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## Joint Committee of Public Accounts and Audit

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

### Submission by the Australian National Audit Office

#### Introduction

1. Procurement is an integral part of the way the Australian Government conducts business and provides services and is therefore core business for Commonwealth entities.<sup>1</sup> In 2021-22 the total value of procurement contracts entered into by entities that report on AusTender was around \$80.7 billion across 97,486 reported parent contracts<sup>2</sup> and amendments.<sup>3</sup>
2. While governments have always purchased some goods and services externally, since the 1990s public sector managers have increasingly relied on services and functions contracted from the private sector to improve government service delivery and achieve better value for money.<sup>4</sup> In 1996, it was estimated by the Industry Commission (the predecessor to the Productivity Commission) that the Commonwealth public sector contracted approximately \$8 billion of services.<sup>5</sup>
3. The year following the Industry Commission report into competitive tendering and contracting by public sector agencies the *Financial Management and Accountability Act 1997* (FMA Act) and *Commonwealth Authorities and Companies Act 1997* (CAC Act), together with the *Auditor-General Act 1997*, were enacted to reform the Australian Government's resource management framework to promote effective and accountable financial management.<sup>6</sup> The *Commonwealth Procurement Guidelines: Core Policies and Principles*, a precursor to the Commonwealth Procurement Rules (CPRs), were issued in the same year.<sup>7</sup>

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<sup>1</sup> Joint Committee of Public Accounts and Audit, Parliament of Australia, Report 472: Commonwealth Procurement – Second Report, Inquiry based on Auditor-General's report 9 and 12 (2017–18) and 61 (2016–17) (2018), p. 1.

<sup>2</sup> The original procurement contract notice published on AusTender is referred to as a parent contract. A contract may be amended on more than one occasion.

<sup>3</sup> ANAO analysis of AusTender data to September 2022.

<sup>4</sup> See for example, F Hilmer, M Rayner and G Taperell, *National Competition Policy*, Report of the Independent Committee of Inquiry into competition policy in Australia, 1993 AGPS, Canberra and Administrative Review Council, *The Contracting Out of Government Services*, Issues 16 Paper, AGPS, February 1997, pp. 2-3.

<sup>5</sup> Industry Commission, Report No 48 - Competitive Tendering and Contracting by Public Sector Agencies, 24 January 1996, p. 3.

<sup>6</sup> Commonwealth, *Parliamentary Debates*, Senate, 5 March 1997, Senator the Hon Ian Campbell, Parliamentary Secretary to the Treasurer.

<sup>7</sup> Joint Committee of Public Accounts and Audit, Parliament of Australia, Report 369: Australian Government Procurement (1999), p. 30.

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4. Sourcing of government activity from private sector participants raises important questions for policymakers regarding efficiency, quality and accountability - including the need for citizens to have access to information about how their money has been spent. Ethical considerations have also been prominent, including the potential for conflicts of interest to arise and preventing perceptions of, and actual corruption.

5. As outsourcing and contract management has increasingly characterised the modern public sector, so too has procedural guidance applying to Australian government procurement been recognised as an important aspect of the policy and regulatory landscape<sup>8</sup>. The relevant policy and legal frameworks have consistently embodied the important principles of value for money, open and effective competition, ethics and fair dealing, and accountability. These principles remain relevant today under the Commonwealth Procurement Rules.<sup>9</sup>

**The Commonwealth Procurement Rules**

6. The Commonwealth Procurement Rules (CPRs)<sup>10</sup>, which are issued by the Finance Minister under subsection 105B(1) of the *Public Governance, Performance and Accountability Act 2013* (PGPA Act), form the core of the Commonwealth procurement framework. They provide the basic compliance framework for regulated Commonwealth entities in undertaking procurements. As a legislative instrument the CPRs have the force of law.<sup>11</sup> The CPRs are supported by guidance and templates from the Department of Finance.<sup>12</sup> The Department of Finance also promulgates Australian Government policies concerning procurement (termed 'procurement-connected policies').

7. The CPRs set out requirements for procuring goods and services that must be observed by 'relevant entities'.<sup>13</sup> Appendix B of the CPRs defines 'relevant entities' as all non-corporate Commonwealth entities and corporate Commonwealth entities prescribed by the Finance Minister in section 30 of the Public Governance, Performance and Accountability Rule 2014 (PGPA Rule).

8. As at 15 November 2022, 24 out of 72 corporate Commonwealth entities are prescribed as 'relevant entities'. While structuring a government body as a corporate Commonwealth entity is usually done to provide a measure of autonomy from the government and its policies, the ANAO suggests that the key principles in the CPRs, such as obtaining value for public money and acting fairly and ethically when conducting procurements, should not be seen as a barrier to operating commercially or at arms-length from the government of the day. The ANAO also notes that the CPRs already contain requirements that have been tailored to the particular circumstances of prescribed corporate Commonwealth entities.<sup>14</sup>

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<sup>8</sup> *Competitive Tendering and Contracting: Guidance for Managers*, Commonwealth of Australia, DOFA, March 1998; and *Commonwealth Procurement Guidelines: Core Policies and Principles*, DOFA, March 1998.

<sup>9</sup> Joint Committee of Public Accounts and Audit, Parliament of Australia, Report 369: Australian Government Procurement, p. 31-33.

<sup>10</sup> The CPRs were amended by the Commonwealth Government, with effect from 1 July 2022.

<sup>11</sup> Further, the *Government Procurement (Judicial Review) Act 2018* provides suppliers with significant rights to challenge a government procurement process for contravention of the CPRs.

