



Submission to the JCPAA Inquiry

Commonwealth procurement: Inquiry into Auditor-General Reports 6, 15, 30, 42 (2021-22) and 5 (2022-23)

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Introduction

Since its establishment in 2019, National Advisory (NA) has been providing strategic policy, regulatory, stakeholder and political advisory services across a broad range of areas including: health, technology, digital business, cyber security, finance, property valuation, government procurement, market access, trade and Royal Commissions.

Since 2021, NA has been assisting a number of our clients in navigating the complexities of Commonwealth Procurement. This work has included establishing the size of prospective markets, reviewing panel contracts, in-depth analysis of Austender records in specific areas of interest, and assisting with advice on actual tenders. I have led this work, utilising my relevant experience in the APS over nearly 20 years, prior to my retirement in 2018.

Through this work, we have become increasingly concerned about current procurement practices, especially procurements from panels and standing offers. We are also concerned by the decline in procurement related skill levels in the APS. This submission does not seek to represent or take forward the specific interests of any of NA's clients, rather it makes general observations about a number of deficiencies in Commonwealth Procurement, supported by de-identified analysis utilising publicly available Austender information.

This submission does not respond to the specifically listed ANAO reports, although there are similarities in our findings and those of the ANAO. The NA submission relates to the following term of reference:

- The views of the Auditor-General, Department of Finance and other interested parties in relation to Commonwealth procurement and demonstrating value for money through competition, probity, and strong contract management.

Standing Offers/Panel Contracts

NA is aware that procurement processes take time and incur significant costs for government agencies and that using standing offer/panel arrangements for commonly used products and services provides increased efficiencies.

On its website, the Department of Finance (Finance) claims that panel arrangements provide increased transparency, standard terms and conditions and improved contract management that benefits both the government and suppliers.

Finance also provides guidance to agency procurement staff on how they should procure from panels. The advice is available at this link:

<https://www.finance.gov.au/government/procurement/buying-australian-government/procuring-panel-panels-101>



The use of panels to procure goods and services has grown dramatically over the last five years and this has been good for government agencies as they have been able to derive the benefits claimed by Finance. Unfortunately, evidence from ANAO reports and the evidence we have collected from Austender records as well as anecdotally, indicates that the use of panels has not always been in accordance with the Finance guidance, and this has had detrimental effects on suppliers and in many cases fails to meet the core principle of procurement for government – Value for Money. During our client research, we have identified a series of common issues with panel procurement and provide the following summaries along with our suggested recommendations to remedy the issues. We trust our submission will assist the JCPAA in its inquiry.

Issue – Market Concentration

In several panels, despite there being a significant number of suppliers, we have identified that very few are actually used and this has led to an unprecedented concentration of procurement contracts flowing to just 1 or 2 suppliers.

In one ICT panel, with fifteen registered suppliers, and for a commonly used service, agencies have let contracts for over \$700 million in the first 8 years of the panel. One supplier has received over 80 per cent of this market and the top two providers have shared 92 per cent.

The Austender results for this panel show most agencies extend contracts year after year without seeking competitive pricing from alternative suppliers. There have also been extensions to contracts past the end date of the panel, and in one case a new contract has been let by an agency which extends to 9 years past the expiry date of the panel contract. When this agency's procurements for this type of service are analysed, it can be shown that the same supplier has provided similar services for the previous 8 years and now will provide the same services for a further 10 years a - total of 18 years. It is unknown whether this agency sought competitive bids from more than one supplier before writing a new contract for the original supplier for a further ten years. However, we observe that incumbency is the greatest determinant of future supplier contracts, and this is detrimental to competition and innovation in the long term.

Austender allows agencies to record panel contracts as having a procurement method of "open tender." This gives the impression that agencies sought multiple bids and received value for money, but if as we suspect, a large portion of contracts on this panel were single sourced, value for money cannot be guaranteed.

We are aware that the Commonwealth Procurement Rules have recently been modified to ensure that buyers approach multiple potential suppliers when procuring from a standing offer (new clause 9.14) states:

- 9.14** To maximise competition, officials should, where possible, approach multiple potential suppliers on a standing offer.



However, the caveat “where possible” allows procurement officials or delegates an easy pass to single select. Officials and delegates can easily identify reasons why it was not possible to seek multiple quotes from a panel and therefore they are still able to single select. One way the “where possible” caveat can be manipulated is by buying multiple short duration extensions to an existing contract thereby increasing the cost to move to a new supplier vs cost to stay with the incumbent, such that the incumbent will always be a more cost-effective solution. It is also common practice to fail to plan procurement and use single selection from panels because the agency does not have the time to seek multiple quotes or to take the time to transition to a new supplier.

We recommend that Finance better define the term “where possible” to further limit the opportunities for single select procurements from panels.

In the ANAO’s report on Digital Transformation Agencies procurement, ANAO’s recommendation five states:

The Australian Government implement reporting requirements for procurements from standing offers, such as panels, to provide transparency on whether an opportunity was open to all suppliers and, if not, how many suppliers were approached.

