

ACT AUDITOR-GENERAL'S  
PERFORMANCE AUDIT REPORT  
**ACTIVITIES OF THE GOVERNMENT  
PROCUREMENT BOARD**  
REPORT NO. 5 / 2023

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The Speaker  
ACT Legislative Assembly  
Civic Square, London Circuit  
CANBERRA ACT 2601

Dear Madam Speaker

I am pleased to forward to you a Performance Audit Report titled 'Activities of the Government Procurement Board' for tabling in the Legislative Assembly pursuant to Subsection 17(5) of the *Auditor-General Act 1996*.

The audit has been conducted in accordance with the requirements of the *Auditor-General Act 1996* and relevant professional standards including *ASAE 3500 – Performance Engagements*.

Yours sincerely



Michael Harris  
Auditor-General  
20 July 2023

*The ACT Audit Office acknowledges the Ngunnawal people as traditional custodians of the ACT and recognises any other people or families with connection to the lands of the ACT and region. The Office acknowledges and respects their continuing culture and the contribution they make to the life of this city and this region.*



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# SUMMARY

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The Government Procurement Board is a part of the Territory's overall procurement framework. The Board has been in operation for more than twenty years. Section 5 of the *Government Procurement Act 2001* establishes the Board and section 6 establishes its functions. One of the Board's functions is to review certain procurement proposals and provide advice to the Territory Entity intending to undertake the procurement.

The Board comprises nine public employee and non-public employee members. In the five years to June 2022 the Board has reviewed 411 separate proposals with an estimated value of \$10.925 billion. The Board's workload is progressed through weekly two-hour meetings, with minutes of the meetings recording its formal advice for Territory Entities.

The audit considers processes for the referral of procurement proposals to the Board by Territory Entities and the Board's review of the proposals and provision of advice. Three case studies (Canberra Health Services, Roads ACT and Canberra Institute of Technology) consider how the Board's advice has been responded to.

## Overall conclusion

The Government Procurement Board meets its obligations under the *Government Procurement Act 2001* to review and advise on proposals. However, the Board is not optimally effective or efficient in fulfilling its functions.

Its effectiveness is compromised by a lack of clarity about what its primary role is, and by its insufficiently challenging review of, and advice for, higher risk procurement proposals.

Its efficiency is compromised by duplication of work for low-risk proposals. This arises from the involvement of multiple entities in the procurement process (i.e. the Board, Procurement ACT and Major Projects Canberra) all of which have a role in facilitating procurement. The direct and indirect costs associated with the Board would be better applied, and could potentially be minimised, if the Board reviewed fewer, higher-risk procurement proposals.

The *Government Procurement Act 2001* and *Government Procurement Regulation 2007* are unhelpful and inhibit the Board from being more effective and more efficient. Actions that will support greater efficiency and effectiveness of the Board are: a more independent Board; an express authority to advise and, if necessary, approve and give directions; and an ability to focus on specific proposals and matters for its review.

A number of themes apparent in the examination of Board processes and practices are illustrated in the three case studies. The case studies show the Board's review and advice was typically:

- constrained by the proponent's last-minute presentation of the procurement proposal, by the stated urgency surrounding the proposal, and by the lack of express authority vested in the Board; and

- compromised by the apparent predetermination by the delegate of a particular course of action, by the proponents' use of loose and inconsistent terminology and by proponents' incomplete disclosure of all pertinent information in a timely manner.

As a result, the Board's advice was insufficiently probing and sceptical, was unassertive and at times equivocal, and was not consistently sound.

The Procurement Reform Program has the potential to progress Board reforms identified in this report.

## Conclusions

### REFERRALS TO THE BOARD

The Regulation requires the referral of procurement proposals, under certain circumstances, with a value over \$1 million or over \$5 million. These thresholds were established in 2007 and do not reflect contemporary procurement risk. Another possible source of referral, which is at the instigation of a Minister, has not been used.

Territory Entities generally comply with referral requirements. Nevertheless, in a few instances (fewer than one in ten) there is evidence of proponents presenting a proposal to the Board after an approach to the market has occurred or presenting a new or substantially different proposal to the Board as a variation to an existing contract.

### BOARD REVIEW

The Board reviews procurement proposals on a weekly basis. Most of its activity in the five years to June 2022 related to single or two-pass reviews of proposals and the review of variations.

Constant challenges for the Board are the presentation of proposals late in the procurement process by proponents, the provision of incomplete documentation by proponents and contradictory and dissenting advice being provided to the Board.

The fundamental issue for consideration is the need for clarity on what the overall purpose of the Board is. There is misalignment between what is stated in the legislation and what is the understanding of the Board's purpose by proponents, Board members and procurement officials. The lack of a clearly stated purpose for the Board leaves it vulnerable to criticism that it duplicates, or even contradicts, the efforts of Procurement ACT and Major Projects Canberra and that it exceeds its authority. The lack of a clearly stated purpose affects the ability of the Government to improve the efficiency and effectiveness of the Board.



## BOARD ADVICE

The Board provides advice on a proponent's proposal that comprises a set of actionable and non-actionable points of advice along with a statement of the Board's endorsement. For many years the Board 'endorsed' procurement proposals. This process was problematic as it was not consistent with the wording of the Act. The practice has now ceased.

Processes for the development and communication of the Board's written advice is undertaken reliably and with sensitivity. Much effort goes into carefully crafting the output of the Board which, according to Board members, seeks to signal the Board's concerns, if there are concerns, to decision-makers. The Board is rarely assertive in its advice and the Board's practice of endorsing proposals and offering advice 'for consideration' is confusing.

The Board does not comprehensively and systematically seek to understand whether its advice has been appropriately considered, recognised and responded to by the proponent. For single-pass proposals, in many cases it is not evident whether the Board's advice has been acknowledged, accepted, acted upon, rejected or ignored.

The Board cannot be assessed as optimally effective in the absence of a clear expression of its purpose. The efficiency of the Board is questionable as long as it serves an unclear purpose, is associated with a range of additional direct and indirect costs and introduces delay and uncertainty to a large volume of procurement activity. The 2022-2025 Procurement Reform Program has the potential to progress Board reforms identified in this report.

## LINEAR ACCELERATORS CASE STUDY (CHS)

In 2019 Canberra Health Services' Radiation Oncology Department replaced two of its four linear accelerator (Linac) machines. In 2021 the department replaced the other two. There are few suppliers in the Australian marketplace for Linacs. Canberra Health Services approached the market through a select process in the first instance and a single select in the second. Two ageing Varian machines were replaced with two new Varian machines in both instances. The cost of replacing the four machines, excluding the cost of the ten-year maintenance plan, was \$14.545 million (GST inc).

The Board reviewed Canberra Health Services' procurement plans between two to four weeks before each approach to market was due to take place. The interactions between the Board and the proponent reflect some of the systemic challenges the Board has in fulfilling its functions. There were missed opportunities for better procurement outcomes because the Board was not assertive with its advice.

### Challenges and missed opportunities

- The Board's advice was constrained by the proponent's late referral of the proposal for review.

- The timing of the delegate’s approval of the 2018 procurement plans was unsatisfactory for the Board’s purposes and for the purpose of accountability.
- The proponent did not prepare procurement plans with sufficient diligence, and in doing so omitted to establish the viability of the preferred procurement option.
- The Board’s review of the procurement proposal in 2018 was incomplete as it did not review the matters specified in the Act and Regulation that were required for a select procurement process.
- The proponent’s documentation used terminology loosely, and this led to the potential for misunderstanding and unsound advice.
- The Board was insufficiently probing in its review of the procurement proposal in 2021 and it provided advice based on a misunderstanding about a purported panel arrangement.

### Learnings

- The timing of the proponent’s referral of the proposal to the Board was suboptimal. It would have been better to have presented the proposal to the Board for the first-pass review two years earlier, before the nominal ten-year lifespan of the first Linac had expired. It would also have been better to have planned for the phased replacement of all four machines, and to have avoided the pressure of supplier discounts tied to imminent deadlines.
- The Board’s review of the procurement proposal in 2018 was unsatisfactory, as to all intents and purposes the outcome had already been predetermined by the proponent: replacement with like-for-like devices. The Board’s two-pass review of the procurement proposal in 2021 was redundant, because a decision over the approach to market had been made six months earlier.
- On 31 July 2018 the proponent acquitted the initial advice of the Board but did not update the Board when there was a substantial change in circumstance that was capable of invalidating the Board’s earlier advice. In March 2021 the Board did not require Canberra Health Services to provide a response back to it, but in that instance Canberra Health Services satisfactorily acquitted the Board’s advice.

### ASPHALT CASE STUDY (TCCS)

In 2016 Roads ACT approached the market and established a panel arrangement for the supply of asphalt to the Territory for a maximum of three years and for a maximum contract value of \$4 million. Through contract variations Roads ACT sought to extend the 2016 panel arrangement to a maximum of \$13.087 million and for a further 21 months beyond the three years. This was an excessive use of variations that undermined the integrity of the original approach to market in 2016. While the panel initially comprised two suppliers, by 2020 only one supplier was reportedly responding to work order requests. Following interaction between the Board and Roads ACT in late

2020, a new approach to the open market was made, and a new panel was established in 2021 comprising three suppliers, offering the potential for improved procurement outcomes.

The interactions between the Board and Roads ACT over the procurement of asphalt in the period 2017 to 2022 reflect some of the systemic challenges the Board has in fulfilling its functions. These interactions also illustrate the positive impact the Board is able to have in improving procurement processes when the Board is more assertive with the advice it provides.

### Challenges and missed opportunities

- The Board reviewed proposed variations that were triggered by the value thresholds. By the time the value thresholds for Board referral had been reached, there had already been other variations. The history of the variations was not straightforward, and it was not fully disclosed to the Board by the proponent. This was likely to have affected the Board's advice.
- One variation was not referred to the Board when it should have been. This delayed the Board's involvement in the procurement.
- Interactions between Roads ACT and the Board about variations were 'last minute' at the behest of Roads ACT. This constrained the Board's advice.
- In November 2020, when Roads ACT sought the Board's advice about varying the existing panel arrangement, it asserted to the Board that it was not ready to approach the market. It decided to do so anyway just two weeks later. Roads ACT's stated unpreparedness in November is likely to have affected the Board's advice at that time.
- The subsequent procurement proposal by Roads ACT (with the support of Major Projects Canberra) to return to the market was not referred to the Board. It would have been prudent to have done so given the likely maximum value of the procurement (based on initial estimates and track record).
- The Board was unaware of what eventuated with this procurement, following its advice to *not endorse* the variation in November 2020. There was no feedback to the Board on the impact of its advice. The Board's advice was unusual in this case as it stated explicitly that the variation was *not endorsed*.

### Achievements

- The review of variations by the Board is not a statutory requirement. However, in this instance the Board had a role to play in ensuring variations were not used where this would bypass the reasonable expectations of other potential suppliers to access a commercial opportunity. The Board was effective, but it could have been more efficient if it had been given more timely and more complete information by the proponent.
- The proponent reacted to the Board's non-endorsement of a proposed variation (on 24 November 2020) by planning a new approach to market. This yielded three panel

members (one new and two existing). The Board's advice was directly influential on the proponent's reconsideration of its options, and indirectly influential in the proponent's ultimate course of action, which was to reapproach the open market. The Board was effective in the instance but could have been more effective and efficient if it had been given more timely and more complete information by the proponent.

- Roads ACT demonstrated better practice in reflecting on panel performance and using this as an opportunity for improving procurement and contract outcomes. A procurement reform program is now underway in the directorate.

### **ORGANISATIONAL TRANSFORMATION CASE STUDY (CIT)**

CIT sought suppliers to support its organisational transformation ambitions and approached the market on at least six occasions since 2017. This resulted in six sequential, and at times overlapping, contracts with a series of related companies (referred to as the 'contractor'). The combined value of the contracts was \$8.78 million.

Three procurement proposals were provided to the Board on four occasions in 2018, 2020 and 2021. The Government Procurement Board (the Board) provided similar advice on each occasion, noting that the proposal lacked clarity, specificity, measurability and simplicity. On the last occasion (December 2021), CIT evolved its procurement approach from seeking a variation of an existing contract with the contractor to proposing a single select procurement of the contractor. The single select procurement did not proceed as planned and CIT made a new approach to the open market instead. Nevertheless, a new contract with the contractor eventuated with a value of \$4.99 million.

The interactions between the Board, Procurement ACT and CIT over the procurement of organisational transformation services in the period 2017 to 2022 reflect some of the systemic challenges the Board has in fulfilling its functions. There were missed opportunities for better procurement outcomes because the Board was not assertive with its advice.

#### **Challenges and missed opportunities**

- The Board's review process was put under pressure in each instance by the proponent's claims of urgency (e.g. urgency to proceed to market, to execute a contract and to deliver outcomes). This constrained the Board's advice.
- The Board's advice was compromised by the omission of important information by the proponent (e.g. the existence of an incumbent contractor and that the proponent had already approached the market). This was likely to have affected the Board's advice.
- The Board was insufficiently sceptical and probing. Although its advice was sound it was unassertive and equivocal (e.g. identifying fundamental weakness but avoiding stating the proposal was 'not endorsed' in its current state).

- CIT did not acquit the Board's advice satisfactorily on any occasion, and only attended to minor matters. The proposals' lack of clarity, specificity, measurability and simplicity remained unaddressed.
- In its communication with the Board, CIT overstated the extent to which it had recognised and implemented the Board's advice.
- The Board was unaware of what eventuated following its review of the CIT procurement proposals, even when CIT was expressly asked to provide a follow-up briefing (September 2018). While feedback was provided in relation to the December 2021 procurement proposal, it was between the proponent and Procurement ACT and did not involve the Board.
- It is apparent that the Board was concerned, from 21 January 2020 onwards, about the risk of CIT having a predetermined outcome in mind from a seemingly open competition. The Board's advice sought to strengthen the propriety and defensibility of the open approach to market, but this did not change the risk of CIT seeking a predetermined outcome.

### Learnings

Relying on a single, small business supplier to provide multi-million dollar consultancy services for the purposes of 'organisational transformation' was high-risk for CIT. A preferred approach would have been to:

- approach the open market at the outset for the maximum extent of the work necessary up to the end-of-contract transition point;
- invite solutions (e.g. via an REOI or RFP) before commencing a formal tendering process (i.e. at least a two-stage process);
- plan for substitution, so that the success of CIT's organisational transformation was not reliant on any one supplier or consultant;
- have the facility to terminate the contract and reapproach the key contractor via a single-select process based on a strong, compelling and evidence-based rationale if further work was required;
- design the approach to market documentation (whether open or single select) based on a Statement of Requirements that was clear, specific and measurable; and
- design the approach to market documentation (whether open or single select) so that the basis for payments was for discrete and demonstrable elements, with clear outputs and outcomes.

Basing a \$4.99 million contract on five time-based payment milestones, with the contractor's performance considered with reference to a limited set of KPIs, represented a major risk to delivery and obtaining value for money.

## Key findings

REFERRALS TO THE BOARD	Paragraph
<b>Referral processes</b>	
<p>Section 11 of the Regulation established thresholds for referral to the Board; the \$5 million threshold for Directorates and \$1 million threshold for other entities. No other basis has been established. The dollar value-based thresholds have not been revised since 2007. The passage of time and the changing nature of Government procurements and the marketplace, including the increasing use of whole of Government standing arrangements and panels, means these thresholds may no longer be appropriate.</p>	2.7
<p>The audit sought to understand whether there were proposals that were required to be referred to the Board (as per section 11 of the Regulation) but were not. In doing so the audit also considered the potential that proponents were manipulating the total estimated value of a proposal to be just under the mandatory referral threshold (either \$5 million or \$1 million). A review of various datasets did not provide any evidence that proposals that should have been referred to the Board were not, or that proponents were manipulating the value of procurement proposals to avoid the thresholds for referral.</p>	2.15
<p>A review of ten per cent of the 411 proposals referred to the Board between July 2017 and June 2022 (41 in total) shows that four of the proposals were referred to the Board after an approach to the market was made. Late referral severely limits the scope of advice provided by the Board as any advice relating to procurement matters already committed to in the approach to market documentation will be difficult to address.</p>	2.31
<p>Of the 411 proposals referred to the Board between July 2017 and June 2022, 63 were presented as variations to existing contracts. Board papers show that 7 of these 63 were questioned by the Board, with the Board questioning whether the proposed variation should have been more appropriately identified as a new proposal. A new proposal would have required substantially more documentation and a new referral to the Board.</p>	2.38
<b>Proposal preparation</b>	
<p>All procurement proposals with an estimated value of \$200,000 or more (i.e. procurements deemed 'complex') should be progressed with the assistance and advice of Procurement ACT, or in the case of capital works projects, with the assistance of Major Projects Canberra's Infrastructure Delivery Partner team. Procurement ACT and Major Projects Canberra outlined various procedures that they had established that sought to: determine whether a procurement is likely to need Board review and the timing of such a review; and obtain an appropriate slot in the Board's agenda. The Secretariat to the Board advised that in mid-2019 an estimated one to two proposals per month had bypassed Procurement ACT or Major Projects Canberra but that, following a concerted effort, including by the Board</p>	2.46

Secretariat, this was addressed and by 2022 only one was received in the year that had not been assisted by Procurement ACT or Major Projects Canberra. Accordingly, the arrangements in place for anticipating, supporting and guiding proposals provide a high level of assurance that Territory Entity proposals are not (by accident or by design) bypassing either Procurement ACT, Major Projects Canberra or the Board.

## BOARD REVIEW

Paragraph

### Board review processes

Since 2015 the Board has implemented a two-pass process, through which ICT and goods and services procurements over \$5 million in estimated value are subject to two Board reviews: Strategic Review (focusing on the procurement strategy) and Procurement Review (focusing on the details of the procurement). By 2018 the two-pass process was established and was generally being followed and by 2020 it was a mainstream practice. The process creates additional administrative tasks for proponents. However, by ensuring proponents engage with the Board at an earlier stage of the procurement it brings forward the Board's consideration of matters that are capable of determining the pace and direction that a procurement proposal may take. It allows the Board to take a wider view of the proposal, including strategic matters, allows the proponent to make more widespread changes to their proposals and potentially avoids the need for re-work by the proponent. It is timely to consider the value of the two-pass review process, in conjunction with a broader consideration of the purpose of the Board.