<sup>12</sup> These are published on the Department of Finance's Procurement Policy website ([Procurement | Department of Finance](#)) and Procurement Practice website ([Procurement Practice | Department of Finance](#)).

<sup>13</sup> Department of Finance, Commonwealth Procurement Rules 1 July 2022, paragraphs 4.9 and 4.10.

<sup>14</sup> For example, all corporate Commonwealth entities are not required to use the standardised suite of contract templates (paragraph 6.10) and specified corporate Commonwealth entities are subject to amended procurement and reporting thresholds (paragraphs 3.7 and 3.8).

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9. The committee may wish to examine whether the criteria that have been used to exempt 48 corporate Commonwealth entities from the CPRs remain appropriate. It may also wish to consider whether applying the CPRs to all corporate Commonwealth entities by default and then permitting exemptions and modifications by legislative instrument, rather than only applying the CPRs to those entities prescribed by legislative instrument, would strengthen the regulatory framework and improve transparency and accountability.<sup>15</sup>

**Procurement - a self-regulatory framework**

10. The Commonwealth procurement framework (and the larger resource management framework in which it sits) operates under a self-regulatory approach. In this respect it is similar to other public sector regulatory frameworks,<sup>16</sup> where policy owners establish the rules of operation and then largely leave it to entity accountable authorities to be responsible for compliance. There are no formal mechanisms in these frameworks to provide assurance on compliance and whether the framework is having the intended impact. Often, the ANAO provides the only source of compliance reporting within the framework.

11. While it is appropriate for the accountable authority to be responsible and accountable for ensuring their entity complies with a whole-of-government policy framework, policy owners have a responsibility to monitor the effectiveness of the framework. Policy owners should at least have processes in place to obtain reliable evidence on compliance with the framework and be able to accurately advise government on whether the framework is achieving its intended results. They should also be willing to modify their regulatory approach if the framework is not operating effectively.

12. For example, beginning in the 2006-07 financial year, Chief Executives of each FMA Act agency were required to provide an annual Certificate of Compliance.<sup>17</sup> Directors of General Government Sector CAC Act authorities and wholly-owned companies were also required to provide a report on compliance with relevant aspects of CAC Act legislation. The certification process was designed to promote awareness and understanding of the requirements of the financial management framework and was used to prepare public reports to the Parliament on compliance with the financial management framework.<sup>18</sup>

13. Subsequent to a recommendation in the Independent Review of Whole-of-Government Internal Regulation, that Finance cease centrally mandated compliance certification, monitoring and reporting<sup>19</sup>, the compliance reporting process from the 2015-16 financial year was changed to require entities to report significant non-compliance with finance law to both the Minister for Finance and the responsible Minister. In the years following removal of the external mandatory reporting, the ANAO observed impacts on how entities identified and assessed the significance of

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<sup>15</sup> Under this approach a decision to exempt an entity from the CPRs (rather than include) would be subject to parliamentary scrutiny under Chapter 3 of the *Legislation Act 2003*.

<sup>16</sup> For example, the Attorney-General's and Home Affairs departments for cyber security; and the Australian Public Service Commission for integrity.

<sup>17</sup> See Auditor-General Report No. 38 2010—11 *Management of the Certificate of Compliance Process in FMA Act Agencies*.

<sup>18</sup> See for example, Commonwealth of Australia, *Certificate of Compliance Report to the Parliament 2012-13*, Department of Finance, Canberra, 2014.

<sup>19</sup> Belcher, B. *Independent Review of Whole-of-Government Internal Regulation*, Volume 1, Department of Finance, p. 34.

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non-compliance, and a reduction in detailed internal reporting provided to audit committees and accountable authorities.<sup>20</sup>

14. Reporting compliance with procurement requirements is limited to the inclusion of instances of significant non-compliance in entities' annual reports. This impacts Finance's ability, as the policy owner, to measure and assess the effectiveness of the procurement framework, identify areas of risk to the sector and to implement timely intervention strategies. Equally, the disaggregated reporting by entities in annual reports reduces transparency and accountability to the Parliament.

15. There would be merit in the Committee considering whether the reporting and assurance frameworks for internal regulation, such as the CPRs, are fit-for-purpose to effectively manage risk.

**The procurement framework is principles-based**

16. The Commonwealth procurement framework is largely principles-based, with prescriptive rules and mandatory requirements kept to a minimum.

17. The principles are straightforward and readily visible in the table of contents of the Commonwealth Procurement Rules (CPRs). The core principle is achieving value for money, and this is enhanced and complemented by other key principles such as encouraging competition; efficient, effective, economical and ethical procurement; accountability and transparency; and risk management.

18. ANAO audits in this space have identified cases where entities seek to comply with the letter of the procurement rules without considering how this achieves the intent of the rules. Often minimum compliance has the appearance of creating convenience for the entity and the provider rather than seeking the fundamental outcomes contemplated in the CPRs, including value for money for the taxpayer.

