address different learning and development needs of officials.

Finance convenes the Senior Procurement Officials Reference Group (SPORG), which comprises key procurement officials from Commonwealth entities. The Group enables sharing of updates, learnings, ideas and best practice on procurement and contract management. The Office is expanding the reach of SPORG by establishing a whole of government procurement and contract management Community of Practice. The Community of Practice will bring together government officials to share best practice, collaborate with other experts, seek advice on common issues, and receive updates on policy, guidance and associated systems and tools.

Finance also supports the Ministerial Roundtable on Procurement. Co-chaired by the Minister for Finance and the Minister for Industry and Science, the Roundtable brings together leaders of peak industry bodies and representatives of regional businesses, Indigenous businesses, and small and medium enterprises, unions and academia. The Roundtable informs the delivery of the Buy Australian Plan and identifies opportunities for national collaboration to contribute to the role public sector procurement and contract management plays in the economy.

Supplier Obligations

The Commonwealth Procurement Framework provides behavioural expectations for suppliers when engaging in procurement activities with the Commonwealth. In accordance with CPR Paragraph 6.7, the Commonwealth expects suppliers to behave in a transparent and honest manner when engaging in procurement activities. Officials have the power to exclude a potential supplier's tender response from consideration on various grounds, including if the supplier's practices are dishonest, unethical or unsafe.

To complement the guidance for officials on appropriate behaviour when undertaking a procurement, Finance is developing stronger guidance for suppliers to support their engagement with the Commonwealth.

The Office has a pipeline of work to improve information for suppliers. The Selling to Government website⁵ includes information for businesses on contracting and working with the Australian Government. The Office is expanding content to include information around the terms and conditions commonly included in the CCS and Australian Government contracts more broadly. The Office will be developing targeted learning events, tools and resources for business which will incorporate content to help suppliers understand their responsibilities when they are awarded a contract. This includes content on requirements to manage conflicts of interest and managing confidential and personal information when participating in Australian Government procurement and contracting.

The Office will continue to review and update learning content and resources based on regular feedback and engagement with industry, and insights from government officials.

⁵ <https://sellingtogov.finance.gov.au/>

Supplier Code of Conduct

Finance takes ethical procurement seriously as part of its stewardship of the Commonwealth Procurement Framework. Finance is developing a Supplier Code of Conduct which will outline the behavioural standards expected from suppliers during procurement processes and engagements under contract.

The Supplier Code of Conduct will clearly set the Australian Government's expectations on the standards of ethical behaviour of both suppliers to the Commonwealth and any sub-contractors, including disclosing conflicts of interest and confidentiality obligations. Consultation on the structure will be conducted with Commonwealth entities and with supplier representative bodies.

Management Advisory Services Panel

In 2021, MAS Panel was established as a coordinated panel arrangement to streamline the engagement of consulting services, increase transparency and improve contract management. It covers three main service areas: financial, corporate and commercial.

The [MAS Panel Head Agreement](#)⁶ contains clauses (provided at [Attachment A](#)) covering active disclosure whereby a service provider is required to notify Finance immediately on becoming aware of any adverse findings made by a court, commission, tribunal or other statutory or professional body regarding the conduct of the service provider or its capacity to deliver the agreed services. Compliance with applicable laws and legislation, including the *Crimes Act 1914*, also apply to suppliers delivering services under the MAS Panel.

Potential breaches of the Head Agreement are considered on a case-by-case basis and will be dependent upon the nature and seriousness of the breach to determine whether the right to terminate should be exercised.

Contract Clauses

Commonwealth Contracting Suite and ClauseBank

The CCS, a document-creation website for Government officials, is designed to simplify the terms and conditions in Commonwealth contracts, provide guidance to officials when drafting contracts and reduce the transaction costs for the Commonwealth and suppliers doing business together. The CCS approach to market and contract documentation is mandatory for procurements under \$200,000 for all NCEs except where a relevant exclusion applies (as outlined in '[RMG 420 – Mandatory use of the Commonwealth Contracting Suite for procurement under \\$200,000](#)⁷'), and is encouraged for contracts valued up to \$1 million. CCEs are encouraged to use the CCS.

ClauseBank is a collection of pre-drafted contract terms that can be used within existing contract templates or in bespoke contracts by Commonwealth entities when appropriate.

⁶ <https://www.finance.gov.au/sites/default/files/2022-02/MAS%20Panel%20Head%20Agreement%20-%20February%202022.pdf>

⁷ <https://www.finance.gov.au/publications/resource-management-guides-rmgs/mandatory-use-commonwealth-contracting-suite-procurement-under-200000-rmg-420>

Finance recommends that protections for the Commonwealth are included in Commonwealth contracts allowing for the termination of a contract for a material breach of that contract, for example breaches of confidentiality and breaches of moral rights. These provisions are incorporated into the contract templates provided to entities through the CCS as well as recommended through ClauseBank.