Finance, who is responsible for Austender, noted the recommendation.

We recommend that the JCPAA also support the ANAO’s initiative to improve the level of reporting on Austender, so it is very clear where standing offers are used to singularly source a product or service.

For another commonly purchased service, there are five panels that can be used. Each panel has several suppliers. All panels were evaluated, and it was found that again there had been a concentration of contracts to one supplier. This supplier received more than 91% of all contracts by value over the last two-year period. Twenty-two other suppliers shared the remaining 9% of the contracts by value. Two of this supplier’s contracts are significant in value and when they are removed from the analysis, this same supplier is still the highest earner by value, earning five times as much as their nearest competitor.

One of the panels that this supplier wins work from was a panel for a different provision of service. The panel allowed for an optional extra, being the service in question. While the broader service provision under the panel was open tendered and evaluated, the optional service is only provided by one supplier on the panel. Therefore, it was not possible to evaluate the optional service against competitor pricing to determine value for money. Nevertheless, significant works have flowed to this supplier for the optional extra work and the contracts for these works are stated in Austender to be by open tender. The supplier was single selected from a panel where there are no competitors.

It is unfortunate that the panels/standing offers have led to some suppliers becoming such dominant market players at the expense of other suppliers who are equally ranked on the panel but receive limited or no opportunities to bid for the work. The recommendations above, if implemented equitably, should assist to return panel procurements to a more competitive balance and avoid market concentration



Issue - Barriers to Entry

There are two common barriers to entry for suppliers that severely restrict competition and favour incumbents.

Firstly, panel contracts are major procurement exercises, and the owning agency invests a lot of time and resources into the tender preparation, tendering, evaluation, and the contracting for the services. They therefore maximise the length of time that the contracts run for, often extending the panels up to 9 years to ensure the best return on their initial investment. During that time new Suppliers come along, with new and more innovative ways of providing services, but they are frozen out of the panel. More recent panels have opportunities for refresh, and this reduces the wait for new players to introduce competition and innovation into the panel and therefore improve value for money.

Agencies are however limited for resources and panel refreshes are often not completed for lengthy periods. One panel we are aware of was tendered during Covid when most people were working from home. Several large providers were unaware of the tender and did not participate. While a refresh has been spoken about by the owning agency, no time has been set for the refresh.

State governments allow refreshes on panels at set times through the contract period of the panel. The refresh periods extend from quarterly to in some cases every three years. This gives ample opportunity for new suppliers to enter the panel, ensures pricing remains competitive and ensures innovation is not put on hold for the entire length of the panel.

We recommend that all panels when tendered have refreshes built in at stipulated periods, at least every two years and at least before a panel is extended.

More and more we are seeing another barrier to entry appear in Government panels and that is the requirement for supplier staff to be security cleared. A supplier can be successful in selection on a panel, but the users of the panel require supplier staff to be security cleared. The Australian Government Security Vetting Agency (AGSVA) is responsible for providing security clearance services to government agencies. However, a supplier's staff need to be sponsored before AGSVA commences the security clearance process. Sponsorship needs justification and it appears that being on the panel does not necessarily qualify the supplier for sponsorship.

Once a supplier receives an agency sponsorship to have staff security cleared, it can take between three and six months for a baseline clearance to be completed. Top Secret clearances are likely to take 6 to 12 months. When agencies try to use the panel and they look for suppliers that have been security cleared, new suppliers with uncleared staff are overlooked as agencies generally cannot wait three to six months for their work to start.

The suppliers are paying AGSVA for the security clearance service but without sponsorship AGSVA will not commence the process and suppliers are unlikely to receive work under the panel. The long-term incumbents therefore continue to get all the work once again reducing competitive tension and potentially value for money.

Suppliers invest their time and money into submitting a panel tender. This commitment is on the expectation that if they are successful, they will not face additional barriers that will make it difficult to



receive government contracts. As a recognition of the expenses committed, the government should sponsor suppliers' staff to commence the vetting process as soon as the tender evaluation committee accepts that the tender has met the minimum requirements for entry into the evaluation phase. As suppliers are paying for the evaluations, the costs to government will be minimal.

It should be noted that AGSVA are stating on their website that security clearances are currently delayed.

We recommend that suppliers, tendering for panel contracts that require staff to be security cleared, be sponsored by the tendering agency once they submit their tender and their tender is assessed as meeting the mandatory participation criteria. The cost of security clearances is to be borne by the supplier.

If this recommendation is accepted, AGSVA will need additional resourcing.

Issue - Value for Money

The core principle of Government procurement is Value for Money. Value comes from an assessment of a lot of factors in a suppliers offer, not just the price. When assessing competitive tenders, the assessed value is compared to the cost to achieve the value. The best value for money option is then the preferred tender.