19. While examples of good practice can be found, there are also many instances where implementation of procurement arrangements falls short of reasonable standards and are primarily an exercise in 'form over substance'.<sup>21</sup> As shown in Auditor-General Report No.42 2021-22 *Procurement of Delivery Partners for the Entrepreneurs' Programme*, an entity may expend significant effort on a procurement that is divorced from the intent of the CPRs.<sup>22</sup>

20. The CPRs do not impose unnecessary regulatory burden on Commonwealth entities and are no barrier to procurements that are genuinely in the national interest. They provide a framework for entities to take a risk-based approach commensurate to the scale, scope and complexity of procurement activities. While shortcomings were identified during the audit, Auditor-General Report No.15 2021-22 *Department of Defence's Procurement of Six Evolved Cape Class Patrol Boats* demonstrates that that CPRs are sufficiently flexibly to support efficient and innovative procurement

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<sup>20</sup> Auditor-General Report No. 47 2017–2018 *Interim Report on Key Financial Controls of Major Entities*, paragraph 10; Auditor-General Report No. 46 2018–2019 *Interim Report on Key Financial Controls of Major Entities*, paragraph 1.39; Auditor-General Report No. 38 2019–2020 *Interim Report on Key Financial Controls of Major Entities*, paragraphs 7, 1.67. See also Department of Finance, *Resource Management Guide No. 214: Notification of significant non-compliance with the finance law (RMG 214)*, Department of Finance, Canberra, May 2019, paragraphs 22 to 25, which was amended in 2019 to include guidance encouraging entities to monitor non-significant non-compliance.

<sup>21</sup> Auditor-General Report No.30 2021–22 *Procurement by the National Capital Authority*; Auditor-General Report No.42 of 2021–22 *Procurement of Delivery Partners for the Entrepreneurs' Programme*, Chapter 2.

<sup>22</sup> Auditor-General Report No.42 2021–22 *Procurement of Delivery Partners for the Entrepreneurs' Programme*, Chapter 2.

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practices; enabling the Department of Defence to conduct a sole source procurement in response to an unsolicited proposal that was not contemplated by its existing procurement program.<sup>23</sup>

21. Discussions and concerns that focus on a perceived burden of compliance with the procurement rules risk losing sight of the benefits to Australian business and taxpayers that the principles are intended to deliver, such as obtaining the best value for money and that the Australian Government is a fair player that strategically supports Australian business. Failure to manage procurement processes effectively can have a significant negative reputational impact on the entity and diminish public trust.

### Specific issues observed through audit work

22. Against this background, the ANAO has outlined below some key issues and suggestions for the JCPAA to consider as part of its inquiry into Commonwealth procurement:

- Demonstrating value for money requires a comprehensive and carefully considered decision-making process that is fully documented
- The underutilisation of open and competitive procurement processes compared with other less competitive mechanisms is both inconsistent with the principle of achieving value for money and at odds with the Australian Government's stated preferred approach.
- Contract management is an integral part of the procurement lifecycle, and influences whether value for money is achieved. Audits frequently identify shortcomings in contract management arrangements, which compromise value for money outcomes.
- Transparency and accountability can be improved – both through entity record keeping practices and AusTender reporting.
- The regularity with which deficiencies in procurement activities are observed in performance audits suggests a deficit in institutional capability and proficiency.

### Demonstrating value for money

23. Value for money is the central procurement principle. Officials must be satisfied, after reasonable inquiries, that the procurement to be undertaken achieves a value for money outcome.<sup>24</sup> To achieve this outcome, the CPRs state that relevant entities should:

- encourage competitive and non-discriminatory processes;
- use public resources in an efficient, effective, economical and ethical manner that is not inconsistent with the policies of the Commonwealth;
- make decisions in an accountable and transparent manner;
- appropriately consider the risks; and
- conduct a process commensurate with the scale, scope and risk of the procurement and business requirement.

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<sup>23</sup> Auditor-General Report No.15 2021-22 *Department of Defence's Procurement of Six Evolved Cape Class Patrol Boats*, paragraph 8. The shortcomings in the audit related to improvements that the Department of Defence could make to the management of probity when handling unsolicited proposals. The ANAO recommended that the Department of Defence develop and implement specific requirements for the management of probity when engaging with industry on unsolicited proposals (paragraphs 2.11 to 2.12).

<sup>24</sup> Paragraph 4.4 of the CPRs.

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24. There is no universal formula for measuring and assessing value for money. Achieving value for money requires the analysis of a wide range of factors and is not determined by price alone. The CPRs provide a non-exhaustive list of factors to consider when assessing value for money including fitness for purpose, a potential supplier's experience and performance history, flexibility, environmental sustainability and whole-of-life costs. Financial and non-financial factors are both critical elements for assessing value for money.<sup>25</sup>

25. Carefully considering what constitutes value in a particular procurement, appropriately documenting the decision-making process and value for money assessment, and ensuring the resulting contract contains appropriate requirements to meet key performance indicators reflective of the criteria identified as delivering value for money are all important factors for achieving the best value for money outcome in the procurement process. They provide reassurance to the entity, suppliers, government and the public that the best outcome has been achieved.

26. In three of the five audits subject to this inquiry entities had conducted procurements for which they could not demonstrate value for money had been achieved.<sup>26</sup> This is sometimes attributable to a failure to make or retain sufficient documentation in relation to the value for money assessment. More commonly, an entity may attest that value for money has been achieved in documentation, but when scrutiny is applied it becomes apparent that the assessment of value is not meaningful or methodical, or does not account for flaws in the conduct of the procurement.