3.19

### Purpose of the Board

As per the Act and Regulation, the Board has a role in reviewing and advising on procurement proposals, examining systemic matters, endorsing practice and methods where appropriate and endorsing Strategic Procurement Plans. However, there is no explicit statement in the Act as to the overall purpose of the Board when exercising its functions and the 2001 and 2007 Bills' presentation speeches may no longer be relevant to this matter. This creates difficulties in determining which of the Board's functions is a priority, for example, identifying systemic matters or reviewing individual proposals.

3.41

Board members consulted as part of the audit emphasised their role in reviewing proposals and identified two broad purposes: acting as an additional safeguard to ensure deficiencies in a proposal are identified or reconsidered and exploring fundamental considerations associated with the proposal in order to provide strategic insights. These broadly align with the two-stages of the two-pass review process and align with the function of the Board to review procurement proposals (paragraph 6(c) of the Act). The lack of a clearly stated purpose for the Board leaves it vulnerable to criticism from proponents that it duplicates, or even contradicts, the efforts of Procurement ACT and Major Projects Canberra, and that it exceeds its authority by querying the fundamentals of a proponent's procurement, even if this is done early in the process. A clearly stated purpose could remove this uncertainty and the risk of creating unnecessary administrative tasks and delays and could also

3.42



resolve the issue of whether 'strategic insights' are a matter for Board consideration and advice.

### Board review activities

Major Projects Canberra and Procurement ACT have a role in assisting proponents with the preparation of procurement documentation. It is apparent that Major Projects Canberra and Procurement ACT respond to the circumstances they face, which are influenced by the capability and capacity in the proponent Territory Entity, as well as the proposal's priority and urgency. Procurement ACT described a formal sign-off process whereby a senior official (either a senior officer or an executive) clears documents prior to them being forwarded to the Secretariat and the Board for consideration. Such an approach is, in principle, administratively sound and efficient if it is transparent as to what is being 'cleared' by whom, and for what purpose. 3.58

A review of procurement proposal documentation suggests, however, that it is unclear who is responsible for the content of certain documentation i.e. whether it was prepared by the proponent or Procurement ACT. This is particularly the case with the Procurement Review proforma that is used in the two-pass process. The proforma includes a section capturing how the proponent has responded to the Board's advice from the first pass. In only a small minority of cases is it evident that the response put to the Board was prepared by the proponent. This creates a risk that the Board's advice, while directed to the proponent, is being acquitted by Procurement ACT. 3.59

Since 2019 Procurement ACT has used a *Government Procurement Board Brief* as a mechanism by which it can identify and outline for the information of the Board any differences it might have with a proponent in relation to the procurement proposal. By doing so it has sought to move away from 'whispers' and 'behind closed door' discussions and bring 'rigour and transparent [to] the process'. However, a review of emails sent by Procurement ACT officials shows that not all briefs circulated by Procurement ACT officials to Board members are captured in the Board's SharePoint records system. Accordingly, the Board's records management system, SharePoint, is likely to reflect only some of the matters that have been escalated to the Board via written briefs by Procurement ACT officials. This is not conducive to rigour and transparency in the process. 3.72

### Board consideration of proposals

The audit considered a sample of 30 procurement proposals (of the 292 single-pass and two-pass proposals presented to the Board between 2017-18 and 2021-22) to test whether sufficient documentation was provided for its review and consideration. With respect to the matters required to be considered by the Board as per subsection 12(2) of the Regulation (i.e. value for money, a proposed evaluation methodology, evaluation criteria and contract management arrangements) the audit found: in six instances a document necessary for the review of a specific requirement was not available to the Board (either a probity statement, or statement of the contract management arrangements was missing); and in a 3.84



further six instances more than one document necessary for the review of a specific requirement was not available to the Board (i.e. there were combinations of a missing probity statement, a statement of the contract managements, a Risk Plan and an Evaluation Plan). The review also shows: in eight instances a clear expression of the purpose and details of the procurement was not evident; in six instances a procurement strategy was not evident; and in three instances there was no evidence that advice in response to the first pass had been taken into account at the second pass.

The audit considered a further 10 per cent sample (29 in total) of the 126 single-pass and 166 two-pass proposals referred to the Board between 2017-18 and 2021-22 in order to consider the timing of the Board's review. The audit found: single-pass proposals are on average put to the Board 1.5 weeks before the intended approach to market; and two-pass proposals, by the time they come back for the second pass, are on average put to the Board two weeks before the intended approach to market. This indicates that where proposals are presented for the second and last time or for the only time to the Board it is common for this to be within a week or two of the intended approach to market. This indicates proponents do not expect substantial matters to arise from the Board's review that would require extensive reworking.

3.93

In June 2022 Procurement ACT presented a rationale to the Board for the cessation of the two-pass review policy. The Board did not agree to it. The two-pass review policy is, however, being reviewed as part of Treasury's 2022-2025 Procurement Reform Program. How the pros and cons of the two-pass process are gauged depends on the purpose of the Board. Government should consider the merits of continuing with the two-pass review process in the light of its wider consideration of the Board's purpose and functions.

3.94

Variations account for a substantial number of items on the Board's weekly agenda; between 2017-18 and 2021-22 they represented 63 of a total of 411 procurement proposals (15 per cent). Forty-seven of the 63 variations related to Contract Price and represented total additional costs of \$581 million for contracts with a total initial Contract Price of \$1.321 billion. While the average variation value was an additional 44 per cent of the initial Contract Price, in 21 instances the variation was for 50 per cent or more of the initial Contract Price. Increases in scale of this magnitude raise questions about fair access to commercial opportunities for other suppliers.

3.106

Board minutes frequently record adverse comments about variations and the limited role the Board can play in reviewing and advising on variations, although it is apparent that the Board has, on occasion, performed an important role in challenging whether a variation is defensible. At the Board meeting of 28 June 2022, Procurement ACT proposed to the Board 'removing the practice of variations being provided to the Board for review'. This appears practically helpful, on the premise that this does not lead to bypassing of the Board by proposals presented as variations which should be a new approach to market.

3.107

## Other review activities of the Board

A review of Board activities between 2017-18 and 2021-22 shows that Strategic Procurement Plans are not frequently presented to or discussed by the Board. Nine instances were found of which six related to the activities of the Suburban Land Agency. The Regulation does not state what information a Strategic Procurement Plan should include and it is not specific about the detail necessary to enable the Board to perform its review for the purposes of endorsement. However, in June 2022 Procurement ACT drafted guidance on the form and function of Strategic Procurement Plans. The guidance should help both the Board and proponents. 3.115

The Board's formal endorsement of a Strategic Procurement Plan is a prerequisite to avoiding the referral of multiple separate but similar proposals. Board endorsement of Strategic Procurement Plans did not happen until 27 October 2020, although earlier Strategic Procurement Plans were reviewed by the Board. Proponents' use of Strategic Procurement Plans is limited and the Board's review process for these plans is not yet mature. For the Board to be efficient and effective Strategic Procurement Plans need to be adopted by more Territory Entities or removed from the Regulation. 3.116

Paragraph 6(d) of the Act allows for the Board 'to consider, advise on and, if appropriate, endorse procurement practices and methods'. A review of Board records indicates that a review of systemic or generalisable procurement practices has not been routinely undertaken by the Board. The Board has, however, been consulted on aspects of the Territory's Procurement Framework, as proposed by Procurement ACT. In March 2022 Procurement ACT and the Board considered how they may work together to create more authoritative guidance on 'internal procurement practices' through a Board endorsement process of such practices. This is a sound approach, which uses another function of the Act for which the Board is responsible, which has not been used to date. 3.123

The Board's review of Annual Procurement Plans is not provided for by the Regulation but was instead introduced through the *Smart Modern Strategic Procurement Savings Initiative* in April 2015. Annual Procurement Plans have been prepared in response to periodic requests from Procurement ACT. While Annual Procurement Plans are prepared by, and for, others and for purposes other than the Board's review, the Board has found little practical use for them. There are references to low completion rates, late completion and a low level of accuracy. One Board member estimated a 20 per cent level of accuracy in respect of planned procurement activity versus activity undertaken. 3.127

## BOARD ADVICE

Paragraph

### Preparation of advice

The Board's advice on a procurement proposal is facilitated by: a business planning session at the beginning of each Board meeting; and a face-to-face question and answer session with the proponent of the procurement proposal. Written advice takes the form of formal minutes of the Board meeting, of which relevant extracts 4.11

are shared with the proponent. The administrative process for developing the Board's advice is mature and is efficient.

On rare occasions matters are escalated directly through discussion between the proponent's delegate and the Chair of the Board, but as this is not recorded in minutes it is not possible to gauge with certainty the frequency of this. As a matter of sound administrative practice these escalated matters should be documented. Paragraph 6(e) of the Act also allows the Board to escalate a matter to the Minister responsible for procurement (i.e. the Special Minister of State). This option has not been taken up. 4.12

One public employee Board member described the challenges of being an ACTPS official on the Board. Revising the balance of Board membership in favour of the non-public employee members has the potential to provide the Board with more autonomy and independence and be less constrained by the expectations of peer ACTPS colleagues. A non-public employee Chair would potentially have a similar impact. 4.18

Section 20 of the Act provides for Board members' disclosure of interests and for the Board member to be excused from deliberating on the matter subject to the declaration. A review of Board meeting minutes shows that declarations of interests are made and dealt with. While more straightforward for the non-public employee members, for public employee members it is apparent that there are regular occurrences of potential interests that 'could conflict with the proper exercise of the member's functions in relation to the board's consideration of the issue' as per paragraph 20(1)(b) of the Act. Having a Board member from Major Projects Canberra, as has occurred since July 2019, is problematic, given the number of capital works project proposals being presented to the Board, in which Major Projects Canberra has participated or supported in one form or other. Also problematic is a member declaring an interest as the proponent, and then the member and others in the proponent's directorate, participating in the minute preparation process. Evidence was found of this in one instance in August 2018. 4.30

### Nature of advice

Throughout the period July 2017 to June 2022, proponents explicitly sought the Board's endorsement or approval of their procurement proposals. This accords with Procurement ACT guidance at the time. Board members advised that the use of the term *endorse* has been a matter of custom and practice for many years and that the Board has carefully considered and reflected on its use periodically. The Board's statements in each of the CMTEDD annual reports between 2016-17 and 2021-22 refer to the Board's *endorsement* of proposals. Furthermore, the schema that was developed for the purpose of implementing the two-pass review process in 2017 also identified that the Board would have responsibility with respect to a proposal's *validation, approval or endorsement* and in the case of the two-pass process, this was to occur on more than one occasion. 4.49

Since 30 June 2022, however, there has been a change to the Board's position of approving or endorsing procurement proposals. *Procurement Factsheet: PFW-08-* 4.50

202111 states ‘it is important to remember that the Board’s purpose is to review and provide advice on procurement proposals. The Board does not have the power to approve, endorse or reject procurement proposals’. A review of Board meeting minutes from July to December 2022 shows that the Board has adjusted its advice accordingly. The Board’s recent avoidance of the term ‘endorse’ is consistent with the Act but overturns a practice that has been in place for a long period (at least five years).

Records over the period of the audit (2017-18 to 2021-22) show the Board has a significant workload that it has undertaken reliably and with sensitivity. The Board provides on average about a page of advice on each proposal comprising a set of actionable and non-actionable points of advice (about equal in number). Few points of advice, fewer than one per proposal, explicitly request the proponent to demonstrate to the Board how the advice has been considered. Most advice is either an observation made to or by the Board (i.e. noted) or it is advice that should be at least considered (and documented) by the proponent in accordance with sound administrative practice. 4.62

The Board’s practice of giving advice (including its endorsement or approval prior to 28 June 2022) demonstrates the Board has applied an ‘intervention’ hierarchy: from not endorsing (no occurrence, based on the sample) or withholding endorsement (few occasions) through to endorsing and offering additional advice for consideration (frequent occasions) and making observations which may be either important or gratuitous but do not need further consideration (frequent occasions). The hierarchy applied by the Board is understandable but is not efficient or effective. Much effort goes into carefully crafting the output of the Board which, according to Board members, seeks to sensitively signal the Board’s concerns to the delegate. The Board is rarely assertive in its advice and the combination of endorsing and offering advice ‘for consideration’ is confusing. 4.63

### Proponents’ response to advice

There is no comprehensive system operated by the Board through its Secretariat that revisits all advice that has been given and seeks to understand whether the Board’s advice was appropriately considered, recognised and responded to by the proponent. At its August 2022 annual planning meeting, however, the Board agreed to undertake follow-up audits of two selected procurement proposals each quarter. Some insights may also be gained through: 4.71

- second-pass reviews, which are capable of capturing the first-pass advice and the proponents’ response to it; and
- the Secretariat maintenance of a control spreadsheet, which identifies specific issues for follow up.

Consideration was given to follow-up activity on the part of proponents in response to the Board’s advice. For single-pass reviews, it is not evident from records in many cases whether the Board’s advice is acknowledged, accepted, acted upon, rejected or ignored. On the other hand, for two-pass reviews there is an increased prospect of the Board oversighting the proponent’s response to the Board’s advice. For the 4.86

proposals reviewed twice by the Board in accordance with the two-pass review process it was evident that for:

- 70 per cent of the advice provided, the documentation contained sufficient information to conclude the proponent had largely accepted the recommendations and had updated the procurement documentation in response;
- 19 per cent of the advice provided the documentation indicated an equivocal or partial response; and
- 9 per cent of advice provided the documentation did not address the recommendation.

The Board is not maximising its impact. It is not routinely and consistently assessing how its advice has been received by the proponent and how it has been acquitted, noting the Board is not explicitly required to do so by the Act or Regulation.

4.87

### Administrative and procedural efficiency

The Board cannot be assessed as optimally effective in the absence of a clear expression of the Board's purpose. The efficiency of the Board is questionable as long as it serves an unclear purpose, is associated with a range of additional direct and indirect costs and introduces delay and uncertainty to a large volume of procurement activity. A reformed Board that is less constrained, considers fewer proposals and operates according to a statement of purpose and with increased autonomy and independence, is likely to deliver improved outcomes and do so with more efficiency. Procurement ACT's Procurement Reform Program has the potential to progress Board reforms identified in this report.

4.104

## Recommendations

### RECOMMENDATION 1 THRESHOLDS FOR REFERRAL

The Government should review:

- the value thresholds established in the Regulation, and if deemed appropriate, propose revisions; and
- the referral 'classes' and how referral rules are established and implemented.

### RECOMMENDATION 2 BOARD PURPOSE AND FUNCTIONS

The Government should clearly articulate the Board's purpose taking into account the context in which Territory procurement is undertaken in 2023. In doing so:

- consideration should be given to whether the Board's primary function is to guide system level policy and practice or individual proposal level practice;

- b) a statement of purpose should be made, which includes primary and subordinate purposes and functions; and
- c) the Act and Regulation should be amended as necessary.

### **RECOMMENDATION 3      ACCOUNTABILITY AND TRANSPARENCY**

Territory Entities should clearly authorise all documentation presented to the Board.

### **RECOMMENDATION 4      TWO-PASS REVIEW PROCESS**

The Government should consider the merits of continuing with the two-pass review process in the light of wider consideration of the Board's purpose and functions.

### **RECOMMENDATION 5      REVIEW PROCESS IMPROVEMENT**

In the light of wider consideration of the Board's purpose and functions, the Government should seek to ensure:

- a) proponents bring forward the Board's review in the procurement timeline;
- b) the Board undertakes fewer, deeper reviews of the highest risk proposals; and
- c) the Board has the facility to conduct reviews of the fundamentals of a proposal (as is undertaken under the current strategic review), including sourcing options, where appropriate.

### **RECOMMENDATION 6      VARIATIONS**

The Government should consider the merits of maintaining or ceasing variation referrals to the Board in the light of wider consideration of the Board's purpose and functions. If the consideration of variations is removed from the Board review process, additional safeguards should be implemented to ensure variations are not used where there is a strong case to return to the market with a new procurement opportunity.

### **RECOMMENDATION 7      STRATEGIC PROCUREMENT PLANS**

The Government should consider the merits of the endorsement and use of Strategic Procurement Plans in the light of wider consideration of the Board's purpose and functions. If endorsement of Strategic Procurement Plans is retained as a function in the Regulation, Procurement ACT's draft guidance should be finalised and promulgated.

### **RECOMMENDATION 8      ENDORSED PROCUREMENT PRACTICES**

The Government should consider the merits of the Board's formal endorsement of procurement practices in the light of wider consideration of the Board's purpose and functions. This may involve a role for the Board in initiating, formulating and endorsing systemic procurement advice and guidance.

**RECOMMENDATION 9 ANNUAL PROCUREMENT PLANS**

The Government should review the use Annual Procurement Plans in the light of the wider consideration of the Board's purpose and functions. In doing so, consideration should be given to the limited impact they have in informing Board activities.

**RECOMMENDATION 10 ESCALATION POST REVIEW**

In the light of wider consideration of the Board's purpose and functions, the Government should consider providing the Board with an express power to provide written advice directly to a director-general (or chief executive) following the Board's consideration of a procurement proposal.

**RECOMMENDATION 11 ENHANCING BOARD INDEPENDENCE**

In the light of wider consideration of the Board's purpose and functions, the Government should consider:

- a) revising the constitution of the Board to achieve a majority of non-public employee members; and
- b) revising the constitution of the Board to ensure a non-public employee member chairs the Board.

**RECOMMENDATION 12 INTERESTS AND VOTING**

In the light of wider consideration of the Board's purpose and functions, the Board should review practices with respect to:

- a) the use of formal voting and the recording of that vote; and
- b) the management of declared interests and the action taken as a result of the declaration.

**RECOMMENDATION 13 ENDORSEMENT**

In the light of wider consideration of the Board's purpose and functions, the Government should clarify and affirm the express power and authority of the Board's advice.

**RECOMMENDATION 14 ADVICE SCHEMA**

In the light of wider consideration of the Board's purpose and functions, the Board should review and revise its advice schema.