Active Disclosure Clauses

Finance is currently in the process of updating the CCS and ClauseBank to reflect similar active disclosure clauses to those contained within the MAS Panel Head Agreement. Once these clauses are added to the CCS and ClauseBank they will be included within the majority of future Commonwealth Contracts, and will apply to consultancy contracts, as well as other goods and services providers.

Conclusion

Finance is committed to supporting best practice in procurement and contract management across the Commonwealth. The CPRs reflect the expectations on officials to use public resources in an efficient, effective, economical and ethical manner. To support the appropriately devolved nature of the Commonwealth Procurement Framework, Finance's role focuses on providing guidance and advice, coordinating activities across the Commonwealth and developing and maintaining tools, templates and systems such as AusTender to support entities.

Finance established the MAS Panel to streamline the engagement of consulting services, increase transparency and improve contract management. Finance is also continuing to look for ways to improve the protections for the Commonwealth through the broader use of contract clauses and improve the information available to suppliers regarding the Commonwealth's expectations regarding their ethical behaviour.

Finance will continue to review the Commonwealth Procurement Framework and its program of activities, particularly through the work of the Office, to ensure that the Commonwealth Procurement Framework continues to support the delivery of value for money outcomes for the Commonwealth.

Background

AusTender data

AusTender is the Australian Government's centralised procurement information system. AusTender provides a centralised portal to connect government entities with suppliers through the publication of business opportunities, and provides transparency of contracts awarded following a procurement process. NCEs must report details of contracts with a value of \$10,000 or more, and prescribed CCEs report contracts with a value of \$400,000 or more. Entities are responsible for the accuracy of procurements and contracts published on AusTender.

- NCEs are required to identify on AusTender all contracts where the primary purpose of the contract is to procure consultancy services. To support adherence with transparency and reporting obligations, [*RMG 423 - Procurement Publishing and Reporting Obligations*](#)⁸ provides guidance to officials on the identification and reporting of consultancies. The guidance includes the definition of a consultancy, a workflow for identifying if a contract is reportable on AusTender, the characteristics of a consultancy contract and some common examples of consultancy engagements.

In 2021-2022, the Australian Government entered into 3,951 consultancy contracts with a total value of \$904.9 million.

Management Advisory Services Panel

With consideration to the volume of consultancy services the Commonwealth engages, the MAS Panel was established in 2021 as a coordinated panel arrangement to streamline the engagement of consulting services, increase transparency and improve contract management. Coordinated arrangements, which are established for the procurement of goods or services that are commonly used across the Commonwealth, are mandatory for NCEs⁹.

The MAS Panel covers three main service areas: financial, corporate and commercial. The MAS Panel does not include contractor services, recruitment or labour hire, services available under other WoAG arrangements, services unique to information and communication technology (ICT) or property consultancy services. Further guidance on the use of the MAS Panel is available in the [*Panel User Guide*](#)¹⁰ on the Finance website.

The MAS Panel provides a range of benefits, including:

- improved quality, consistency and efficiency of purchasing management advisory services with standard terms and conditions and a Performance Management Framework;
- cost savings and efficiencies for service providers by reducing administration and tendering efforts;
- reduction in the time and effort for entities and for service providers to establish contracts;

⁸ <https://www.finance.gov.au/publications/resource-management-guides/procurement-publishing-and-reporting-obligations-rmg-423>

⁹ The MAS Panel is optional for CCEs and Commonwealth companies, including Government Business Enterprises.

¹⁰ <https://www.finance.gov.au/government/procurement/whole-australian-government-procurement/management-advisory-services-panel/panel-user-guide>

- replacing multiple panel arrangements across Government with a single panel arrangement; and
- providing standardised rate structures for entities, noting that service providers' rates can vary significantly across other panels for the same types of services.

Under the CPRs, entities must assess value for money when engaging suppliers to assist the Commonwealth, including when engaging them through a coordinated arrangement. Each purchase from a panel represents a separate procurement process. Even though value for money has been demonstrated for the supplier to be on a panel, officials must demonstrate value for money when engaging from a panel. To maximise competition, the CPRs were updated on 1 July 2022 to include a new paragraph 9.14 which encourages officials, where possible, to approach more than one supplier on a panel for a quote.

Attachment A – MAS Panel Active Disclosure Clauses

MAS Panel Active Disclosure Clauses:

16.2.3 The Service Provider must:

(b) notify Finance immediately on becoming aware of:

- i. any adverse comments or findings made by a court, commission, tribunal, or other statutory or professional body regarding the conduct or performance of the Service Provider or impacting on the professional capacity or capability of its Personnel to deliver the Services;
- ii. any unsettled judicial decisions against it relating to unpaid employee entitlements;
- iii. any other significant matters, including the commencement of legal action, involving the Service Provider or its Personnel that may adversely impact on an Agency's compliance with Australian Government policy and legislation or the Commonwealth's reputation; and
- iv. any non-compliance by the Service Provider or its Personnel with any judgment against it from any court or tribunal (including overseas jurisdictions but excluding judgments under appeal or instances where the period for appeal or payment/settlement has not expired) relating to a breach of workplace relations law, work health and safety law or workers' compensation law.