27. Entities are better placed to demonstrate value for money when procurement is conducted on a competitive basis; provided the evaluation criteria are sound and are followed by the entity in a genuine and transparent way, value for money can be readily supported. A choice of less competitive procurement methods makes demonstrating value for money more difficult, beginning with the need to explain before the process commences why the non-competitive process would deliver value for money. Time constraints or an existing business relationship are not in themselves sufficient to justify a non-competitive procurement process.<sup>27</sup>

28. Paragraph 2.6 of the CPRs provides that an accountable authority may vary the application of the CPRs in limited circumstances.<sup>28</sup> Even if an exemption is obtained under paragraph 2.6, the core rules of achieving value for money and conducting the procurement in a fair, transparent and accountable manner, continue to apply to the procurement.<sup>29</sup> Auditor-General Report No.37 2019–20 *Procurement of Garrison Support and Welfare Services* provides an example where an accountable authority retained the requirement to be satisfied of value for money when invoking paragraph 2.6, but the subsequent procurement did not document the basis on which the three selected providers had been chosen to receive a limited request for tender.<sup>30</sup>

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<sup>25</sup> Failure to establish proper methodologies and processes to assess value for money adequately could potentially result in a complaint under the *Government Procurement (Judicial Review) Act 2018*.

<sup>26</sup> Auditor-General Report No.30 2021–22 *Procurement by the National Capital Authority*, paragraphs 2.31, 2.65, Case Study 2; Auditor-General Report No.42 2021–22 *Procurement of Delivery Partners for the Entrepreneurs' Programme*, Chapter 2; Auditor-General Report No.5 2022-23 *Digital Transformation Agency's Procurement of ICT-Related Services*, paragraphs 3.5, 3.55, 3.69.

<sup>27</sup> Auditor-General Report No.30 2021–22 *Procurement by the National Capital Authority*, paragraph 2.45.

<sup>28</sup> Another exemption is contained in paragraph 10.3 of the CPRs. If a circumstance listed in paragraph 10.3 applies, the Commonwealth entity may run a limited tender, rather than an open approach to market.

<sup>29</sup> Auditor-General Report No.22 2020–21, *Planning and Governance of COVID-19 Procurements to Increase the National Medical Stockpile*, paragraphs 3.55 to 3.62.

<sup>30</sup> Auditor-General Report No. 37 2019–20, *Procurement of Garrison Support and Welfare Services*, paragraphs 2.15 to 2.20.

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**Effective use of competition**

29. The CPRs encourage competition as a tool to achieve value for money and to ensure Australian businesses, including small to medium enterprises, have a fair and equitable opportunity to secure government business. Recent audits demonstrate that the APS can make smarter use of competition in its dealings with suppliers without imposing unreasonable costs on entities and potential suppliers. Evidence suggests that the decision to exempt procurements from open competition has often been based on it being a less costly and easier process for the entity to undertake, rather than a focus on the overall value of the use of taxpayers' funds.

30. The obvious means of promoting competition is to use open tenders. Despite the CPRs emphasising the benefits of open and effective competition, limited tender is a commonly used procurement approach. ANAO analysis of AusTender data shows that the reported use of open tender procurement methods has increased from approximately 45% of all contracts and amendments in 2017-18 to approximately 54% in 2021-22.<sup>31</sup> These figures include procurements arising from an approach to a single supplier due to the reporting requirements for panel arrangements, an issue discussed further below. The committee may wish to make inquiries to estimate the true rate of open tenders or consider whether in absolute terms the proportion of open tenders is appropriate.

31. Competitive pressure should still be applied in processes that are not open tender, where feasible. Three of the audit reports subject to this inquiry illustrate how this may not occur in practice, including approaching one potential supplier only, or limiting the number of potential suppliers approached on grounds that are not permitted under the CPRs, such as including conditions for participation that unfairly limit competition.<sup>32</sup>

**Panel arrangements**

32. Panel arrangements are designed to improve efficiency and reduce risk, not reduce fair and transparent competition. Establishment of a panel should be viewed as a preliminary process intended to facilitate future procurement processes, which themselves should be conducted in a manner commensurate with the scale, scope and risk of the procurement and business requirement. Auditor-General Report No.5 2022-23 *Digital Transformation Agency's Procurement of ICT-Related Services* contains examples where the use of panel arrangements fell short of conducting a proper procurement process in line with the requirements and intent of the CPRs.<sup>33</sup>

33. Department of Finance guidance states that 'even though value for money has been demonstrated for the supplier to be on a panel, you will still need to demonstrate value for money when engaging from a Panel, and competition is one of the easier ways to demonstrate this'.<sup>34</sup> This guidance could perhaps be clearer if it referred to panel members as those who have demonstrated

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<sup>31</sup> ANAO analysis of AusTender data to September 2022.

<sup>32</sup> Auditor-General Report No.30 2021-22 *Procurement by the National Capital Authority*, paragraphs 2.42 to 2.46, case study 1 and case study 2; Auditor-General Report No.42 2021-22 *Procurement of Delivery Partners for the Entrepreneurs' Programme*, paragraph 3.48; Auditor-General Report No.5 2022-23 *Digital Transformation Agency's Procurement of ICT-Related Services*, paragraph 3.16 and case study 2.

<sup>33</sup> Auditor-General Report No.5 2022-23 *Digital Transformation Agency's Procurement of ICT-Related Services*, paragraph 3.32.

<sup>34</sup> Department of Finance, *Procuring from a panel – panels 101*, Finance, Canberra, 2021, available from <https://www.finance.gov.au/government/procurement/buying-australian-government/procuring-panel-panels-101> [accessed 18 November 2022]

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the *potential* to provide value for money, to avoid confusion around when value for money must be assessed.