**RECOMMENDATION 15 BOARD FOLLOW UP**

In the light of wider consideration of the Board's purpose and functions, the Board should develop a risk-based practice for the review of proponents' consideration and acquittal of Board advice.

## RECOMMENDATION 16 RISK-BASED REFERRALS

In the light of wider consideration of the Board's purpose and functions, the Government should:

- a) develop a range of automatic and discretionary triggers that can be activated by the Board, such that the Board receives and reviews fewer procurement proposals, but which are higher risk; and
- b) consider including a Board 'call-in' process, which can be informed by the Board's early oversight of procurement activity being supported by Major Projects Canberra and Procurement ACT.

### Entities' responses

In accordance with subsection 18(2) of the *Auditor-General Act 1996*, the Chief Minister, Treasury and Economic Development Directorate, the Government Procurement Board, Canberra Health Services, the Transport Canberra and City Services Directorate and the Canberra Institute of Technology were provided with:

- a draft proposed report for comment. All comments were considered and required changes were reflected in the final proposed report; and
- a final proposed report for further comment. All comments were considered and required changes were reflected in the final report.

As part of the final proposed report process, the above entities were also asked to provide comments for inclusion in the final report in the Summary chapter. No comments were provided for inclusion in this Summary chapter.



# 1 INTRODUCTION

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## Government Procurement Board responsibilities

- 1.1 The Government Procurement Board (the Board) is a component of the Territory's overall procurement framework. The Board has operated for more than 20 years. Section 5 of the *Government Procurement Act 2001* establishes the Board and section 6 establishes its functions.
- 1.2 One of the Board's functions is to review procurement proposals and provide advice to the *proponent*. The proponent is the Territory Entity undertaking the procurement. The proponent has ultimate decision-making authority.

## Procurement proposals

- 1.3 The *Government Procurement Act 2001* (the Act) and its associated *Government Procurement Regulation 2007* (the Regulation) establishes that the Board:
  - must review certain proposals; and
  - may review others.
- 1.4 For proposals that must be referred to the Board for review, the obligation resides with the Territory Entity to do so. This is determined by the estimated value of the procurement, for which thresholds have been established. Ministers and Territory Entities may also voluntarily refer proposals.

### *Territory Entities*

- 1.5 The Act distinguishes between:
  - Administrative Units – the 9 Government directorates; and
  - Non-Administrative Units – 19 other entities such as the Canberra Institute of Technology, the Suburban Land Agency and the Cultural Facilities Corporation.
- 1.6 For the purposes of this audit all 28 units are referred to as Territory Entities.

## Referral thresholds

- 1.7 Section 11 of the Regulation provides that the threshold for mandatory referral to the Board is:
  - \$5 million (total estimated value) of the proposal for Administrative Units; and
  - \$1 million for non-Administrative Units.

- 1.8 If the Board reviews a Territory Entity's 'Strategic Procurement Plan', the Board is not required to then review the individual procurement proposals contained in that plan.

### Board review

- 1.9 Paragraph 6(c) of the Act requires the Board 'to review procurement proposals of territory entities in accordance with the regulations'. A review must include consideration of:
- the value for money procurement principle (section 22A of the Act);
  - matters declared by the Minister (section 22B of the Act). This includes *The Government Procurement (Charter of Procurement Values) Direction 2020* (3 September 2020) and the *Government Procurement (Ethical Treatment of Workers Evaluation) Direction 2021* (7 December 2021); and
  - other matters specified in the Regulation. Subsection 12(2)(b) requires procurement proposals to include information on:
    - the evaluation methodology to be applied;
    - the evaluation criteria to be applied to the procurement; and
    - the proposed contract management arrangements.

### Board advice

- 1.10 Paragraph 6(a) of the Act allows for the Board to 'give advice'. As a matter of custom and practice the Board provides advice to the proponent:
- at a meeting of the Board where the proponent is in attendance, the advice is given directly at the end of the discussion about the proponent's proposal; and
  - following the meeting, once draft minutes are internally agreed by Board members, relevant minute extracts are shared with the proponent via email.
- 1.11 The minutes containing advice are formally adopted at the next meeting of the Board.

### Other responsibilities

- 1.12 In addition to reviewing and advising on specific procurement proposals, section 6 of the Act also provides for the following functions of the Board:
- ...
- (d) to consider, advise on and, if appropriate, endorse procurement practices and methods for use by territory entities; and
- (e) to provide advice to the Minister on any issue relevant to the procurement activities of territory entities or the operation of this Act ...
- 1.13 Section 10 of the Act establishes that the Board:
- ... must give the Minister any information about its operations that the Minister requires.

## Board constitution and procedure

- 1.14 Section 11 of the Act provides for the following part-time members to be appointed to the Board:
- (a) the chairperson;
  - (b) the deputy chairperson;
  - (c) 3 public employee members;
  - (d) 4 non-public employee members.
- 1.15 Section 19 of the Act establishes procedures for the Board and its meetings. For example, subsection 19(11) of the Act requires the Board to keep minutes of its meetings. Section 20 establishes procedures for the disclosure of Board member interests.
- 1.16 Public employees provide their services in the course of the normal duties i.e. they are not additionally remunerated.<sup>1</sup> Non-public employee members are currently paid \$27,171 per annum for their services, which is an amount established by the Remuneration Tribunal.

## Procurement ACT

- 1.17 Procurement ACT is a business unit within the Treasury Division of the Chief Minister, Treasury and Economic Development Directorate (CMTEDD). It supports Territory Entities' procurement activities by advising and facilitating, and by developing and promulgating policy and guidance. Procurement ACT's main activities are supported by two teams:
- the Policy and Capability Team – responsible for policy; and
  - the Goods and Services Team - responsible for directly assisting proponents.
- 1.18 Procurement ACT was the subject of a review by Renée Leon, the report of which was tabled in the Legislative Assembly on 7 April 2022.<sup>2</sup> The effectiveness of the Government Procurement Board was not within the scope of that review and the report did not include commentary on it.

## Major Projects Canberra

- 1.19 Major Projects Canberra was established on 1 July 2019. It is responsible for the procurement and delivery of capital works and major infrastructure projects. Its Infrastructure Delivery Partner and designated projects teams advise on and facilitate capital projects.
- 1.20 Procurement ACT advises on and facilitates goods and services procurement activity.

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<sup>1</sup> *Legislation Act 2001* Dictionary: 'public employee means— (a) a public servant; or (b) a public sector member; or (c) a person employed by a territory instrumentality'

<sup>2</sup> Review of Procurement ACT, Renée Leon for the Head of Service, October 2021

## Board Secretariat role

1.21 The Board Secretariat function is provided by Procurement ACT, from resources within the Policy and Capability Team. The Secretariat manages the administration of the Board's business. This involves liaison and coordination with proponents, Procurement ACT and Major Projects Canberra teams and Board members. Two business systems used by the Secretariat are central to its function:

- a Government Procurement Board email account, through which members and the Secretariat communicate with each other; and
- a SharePoint site, an electronic document and records management system (EDRMS), which provides a 'single point of truth' library of documentation considered by the Board for its advice formulation.

1.22 The Secretariat is well regarded by Board members. The Secretariat has prepared a draft standard operating procedure for its activities. The Secretariat does not provide research capability to the Board. Research capability is provided by others within Procurement ACT.

## Procurement Reform Program

1.23 In March 2022 the Treasury Division of the Chief Minister, Treasury and Economic Development Directorate briefed the Government Procurement Board on a Procurement Reform Program:

Work initiated by Procurement ACT and external review, including the Procurement Review Advisory Group (2019), the Working Groups of the ACT Government Procurement Community of Practice (2020-21), the Review of Procurement ACT Report (2021) and the Better Regulation Taskforce (2021-22) has identified elements of the Procurement Framework that require improvement.

...

In recognising that procurement is a whole of government priority area for reform, Treasury has established the Procurement Reform [Program].

1.24 Implementation of the Procurement Reform Program commenced in June 2022 and is due for completion by June 2025. It comprises the following key focus areas:

- increasing transparency;
- streamlining processes; and
- providing greater support.

1.25 One key element is an accreditation program which, 'will make sure that agencies who undertake procurement have the right capability to do so'. Another is the review of, and amendment to, the *Government Procurement Act 2001* and *Government Procurement Regulation 2007*.

## Audit objective and scope

### Audit objective

- 1.26 The objective of the audit was to assess the efficiency and effectiveness of the Government Procurement Board in improving procurement practices, with a focus on:
- systems and processes for reviewing procurement proposals and giving advice to Territory Entities; and
  - the response of Territory Entities to advice provided by the Board on a selection of procurement proposals.

### Audit scope

- 1.27 The audit considered the activities of the Government Procurement Board, focusing on its review and advisory functions, as provided for by paragraphs 6(b) and 6(c) of the *Government Procurement Act 2001*. The audit included consideration of:
- procurement proposals and activities required to be referred by the Regulation, voluntarily referred or referred by the Minister;
  - procurement proposals and activities referred during the period 1 July 2017 to 30 June 2022; and
  - Strategic Procurement Plans presented to the Board during the period 1 July 2017 to 30 June 2022.
- 1.28 In doing so, the audit considered the impact of Board advice on Territory Entities' procurement proposals. The audit considered the efficiency and effectiveness of the administrative systems supporting the Government Procurement Board's functions.
- 1.29 In addition, the audit considered how and what matters are escalated to the Minister in accordance with paragraph 6(e) of the *Government Procurement Act 2001* and the use of other avenues open to the Board to enhance the impact of its specific advice.

## Audit criteria, approach and method

### Audit criteria

- 1.30 To form a conclusion against the objective, the following criteria were used:

#### *Criterion One*

Does the Government Procurement Board efficiently and effectively support Territory Entities' procurement practices?

- Proposals are referred to the Government Procurement Board in accordance with legislative requirements.
- The Government Procurement Board reviews referred proposals and provides sound advice to Territory Entities.
- Efficient and effective systems and processes enable this referral, review and advice.

### *Criterion Two*

Has the Government Procurement Board been effective in improving the procurement practices of Territory Entities in respect of the selected procurement proposals?

- The selected proposals were referred to the Government Procurement Board as required and the proposing Territory Entities effectively engaged with the review process.
- The Government Procurement Board reviewed the referred proposals and provided sound advice to the Territory Entities.
- The Territory Entities effectively responded to advice received from the Government Procurement Board.

## **Audit approach and method**

1.31 The audit approach consisted of:

- identification and review of relevant ACT Government information and documentation including the governance and accountability frameworks, related policy and procedures, research documents, and relevant reports;
- review of Board records including proposal documentation and minuted advice;
- identification and documentation of internal controls and procedures used to give effect to the policies and guidelines and to ensure compliance and evaluating the effectiveness of these controls; and
- interviews and discussions with key officials of Procurement ACT and Major Projects Canberra, and members of the Government Procurement Board.

1.32 The audit comprised:

- a broad-based 'system review' of proposals referred to the Board between 1 July 2017 and 30 June 2022; and
- consideration of three selected case studies.

## **System review**

1.33 The audit considered the operations of the Board for the period 1 July 2017 to 30 June 2022. In this five-year period there were 173 weekly two-hour meetings of the Board, at which 411 separate procurement-related items were considered. Minutes of these meetings

indicate that most agenda time was given over to the Board's consideration of individual procurement proposals and the giving of advice on those proposals.

#### *Additional activities*

- 1.34 The standard practice (as per a draft Standard Operating Procedure) is that the Board considers one to three specific procurement proposals at each meeting and this takes up nearly all the allocated time. In addition to these proposals, the Board:
- receives and discusses updates on previously discussed proposals;
  - holds annual business planning meetings where it reviews its governance documentation and sets out its plans for the year;
  - reviews the Annual Report content related to the operation of the Board which is to be annexed to the CMTEDD Annual Report;
  - reviews Strategic Procurement Plans;
  - reviews Government policy and on occasion initiates queries in relation to the Board's operating practices in respect of policy; and
  - undertakes knowledge development and sharing activities.
- 1.35 These additional activities are all periodic, or ad hoc activities. The vast majority of the Board's time, that is, more than 80 per cent of the Board's scheduled meeting time, directly relates to the review and examination of procurement proposals and the formulation of advice for these proposals.

#### *Written advice*

- 1.36 The means of capturing, recording and sharing advice is for the most part the Board approved minutes. Board minutes are required by legislation. The audit remained open to the possibility that other forms of advice or advisory processes stewarded by the Board may also exist. Where these became evident, they were also taken into account.
- 1.37 As part of this evaluation, soundness of advice has been examined by the Audit Office, where soundness is a judgement of whether the Board's minuted advice, based upon the documentary evidence made available to it, is consistent with the information provided, consistent with policy, is material and is otherwise tenable.

#### *Evaluation of the proponent's response*

- 1.38 A further examination was undertaken by the Audit Office of the proponent's response to the Board's advice. This examination takes account of:
- written and verbal submissions from the proponent to the Board;
  - revised procurement documentation following the issuing of Board advice;

- documentation not provided to the Board but prepared for consideration by the proponent as part of the proponent Territory Entity's internal governance processes; and
- the timing of the above in relation to the point in the procurement lifecycle the procurement had reached at the time of the response.

1.39 The legislation does not require the Board to assess or enforce compliance with its advice. However, as a matter of procedural integrity and good governance it is expected that Territory Entities will acquit the advice received from the Board and that this acquittal will be documented. It is noted, however, that acquittal does not mean necessarily *acceptance*.

### Case studies

1.40 The three case studies enabled closer consideration of what advice the Board provided, how that advice was formulated, how the advice was acquitted by the proponent and whether the acquittal was shared with the Board.

1.41 Accordingly, the case studies:

- summarise the procurement activity, its purpose, value and sourcing options; and
- consider advice of the Board and the effect of that advice on the procurement.

1.42 Three case studies are presented:

- Canberra Health Services (and prior to October 2018, the ACT Health Directorate) proposals in respect of the purchasing of Linear Accelerators. Two proposals were referred to the Board in 2018 and 2021;
- Transport Canberra and City Services proposals in respect of the supply of asphalt. Two proposals were referred to the Board in 2018 and 2020; and
- Canberra Institute of Technology proposals in respect of services designed to achieve organisational change. Three proposals were referred to the Board between 2018 and 2021.

### Evaluation of advice

1.43 For each of the three case studies, the Board's advice was evaluated, taking account of:

- the volume of the actionable and non-actionable discrete points of advice;
- the timing of the advice in relation to the point reached in the procurement lifecycle;
- the potential of the actionable advice to affect the procurement outcome;
- the soundness of the advice; and
- any likely consequences evident in the non-actionable advice.



## Conduct of the audit

- 1.44 The audit was performed in accordance with *ASAE 3500 – Performance Engagements*. The audit adopted the policy and practice statements outlined in the Audit Office’s *Performance Audit Methods and Practices (PAMPr)* which is designed to comply with the requirements of the *Auditor-General Act 1996* and *ASAE 3500 – Performance Engagements*.
- 1.45 In the conduct of this performance audit the ACT Audit Office complied with the independence and other relevant ethical requirements related to assurance engagements.

## Terminology

- 1.46 The report primarily considers the activities of the Government Procurement Board and proponent Territory Entities in the period 1 July 2017 to 30 June 2022. The procurement terminology presented in the report reflects that used at the time. In some cases terminology has changed as Procurement ACT has renewed and revised policies, guidance, factsheets and templates within the Government’s Procurement Framework. Table 1-1 is an example of changes to Approach to Market terminology related to the number of suppliers to be approached.

**Table 1-1 Approach to Market terminology**

Terminology used in this report (2017-2022)	Procurement Factsheet PLN-02 terminology
<i>Single Select</i> : an approach to one named supplier	<i>Limited</i> : an approach to a limited number of suppliers (including just one)
<i>Select</i> : an approach to a selection of suppliers (two or more)	
<i>Open, or Public</i> : an open approach to all interested suppliers	<i>Public</i> : an open approach to all interested suppliers
<i>Whole of government contracts and panels</i> : suppliers preselected through a procurement process, in categories, with pre-agreed contracting arrangements	<i>Selective</i> : an approach to suppliers who have been prequalified to submit a tender such as from a panel arrangement or multi-use list

Source: Report, and ACT Government *Approach to Market and Request Types* Procurement Factsheet PLN-02, June 2022

## Report structure

- 1.47 The audit considered:
- processes for the referral of proposals to the Board (Chapter 2);
  - processes for the Board’s review of proposals (Chapter 3); and

- processes for the formulation and communication of the Board's advice to proponents and the proponents' consideration of the advice. To a limited extent the audit examined how advice is systemically acquitted. Efficiency is also considered (Chapter 4).

1.48 The three case studies (Chapters 5 to 7) more closely examine how proponents have responded to the advice provided by the Board.

## 2 REFERRALS TO THE BOARD

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- 2.1 This chapter discusses the processes by which proponents refer procurement proposals to the Board.

### Summary

### Conclusion

The Regulation requires the referral of procurement proposals, under certain circumstances, with a value over \$1 million or over \$5 million. These thresholds were established in 2007 and do not reflect contemporary procurement risk. Another possible source of referral, which is at the instigation of a Minister, has not been used.

Territory Entities generally comply with referral requirements. Nevertheless, in a few instances (fewer than one in ten) there is evidence of proponents presenting a proposal to the Board after an approach to the market has occurred or presenting a new or substantially different proposal to the Board as a variation to an existing contract.

### Key findings

	Paragraph
<b>Referral processes</b>	
Section 11 of the Regulation established thresholds for referral to the Board; the \$5 million threshold for Directorates and \$1 million threshold for other entities. No other basis has been established. The dollar value-based thresholds have not been revised since 2007. The passage of time and the changing nature of Government procurements and the marketplace, including the increasing use of whole of Government standing arrangements and panels, means these thresholds may no longer be appropriate.	2.7
The audit sought to understand whether there were proposals that were required to be referred to the Board (as per section 11 of the Regulation) but were not. In doing so the audit also considered the potential that proponents were manipulating the total estimated value of a proposal to be just under the mandatory referral threshold (either \$5 million or \$1 million). A review of various datasets did not provide any evidence that proposals that should have been referred to the Board were not, or that proponents were manipulating the value of procurement proposals to avoid the thresholds for referral.	2.15
A review of ten per cent of the 411 proposals referred to the Board between July 2017 and June 2022 (41 in total) shows that four of the proposals were referred to the Board after an approach to the market was made. Late referral severely limits the scope of advice provided by the Board as any advice relating to procurement	2.31

matters already committed to in the approach to market documentation will be difficult to address.

