

Submission to the Joint Committee of Public Accounts and Audit (JCPAA)
Inquiry into Commonwealth Procurement Practices

The five ANAO investigations selected as a starting point and terms of reference for this Inquiry¹ highlight a number of key challenges and failure points.

An analysis of the ANAO’s list of recommendations across all five reports is provided in Table 1 below. The great majority of recommendations relate to process improvement and process oversight / audit.

Table 1: Analysis of the ANAO recommendations by category

Recommendation	Count	Recommendation	Count
Process Improvement	15	Auditing / Oversight	6
Policy Improvement	5	Contract Management	4
Improved Reporting	4	Staff Training / Skills	2

Process improvement and improved compliance are clearly required, although process improvement alone is unlikely to be sufficient to ensure improved ‘value-for-money’ outcomes for the Commonwealth of Australia.

This submission is intended to draw attention to a number of other key factors that will improve the effectiveness, efficiency, transparency and outcome-focus of procurement teams. The ANAO reports do touch on some of these factors, but do not highlight them to the degree to which they can impact the delivery of value-for-money outcomes.

Fixing the process is not enough - it requires skilled staff

1) ‘Procurement’ is not an administrative task, but a commercial task

Procurement is a specialist profession. It is a subject taught at universities, there is a chartered industry body and a curriculum of continuing professional development. That ‘process knowledge’ is typically embedded in an organisation’s procurement process.

In addition to a sound process, effective procurement requires commercial skills, business acumen and professional negotiation skills. None of these are taught at universities and business schools. They require real-world expertise and training.

The ANAO Report on Maritime Surveillance Services noted that “*the department had not ensured that each of its contract managers had appropriate training or experience.*”²

In spite of its prominence in the report, this important insight was not ultimately reflected in a specific recommendation by the ANAO to either engage experienced procurement staff or to train staff in negotiation skills. Either strategy could ensure that the department is equipped to manage supplier performance shortfalls and to negotiate contract change proposals without compromising value-for-money.

¹ No. 6 (2021-22) Management of the Civil Maritime Surveillance Services Contract, No. 15 (2021-22) Department of Defence’s Procurement of Six Evolved Cape Class Patrol Boats, No. 30 (2021-22) Procurement of the National Capital Authority, No. 42 (2021-22) Procurement of Delivery Partners for the Entrepreneurs’ Programme, and No. 5 (2022-23) Digital Transformation Agency’s Procurement of ICT Related Services.

² No. 6 (2021-22) Management of the Civil Maritime Surveillance Services Contract, pages 8, 9, 18, 26, 27...

2) The process needs fewer guard dogs and more guide dogs

It can probably be argued that the majority of breaches of procurement rules and processes are not motivated by malice, malfeasance, favouritism or corruption, but simply by misinterpretation of the rules, pressure of time, lack of experience or lack of expert guidance from senior members of the team.

Adding more process, policing and audit can serve to address biased intent, but is unlikely to effectively address sub-optimal procurement due to lack of experience, expertise, training and guidance. In fact, it is our experience that some less experienced procurement teams can often be more cautious and risk averse because they are not fully aware of the range of activities that the rules do allow. Extreme risk aversion or a hesitation to engage with prospective suppliers also come with a cost. Either have a direct impact on agility, procurement duration, probably create additional costs for government and industry, as well as making value creation more difficult for both sides.

Negotiation is a key part of the process

3) Competition alone does not lead to value-for-money outcomes

Several of the ANAO reports include a paragraph highlighting that:

“Competition is a key element of the Australian Government’s procurement framework ... Generally, the more competitive the procurement process, the better placed an entity is to demonstrate that it has achieved value for money. Competition encourages respondents to submit more efficient, effective and economical proposals.”³

This statement reflects the theory, but often not the entire reality.

An open, transparent and ethically competitive process is necessary, but not sufficient, to produce a value-for-money outcome.

Poor preparation, inappropriate specification, speculative tendering, inefficient resourcing, ineffective evaluation, political imperatives, unrealistic budgets, wishlist dumping, scope changes, time pressure, poor negotiation and weak contract management can all ensure that a highly competitive procurement that was executed ‘perfectly’ on paper still delivers a poor value outcome overall.

The skill with which a procurement is undertaken is arguably a much more significant driver of value-for-money than the process itself - and even more so in sole-source negotiations.

4) Most procurements produce sole-source negotiations

Whilst a lively tender process can create the illusion of a value-for-money process, most procurement processes quickly downselect to a few prospective providers which are then invited to a short round of ‘offer definition’ or ‘clarification’ activities. The list of prospective candidates may then be refined further and a preferred supplier identified.

At that point the procurement effectively becomes a sole-source negotiation. Whilst, technically, the process rules reserve the right to switch to a second- or third-most

³ For example in No. 42 (2021-22) Procurement of Delivery Partners for the Entrepreneurs’ Programme, page 14.

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preferred supplier, practically there is rarely time or the political and financial appetite to start the process all over again with another party.

Moreover, late changes to specification, scope or volume are often left until the very final stage of the process (the formal ‘negotiation’ stage). This provides preferred suppliers with the ability to re-cost or re-shape their bid in the absence of compelling competitive tension.