34. While the number of suppliers approached should be appropriate to the scale, scope and risk of the procurement, it is obvious that approaching one supplier alone makes it harder to secure and demonstrate value for money. Auditor-General Report No.5 2022-23 *Digital Transformation Agency's Procurement of ICT-Related Services* and Auditor-General Report No.4 2020-21 *Establishment and Use of ICT Related Procurement Panels and Arrangements* provide examples of procurements where a single supplier on a panel was approached, invariably placing the entity in the position of a price-taker, including that prices can exceed agreed rates specified in the panel agreement.<sup>35</sup> Delegates can pose an obvious question to test the logic of a proposed single supplier approach: 'what is the argument for not approaching multiple suppliers?'

35. Under the CPRs, procurements involving a panel arrangement, even where only one supplier is approached to tender, are reported on AusTender as an open tender if this was the method used to select the panel. This means that the limited competitive pressure on the tenderer arising from a sole source approach is not transparent to the public. A requirement to more accurately report these procurements would support entities to choose competitive processes more often.

36. Recommendation 5 of Auditor-General Report No.5 2022-23 *Digital Transformation Agency's Procurement of ICT-Related Services* was addressed to the Department of Finance and recommended that 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. The CPRs were amended on 1 July 2022 to encourage entities to approach multiple suppliers on a panel (in line with existing guidance from the Department of Finance), and the Department of Finance advised that it would consider the reporting requirement in the course of making future updates to AusTender.<sup>36</sup>

37. The committee may wish to ask the Department of Finance for an update on progress towards a revised reporting requirement and what form it might take. It may be useful to ask how revised reporting requirements would handle an example provided in Auditor-General Report No.30 2021-22 *Procurement by the National Capital Authority*. In the example, a panel was established via open tender, but the integrity of the open tender was subsequently undermined when an approach to panel members was extended to non-panelled members chosen by the entity.<sup>37</sup>

38. Contracting through procurement panels has been growing significantly both in terms of the number of contract notices and their value. It remains common for a relatively small proportion of suppliers on a panel to be awarded the majority of contract value when the panel is accessed. For example, for eight of the top ten panel arrangements by total committed value over the ten years analysed, at least 80% of the total committed value of contracts and amendments associated with the panel arrangement were reported to be supplied by less than a third of suppliers represented on the panel.<sup>38</sup>

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<sup>35</sup> Auditor-General Report No.5 2022-23 *Digital Transformation Agency's Procurement of ICT-Related Services*, paragraph 3.29 and paragraphs 3.56 and 3.57; Auditor-General Report No.4 2020-21 *Establishment and Use of ICT Related Procurement Panels and Arrangements*, paragraphs 4.25 to 4.36.

<sup>36</sup> Paragraphs 9.13 and 9.14 of the CPRs. See also Auditor-General Report No.5 2022-23 *Digital Transformation Agency's Procurement of ICT-Related Services*, paragraphs 3.40 to 3.45.

<sup>37</sup> Auditor-General Report No.30 2021-22 *Procurement by the National Capital Authority*, paragraph 2.48.

<sup>38</sup> Auditor-General Report No. 27 2019-20 *Australian Government Procurement Contract Reporting Update*, paragraph 4.5.



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39. The Committee may wish to examine whether additional monitoring and reporting on the use of panel arrangements would be appropriate to promote transparency and ensure they are not inadvertently constraining competition.

**Ethical use of public resources**

40. The ethical administration of government procurements and contracts is a key consideration in performance audits of procurement activities.

41. The CPRs are the reference point for evaluating whether Australian Public Service employees are fulfilling their duty under the APS Code of Conduct to act properly and ethically in the course of procurement. APS employees are legally bound to act with care and diligence and to use Commonwealth resources to achieve the best results for the Australian community.<sup>39</sup>

42. All officials of Commonwealth entities are also subject to the duties set out in sections 25–29 of the PGPA Act, some of which will be relevant to procurement activities. In particular, officials must not improperly use their position, or information obtained because they are an official to gain or seek to gain a benefit or advantage for themselves or any other person or seek to cause detriment to the Commonwealth or another person (sections 27 and 28). Moreover, officials must disclose details of any material personal interest that relates to the affairs of the entity (section 29).

43. The CPRs list mandatory ethical behaviours for officials undertaking a procurement process. Paragraph 6.6 of the CPRs includes:

- recognising and dealing with conflicts of interest
- dealing with potential suppliers, tenderers and suppliers equitably, including by seeking internal or external advice on probity issues and not accepting inappropriate gifts or hospitality
- carefully considering the use of public resources
- complying with all directions, including relevant entity requirements, in relation to gifts or hospitality, the *Australian Privacy Principles of the Privacy Act 1988* and the security provisions of the Criminal Code

44. Paragraph 6.6 is not an exclusive list of ethical behaviours and should be viewed in conjunction with the PS Act<sup>40</sup>, the PGPA Act, and any other law that imposes obligations on APS officials to act ethically and be perceived as acting ethically in the course of using public resources. The behaviours listed in paragraph 6.6 are specifically identified as areas of highest risk in the course of procurement activity.

45. Four of the five audits subject to this inquiry contained adverse findings relating to ethical behaviour and probity risks in line with those outlined in paragraph 6.6. Issues identified in the audits included failure to adhere to policy requirements such as mandatory fraud training, flawed processes for appointing a probity adviser, and a failure to take action in response to identified probity risks and proposed treatments.<sup>41</sup>

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<sup>39</sup> Sections 10 and 13, *Public Service Act 1999*.

<sup>40</sup> Sections 10 and 12 to 14, *Public Service Act 1999*.