Of the 411 proposals referred to the Board between July 2017 and June 2022, 63 were presented as variations to existing contracts. Board papers show that 7 of these 63 were questioned by the Board, with the Board questioning whether the proposed variation should have been more appropriately identified as a new proposal. A new proposal would have required substantially more documentation and a new referral to the Board. 2.38

### Proposal preparation

All procurement proposals with an estimated value of \$200,000 or more (i.e. procurements deemed 'complex') should be progressed with the assistance and advice of Procurement ACT, or in the case of capital works projects, with the assistance of Major Projects Canberra's Infrastructure Delivery Partner team. Procurement ACT and Major Projects Canberra outlined various procedures that they had established that sought to: determine whether a procurement is likely to need Board review and the timing of such a review; and obtain an appropriate slot in the Board's agenda. The Secretariat to the Board advised that in mid-2019 an estimated one to two proposals per month had bypassed Procurement ACT or Major Projects Canberra but that, following a concerted effort, including by the Board Secretariat, this was addressed and by 2022 only one was received in the year that had not been assisted by Procurement ACT or Major Projects Canberra. Accordingly, the arrangements in place for anticipating, supporting and guiding proposals provide a high level of assurance that Territory Entity proposals are not (by accident or by design) bypassing either Procurement ACT, Major Projects Canberra or the Board. 2.46

## Referral processes

2.2 Territory Entities are responsible for referring proposals to the Board.

### Thresholds for referral

2.3 Amendments to the Act that were introduced in a 2007 Bill anticipated:

The responsible minister ... having the power to refer classes of procurement activities - for example, by type, risk profile or procurement proposals with an estimated value ... to the board for review.

2.4 In practice, section 11 of the Regulation established a dollar value-based threshold for referral to the Board; the \$1 million and \$5 million value thresholds. No other basis has been established.

2.5 One Board member consulted as part of the audit commented:

One oddity is that the Board trigger thresholds have not been changed since 2007. There are several problems with this:

- the legislation then dealt with a different range of procurements and markets ...
- the thresholds mean there are even more procurements coming to the board due to the effect of inflation since 2007 ...
- the dollar value does not equal procurement risk. The Board sees lots of routine proposals over \$5m and some higher risk ones between \$1m and \$5m. Risks relate organisational experience and capability and the type of market to be approached and history of the organisation ... how creative and much effort they have put in in the past ...

2.6 It would be appropriate to review the dollar thresholds, given the passage of time and the changing nature of government procurement and the marketplace, including the increasing use of whole-of-government standing offer arrangements and panels. CPI alone, over 15 years, accounts for a 46 per cent change in the practical effect of the thresholds, meaning far more procurement proposals require referral now than in 2007.

2.7 Section 11 of the Regulation established thresholds for referral to the Board; the \$5 million threshold for Directorates and \$1 million threshold for other entities. No other basis has been established. The dollar value-based thresholds have not been revised since 2007. The passage of time and the changing nature of Government procurements and the marketplace, including the increasing use of whole of Government standing arrangements and panels, means these thresholds may no longer be appropriate.

#### RECOMMENDATION 1 THRESHOLDS FOR REFERRAL

The Government should review:

- a) the value thresholds established in the Regulation, and if deemed appropriate, propose revisions; and
- b) the referral 'classes' and how referral rules are established and implemented.

2.8 However, a value threshold alone is not a sufficient indicator of procurement risk. Recommendation 15 refers to a risk-based referral process.

## Referrals of proposals

2.9 The audit sought to understand whether there were proposals that were:

- required to be referred (as per section 11 of the Regulation) but were not; and
- voluntarily referred (as per subparagraph 6(b(i)) of the Act) but did not need to be.

## Non referral of required proposals

2.10 Separate databases of procurement activity, including Major Projects Canberra tracking spreadsheets, Tenders ACT and the Contracts Register, were cross-checked with Board

listed proposals. This review identified 19 procurement proposals that were not provided to the Board for review, but which *prima facie* were proposals that should have been referred.

2.11 In each case either Procurement ACT or Major Projects Canberra was able to provide a reasonable explanation of why the proposal had not been referred to the Board, including that the proposal:

- was withdrawn;
- was subsumed into a larger proposal with a different proponent;
- was referred under another name;
- was part of a Board-reviewed Strategic Procurement Plan;
- had already been put to the Board (prior to 1 July 2017);
- had not yet been put to the Board (as at 30 June 2022); and
- was erroneously identified by the Audit Office.

2.12 Accordingly, the potential for procurement proposals to proceed to market without having been referred to the Board, where this was required by legislation, appears to be limited.

### Potential manipulation of proposal values

2.13 The audit also sought to understand whether proponents were manipulating the total estimated value of a proposal to be just under the mandatory referral threshold (either \$5 million or \$1 million), thus avoiding the need to refer the proposal to the Board.

2.14 A dataset from Major Projects Canberra for capital works project procurements that resulted in contracts during the audit period (2017 to 2022) was obtained and reviewed. There was no discernible manipulation of procurement values in the dataset.

2.15 The audit sought to understand whether there were proposals that were required to be referred to the Board (as per section 11 of the Regulation) but were not. In doing so the audit also considered the potential that proponents were manipulating the total estimated value of a proposal to be just under the mandatory referral threshold (either \$5 million or \$1 million). A review of various datasets did not provide any evidence that proposals that should have been referred to the Board were not, or that proponents were manipulating the value of procurement proposals to avoid the thresholds for referral.

### Voluntary referrals

2.16 There have been no referrals of procurement proposals to the Board by the Minister in the five-year period to June 2022.

- 2.17 One Board member recalled a voluntary referral from a proponent, because it was deemed particularly sensitive, but did not recall the specifics. Other Board members did not recall any other referrals.
- 2.18 Accordingly, possibly with one exception, neither Territory Entities or Ministers have made voluntary referrals of procurement proposals to the Board.

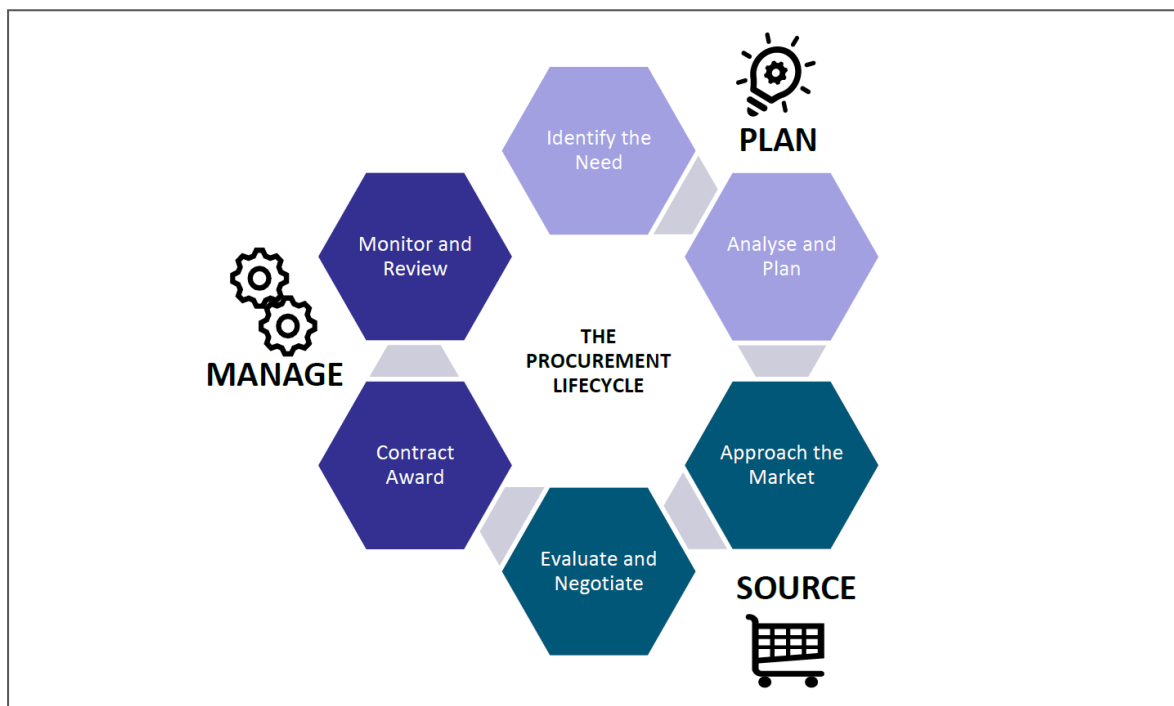
## Other referral considerations

- 2.19 Two further issues related to referrals were considered:
- the risk that proponents refer proposals to the Board after an approach to market has been made. If this eventuates, the referral risks being irrelevant as any Board advice may be redundant if it is unactionable; and
  - the risk that a proposal for a contract variation should be more appropriately classified as a new procurement. Whether a proposal is a variation or a new procurement impacts the documentation presented and the Board's review process, as well as the procurement outcome.

## Timing of referrals

- 2.20 The *ACT Government Procurement Values Guide* (September 2020) supports the *Government Procurement (Charter of Procurement Values) Direction 2020*. The *ACT Government Procurement Values Guide* defines the procurement lifecycle in three 'phases' and six 'sub-phases' (refer to Figure 2-1).

**Figure 2-1 Procurement lifecycle**



Source: *ACT Government Procurement Values Guide* (September 2020), page 6

- 2.21 The procurement lifecycle is identified as comprising the *planning, sourcing* and *management* of the contract through to its post completion review.
- 2.22 The term ‘procurement proposal’ or ‘proposal’ is not defined in the Act or Regulation or in the *Legislation Act 2001* dictionary. A procurement proposal could be taken to be a proposal throughout the first four sub-phases of the procurement lifecycle, *identify the need, analyse and plan, approach the market, evaluate and negotiate*, but would clearly no longer be a proposal once the contract has been awarded.
- 2.23 The issue of when a proponent should refer a proposal for the Board’s review is not straightforward:
- a proponent’s early referral of a proposal (e.g. at the *analyse and plan* sub-phase):
    - gives rise to the risk of receiving advice that is capable of changing the proposal to the extent that a further referral is necessary; and
    - may also mean the proposal is insufficiently developed for the Board to address the matters it needs to review (e.g. the evaluation plan and contract management plan);
  - a proponent’s late referral of a proposal (e.g. at the *evaluate and negotiate* sub-phase):
    - risks constraining the Board’s advice to minor technical matters; and
    - risks the proponent receiving advice that is capable of changing the proposal to the extent that a new approach to market is necessary. In these circumstances, some commercial advantage may be lost to the Territory, suppliers may be put off by the Territory’s seeming indecision and the efficiency of the process may be compromised by the need for re-work.

#### *Optimal review timing*

- 2.24 The decision as to the point up to which, or at which, a proposal should be referred to the Board affects the balance of procedural efficiency and probity, and the effectiveness of the procurement outcome. Previous Auditor-General performance audit reports, Procurement ACT officials’ advice and the procedures evidently applied to proposals (i.e. the two-pass review process) are all underpinned by the principle that a proposal for the purpose of the Board’s review needs to be referred for review *prior* to the *approach to market* sub-phase. This is also signalled by the phrases ‘to be used’ and ‘to be applied’ in section 12 of the Regulation.
- 2.25 Accordingly, for the purpose of this audit, a Board referral and review *prior* to the *approach to market* has been accepted as one condition of satisfactorily addressing the Act and Regulation.

#### *Proposal and contract alignment*

- 2.26 In accordance with the observation made in paragraph 2.21 that a procurement proposal could remain a proposal until it results in a contract, all other things being equal, such a



contract would need to be consistent with the proposal referred to and reviewed by the Board. A procurement proposal that changes substantially after it has been reviewed by the Board, for example, due to a change in requirements or evaluation methodology or because of a different approach to market, would require it to be referred to and reviewed by the Board afresh.

- 2.27 A challenge facing the proponent is determining the significance of any such changes to a procurement proposal. For example, is the change capable of altering the way potential suppliers would approach the commercial opportunity? A shorter or longer tender period, which would be a matter for the proponent to consider and the Board to review, or a shorter or longer project delivery term, which would be a matter for the proponent, may affect the market response substantially.
- 2.28 A similar challenge faces the Board in formulating its advice. If the Board provides advice that is capable of affecting the proposal to the extent that it becomes a significantly different proposal, the Board could expect to review the resulting proposal again (provided the Board's advice is accepted by the proponent). This expectation is relevant to the three case studies.

### Late referrals

- 2.29 A review of ten per cent of the 411 proposals referred to the Board between July 2017 and June 2022 (41 in total) shows that four of the proposals were referred to the Board after an approach to the market had been made. In two of the four instances the Board observed that it was aware the proponent had already approached the market.
- 2.30 The Board has sought to obtain through Procurement ACT advanced notice of what procurements are in the pipeline so that they may encourage earlier engagement by Territory Entities with the Board. It is unclear how the Board could achieve this under its existing functions and powers.
- 2.31 A review of ten per cent of the 411 proposals referred to the Board between July 2017 and June 2022 (41 in total) shows that four of the proposals were referred to the Board after an approach to the market was made. Late referral severely limits the scope of advice provided by the Board as any advice relating to procurement matters already committed to in the approach to market documentation will be difficult to address.

### Referrals of variations

- 2.32 Contract variations are changes mutually agreed between the parties to a contract that change the timeframe (i.e. an extension), the price or the scope of the contracted goods, services or works. The extent of permissible variations is guided by contractual terms and by Government procurement policy. Variations are not limitless, as continuing to vary a contract risks a departure from the original proposal's rationale and authorisation, and risks denying others a commercial opportunity.

- 2.33 The Act does not require the Board to review a proposed variation to an existing contract. However, the *Procurement ACT Contract Variations* factsheet references the role of the Board, and guidance on Procurement ACT's webpages sets out thresholds for the referral of variations.
- 2.34 According to the factsheet one purpose of the Board's review is to establish whether the purpose of the variation amounts to a departure from the original proposal that warrants a new procurement, and therefore should be presented to the Board as a new proposal for its review. This indicates that the Board has a role in ensuring proponents do not vary contracts when this is inappropriate. No further guidance has been provided as to what other purpose a Board review of a variation satisfies.
- 2.35 A proponent's documentation presented to the Board for a variation is different to the documentation necessary for the purposes of the Board's review of a new proposal. A variation deemed a new proposal, or vice versa, would need to be represented with different documentation to the Board.
- 2.36 Board members referred to circumstances where a proposed variation to a contract was referred to the Board, but it would have been more appropriate to describe the proposed variation as a new proposal requiring a new approach to the market. For example, the Board's minutes for its meeting of 28 June 2022 state:
- A good proportion of the variations that the Board consider should actually be treated as new procurements.
- 2.37 A review of the 411 proposals referred to the Board between July 2017 and June 2022 shows that 63 were presented as variations. Board papers show that 7 of these 63 were queried by the Board as to whether the proposed variation should have been identified as a new proposal. For example, the Board's minutes for its meeting of 7 September 2021 state:
- ... The Board noted the scale and nature of the proposed variations represent what is in effect a single select process.
- 2.38 Of the 411 proposals referred to the Board between July 2017 and June 2022, 63 were presented as variations to existing contracts. Board papers show that 7 of these 63 were questioned by the Board, with the Board questioning whether the proposed variation should have been more appropriately identified as a new proposal. A new proposal would have required substantially more documentation and a new referral to the Board.

## Proposal preparation

- 2.39 It is Government policy that all procurement proposals with an estimated value of \$200,000 or more (i.e. procurements deemed 'complex') should be progressed with the assistance and advice of Procurement ACT, or in the case of capital works projects, with the assistance of Major Projects Canberra's Infrastructure Delivery Partner team.

### Involvement of Procurement ACT and Major Projects Canberra

- 2.40 Procurement ACT and Major Projects Canberra outlined arrangements that mitigate the risk that a procurement proposal of a greater estimated value than the regulation thresholds (i.e. \$5 million and \$1 million) could:
- be unknown to them; and
  - (if known) avoid being referred to the Board.
- 2.41 Procurement ACT and Major Projects Canberra outlined procedures that sought to:
- determine whether a procurement is likely to need Board review and the timing of such a review; and
  - obtain an appropriate slot in the Board's agenda.
- 2.42 These included processes to engage early with potential proponents to understand the basis for the estimated value, and then plan for a date for referral to the Board.
- 2.43 To validate these assertions information was sought from the Secretariat as to whether any procurement proposals had been brought to the Board, other than with the assistance of officials within Procurement ACT and Major Projects Canberra. The Secretariat advised there had been none during 2022, but that in mid-2019 an estimated one to two a month were coming direct to the Board that bypassed Procurement ACT or Major Projects Canberra. The Secretariat further advised that following a concerted effort, including by the Board Secretariat, this was addressed and by 2022 only one was received that had not been assisted by Procurement ACT or Major Projects Canberra.
- 2.44 The Suburban Land Agency is, however, an exception, as it manages all aspects of its procurements without the assistance of either Procurement ACT or Major Projects Canberra. This arrangement was widely understood and accepted.
- 2.45 Accordingly, the arrangements in place for anticipating, supporting and guiding proposals provide a high level of assurance that Territory Entity proposals are not (by accident or by design) bypassing either Procurement ACT, Major Projects Canberra, or the Board.
- 2.46 All procurement proposals with an estimated value of \$200,000 or more (i.e. procurements deemed 'complex') should be progressed with the assistance and advice of Procurement ACT, or in the case of capital works projects, with the assistance of Major Projects Canberra's Infrastructure Delivery Partner team. Procurement ACT and Major Projects

Canberra outlined various procedures that they had established that sought to: determine whether a procurement is likely to need Board review and the timing of such a review; and obtain an appropriate slot in the Board's agenda. The Secretariat to the Board advised that in mid-2019 an estimated one to two proposals per month had bypassed Procurement ACT or Major Projects Canberra but that, following a concerted effort, including by the Board Secretariat, this was addressed and by 2022 only one was received in the year that had not been assisted by Procurement ACT or Major Projects Canberra. Accordingly, the arrangements in place for anticipating, supporting and guiding proposals provide a high level of assurance that Territory Entity proposals are not (by accident or by design) bypassing either Procurement ACT, Major Projects Canberra or the Board.