So, in practice, by managing the process in a way that dissipates most of the buyer’s negotiation leverage before negotiations even begin, the process itself can impair the development of optimal outcomes for the Commonwealth.

“The power of competition doesn’t just happen – to be effective, it needs to be controlled and managed with skill throughout the process.”

An analogous challenge exists once in contract, as noted in several of the ANAO reports. If contract managers do not have the skills, training and confidence to negotiate under time pressure in what is effectively a sole source environment, then sub-optimal outcomes are unavoidable, even when there is a detailed process for effective contract management.

5) Value-for-money objectives can be in conflict

The definition of what constitutes “value-for-money” is not fixed, but unique to each particular procurement. Many of the stated and unstated elements that make up “value” require compromises and trade-offs to be negotiated, at first internally and then with the preferred suppliers. For any particular procurement:

- if time is critical, it may be difficult to achieve the best possible price;
- if budget is constrained, specification and volume may need to be adjusted;
- if SME involvement is key, key person and insolvency risks may be more material;
- if building sovereign capability is key, time to delivery may be extended;
- if risk needs to be minimised, time and cost may increase, etc.

Every element of “value” to the Commonwealth requires a degree of trade-off. Whether a procurement has delivered an optimal balance of value-for-money outcomes for the Commonwealth can be difficult to judge in the absence of knowing which elements were deemed to be of high priority and which of a lesser priority at the time.

“It’s difficult to hit a target if you don’t know what you are aiming for.”

In the experience of Negotiation Partners, that internal negotiation involving all key stakeholders is typically more challenging than the external negotiation – and so it is sometimes avoided or glossed over. Negotiating what value-for-money means in the context of each particular procurement project is key to delivering an optimal value-for-money outcome.

6) Negotiation is not what happens at the end

Most formal procurement processes view negotiation as a tail-end activity, designed to resolve any remaining issues the preferred bidder was unwilling to concede on unilaterally as part of the competitive process. In fact, many procurement processes explicitly *forbid* engaging in negotiations until the very final stage of the process.

The problem with this approach is that it can encourage procurement teams to view negotiation as an afterthought, when it is actually a central and recurring component of the entire process.

“If you are managing a procurement, you are conducting an extended series of complex negotiations.”

As set out in point 5 above, negotiation skills are critical in the preparation phase of any procurement. If the value-for-money priorities are unclear, the ‘Approach to Market’ documents will be unclear and the evaluation criteria ‘generic’.

In negotiation terms, the first ‘Approach to Market’ document is, in fact, the opening proposal of a negotiation. Too often in our work with clients, we are engaged at the end of the process to try and recover value-for-money, when this could have been avoided or made easier, had the tender documentation and the process been set-up at the beginning to preserve competitive tension and degrees of flexibility for the final negotiation stage.

The need to negotiate effectively is also not retired once the contract is signed. In fact, most negotiations happen after the contract is in place. As highlighted by the ANAO, much value can be lost in the implementation and contract management phase during negotiations to address evolving needs or to manage performance issues.

“A procurement does not finish with a signed contract ; it finishes at the end of the contract.”

Avenues for improvement

7) Capability facilitates process

Whilst many of the shortfalls documented by the ANAO reports are failures of process, the underlying causes of those shortcomings are worthy of exploration. Often, failures of process are principally failures of capability, experience and staff development in some of the critical skills required to manage a complex process, rather than shortcomings in the process *per se*.

“If a team is struggling to implement the rules, a bigger rule book is rarely the most effective solution.”

Some government agencies have been investing substantially into the professionalisation of their procurement teams. The Dept. of Defence and CASG are a prime example. In addition to skills development, the Department established a panel of expert negotiators to support project teams, senior staff and to actively facilitate more challenging procurements.

Procurement is a commercial activity that needs to be appropriately resourced. It requires a team with commercial experience and the ability, skill and confidence to manage the internal and external negotiations that are required throughout the process.

Adjustments to the process alone are comparatively simple and easy to make, but unlikely to move the needle substantially in the absence of a skilled team to execute the process.

8) Measurement facilitates progress

In some jurisdictions, a central Government Procurement Agency oversees and audits all government procurement activity. In the UK, all government agencies must follow LEAN

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procurement principles using a standard suite of processes. The target award date for completion of all but the most complex procurements in the UK is 120 working days from publication of the contract notice.⁴

Introducing and tracking a number of agreed metrics of the procurement process will be key to any concerted improvement activity. Benchmarking the efficiency of current procurement processes will allow departments to gauge their current performance and the impact of any targeted improvement activities. Tracking not only the overall time to award, but also a series of intermediate checkpoints can highlight where the process can be improved, where additional resources are required or where perhaps a different procurement process could be used.

Such knowledge will assist government departments to develop efficiencies, to reduce internal transaction costs and to minimise delay. That too will improve value-for-money outcomes for the government, for industry, and particularly for SME's.

“If you don't measure it, you can't improve it.”

I hope that by providing a practitioner's perspective, the above observations will assist the Committee in its analysis of the procurement challenges outlined in the five cited ANAO reports.

I welcome the opportunity to answer questions or to discuss in detail any of the issues raised herein, should this be of assistance to the Committee.

Sincerely,

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Managing Partner
NEGOTIATIONPARTNERS

⁴ <https://www.gov.uk/guidance/public-sector-procurement-policy>