<sup>41</sup> Auditor-General Report No.30 2021-22 *Procurement by the National Capital Authority*, paragraphs 2.69 to 2.84; Auditor-General Report No.42 2021-22 *Procurement of Delivery Partners for the Entrepreneurs' Programme*, paragraphs 2.74 to 2.97; Auditor-General Report No.5 2022-23 *Digital Transformation Agency's Procurement of ICT-Related Services*, paragraphs 2.49 to 2.77; Auditor-General Report No.15 2021-22 *Department of Defence's Procurement of Six Evolved Cape Class Patrol Boats*, paragraphs 2.76 to 2.86.

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46. Two of the audits provide examples where the role of a probity adviser was not understood or implemented effectively. Auditor-General Report No.5 2022-23 *Digital Transformation Agency's Procurement of ICT-Related Services* reports that the need for a probity adviser was not assessed as required for all but one procurement sampled; for this procurement, there was no evidence of any advice given by the probity adviser.<sup>42</sup> In Auditor-General Report No.42 2021-22 *Procurement of Delivery Partners for the Entrepreneurs' Programme* the entity compromised the independence of its probity adviser and did not implement in full the probity risk management measures recommended by the probity adviser.<sup>43</sup>

47. Probity advisers should be engaged for a purpose, not as a 'tick-the box' exercise. The appearance of appointing a probity adviser alone does not control probity risks. Entities need to demonstrate value for money when procuring a probity adviser, consider probity advice and document why advice has not been accepted.

48. Notably, three of the five audits demonstrated failures in procedures to ensure officials declare conflicts of interest that may call into question whether procurement was conducted ethically.<sup>44</sup> Actual or perceived conflicts of interest can damage trust in the Australian Government, and damage the reputations of entities and officials, potential service providers and service providers. Requiring declarations and managing declared conflict risks from persons involved in procurement is a very simple control to administer.

**Transparency and accountability**

49. The CPRs mandate that entities create and maintain records that provide accountability and transparency around procurement activity. This suite of documentation should stand on its own as a scrutable record of a procurement process. In particular:

- officials must maintain appropriate documentation for each procurement commensurate with the scale, scope and risk of the procurement
- documentation must be retained in accordance with the *Archives Act 1983*.
- after the entity has selected a supplier, it must have appropriate documentation with that supplier, such as a written contract or purchase order.

50. Performance audits routinely find that entities have not complied with these requirements in some way.<sup>45</sup> Auditor-General Report No.6 2021-22 *Management of the Civil Maritime Surveillance Services Contract* reported that the audit was impeded by the entity's failure to maintain records as required by the CPRs.<sup>46</sup> The ANAO is regularly required to examine additional sources of evidence

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<sup>42</sup> Auditor-General Report No.5 2022-23 *Digital Transformation Agency's Procurement of ICT-Related Services*, paragraphs 2.54.

<sup>43</sup> Auditor-General Report No.42 2021-22 *Procurement of Delivery Partners for the Entrepreneurs' Programme*, paragraph 14.

<sup>44</sup> Auditor-General Report No.5 2022-23 *Digital Transformation Agency's Procurement of ICT-Related Services*, paragraphs 2.57-2.68; Auditor-General Report No. 42 2021-22 *Procurement of Delivery Partners for the Entrepreneurs' Programme*, paragraphs 2.82-2.86; Auditor-General Report No.30 2021-22 *Procurement by the National Capital Authority*, paragraphs 2.72-2.80.

<sup>45</sup> Auditor-General Report No.30 2021-22 *Procurement by the National Capital Authority*, paragraphs 10-18. Auditor-General Report No.42 2021-22 *Procurement of Delivery Partners for the Entrepreneurs' Programme*, paragraph 15; Auditor-General Report No.5 2022-23 *Digital Transformation Agency's Procurement of ICT-Related Services*, paragraphs 18 to 19.

<sup>46</sup> Auditor-General Report No.6 2021-22 *Management of the Civil Maritime Surveillance Services Contract*, paragraph 2.2.

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such as departmental emails and conduct meetings with officials to understand the facts of a procurement process.

### **Contract management**

51. Contract management is a critical element in public administration. The JCPAA reinforced this view as far back as 2000 when it noted “the search for excellence in contract management as one of the pressing challenges for the Australian Public Service”.<sup>47</sup>

52. Procurement should be seen in a whole-of-life context, from the initial tender of the goods/service to negotiation and finalisation of a contract and planning for what occurs next. A procurement process that results in a favourable contract does not actually achieve value for money if a contractor fails to perform in accordance with the terms of the contract.<sup>48</sup> ANAO audits have found that supplier performance against contractual commitments is not systematically monitored.<sup>49</sup>

53. Importantly, entities should plan for the expiry of contracted services so that adequate time is available to conduct a competitive procurement process before the contract expires.<sup>50</sup> This should include evaluating the contract before its expiry to inform market testing on a replacement.

54. Contract succession planning and management policies need to identify the renewal options available to organisations and provide guidance on timeframes for ensuring service continuity. The simple practice of rolling-over contracts as they expire may be the only option available to entities that fail to appropriately plan for contract succession. Poor planning can lead to decisions by accountable authorities to inappropriately invoke exceptions in the Commonwealth Procurement Rules simply to maintain continuity of service.

55. Entities should also pay close attention to transition arrangements, particularly where service delivery is transferred from one provider to another. This is to ensure not only that there is a smooth transition but also to minimise the chances of a loss of service delivery and an adverse impact on clients and other stakeholders as the new provider builds the necessary expertise and knowledge.