## 3 BOARD REVIEW

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3.1 This chapter discusses the Board’s processes for the review of procurement proposals.

### Summary

### Conclusion

The Board reviews procurement proposals on a weekly basis. Most of its activity in the five years to June 2022 related to single or two-pass reviews of proposals and the review of variations.

Constant challenges for the Board are the presentation of proposals late in the procurement process by proponents, the provision of incomplete documentation by proponents and contradictory and dissenting advice being provided to the Board.

The fundamental issue for consideration is the need for clarity on what the overall purpose of the Board is. There is misalignment between what is stated in the legislation and what is the understanding of the Board’s purpose by proponents, Board members and procurement officials. The lack of a clearly stated purpose for the Board leaves it vulnerable to criticism that it duplicates, or even contradicts, the efforts of Procurement ACT and Major Projects Canberra and that it exceeds its authority. The lack of a clearly stated purpose affects the ability of the Government to improve the efficiency and effectiveness of the Board.

### Key findings

Paragraph

#### Board review processes

Since 2015 the Board has implemented a two-pass process, through which ICT and goods and services procurements over \$5 million in estimated value are subject to two Board reviews: Strategic Review (focusing on the procurement strategy) and Procurement Review (focusing on the details of the procurement). By 2018 the two-pass process was established and was generally being followed and by 2020 it was a mainstream practice. The process creates additional administrative tasks for proponents. However, by ensuring proponents engage with the Board at an earlier stage of the procurement it brings forward the Board’s consideration of matters that are capable of determining the pace and direction that a procurement proposal may take. It allows the Board to take a wider view of the proposal, including strategic matters, allows the proponent to make more widespread changes to their proposals and potentially avoids the need for re-work by the proponent. It is timely to consider

3.19

the value of the two-pass review process, in conjunction with a broader consideration of the purpose of the Board.

### Purpose of the Board

As per the Act and Regulation, the Board has a role in reviewing and advising on procurement proposals, examining systemic matters, endorsing practice and methods where appropriate and endorsing Strategic Procurement Plans. However, there is no explicit statement in the Act as to the overall purpose of the Board when exercising its functions and the 2001 and 2007 Bills' presentation speeches may no longer be relevant to this matter. This creates difficulties in determining which of the Board's functions is a priority, for example, identifying systemic matters or reviewing individual proposals. 3.41

Board members consulted as part of the audit emphasised their role in reviewing proposals and identified two broad purposes: acting as an additional safeguard to ensure deficiencies in a proposal are identified or reconsidered and exploring fundamental considerations associated with the proposal in order to provide strategic insights. These broadly align with the two-stages of the two-pass review process and align with the function of the Board to review procurement proposals (paragraph 6(c) of the Act). The lack of a clearly stated purpose for the Board leaves it vulnerable to criticism from proponents that it duplicates, or even contradicts, the efforts of Procurement ACT and Major Projects Canberra, and that it exceeds its authority by querying the fundamentals of a proponent's procurement, even if this is done early in the process. A clearly stated purpose could remove this uncertainty and the risk of creating unnecessary administrative tasks and delays and could also resolve the issue of whether 'strategic insights' are a matter for Board consideration and advice. 3.42

### Board review activities

Major Projects Canberra and Procurement ACT have a role in assisting proponents with the preparation of procurement documentation. It is apparent that Major Projects Canberra and Procurement ACT respond to the circumstances they face, which are influenced by the capability and capacity in the proponent Territory Entity, as well as the proposal's priority and urgency. Procurement ACT described a formal sign-off process whereby a senior official (either a senior officer or an executive) clears documents prior to them being forwarded to the Secretariat and the Board for consideration. Such an approach is, in principle, administratively sound and efficient if it is transparent as to what is being 'cleared' by whom, and for what purpose. 3.58

A review of procurement proposal documentation suggests, however, that it is unclear who is responsible for the content of certain documentation i.e. whether it was prepared by the proponent or Procurement ACT. This is particularly the case with the Procurement Review proforma that is used in the two-pass process. The proforma includes a section capturing how the proponent has responded to the Board's advice from the first pass. In only a small minority of cases is it evident that the response put to the Board was prepared by the proponent. This creates a risk 3.59

that the Board's advice, while directed to the proponent, is being acquitted by Procurement ACT.

Since 2019 Procurement ACT has used a *Government Procurement Board Brief* as a mechanism by which it can identify and outline for the information of the Board any differences it might have with a proponent in relation to the procurement proposal. By doing so it has sought to move away from 'whispers' and 'behind closed door' discussions and bring 'rigour and transparent [to] the process'. However, a review of emails sent by Procurement ACT officials shows that not all briefs circulated by Procurement ACT officials to Board members are captured in the Board's SharePoint records system. Accordingly, the Board's records management system, SharePoint, is likely to reflect only some of the matters that have been escalated to the Board via written briefs by Procurement ACT officials. This is not conducive to rigour and transparency in the process. 3.72

### Board consideration of proposals

The audit considered a sample of 30 procurement proposals (of the 292 single-pass and two-pass proposals presented to the Board between 2017-18 and 2021-22) to test whether sufficient documentation was provided for its review and consideration. With respect to the matters required to be considered by the Board as per subsection 12(2) of the Regulation (i.e. value for money, a proposed evaluation methodology, evaluation criteria and contract management arrangements) the audit found: in six instances a document necessary for the review of a specific requirement was not available to the Board (either a probity statement, or statement of the contract management arrangements was missing); and in a further six instances more than one document necessary for the review of a specific requirement was not available to the Board (i.e. there were combinations of a missing probity statement, a statement of the contract managements, a Risk Plan and an Evaluation Plan). The review also shows: in eight instances a clear expression of the purpose and details of the procurement was not evident; in six instances a procurement strategy was not evident; and in three instances there was no evidence that advice in response to the first pass had been taken into account at the second pass. 3.84

The audit considered a further 10 per cent sample (29 in total) of the 126 single-pass and 166 two-pass proposals referred to the Board between 2017-18 and 2021-22 in order to consider the timing of the Board's review. The audit found: single-pass proposals are on average put to the Board 1.5 weeks before the intended approach to market; and two-pass proposals, by the time they come back for the second pass, are on average put to the Board two weeks before the intended approach to market. This indicates that where proposals are presented for the second and last time or for the only time to the Board it is common for this to be within a week or two of the intended approach to market. This indicates proponents do not expect substantial matters to arise from the Board's review that would require extensive reworking. 3.93

In June 2022 Procurement ACT presented a rationale to the Board for the cessation of the two-pass review policy. The Board did not agree to it. The two-pass review policy is, however, being reviewed as part of Treasury's 2022-2025 Procurement 3.94

Reform Program. How the pros and cons of the two-pass process are gauged depends on the purpose of the Board. Government should consider the merits of continuing with the two-pass review process in the light of its wider consideration of the Board's purpose and functions.

Variations account for a substantial number of items on the Board's weekly agenda; between 2017-18 and 2021-22 they represented 63 of a total of 411 procurement proposals (15 per cent). Forty-seven of the 63 variations related to Contract Price and represented total additional costs of \$581 million for contracts with a total initial Contract Price of \$1.321 billion. While the average variation value was an additional 44 per cent of the initial Contract Price, in 21 instances the variation was for 50 per cent or more of the initial Contract Price. Increases in scale of this magnitude raise questions about fair access to commercial opportunities for other suppliers.

3.106

Board minutes frequently record adverse comments about variations and the limited role the Board can play in reviewing and advising on variations, although it is apparent that the Board has, on occasion, performed an important role in challenging whether a variation is defensible. At the Board meeting of 28 June 2022, Procurement ACT proposed to the Board 'removing the practice of variations being provided to the Board for review'. This appears practically helpful, on the premise that this does not lead to bypassing of the Board by proposals presented as variations which should be a new approach to market.

3.107

### Other review activities of the Board

A review of Board activities between 2017-18 and 2021-22 shows that Strategic Procurement Plans are not frequently presented to or discussed by the Board. Nine instances were found of which six related to the activities of the Suburban Land Agency. The Regulation does not state what information a Strategic Procurement Plan should include and it is not specific about the detail necessary to enable the Board to perform its review for the purposes of endorsement. However, in June 2022 Procurement ACT drafted guidance on the form and function of Strategic Procurement Plans. The guidance should help both the Board and proponents.

3.115

The Board's formal endorsement of a Strategic Procurement Plan is a prerequisite to avoiding the referral of multiple separate but similar proposals. Board endorsement of Strategic Procurement Plans did not happen until 27 October 2020, although earlier Strategic Procurement Plans were reviewed by the Board. Proponents' use of Strategic Procurement Plans is limited and the Board's review process for these plans is not yet mature. For the Board to be efficient and effective Strategic Procurement Plans need to be adopted by more Territory Entities or removed from the Regulation.

3.116

Paragraph 6(d) of the Act allows for the Board 'to consider, advise on and, if appropriate, endorse procurement practices and methods'. A review of Board records indicates that a review of systemic or generalisable procurement practices has not been routinely undertaken by the Board. The Board has, however, been consulted on aspects of the Territory's Procurement Framework, as proposed by Procurement ACT. In March 2022 Procurement ACT and the Board considered how they may work together to create more authoritative guidance on 'internal

3.123



procurement practices' through a Board endorsement process of such practices. This is a sound approach, which uses another function of the Act for which the Board is responsible, which has not been used to date.

The Board's review of Annual Procurement Plans is not provided for by the Regulation but was instead introduced through the *Smart Modern Strategic Procurement Savings Initiative* in April 2015. Annual Procurement Plans have been prepared in response to periodic requests from Procurement ACT. While Annual Procurement Plans are prepared by, and for, others and for purposes other than the Board's review, the Board has found little practical use for them. There are references to low completion rates, late completion and a low level of accuracy. One Board member estimated a 20 per cent level of accuracy in respect of planned procurement activity versus activity undertaken. 3.127

## Board review processes

- 3.2 The Board's review of procurement proposals is principally shaped by:
- requirements established in the Act and Regulation as to what a procurement proposal must address (refer to paragraph 1.9); and
  - policies, guidance, factsheets and templates that, combined, form the *ACT Government Procurement Framework*.<sup>3</sup>
- 3.3 The Board's review is informed by:
- documentation that is prepared for, and provided to, the Board by the proponent; and
  - a 'question and answer' session lasting between 20 to 30 minutes between the Board and proponent, which is also attended by Procurement ACT and Major Projects Canberra advisors.
- 3.4 Minutes of Board meetings indicate that a periodic topic of discussion of the Board relates to what documents it should obtain in advance of its consideration of procurement proposals. Some documents are required for any complex procurement as a matter of procurement governance, while others relate to the Board's specific requirements for its review.

## Proposal documentation

- 3.5 According to the *ACT Government Procurement Framework* all complex procurements, regardless of whether they are referred to the Board, should have a variety of documents prepared prior to the approach to market, including:
- a Statement of Requirements;

<sup>3</sup> Procurement Factsheet: PFW-01-202206 sets this out.

- procurement Risk Assessment;
  - a draft contract;
  - a draft Contract Management Plan; and
  - draft approach to market documents such as a Request for Tender (RFT) and an Evaluation Plan.
- 3.6 Additionally, a Procurement Plan Minute, a Procurement Approval Minute or a Procurement Plan Variation is also likely to have been prepared. Such documentation should be prepared, but not necessarily approved, by the delegate prior to the Board's consideration of the proposal. Final delegate approval prior to the Board's review risks making the Board's advice redundant.
- 3.7 These draft documents, if prepared reflecting available policy and guidance, are sufficient for the Board to address its statutory role, which is to consider:
- the value for money procurement principle (subsection 22A(3) of the Act), where four matters are highlighted:
    - (a) probity and ethical behaviour;
    - (b) management of risk;
    - (c) open and effective competition; and
    - (d) optimising whole of life costs;
  - *the Government Procurement (Charter of Procurement Values) Direction 2020* and *Government Procurement (Ethical Treatment of Workers Evaluation) Direction 2021*; and
  - paragraph 12(2)(b) of the Regulation, where three matters are highlighted:
    - (i) the evaluation methodology to be used to decide the successful supplier; and
    - (ii) the evaluation criteria to be applied to the procurement; and
    - (iii) the contract management arrangements to be applied to the procurement.
- 3.8 With the exception of the *Charter of Procurement Values* of 2020, the Board's consideration of these matters is most effectively achieved *later* in a proposal's development, after a procurement strategy has been developed. There is, however, a risk that leaving Board consideration until a later stage means substantial rework by the proponent and delay to the procurement, if the Board disagrees with the proposed approach or recommends additional work to be done.

### Two-pass review process

- 3.9 On 11 April 2015 Cabinet endorsed the *Smart Modern Strategic Procurement Savings Initiative*. The initiative included the introduction of:
- a 'two-pass process for major procurements, whereby a proposed procurement approach is provided to the Board at the concept stage to allow [for] consideration of procurement sourcing options and an assessment of risks'; and

- ‘the submission of Annual Procurement Plans from each Directorate that will allow a consolidated cross-Directorate review of the Territory’s proposed procurements’.
- 3.10 The Board sought to implement this two-pass process, through which ICT and goods and services procurements over \$5 million in estimated value are subject to two Board reviews:
- a **Strategic Review**: The initial (i.e. first-pass) review focuses on the procurement strategy. Proponents outline the sourcing options that have been considered and recommend an approach that best supports the strategic objectives, and identify strategic risks, opportunities for cross-agency collaboration, and high-level contract management principles.
  - a **Procurement Review**: The second review (i.e. second-pass) focuses on the details of the procurement as captured in the full procurement documentation (e.g. the Request For Tender, evaluation criteria and assessment methodology, governance arrangements and a Contract Management Plan).
- 3.11 For other proposals a single-pass review is undertaken. A single-pass review entails a Board review that incorporates elements of both the Strategic Review and Procurement Review.
- 3.12 Board records indicate that by 2018 the two-pass process was established and was generally being followed and by 2020 it was mainstream. Accompanying two-pass and single-pass Board review processes is a suite of proformas that are specific to the needs of the review process. For example, the Strategic Review Submission proforma encourages an in-depth examination and presentation of the preferred procurement strategy including consideration of:
- existing panels or whole-of-government standing offer agreements;
  - a ‘discovery’ process, which outlines different sourcing possibilities; and
  - collaboration and cross-directorate consultation.
- 3.13 For proposals subject to the two-pass process, this brings forward the Board’s consideration of matters that are capable of determining the pace and direction that a procurement proposal may take. It facilitates the Board’s influence over delegate and senior executive decision making and away from the more technical aspects typically managed and administered by procurement officials within the proponent Territory Entity or Procurement ACT.
- 3.14 The two-pass process has been slow to become embedded. It is now largely accepted, but it has not been universally welcomed. While presented as part of an efficiency and savings agenda in 2015, it has also been described as adding resources, time and uncertainty.

### Number of two-pass and single-pass proposals

- 3.15 Table 3-1 shows the Board’s consideration of two-pass and single-pass procurement proposals between 2017-18 and 2021-22.

**Table 3-1 Board consideration of proposals in single-pass and two-pass process**

	2017-18	2018-19	2019-20	2020-21	2021-22	Total
Single-pass proposals	22	14	27	36	27	126
Two-pass proposals	27	34	24	34	47	166
<b>Total</b>	<b>49</b>	<b>48</b>	<b>51</b>	<b>70</b>	<b>74</b>	<b>292</b>

Source: Audit Office analysis of Board papers (July 2017 to June 2022)

3.16 A review of the Board's consideration of two-pass and single-pass procurement proposals between 2017-18 and 2021-22 shows the Board considered more proposals in the two-pass process (166 from a total of 292) than one-pass proposals (126 from a total of 292).

3.17 A review of Board minutes between 2017-18 and 2021-22 also shows the two-pass review process has been frequently discussed by the Board, particularly with respect to its initial implementation. The Board frequently discussed:

- whether it was necessary;
- what categories of procurement proposals it could apply to; and
- what documents are best able to facilitate the reviews.

3.18 The Board did not initiate the concept of the two-pass process review and it is apparent that the Board:

- expressed reservations with the way it was introduced;
- has focused on minimising the burden of documentary requirements associated with the two-pass review process; and
- has generally not been supportive of broadening the scope of the process, for example, by requiring all procurement proposals being subject to the two-pass process.

3.19 Since 2015 the Board has implemented a two-pass process, through which ICT and goods and services procurements over \$5 million in estimated value are subject to two Board reviews: Strategic Review (focusing on the procurement strategy) and Procurement Review (focusing on the details of the procurement). By 2018 the two-pass process was established and was generally being followed and by 2020 it was a mainstream practice. The process creates additional administrative tasks for proponents. However, by ensuring proponents engage with the Board at an earlier stage of the procurement it brings forward the Board's consideration of matters that are capable of determining the pace and direction that a procurement proposal may take. It allows the Board to take a wider view of the proposal, including strategic matters, allows the proponent to make more widespread changes to their proposals and potentially avoids the need for re-work by the proponent. It is timely to consider the value of the two-pass review process, in conjunction with a broader consideration of the purpose of the Board.

## Purpose of the Board

- 3.20 Discussion with members, and a review of agenda and Board minutes for the audited period (1 July 2017 to 30 June 2022), indicates that the vast majority of the Board's time and output relates to reviewing and advising on proponents' procurement proposals. However, the functions of the Board are broader than reviewing and advising on proponents' procurement proposals. Given the breadth of the Board's functions, as per paragraphs 6(a) to 6(e) of the Act, and the Board's particular concentration of effort on procurement proposals (paragraph 6(c) of the Act), the audit considered the Board's purpose through:
- consideration of the legislative intent, as set out in the introductory statement to the Bills of 2001 and 2007;
  - discussion with Board members as to how they perceive their role;
  - consideration of proponent feedback on the Board's purpose and value; and
  - a review of records of the Board's annual planning meetings. These meetings provide particular insights into the Board's reflection on its overall purpose and functions.