There appears to be a belief amongst some agencies that if you access a panel or standing offer, you do not need to prove value for money because the panel owner has already done that assessment. The "panel 101" instructions from Finance clearly states that single select procurements cannot be assessed as being value for money.

The concept of value can vary between agencies as every agency values a supplier's offering differently, based on the lens they look through. For example, the Department of Climate Change might see the value of a solar panel installation differently to Finance. However, when using a panel procurement, value for money is biased to the panel owners' value set.

We make no recommendations for this issue.

Issue - Misuse of Panels

One panel we have examined is open to all agencies and since its inception in 2019 it has been used 330 times. 314 of the 330 contracts are under \$1 million in value (275 contracts are less than \$250k and 183 contracts are less than \$100k). One particular contract stood out in our analysis. This contract was for more than \$22 million and anecdotal evidence suggests it was a single select tender. We do not think that panels should be used for such high value procurements. Panels and panel rates are obtained by going to market with a general specification suitable for the general goods and services that government procures. When an agency tries procuring services that are estimated in value to be more than two hundred times the mean and median of all other contracts issued on the panel, the panel owner should suggest the Agency goes to tender separately. A specific open market tender, written around the specific needs of the high value procurement is more likely to generate value for money. The current guidance to agencies on this matter is in the CPRs and states:



A panel cannot be used to purchase goods or services that fall outside the scope of the arrangement.

It is recommended that Finance provide more detailed guidance on the use of panel contracts to avoid misuse of a panel and to achieve better value for money outcomes.

Issue – Skills and experience

The downsizing of the public service, the push to generalise the skill sets of public servants, outsourcing of specialist skills, and the lack of investment in training of staff all contribute to poor procurement outcomes. In the Independent Review of the Australian Public Service report released in September 2019 [Our Public Service, Our Future], the review panel identifies the key actions that must be taken to ensure that the APS is fit for purpose to serve all Australians now and in the decades ahead. They identified seven priority areas. One of the priorities was to invest in people to strengthen the APS's capability.

Some key take outs from their capability review are:

the APS's spend on learning and development is at, or below, the lowest global benchmark for spending on learning and development in large private sector organisations. This analysis reinforces many submissions that suggest that the APS does not prioritise learning and development.

knowledge professions, such as lawyers, accountants, management consultants and technology developers, have well-developed skills, experience, and role requirements for career advancement. The APS lags behind these professions. By not delineating career paths, a single track largely prevails in senior levels of the APS, that of generalist management.

In today's public service, procurement officers and delegates who sign off on procurements are often generalists with limited procurement knowledge or experience. They receive little or no training, and their work is not reviewed because the specialist skilled staff are largely no longer employed in the APS.

Another finding reported in the Our Public Service, Our Future report was:

there are no established mechanisms for assessing agency capability over time

Poor procurement practices in the APS should not need to be found by the ANAO when they do their performance audits. They should be identified by internal checks within the Agency. The PGPA Act and the CPRs require agencies to provide training to relevant officials and sets out repercussions for non-compliance. However, without internal checks it is impossible for an agency to know whether it is meeting its obligations.

Section 16 of the PGPA Act outlines an *Accountable Authority's* duty to establish appropriate internal control systems for their *relevant entity*. The CPRs provide the necessary framework for *Accountable Authorities* when issuing Accountable Authority Instructions and operational requirements in relation to *procurement*. In the area of *procurement*, an *Accountable Authority* should provide a mechanism to:



1. apply the principles and requirements of the resource management and procurement frameworks, focusing on the *relevant entity's* operations; and
2. provide primary operational instructions to *relevant entity officials* in carrying out their duties related to *procurement*, in a way that is tailored to a *relevant entity's* particular circumstances and needs.

Non-compliance with the requirements of the Resource Management Framework, including in relation to *procurement*, may attract a range of criminal, civil or administrative remedies including under the *Public Service Act 1999* and the *Crimes Act 1914*.

Finance, which has a responsibility for Government Procurement, has developed internal tests that its procurement officers and procurement delegates must successfully complete each year. If an officer fails to complete the test, they are no longer allowed to undertake a procurement and must retrain and resit the test before they are allowed to procure.

We recommend that the Finance “procurement test” be rolled out across all agencies on an annual basis and that only staff that successfully complete the test be allowed to be procurement officers or procurement delegates.

We recommend that procurement training be mandatory for staff involved in procurement and that staff with limited procurement experience be supervised or mentored by skilled or specialist procurement staff. The training should particularly cover procurement from panels and standing offers, given this makes up the bulk of all procurements.

We recommend that Finance conduct routine audits of agency’s Austender listings and procurement files to ensure that Commonwealth procurements follow the Commonwealth Procurement Rules.



Submitting Person/Organisation

This submission is made by Andrew Smith, Special Consultant with National Advisory Pty Ltd, a strategic advisory firm based in Canberra.

Andrew Smith

Special Consultant

National Advisory Pty Ltd