### **Contract extensions and variations**

56. The procurement principles, in particular value for money, are equally applicable where the extension or variation of a contract is being contemplated. The value of public funds committed through contract extensions is significant: AusTender reporting for 2021—22 shows roughly \$29.8 billion of contract amendments, compared to roughly \$50.9 billion of parent contracts.<sup>51</sup> Entities should ensure that contract managers, and any individuals advising them, understand that contract extensions and variations that are inconsistent with the key procurement principles can be detrimental to the conduct of a transparent and accountable process and to the achievement of value for money for the taxpayer.

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<sup>47</sup> Joint Committee of Public Accounts and Audit 2000, *Contract Management in the Australian Public Service*, Report 379, Canberra. October.

<sup>48</sup> Auditor-General Report No.6 2021-22 *Management of the Civil Maritime Surveillance Services Contract*, paragraphs 10 to 13.

<sup>49</sup> Auditor-General Report No.5 2022-23 *Digital Transformation Agency's Procurement of ICT-Related Services*, paragraphs 4.25 to 4.30.

<sup>50</sup> Auditor-General Report No.42 2021-22 *Procurement of Delivery Partners for the Entrepreneurs' Programme*, recommendation 6.

<sup>51</sup> ANAO analysis of AusTender data to September 2022.

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57. The reports before the inquiry include examples where decisions to extend or vary contracts might be driven by convenience for entities and officials (sometimes termed ‘leveraging’ an existing contract) rather than an effort to get the best results for the Australian community. Auditor-General Report No.5 2022-23 *Digital Transformation Agency’s Procurement of ICT-Related Services* contains several examples where contract variations were used unethically and without adequate consideration of value for money.<sup>52</sup> This included a contract that was varied ten times over two years, increasing from its original value of \$121,000 to \$4,942,080 and expanding its scope from providing advice on a business case to a range of services for four different teams.<sup>53</sup>

58. Auditor-General Report No.6 2021-22 *Management of the Civil Maritime Surveillance Services Contract* provides an example of a contract extension option that was exercised before contractor performance over the majority of the contract could be assessed, with a view to reducing annual costs.<sup>54</sup> Entities may be tempted to extend contracts that were awarded under flawed procurement processes, furthering the consequences of those actions, as an easier alternative to conducting a new process.<sup>55</sup>

59. Where an amendment to increase the value of a contract has been reported on AusTender, the extent of the increase has often been significant. For example, Auditor-General Report No.27 2019–20 *Australian Government Procurement Contract Reporting Update* showed that 41.8 per cent of amended parent contracts had their value increase by more than 100 per cent, including 19.9 per cent of amended contracts where the value increased by 200 per cent or more.<sup>56</sup> AusTender requires entities to report the reason for amendments to the contract, which is recorded as a free-text field description; as a result, the transparency provided by this field is only as good as the information the reporting officer chooses to input. Both issues are illustrated in Contract Notice CN179354.<sup>57</sup> The contract notice concerns a parent contract for \$96 million commencing in 27 June 2009 that has been amended 237 times (including multiple extensions to the duration of the contract) and now has a reported value of around \$496 million (517% of the reported original contract value). The reasons provided for contract amendments range from descriptions of specific services to descriptions containing only work order numbers or generic statements such as ‘additional project costs’.

## Capability shortfalls in the APS

60. An institutional capability to buy well and manage what is bought is fundamental to the delivery of many government services.

61. The issues raised in this submission frequently originate with officials who do not fully understand the procurement framework, including the requirements in the CPRs. This is often the

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<sup>52</sup> Auditor-General Report No.5 2022–23 *Digital Transformation Agency’s Procurement of ICT-Related Services*, paragraphs 4.37 to 4.42.

<sup>53</sup> Auditor-General Report No.5 2022–23 *Digital Transformation Agency’s Procurement of ICT-Related Services*, paragraphs 4.37 to 4.38.

<sup>54</sup> Auditor-General Report No.6 2021–22 *Management of the Civil Maritime Surveillance Services Contract*, paragraph 1.4.

<sup>55</sup> Auditor-General Report No.42 2021–22 *Procurement of Delivery Partners for the Entrepreneurs’ Programme*, recommendation 6.

<sup>56</sup> Auditor-General Report No.27 2019–20 *Australian Government Procurement Contract Reporting Update*, paragraph 2.17.

<sup>57</sup> The notice and the described reason for the amendments can be viewed at <https://www.tenders.gov.au/Cn/Show/f9da4a11-e7fd-9113-2e0b-25658ba8ec3c>.

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case for officials for whom procurement is an infrequent or secondary responsibility. There is strong evidence that there are shortcomings in the Australian Public Service's institutional capacity and capability for procurement and contract management.

62. Many procurement processes involve complex requirements and judgements as well as substantial resources. There is a particular risk that the private sector service provider may have greater information and knowledge about the task than the Australian Government entity. If they are not to be disadvantaged, entities need a level of market knowledge and technical skills matching those prevailing amongst private sector service providers.

63. It is important that entity officials have or are able to draw on guidance and training as well as relevant expertise to enable them to carry out their procurement activities efficiently and effectively, and in compliance with the intended government and entity requirements.<sup>58</sup> A lack of adequate knowledge and expertise in procurement may lead to serious implications for entities and officials, including non-compliance with the CPRs and potential breaches of the PGPA Act or APS Code of Conduct, and compromise the achievement of value for money outcomes. Strengthening the procurement and contract management capability in the APS, should be a priority for public sector leaders.