## Legislation

- 3.21 Other than the Board's review and advice on procurement proposals, it is also evident in the Act that it was intended for the Board to:
- examine systemic matters in addition to specific proposals (paragraphs 6(d) and 6(e)); and
  - endorse practice and methods where appropriate (paragraph 6(d)); and
  - endorse Strategic Procurement Plans as per paragraph 11(2)(b) in the Regulation.
- 3.22 There is no explicit statement in the Act as to the overall purpose of the Board when exercising its functions. There is no statement in the Act as to which functions are the most important, or why a particular function should be addressed, i.e. its purpose.
- 3.23 What is stated in the Act with respect to the Board's function has remained the same since 2007.
- 3.24 For the Government Procurement Bill's presentation speech on 1 March 2001, the Minister outlined:
- The bill will create the Government Procurement Board, which will develop, implement and review policies and practices for the procurement of goods, services and works by territory entities ...
- ... the board will ensure the **ongoing improvement of procurement practices** [audit emphasis] and purchasing skills in government agencies. The board will develop and issue procurement guidelines and monitor the key purchasing activities of territory entities ...
- Importantly, the board's central functions will not **detract from the accountability of chief executives** [audit emphasis] ... [and] will not have executive power to enter contracts, nor to prevent agencies from entering contracts.

... agencies will be required by procurement guidelines to submit details of their proposed procurement methodology on major projects, say above \$1 million in value, before inviting tenders or expressions of interest. Similarly, the board will be providing advice at the planning stages of high-risk projects.

3.25 The 2001 Bill’s presentation speech refers to a broad purpose for the Board, which is to ‘ensure the ongoing improvement of procurement practices’.

3.26 The reference to ‘the accountability of chief executives’ reflects *inter alia* responsibilities established in section 31 and section 55 of the *Financial Management Act 1996*. The use of the word ‘detract’ appears to indicate concern that the Board may weaken the accountability of Chief Executives (or other delegates). However, it is equally the case that the ‘accountability of Chief Executives’ does not diminish the responsibilities of others where those responsibilities are placed on them by legislation. This matter is discussed further in Chapter 4 (paragraph 4.45).

3.27 In 2007, in the context of the *Strategic and function review of the ACT Public Sector and Services* (April 2006) and the *Review of the operation of the Government Procurement Act 2001* (November 2006), the Minister’s presentation speech on the Amendment Bill on 6 March 2007 outlined proposed changes that would:

... remove a range of unnecessary administrative obligations; improve the efficiency of relevant government operations; reduce the time frames for individual procurement activities ... [and give] the board a more strategic advisory role and removing its ability to make disallowable instruments and determine the regulatory framework faced by agencies. The Government believes that this latter function is more appropriately discharged by the Executive and the Legislative Assembly.

3.28 It is clear from the bills’ presentation speeches in 2001 and 2007 that the scope and authority of the Board were matters of interest and consideration. By 2007, however, and following five years of Board activity, there was a significant focus on improving efficiency by reducing administrative obligations and timeframes. Given these speeches reflect the context of the Government’s procurement activities over 15 years ago, it would be timely to redefine and to detail the Board’s purpose, whether in the Act, or through other means.

### Members’ perspectives

3.29 For the purpose of the audit, eight current or former members of the Board (public and non-public employee) provided feedback as to the purpose and value of the Board as well as its shortcomings. Table 3-2 provides a summary of comments from the feedback on the Board’s purpose and value.

**Table 3-2 Board member feedback on the purpose and value of the Board**

Principal purpose and changing role of the Board
<ul style="list-style-type: none"> <li>• The role was that of a gatekeeper but is more that of an advisor now.</li> <li>• The idea is that the Board is the checkers’ checker ... ‘a sanity check’.</li> <li>• In the early days I struggled with working out what the point was.</li> </ul>

<b>Principal purpose and changing role of the Board</b>
<ul style="list-style-type: none"> <li>• The Board has become much more interested in pursuing what impact it is having, e.g. a focus on outcomes.</li> <li>• It begs the question why is the Board even necessary? If the procurement framework was operating in accordance with best contemporary practice, Board advice would be redundant.</li> </ul>
<b>Impact of the Board's considerations</b>
<ul style="list-style-type: none"> <li>• We deal with routine and administrative stuff, and fundamental issues are rare.</li> <li>• There were some of the more seasoned ACTPS members who were less engaged or less interested in the big issues and happy to 'tick and flick'.</li> <li>• I knew that procurement is a hugely significant issue to the Territory and to the community. It has the potential to be highly influential. I get the leverage that strategic thinking can bring to the \$ value of proposals.</li> <li>• I realised not all members are happy seeing the Board as operating in the strategic space. Some of the members are happier in amongst the weeds, and not wanting to look at the big picture issues.</li> <li>• I have become fed up with the number of times that risk assessments were the talking point. Too many times the discussion descends into 'low level' matters. It needs scaling up. That's where the value is.</li> <li>• Well, it's our job to provide advice and we'll always find something to add, and we'll dig down into the minutiae if there's nothing apparent at the strategic level.</li> <li>• The attention of the Board is 'overkill' for the more routine procurements.</li> </ul>

Source: Notes from Audit Office interviews with Board members (September and October 2022)

3.30 Members and former members also commented on risks surrounding the relationship between the Board and the proponent. These are shown in Table 3-3.

**Table 3-3 Board member feedback on its relationship with proponents**

<b>Managing relationships</b>
<ul style="list-style-type: none"> <li>• There is the dilemma between the delegate and the Board. Delegates have the FM Act authority and not the Board so making bold authorisations is pointless and will be shrugged off by the delegate.</li> <li>• Getting the language and authority and reach in balance is the challenge.</li> <li>• The Board generally knows when its hands are tied and it tries to make the best of a bad situation.</li> <li>• On the advisory remit of the Board, there was always that tension, getting the right tone, and not asserting we have any form of delegated authority. It was widely understood we were advisory but that in itself sometimes worked against the process we needed to go through.</li> <li>• We are working away from an 'adversarial' process, combative relationship, or 'audit style', and trying to introduce more of an outcome focus, rather than the procedures and process focus of PACT.</li> </ul>
<b>Risk of overreach versus value adding</b>
<ul style="list-style-type: none"> <li>• It's not the Board's role to go into fundamentals. When members stray into asking about the necessity of the proponents' services, or the shape of outcomes, then the Board has gone too far.</li> <li>• A lot of time is spent working beyond the superficial into what it is the procurement is all about. What are the specific features that make [a construction project] fit-for-purpose? The GPB would want to explore this. This should be more of their core business, than routine QA.</li> </ul>

- We do provide a lot of advice on program planning, implementation and risk, and understanding the outcome that needs to be achieved for government and community.
- And that takes a lot of time and effort, and there is often as much discussion about project implementation and project risk, rather than procurement risk.
- The legislation provides the minimum authorising environment. There is a whole load of other matters that influence the operation of the Board.
- I get that what the Board wants to do and what value it is perceived to have by the proponents are two different things. This might be why proponents don't bother filling in the surveys the Board sends out.
- We are trying to encourage a more 'exploratory' response by proponent. However, the proponent doesn't then get why the advice is different to PACT.

Source: Notes from Audit Office interviews with Board members (September and October 2022)

3.31 All members describe positive aspects in their advisory role. Many of the members described the changing nature of the role over time and described this as improvement. A review of members' comments (as shown in Table 3-2) broadly suggests there are two views as to the Board's purpose:

- the Board is an additional safeguard to ensure deficiencies in a proposal are identified or reconsidered (but the fundamentals of the proposal remain to be shaped and decided upon by the proponent); and
- the purpose of the Board is to explore fundamentals of the proposal, such as consideration of project outcomes and project risk, rather than specific procurement risks, in order to be able to arrive at strategic insights.

3.32 All members acknowledged the advisory rather than directive nature of their function, and the focus on striking the right tone and balance in engaging with proponents and delegates (as shown in Table 3-3).

3.33 It was noted in members' comments that there was less emphasis on the Board's role in developing understanding and advising on systemic matters and more emphasis on its role in advising on individual proposals. This is also borne out in the Minister's response to an Estimates Hearing Question on Notice on 5 September 2022:

Based on available records, the Government Procurement Board has not formally provided advice to the Minister on issues of procurement activities of Territory entities or the operation of the Act in the last five years under section 6(e) of the *Government Procurement Act 2001* (the Act).

3.34 In response to the draft proposed report the Chief Minister, Treasury and Economic Development Directorate advised:

Noting the predominantly advisory role of the Board, obligations of the Board (for example, reporting to the Minister) are generally expressed in reactive terms (for example, as requested).



### Annual planning

3.35 At annual business planning meetings of the Board there has been regular discussion as to the Board's purpose:

- 5 September 2017 minutes refer to 'original intent not being advisory but about accreditation ... and guidelines and policy and that this intent changed when the regulations were implemented';
- 4 August 2020 minutes refer 'to our actions in respect of our broader purpose' and itemising areas for learnings on systemic matters; and
- 21 June 2022 minutes posed the question 'What if the Board were given the power to intervene in procurements?'

3.36 At these annual meetings the Board also routinely reviewed and revised as necessary its core governance documentation: Risk Plans, Business Plan, Charter and Terms of Reference. However, these documents do not specifically discuss or provide further guidance with respect to the Board's purpose.

### Proponents' perspectives

3.37 As a matter of better practice, the Board seeks feedback on its activities from proponents. Board minutes refer to two surveys of proponents having been conducted:

- 13 October 2020 refers to 15 respondents (from a total of 80 surveys sent) of whom 12 agreed or strongly agreed they 'found the Board's advice valuable' and 11 advised that they had made changes as a result of the advice from the Board; and
- 23 November 2021 refers to 54 respondents of whom 31 agreed or strongly agreed they 'found the Board's advice useful' and 35 advised that they followed all the Board's advice. The number of surveys sent for this survey was not recorded.

3.38 Following the completion of the two surveys the Board identified learnings and improvement actions. For example, minutes of the Board's 23 November 2021 meeting state:

Part of this discussion will identify ways in which the purpose and role of the Board can be better communicated to directorates. This will assist in addressing the following points that were made as part of the survey responses:

- raised questions around the role and functions of the Board; and
- timeframes and time pressures in coming to the Board.

3.39 The audit also considered interview notes from the Renée Leon review (October 2021) and qualitative statements made in the Board surveys of 2020 and 2021. Selected feedback from proponents includes:

From my limited involvement with the Board, I think its entire terms of reference and role needs to be reviewed to make it relevant.

A stronger focus [from the Board] on pushing cross-directorate or WhoG engagements would be better for the Territory.

Involvement [with the Board] was a masterclass rather than to discuss a procurement.

Interactions have been good going through the Procurement Board.

3.40 As part of audit fieldwork one ACTPS executive advised:

The definition of the Board role needs fixing. The question is 'why does the Board as part of the risk and governance arrangements for the Government conduct 'low level reviews', especially when there is a distinct overlap with what Procurement ACT does?' As currently configured it creates difficulties for both ...

3.41 As per the Act and Regulation, the Board has a role in reviewing and advising on procurement proposals, examining systemic matters, endorsing practice and methods where appropriate and endorsing Strategic Procurement Plans. However, there is no explicit statement in the Act as to the overall purpose of the Board when exercising its functions and the 2001 and 2007 Bills' presentation speeches may no longer be relevant to this matter. This creates difficulties in determining which of the Board's functions is a priority, for example, identifying systemic matters or reviewing individual proposals.

3.42 Board members consulted as part of the audit emphasised their role in reviewing proposals and identified two broad purposes: acting as an additional safeguard to ensure deficiencies in a proposal are identified or reconsidered and exploring fundamental considerations associated with the proposal in order to provide strategic insights. These broadly align with the two-stages of the two-pass review process and align with the function of the Board to review procurement proposals (paragraph 6(c) of the Act). The lack of a clearly stated purpose for the Board leaves it vulnerable to criticism from proponents that it duplicates, or even contradicts, the efforts of Procurement ACT and Major Projects Canberra, and that it exceeds its authority by querying the fundamentals of a proponent's procurement, even if this is done early in the process. A clearly stated purpose could remove this uncertainty and the risk of creating unnecessary administrative tasks and delays and could also resolve the issue of whether 'strategic insights' are a matter for Board consideration and advice.

## RECOMMENDATION 2 BOARD PURPOSE AND FUNCTIONS

The Government should clearly articulate the Board's purpose taking into account the context in which Territory procurement is undertaken in 2023. In doing so:

- a) consideration should be given to whether the Board's primary function is to guide system level policy and practice or individual proposal level practice;
- b) a statement of purpose should be made, which includes primary and subordinate purposes and functions; and
- c) the Act and Regulation should be amended as necessary.

## Board review activities

- 3.43 The audit considered the scope of activities undertaken for the purpose of the Board's review of procurement proposals including:
- the preparation of procurement proposal documentation;
  - scheduling of a Board agenda slot;
  - the clearance of a procurement proposal for the Board's review; and
  - the conduct of the Board meeting.
- 3.44 The audit also considered the extent to which matters of relevance were captured in documentation and shared with the Board prior to the meeting and whether matters of significance to the Board's review were communicated through other means.

### Preparation of procurement documentation

- 3.45 Major Projects Canberra and Procurement ACT officials outlined the processes they followed for the preparation of procurement proposal documentation for the Board. The number of new procurement proposals is significant (around 200 at any one time in the goods and services category alone) although only a small proportion of those proposals is flagged for Board referral and review.
- 3.46 Major Projects Canberra and Procurement ACT provided different accounts of how they prepare and review documentation, including the extent to which they:
- edited and amended the documentation originated by the proponent; and
  - completed documentation originated either by the proponent or by others.
- 3.47 It is apparent, however, that Major Projects Canberra and Procurement ACT respond to the circumstances they face, which are influenced by the capability and capacity in the proponent Territory Entity, as well as the proposal's priority and urgency. This is administratively sound and efficient. The Major Projects Canberra Infrastructure Delivery Partners team described itself as collaborative, as the team's name suggests, although it respects a proponent's authority and responsibility.

### Scheduling of the procurement proposal

- 3.48 When documentation is nearing completion, a place on the Board's agenda is arranged. This is done as early as possible. The Secretariat's diaries indicate slots in meetings being allocated between two to four weeks in advance.
- 3.49 However, emails in the Board's Outlook email account indicate that consideration by the Board has also been requested at short notice (e.g. at one of the next two meetings) in a small minority of cases. On rare occasions a meeting may be conducted via an exchange of emails. This is referred to as an 'out of session' process due to the proponents' appeals of

urgency. Secretariat tracking sheets indicate this has occurred on 11 occasions (of 130) in the period July 2017 to June 2021.

- 3.50 Major Projects Canberra and Procurement ACT officials coordinate the referral and booking process with the Board Secretariat rather than the proponents directly.

### Clearance of a procurement proposal for the Board's review

#### *Procurement ACT*

- 3.51 Goods and services proposals account for 59 per cent of proposals referred to the Board. It is exclusively goods and services proposals that are subject to a two-pass review process, which in part accounts for the larger proportion of goods and services proposals than capital works proposals. Procurement ACT described a formal sign-off process whereby a senior official (either a senior officer or an executive) clears documents prior to them being forwarded to the Secretariat and the Board for consideration.
- 3.52 There is a risk that the implementation of a 'clearance' process presents Procurement ACT officials with an authority, and a corresponding responsibility and ownership for the proposal, that *appears* to be at odds with the 'accountability of chief executives' (paragraphs 3.24 and 3.25). However, such an approach is, in principle, administratively sound and efficient if it is transparent as to what is being 'cleared', by whom, and for what purpose. It is not.
- 3.53 The templates routinely used in documentation provided to the Board refer to Procurement ACT assurance. For example, proposals to the Board that involve Procurement ACT may be signed off by the Executive Branch Manager, with a statement that:
- Procurement ACT has been consulted and has provided advice that the [Procurement Plan Minute] is consistent with the Territory Procurement Framework (Framework), inclusive of the *Government Procurement Act 2011*, *Government Procurement Regulation 2007* and other relevant legislation and Territory policies.
- 3.54 This 'sign-off' template, according to its explanatory notes, also allows for the identification of 'matters that may have an impact upon procurement outcomes or departures from advice provided by Procurement ACT'.
- 3.55 In practice, however, the accompanying Procurement ACT documentation provided to the Board offers limited additional assurance, since documentary evidence of clearance in the Board's SharePoint records system was lacking, was equivocal or was incomplete in around half (54 per cent) of a sample of 120 cases reviewed in respect of the three years between 2019-20 to 2021-22.<sup>4</sup>
- 3.56 The matter of what assurance the clearance process provides is further complicated by the difficulty the Board has in knowing who is responsible for the content of certain

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<sup>4</sup> The most recent complete three years (2019-2022) of the audit period were sampled since the two-pass process had matured by this stage.

documentation, since not all documentation presented to the Board makes it clear who prepared it: the proponent or Procurement ACT.

- 3.57 This is particularly the case with the Procurement Review proforma that is used in the two-pass process. The proforma includes a section capturing how the proponent has responded to the Board's advice from the first pass. However, in only a small minority of cases is it evident that the response put to the Board was prepared by the proponent. There is therefore a risk that the Board's advice, while directed to the proponent, is being acquitted by Procurement ACT. If this is the case this is poor administration in terms of efficiency, accountability and procedural integrity.
- 3.58 Major Projects Canberra and Procurement ACT have a role in assisting proponents with the preparation of procurement documentation. It is apparent that Major Projects Canberra and Procurement ACT respond to the circumstances they face, which are influenced by the capability and capacity in the proponent Territory Entity, as well as the proposal's priority and urgency. Procurement ACT described a formal sign-off process whereby a senior official (either a senior officer or an executive) clears documents prior to them being forwarded to the Secretariat and the Board for consideration. Such an approach is, in principle, administratively sound and efficient if it is transparent as to what is being 'cleared' by whom, and for what purpose.
- 3.59 A review of procurement proposal documentation suggests, however, that it is unclear who is responsible for the content of certain documentation i.e. whether it was prepared by the proponent or Procurement ACT. This is particularly the case with the Procurement Review proforma that is used in the two-pass process. The proforma includes a section capturing how the proponent has responded to the Board's advice from the first pass. In only a small minority of cases is it evident that the response put to the Board was prepared by the proponent. This creates a risk that the Board's advice, while directed to the proponent, is being acquitted by Procurement ACT.

### RECOMMENDATION 3 ACCOUNTABILITY AND TRANSPARENCY

Territory Entities should clearly authorise all documentation presented to the Board.

#### *Procurement ACT and Major Projects Canberra*

- 3.60 Once a proposal is ready for the Board's review, whether or not accompanied by a clearance document, the suite of proposal documentation is then provided to the Secretariat and to the Board by officials in either Major Projects Canberra or Procurement ACT. At this point the Board's Secretariat loads the documentation into the Board's SharePoint system in the 'This Week's Meeting Papers' folder. A review of the Board's Outlook email account shows it is very rare for documentation to be sent direct to the Board by the proponent.

## Unresolved matters

- 3.61 In addition to the 'sign-off' template clearance, Procurement ACT also advised of the introduction in 2019 of a document titled *Government Procurement Board Brief*. This document is used to capture Procurement ACT officials' advice where an alternative to the proponents' preferred course of action is recommended.
- 3.62 Documentary evidence of the use of this *Government Procurement Board Brief* in the Board's SharePoint records system was rare, with only three goods and services proposals being accompanied by a *Government Procurement Board Brief* since July 2019.

## Conduct of the Board meeting

- 3.63 Major Projects Canberra and Procurement ACT officials described to the Audit Office their role in the review process at the Board meeting. There are distinct roles performed:
- by a senior official of Procurement ACT as *advisor* or previously as *ex officio* member of the Board;
  - by officials from the Major Projects Canberra Infrastructure Delivery Partners team and Procurement ACT Goods and Services team; and
  - on occasion, by officials from either Procurement ACT or Major Projects Canberra as proponents in their own right.
- 3.64 Procurement ACT described the evolution of the role of *ex officio* to *advisor* in 2020. The *advisor*, who is not drawn from the Procurement ACT's Goods and Service team, in order to maintain a separation of duties, advises the Board on general procedure and policy. The *advisor* attends a business planning session at the beginning of the meeting at which the Board members share their understanding of key issues associated with the procurements and plan their questions for the proponents. A former *ex officio* attendee advised that the Board 'is not influenced or dominated by Procurement ACT people'.
- 3.65 Major Projects Canberra and Procurement ACT officials who either 'partner with' or are allocated to advise and support a proponent attend the allocated agenda session with the proponent. The session follows a 'question and answer' format. Time-consuming presentations from proponents are discouraged. Major Projects Canberra and Procurement ACT officials emphasised that they do not lead, and most of the time do not even contribute to, the 'question and answer' session as it is for matters between the Board members and the proponent.
- 3.66 Major Projects Canberra and Procurement ACT advised that their attendance was to support the proponent at the meeting and afterwards to help acquit any advice arising from the Board. Board members commented on the oddity of Major Projects Canberra and Procurement ACT officials not participating in the discussion.

## Documentation of officials' procurement advice

3.67 The audit sought to understand whether there was a 'back channel' of advice from Procurement ACT that might inform the Board's review. Procurement ACT officials discussed an escalation process, through the use of the *Government Procurement Board Brief* (refer to paragraph 3.61), and the formalisation of this in the last three years. According to officials, this had moved Procurement ACT away from 'whispers' and 'behind closed door' discussions and brought:

... rigour and transparency of the process. But it is 'work in progress' ... and backchannelling has lessened to a degree.

3.68 Major Projects Canberra advised that no such escalation system exists for its procurement proposals. Officials also advised that there is also no direct recourse by Major Projects Canberra officials to any Board member where there are divergent views. Major Projects Canberra occasionally utilise a 'Key Issues Brief' for Board members (seven examples were found in the July 2019 to June 2022 period) but as one Major Projects Canberra official suggested:

We are unlikely to see the Board as a place to resolve differences, so it is not used in that way. Matters of substance are fixed early on.

3.69 Procurement ACT officials referred to the increasing transparency achieved through the use of the *Government Procurement Board Brief* since 2019. However, a review of emails sent by Procurement ACT officials shows that not all briefs circulated by Procurement ACT officials to Board members are captured in the Board's SharePoint records system. While three briefs were located in SharePoint records for the period July 2019 to June 2022, the following three additional briefs were located in emails to members in a sampled six-month period in (January to June 2021) that were not put into the SharePoint records system:

- ESA Integrated Facilities Management Services, circulated to Board members on 28 January 2021;
- Replacement of Linear Accelerator at Canberra Hospital, circulated to Board members on 11 March 2021; and
- Taxi subsidy scheme variation, circulated to Board members on 17 June 2021.

3.70 A brief discussed in the CIT case study (paragraph 7.50) also falls into this category, i.e. it was shared with Board members but not recorded in SharePoint.

3.71 Accordingly, the Board's records management system, SharePoint, is likely to reflect only some of the matters that have been escalated to the Board via written briefs by Procurement ACT officials. Rigour and transparency, as the Procurement ACT official stated, is a 'work in progress'.

3.72 Since 2019 Procurement ACT has used a *Government Procurement Board Brief* as a mechanism by which it can identify and outline for the information of the Board any differences it might have with a proponent in relation to the procurement proposal. By

doing so it has sought to move away from ‘whispers’ and ‘behind closed door’ discussions and bring ‘rigour and transparent [to] the process’. However, a review of emails sent by Procurement ACT officials shows that not all briefs circulated by Procurement ACT officials to Board members are captured in the Board’s SharePoint records system. Accordingly, the Board’s records management system, SharePoint, is likely to reflect only some of the matters that have been escalated to the Board via written briefs by Procurement ACT officials. This is not conducive to rigour and transparency in the process.

## Board consideration of proposals

3.73 The audit considered all proposals that had been subject to Board consideration between 2017-18 and 2021-22. There were 411 separately identifiable proposals referred to the Board in this period. Of these, 292 were subject to a single-pass or two-pass review as a procurement proposal. The remaining 119 were either variations to existing contracts (63) or were updates and presentations (56).

3.74 The following matters were considered as part of the review of the Board’s activities:

- the completeness of documentation provided to the Board;
- the timing of procurement proposals referred to the Board; and
- the nature of the Board’s consideration of procurement proposals identified as variations to existing contracts.

## Completeness of documentation

3.75 To assess the completeness of documentation provided to the Board, the audit:

- selected a sample of 30 procurement proposals (of the 292 single-pass and two-pass proposals) to test whether the necessary documentation was provided; and
- reviewed the minutes to ascertain whether Board members observed any gaps in the document suite or commented on other substantial omissions they saw as an impediment to completing their review.

3.76 In doing so the audit sought to identify whether there was:

- an assessment of risk and the management of that risk;
- a statement concerning contract management arrangements;
- an Evaluation Plan including criteria and processes;
- acknowledgement of probity matters; and
- a statement about how ‘open and effective’ competition would be sought, for example as expressed in a Procurement Plan Minute, or the Strategic Review Submission.



- 3.77 Of the 30 procurement proposals, it was observed that the Board:
- noted and requested a missing document in four instances;
  - in another instance adjudged a single select proposal to be a variation, and consequently asked for a wholly new document suite to be prepared;
  - commented favourably on the comprehensiveness or high quality of a document or document suite in two instances;
  - requested more senior officials attend another meeting in one instance; and
  - commented on the inadequacy of the proponent's response to advice provided in the first pass of a two-pass review process in one instance.
- 3.78 Due to its breadth and comparative recency, the extent to which proponents' documentation addressed the *Government Procurement (Charter of Procurement Values) Direction 2020* was not considered as part of the audit. However, Board members and ACTPS officials noted that addressing the *Direction* is a requirement that is at times insufficiently considered by proponents.
- 3.79 With respect to the matters required to be considered by the Board as per subsection 12(2) of the Regulation (i.e. value for money, a proposed evaluation methodology, evaluation criteria and contract management arrangements) in the 30 procurement proposals the audit found:
- in 18 instances (60 per cent) the documentation provided to the Board contained the necessary documents to complete a review of the Regulation's specific requirements;
  - in 6 instances (20 per cent) a document necessary for the review of a specific requirement was not available to the Board (either a probity statement, or a statement of the contract management arrangements was missing); and
  - in a further 6 instances (20 per cent) more than one document necessary for the review of a specific requirement was not available to the Board (i.e. there were combinations of a missing probity statement, a statement of the contract management arrangements, a Risk Plan and an Evaluation Plan).
- 3.80 For the purpose of good governance, other information should be available in documentation to the Board including:
- a clear expression of the purpose of the procurement and details of the goods, services or capital works being procured. Most but not all procurements specify this in a Statement of Requirements or ultimately in the approach to market documentation (e.g. an RFT). A paragraph or two in the Procurement Plan Minute is unlikely to be sufficient;
  - a Procurement Plan Minute, Procurement Approval Minute or Procurement Plan Variation outlining the intended procurement strategy including details of its implementation; and

- recognition of earlier Board advice and how this has been acquitted by the proponent. This was evident in most two-pass reviews at the second pass and was achieved through the use of a Procurement Review Submission proforma.

3.81 A review of the documentation provided to the Board (for the sample of 30 proposals) shows:

- in eight instances (25 per cent) a clear expression of the purpose and details of the procurement were not evident;
- in six instances (20 per cent) a procurement strategy was not evident;
- in three instances (10 per cent) there was no evidence that advice in response to the first pass had been taken into account at the second pass.

3.82 The necessity and timing of the preparation of a Statement of Requirements has been considered by the Board on a number of occasions. Minutes of Board minutes state:

In relation to the second pass documents, the Board suggested the providing of the Statement of Requirements (not currently provided) and Procurement Plan Minute would assist their review. (10 November 2020)

The Board requested that the [Statement of Requirements] is a required document for the Board's consideration for goods and services procurements – on the second pass and for single-pass procurements. (17 November 2020)

[The Board] recommends the following initial changes are made to the documentation provided: Include the Statement of Requirements under which items to include in a procurement proposal. (28 June 2022)

3.83 Procurement ACT prepared a draft *Procurement better practice guide (SCE-02-202111) Government Procurement Board Procurement Proposals and Strategic Procurement Plans*, which it shared with the Board on 28 June 2022. The guide includes the documentation requirements, as per paragraph 3.76 but makes no reference to a Statement of Requirements.

3.84 The audit considered a sample of 30 procurement proposals (of the 292 single-pass and two-pass proposals presented to the Board between 2017-18 and 2021-22) to test whether sufficient documentation was provided for its review and consideration. With respect to the matters required to be considered by the Board as per subsection 12(2) of the Regulation (i.e. value for money, a proposed evaluation methodology, evaluation criteria and contract management arrangements) the audit found: in six instances a document necessary for the review of a specific requirement was not available to the Board (either a probity statement, or statement of the contract management arrangements was missing); and in a further six instances more than one document necessary for the review of a specific requirement was not available to the Board (i.e. there were combinations of a missing probity statement, a statement of the contract managements, a Risk Plan and an Evaluation Plan). The review also shows: in eight instances a clear expression of the purpose and details of the procurement was not evident; in six instances a procurement strategy was not evident; and in three instances there was no evidence that advice in response to the first pass had been taken into account at the second pass.

## Timing of reviews

- 3.85 Involvement of the Board in a proposal adds time and proponents often want urgent responses. Proponents, Procurement ACT officials and Board members all acknowledged the time associated with referring proposals to the Board. Board members also commented on the urgency evident in proposals that are brought to it, as expressed in the proponent's documentation or the Board's minutes, or urgency indicated in the proposal's timeline.
- 3.86 The audit considered another 10 per cent sample (29 in total) of the 126 single-pass and 166 two-pass proposals referred to the Board between 2017-18 and 2021-22 in order to consider the timing of the Board's review.<sup>5</sup> The audit considered the date the Board first reviewed the proposal and the estimated date the proponent intended to approach the market (e.g. the date of publishing of a request for tender (RFT)). The audit found:
- according to timelines in the Procurement Plan Minutes, single-pass proposals are on average put to the Board 1.5 weeks before the intended approach to market;
  - according to Procurement Plan Minute timelines, two-pass proposals, by the time they come back for the second pass, are on average put to the Board two weeks before the intended approach to market; and
  - the lapsed time between the Strategic Review (first review) and the Procurement Review (second review) is on average 22 weeks.
- 3.87 This indicates that where proposals are presented for the second and last time or for the only time to the Board it is common for this to be within a week or two of the intended approach to market. Where proposals are presented via a Strategic Review process followed by a Procurement Review, the first pass (Strategic Review) is commonly many weeks before the intended Procurement Review and approach to market.
- 3.88 One Board member advised that the work necessary for a proponent to complete a Strategic Review is undertaken well as a matter of sound planning by some, and poorly by others, regardless of whether the Strategic Review is mandated. Although anecdotal, this illustrates that the two-pass process may not be the reason for the quality, or lack thereof, of proposals requiring to be progressed under the two-pass policy, but it does encourage early consideration of a proposal by the Board.
- 3.89 Given about 45 per cent of procurement proposals are reviewed only once (i.e. all capital works projects, and all goods and services procurements under \$5 million), it would be better if these were to be presented earlier than the week of, or the week before, the intended approach to market. It is noted, however, that the Board's review is only one consideration, and not necessarily the most significant, in a proponent's implementation of their procurement strategy. One Board member observed:

When there are delays due to the Board's desire to have a proposal revisited, the Territory Entity will often ask 'How long will that take?' The irony is that it can come back the next

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<sup>5</sup> A stratified sample, that is a 10 per cent sample of each group was randomly selected (a total of 29 proposals).

meeting, a week later. Many proposals come back months later not at the behest of the Board but due to other delays factors. In other words, delays are caused by factors other than the Board's scheduling.

3.90 Another Board member observed:

The two-pass system is not perfect, but it's better. We still get two passes in close proximity, or get the first pass when they have really already progressed beyond that point ...

3.91 At the Board meeting on 28 June 2022, Procurement ACT sought the views of the Board with respect to 'removing the two-pass process for goods and services procurements that will return to a single pass'. The Board did not agree to this:

The Board consider anecdotally that proponents have found value in the two-pass procurement process, as this allows for early advice to be provided in the early phases of the procurement development (not just before a procurement is released to market). This also allows for the Board's advice to be provided with sufficient time to not impact on the timings for the approach to market.

3.92 In response to the draft proposed report the Chief Minister, Treasury and Economic Development Directorate advised:

We note that under the Procurement Reform Program, Procurement ACT is removing the need for an automatic two-pass process.

3.93 The audit considered a further 10 per cent sample (29 in total) of the 126 single-pass and 166 two-pass proposals referred to the Board between 2017-18 and 2021-22 in order to consider the timing of the Board's review. The audit found: single-pass proposals are on average put to the Board 1.5 weeks before the intended approach to market; and two-pass proposals, by the time they come back for the second pass, are on average put to the Board two weeks before the intended approach to market. This indicates that where proposals are presented for the second and last time or for the only time to the Board it is common for this to be within a week or two of the intended approach to market. This indicates proponents do not expect substantial matters to arise from the Board's review that would require extensive reworking.

3.94 In June 2022 Procurement ACT presented a rationale to the Board for the cessation of the two-pass review policy. The Board did not agree to it. The two-pass review policy is, however, being reviewed as part of Treasury's 2022-2025 Procurement Reform Program. How the pros and cons of the two-pass process are gauged depends on the purpose of the Board. Government should consider the merits of continuing with the two-pass review process in the light of its wider consideration of the Board's purpose and functions.

**RECOMMENDATION 4 TWO-PASS REVIEW PROCESS**

The Government should consider the merits of continuing with the two-pass review process in the light of wider consideration of the Board's purpose and functions.

## RECOMMENDATION 5 REVIEW PROCESS IMPROVEMENT

In the light of wider consideration of the Board's purpose and functions, the Government should seek to ensure:

- a) proponents bring forward the Board's review in the procurement timeline;
- b) the Board undertakes fewer, deeper reviews of the highest risk proposals; and
- c) the Board has the facility to conduct reviews of the fundamentals of a proposal (as is undertaken under the current strategic review), including sourcing options, where appropriate.

### Variations

3.95 Neither the Act or Regulation requires variations to be referred to the Board. However, Procurement ACT's *Contract Variations* (MNG-03-202206) factsheet states:

Contract variations do not need to be reviewed by the Government Procurement Board (Board). That said, a substantial change in scope may give rise to a new procurement which the Board would need to review under section 6(c) of the *Government Procurement Act 2001*.

3.96 Guidance on Procurement ACT's webpages specifies the conditions under which variations are to be referred to the Board for its review:

#### *For Administrative Units*

- variations that will increase the contract by either \$1 million or 20 per cent of the original value of the contract (whichever is greater);
- variations of ICT contracts that change the total estimated value to \$1 million or more; and
- variations to all other goods, works and services contracts that change the estimated value to \$5 million or more.

#### *For other Territory Entities*

- variations that will change the total estimated value of the contract to \$1 million or more.

3.97 Variations account for a substantial number of items on the Board's weekly agenda. Between 2017-18 and 2021-22 they represented 63 of a total of 411 procurement proposals (15 per cent). Of interest to the audit was:

- the type of variations presented to the Board and if relating to changes in contract value, the scale of variations in relation to the original contract; and
- the frequency and timing of variations being brought to the Board.