64. Public procurement is an underdeveloped professional discipline. Despite the scale of procurement undertaken by many entities, the execution of the procurement process is often viewed as a compliance obligation, rather than as a strategic capability delivering broad benefits.

65. Some larger entities have sought to build their procurement capability and invest in a professional procurement function, such as the Departments of Defence and Home Affairs. Auditor-General Report No.6 2021–22 *Management of the Civil Maritime Surveillance Services Contract* gives an indication of the results of Department of Home Affairs Procurement Reform Programme.<sup>59</sup> Despite these examples, the extent of investment and authority vested in procurement officials across the sector is variable. As demonstrated in Auditor-General Report No.5 2022–23 *Digital Transformation Agency's Procurement of ICT-Related Services*, building a team of procurement experts will not help officials who ignore the expert advice.<sup>60</sup>

66. In response to a recommendation of the Independent Review of the Australian Public Service, in 2020 the APSC established human resources, digital and data professional streams aimed at improving practice in these areas across the APS. The committee may wish to investigate whether a procurement professional stream could help to promote procurement as a strategic function critical to government service delivery, develop the commercial capabilities of officials, and improve procurement and contract management practices and outcomes in the APS. As shown in Figure 1, the amount of public money spent by the public service on human resources is in the order of \$49 billion in 2020–21 and a professional stream has been identified in this broad area of public sector administration. On the other hand, the amount of money spent by the public service in the course

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<sup>58</sup> Refer to Auditor-General Report No.6 2021-22 *Management of the Civil Maritime Surveillance Services Contract* and Auditor-General Report No.5 2022-23 *Digital Transformation Agency's Procurement of ICT-Related Services*.

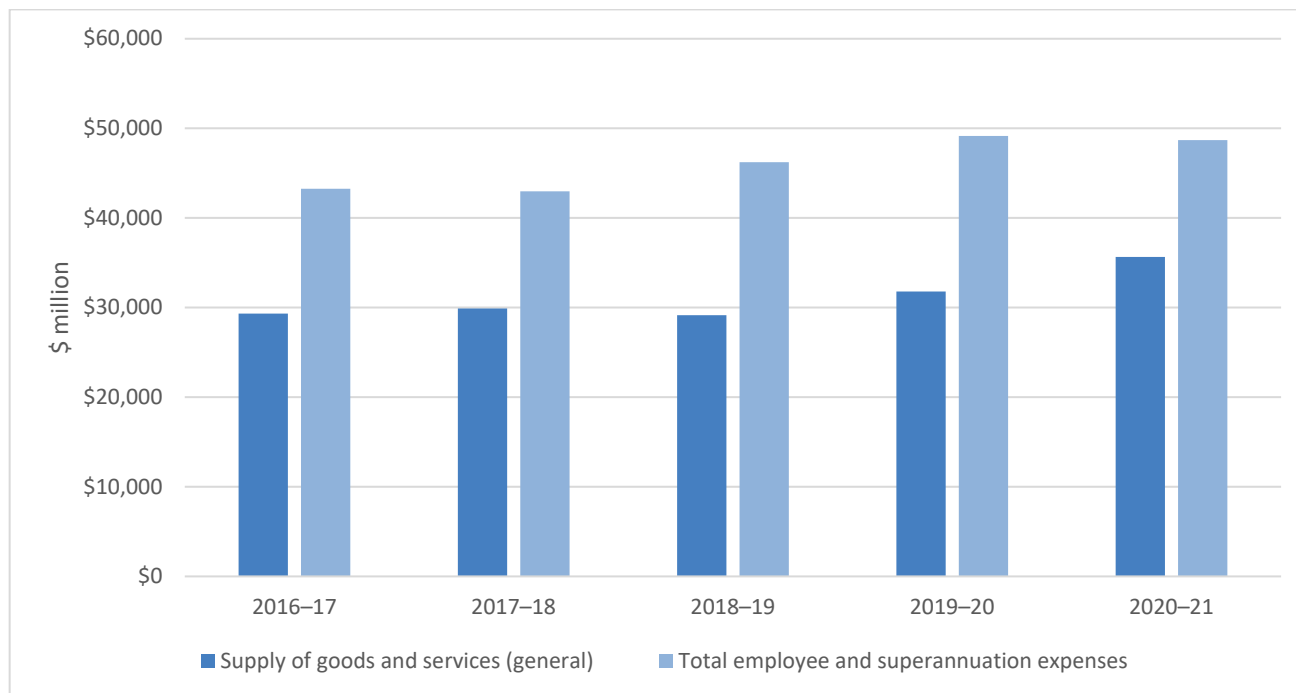
<sup>59</sup> Auditor-General Report No. 6 of 2021–22 *Management of the Civil Maritime Surveillance Services Contract*, paragraphs 2.25 to 2.27; see also Auditor-General Report No.37 2019–20 *Procurement of Garrison Support and Welfare Services*, Table A.10.

<sup>60</sup> Auditor-General Report No.5 2022-23 *Digital Transformation Agency's Procurement of ICT-Related Services*, paragraph 4.39 and case study 6.

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of procuring goods and services was in the order of \$36 billion in 2020–21.<sup>61</sup> Human resources management may be a useful comparator when considering the degree of professionalisation that would be appropriate for procurement and contract management.

**Figure 1: General Government Sector expenses**



Source: Commonwealth of Australia, Consolidated Financial Statements (2017–18 to 2020–21).

<sup>61</sup> The figures represent actual expenditure, not the potential maximum contract value that is reported on AusTender.