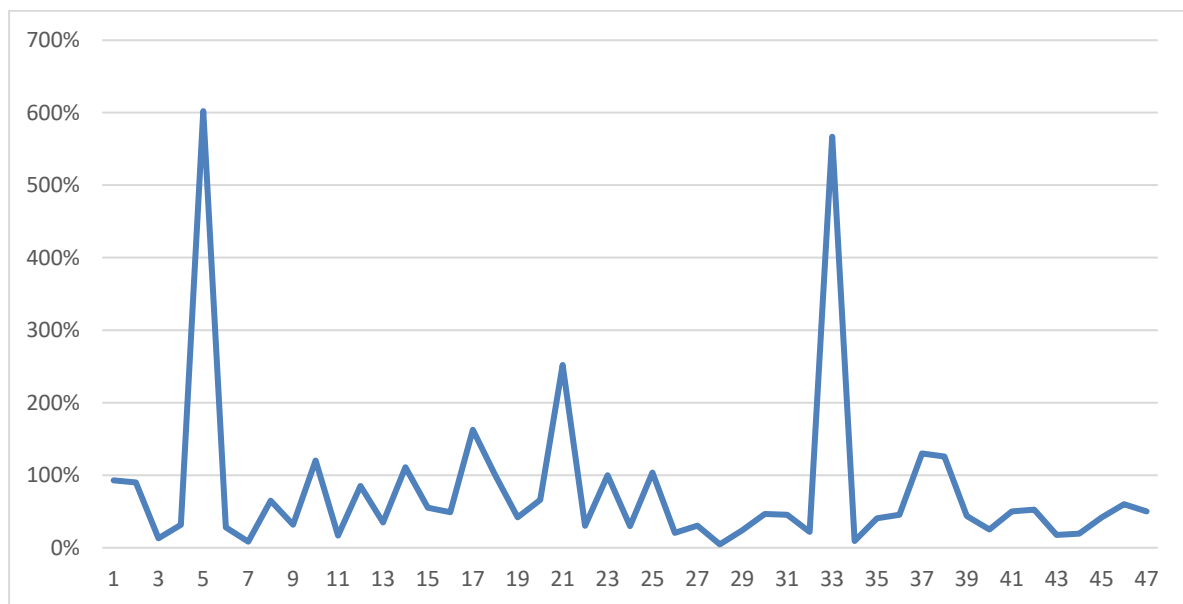
### Variation type

3.98 Variations were examined for whether the variation related to a Contract Price increase, a change in contract time period (i.e. a contract extension) or change in scope, or a combination of these:

- 47 of the 63 variations related to Contract Price;
- 22 related to extensions of time; and
- 25 related to changes in scope.

3.99 The 47 variations to Contract Price represented total additional costs of \$581 million for contracts with a total initial Contract Price of \$1.321 billion. While the average variation value was an additional 44 per cent of the initial Contract Price, in 21 instances the variation was for 50 per cent or more of the initial Contract Price. In one instance the variation in the Contract Price was for 567 per cent and in another instance the variation in the Contract Price was for 602 per cent. Increases in scale of this magnitude raise questions about fair access to commercial opportunities for other suppliers. Figure 3-1 shows the percentage increase in Contract Price of the 47 variations chronologically.

**Figure 3-1 Increase in Contract Price by variation compared to initial Contract Price**



Source: Audit Office, based on analysis of variations referred to the Board between 2017-18 and 2021-22

3.100 Each type of variation presents procedural challenges. For example, changes in scope are potentially highly problematic, particularly if the proposed new activity has not been put to the market.

## Frequency and timing

- 3.101 The Transport Canberra and City Services Directorate and Canberra Health Services accounted for 43 per cent of the 63 variations presented to the Board between 2017-18 and 2021-22; 14 and 13 respectively.
- 3.102 There was reference to urgency in the proponent's documentation, the Board's minutes, or urgency indicated in the proposal's timeline for 24 of the 63 variations (38 per cent). In four instances a decision was necessary within one week due to imminent contract end dates.

## Board observations of variations

- 3.103 Board minutes frequently record adverse comments about variations, including that:
- a variation brought to the Board may be the variation that tips the sum total of variations to date over a threshold (as per paragraph 3.96) requiring Board referral. In those instances, the Board has noted the unhelpful lack of visibility on earlier variations or that the review process by the Board appears to be purely administrative and of limited purpose;
  - some variations are more reasonably viewed as new procurements primarily due to a substantial change in scope not previously exposed to the market. In those instances, they should be presented as such; and
  - delegates have already approved the variation and the work is already underway.
- 3.104 Further observations are evident from the review of Board documentation, that:
- some proponents appear to be bringing a variation to the Board when it is a variation to a proposal and not a variation to a contract. A variation to a procurement proposal is distinct and needs a different form of review;
  - some proponents seek successive variations over a period of two or more years and each time refer to preparatory work underway to approach the market with a new tender process 'next time'. The Board does, on occasion, challenge this (refer to the supply of asphalt case study) while being mindful of its remit; and
  - in some instances, it is not apparent whether a requested time extension had been foreseen in and permissible under the contract.
- 3.105 The topic of variations was raised in discussion with Board members as an area where it is doubtful as to whether the Board can add value. At the Board meeting of 28 June 2022, Procurement ACT proposed to the Board 'removing the practice of variations being provided to the Board for review'. This appears practically helpful, on the premise that this does not lead to bypassing of the Board by proposals presented as variations which should be a new approach to market.

- 3.106 Variations account for a substantial number of items on the Board’s weekly agenda; between 2017-18 and 2021-22 they represented 63 of a total of 411 procurement proposals (15 per cent). Forty-seven of the 63 variations related to Contract Price and represented total additional costs of \$581 million for contracts with a total initial Contract Price of \$1.321 billion. While the average variation value was an additional 44 per cent of the initial Contract Price, in 21 instances the variation was for 50 per cent or more of the initial Contract Price. Increases in scale of this magnitude raise questions about fair access to commercial opportunities for other suppliers.
- 3.107 Board minutes frequently record adverse comments about variations and the limited role the Board can play in reviewing and advising on variations, although it is apparent that the Board has, on occasion, performed an important role in challenging whether a variation is defensible. At the Board meeting of 28 June 2022, Procurement ACT proposed to the Board ‘removing the practice of variations being provided to the Board for review’. This appears practically helpful, on the premise that this does not lead to bypassing of the Board by proposals presented as variations which should be a new approach to market.

#### RECOMMENDATION 6 VARIATIONS

The Government should consider the merits of maintaining or ceasing variation referrals to the Board in the light of wider consideration of the Board’s purpose and functions. If the consideration of variations is removed from the Board review process, additional safeguards should be implemented to ensure variations are not used where there is a strong case to return to the market with a new procurement opportunity.

## Other review activities of the Board

- 3.108 Other activities of the Board that were also considered as part of the audit were the Board’s review of:
- Strategic Procurement Plans;
  - Government procurement policies and practices; and
  - Annual Procurement Plans.

## Strategic procurement plans

- 3.109 Strategic Procurement Plans are defined in the 2007 Regulation as follows:

**endorsed strategic procurement plan** means a procurement plan that—

- (a) states that it applies to separate procurement proposals, or activities, of a stated kind; and
- (b) has been endorsed by the board as a strategic procurement plan.



3.110 A review of Board activities between 2017-18 and 2021-22 shows that Strategic Procurement Plans are not frequently presented to or discussed by the Board. Nine instances were found of which six related to the activities of the Suburban Land Agency.

**Table 3-4 Strategic Procurement Plans presented to the Board**

Territory Entity	Meeting date	Sum	Board response
Suburban Land Agency	23 March 2018	\$205 million (14 projects)	Minutes not found
Suburban Land Agency	30 October 2018	\$7 million (4 projects)	Advice provided on the plan
ACT Property	25 June 2019	\$340 million	Requested proponent submit a plan
Suburban Land Agency	9 July 2019	\$175 million (14 projects)	Advice and requested update
CMTEDD	24 October and 26 November 2019	\$50 million	Advice, requested update then no further comment
Suburban Land Agency	27 October 2020	\$54 million (5 packages)	Advice given and plan endorsed
Suburban Land Agency	30 March 2021	\$87 million (7 projects)	Advice given and plan endorsed
Suburban Land Agency	25 May 2021	\$6 million (4 projects)	Advice given and plan endorsed
ACT Health	26 October 2021	\$47 million (100 services)	Advice given and plan endorsed

Source: Audit Office review of all proposals referred to the Board (July 2017 to June 2022)

3.111 The Regulation does not state what information a Strategic Procurement Plan should include. It is not specific about the particulars necessary to enable the Board to perform its review for the purposes of endorsement. The Suburban Land Agency has taken a pragmatic approach to determining the contents of its Strategic Procurement Plans. The nature of its business lends itself to the use of Strategic Procurement Plans.

3.112 In June 2022 Procurement ACT drafted guidance on the form and function of strategic procurement plans. The *Government Procurement Board Procurement Proposals and Strategic Procurement Plans* guidance states that 'a strategic procurement plan should cover the same matters as set out in section 12 of the Regulation' and identifies better practice use of plans for:

- projects or programs that include multiple procurement activities to achieve the outcome;
- procurements to establish a standing-offer contract or panel, including whole of Government arrangements; or

- an overarching procurement strategy for a category of procurement (e.g., seeking approval for all ICT hardware purchases to use an interjurisdictional panel such as the Digital Market Place).

3.113 The Suburban Land Agency supplies the Board with documentation that is very similar in content, in the type of artefact and its length to that provided for individual procurement proposals, namely:

- Procurement Plan Minute;
- Risk Plan;
- Probity Plan; and
- Evaluation Plan.

3.114 Board meeting minutes indicate the following considerations with respect to Strategic Procurement Plans:

- the need to work with the newly established Major Projects Canberra on a definition of a Strategic Procurement Plan (9 July 2019);
- request for the ACT Property Group to prepare a Strategic Procurement Plan (25 June 2019);
- general consideration of Strategic Procurement Plans in its annual business planning meeting (4 August 2020);
- a shift from *not explicitly endorsing* to *explicitly endorsing* Strategic Procurement Plans between 24 October 2019 and 27 October 2020; and
- anticipating a review of procurements flowing from ACT Health's Strategic Procurement Plan (26 October 2021).

3.115 A review of Board activities between 2017-18 and 2021-22 shows that Strategic Procurement Plans are not frequently presented to or discussed by the Board. Nine instances were found of which six related to the activities of the Suburban Land Agency. The Regulation does not state what information a Strategic Procurement Plan should include and it is not specific about the detail necessary to enable the Board to perform its review for the purposes of endorsement. However, in June 2022 Procurement ACT drafted guidance on the form and function of Strategic Procurement Plans. The guidance should help both the Board and proponents.

3.116 The Board's formal endorsement of a Strategic Procurement Plan is a prerequisite to avoiding the referral of multiple separate but similar proposals. Board endorsement of Strategic Procurement Plans did not happen until 27 October 2020, although earlier Strategic Procurement Plans were reviewed by the Board. Proponents' use of Strategic Procurement Plans is limited and the Board's review process for these plans is not yet mature. For the Board to be efficient and effective Strategic Procurement Plans need to be adopted by more Territory Entities or removed from the Regulation.

## RECOMMENDATION 7 STRATEGIC PROCUREMENT PLANS

The Government should consider the merits of the endorsement and use of Strategic Procurement Plans in the light of wider consideration of the Board's purpose and functions. If endorsement of Strategic Procurement Plans is retained as a function in the Regulation, Procurement ACT's draft guidance should be finalised and promulgated.

### Procurement practices

3.117 Paragraph 6(d) of the Act makes provision for the Board:

... to consider, advise on and, if appropriate, endorse procurement practices and methods.

3.118 'Procurement practices and methods' signifies systemic or generalisable actions rather than ones specific to a particular proposal. A review of Board records indicates this is not routinely undertaken by the Board. It does happen on occasion, when instigated by others, normally Procurement ACT. For example, the Board was consulted on the following elements of the Territory's Procurement Framework:

- 3 December 2019 - Procurement ACT provided the Board with two factsheets. The Board 'noted that Procurement ACT would submit updated factsheets to the Board for their consideration and discussion by the Board by exception'. The factsheets were not reviewed, advised upon or endorsed by the Board.
- 1 December 2020 - Procurement ACT provided the Board with one factsheet for which the Board provided substantial advice. The factsheet was reviewed and advised upon, but not endorsed by the Board.
- 6 July 2021 - Procurement ACT provided the Board with two factsheets. The factsheet was reviewed and advised upon, but not endorsed by the Board.

3.119 An intention expressed in the Bill's presentation speech in 2007 referenced 'removing [the Board's] ability to make disallowable instruments and determine the regulatory framework faced by agencies'. However, paragraph 6(d) of the Act left a residual function for the Board to consider, advise on and, if appropriate, endorse procurement practices. However, in practice this appears to have been dormant until 2022.

3.120 On 1 March 2022 Procurement ACT provided the Board with a briefing on a draft *Government Procurement Board Endorsed Procurement Practices 'governance and processes guide'*. The guide sought to formalise a process whereby the Board is requested, via Procurement ACT, to endorse, or otherwise decline or propose changes to procurement practices. This appears to address the Board's function of endorsing 'procurement practices and methods' as per paragraph 6(d) of the Act.

3.121 Procurement ACT briefed the Board on 1 March 2022 that it had:

... identified a need to provide agile procurement guidance and rules to Territory entities through EPPs [Endorsed Procurement Practices] as there is a gap in the policy levers for ‘mandating’ internal procurement practices without wholesale legislative change’.

3.122 In response, the Board wished to note in minutes that it:

... can suggest items that might be investigated for being possible EPPs for Procurement ACT to then develop as required.

3.123 Paragraph 6(d) of the Act allows for the Board ‘to consider, advise on and, if appropriate, endorse procurement practices and methods’. A review of Board records indicates that a review of systemic or generalisable procurement practices has not been routinely undertaken by the Board. The Board has, however, been consulted on aspects of the Territory’s Procurement Framework, as proposed by Procurement ACT. In March 2022 Procurement ACT and the Board considered how they may work together to create more authoritative guidance on ‘internal procurement practices’ through a Board endorsement process of such practices. This is a sound approach, which uses another function of the Act for which the Board is responsible, which has not been used to date.

#### RECOMMENDATION 8      ENDORSED PROCUREMENT PRACTICES

The Government should consider the merits of the Board’s formal endorsement of procurement practices in the light of wider consideration of the Board’s purpose and functions. This may involve a role for the Board in initiating, formulating and endorsing systemic procurement advice and guidance.

### Annual Procurement Plans

3.124 Unlike Strategic Procurement Plans, Annual Procurement Plans are not described in the Regulation. Annual Procurement Plans were introduced as a matter of policy on 11 April 2015 through the *Smart Modern Strategic Procurement Savings Initiative*. The initiative envisaged:

The submission of Annual Procurement Plans from each Directorate ... will allow a consolidated cross-directorate review of the Territory’s proposed procurements.

3.125 While Annual Procurement Plans were intended to assist the Treasurer in developing a consolidated oversight of directorates’ forecasted procurement activities, the Board also has sought to utilise the nine directorates’ Annual Procurement Plans.

3.126 Annual Procurement Plans have been prepared in response to periodic requests from Procurement ACT. The Board has requested a copy of Annual Procurement Plans, and in 2019 a Board member even conducted their own review and analysis. However, while Annual Procurement Plans are prepared by, and for, others and for purposes other than the Board’s review, the Board has, according to its minutes, found little practical use for them. There are references to low completion rates, late completion and a low level of accuracy.

One Board member estimated a 20 per cent level of accuracy in respect of planned procurement activity as set out in Annual Procurement Plans versus activity undertaken.

3.127 The Board's review of Annual Procurement Plans is not provided for by the Regulation but was instead introduced through the *Smart Modern Strategic Procurement Savings Initiative* in April 2015. Annual Procurement Plans have been prepared in response to periodic requests from Procurement ACT. While Annual Procurement Plans are prepared by, and for, others and for purposes other than the Board's review, the Board has found little practical use for them. There are references to low completion rates, late completion and a low level of accuracy. One Board member estimated a 20 per cent level of accuracy in respect of planned procurement activity versus activity undertaken.

#### RECOMMENDATION 9 ANNUAL PROCUREMENT PLANS

The Government should review the use Annual Procurement Plans in the light of the wider consideration of the Board's purpose and functions. In doing so, consideration should be given to the limited impact they have in informing Board activities.



## 4 BOARD ADVICE

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- 4.1 This chapter discusses the Board's processes for the development and provision of advice to proponents.

### Summary

### Conclusion

The Board provides advice on a proponent's proposal that comprises a set of actionable and non-actionable points of advice along with a statement of the Board's endorsement. For many years the Board 'endorsed' procurement proposals. This process was problematic as it was not consistent with the wording of the Act. The practice has now ceased.

Processes for the development and communication of the Board's written advice is undertaken reliably and with sensitivity. Much effort goes into carefully crafting the output of the Board which, according to Board members, seeks to signal the Board's concerns, if there are concerns, to decision-makers. The Board is rarely assertive in its advice and the Board's practice of endorsing proposals and offering advice 'for consideration' is confusing.

The Board does not comprehensively and systematically seek to understand whether its advice has been appropriately considered, recognised and responded to by the proponent. For single-pass proposals, in many cases it is not evident whether the Board's advice has been acknowledged, accepted, acted upon, rejected or ignored.

The Board cannot be assessed as optimally effective in the absence of a clear expression of its purpose. The efficiency of the Board is questionable as long as it serves an unclear purpose, is associated with a range of additional direct and indirect costs and introduces delay and uncertainty to a large volume of procurement activity. The 2022-2025 Procurement Reform Program has the potential to progress Board reforms identified in this report.

### Key findings

Paragraph

#### Preparation of advice

The Board's advice on a procurement proposal is facilitated by: a business planning session at the beginning of each Board meeting; and a face-to-face question and answer session with the proponent of the procurement proposal. Written advice takes the form of formal minutes of the Board meeting, of which relevant extracts are shared with the proponent. The administrative process for developing the Board's advice is mature and is efficient.

4.11

On rare occasions matters are escalated directly through discussion between the proponent's delegate and the Chair of the Board, but as this is not recorded in minutes it is not possible to gauge with certainty the frequency of this. As a matter of sound administrative practice these escalated matters should be documented. Paragraph 6(e) of the Act also allows the Board to escalate a matter to the Minister responsible for procurement (i.e. the Special Minister of State). This option has not been taken up. 4.12

One public employee Board member described the challenges of being an ACTPS official on the Board. Revising the balance of Board membership in favour of the non-public employee members has the potential to provide the Board with more autonomy and independence and be less constrained by the expectations of peer ACTPS colleagues. A non-public employee Chair would potentially have a similar impact. 4.18

Section 20 of the Act provides for Board members' disclosure of interests and for the Board member to be excused from deliberating on the matter subject to the declaration. A review of Board meeting minutes shows that declarations of interests are made and dealt with. While more straightforward for the non-public employee members, for public employee members it is apparent that there are regular occurrences of potential interests that 'could conflict with the proper exercise of the member's functions in relation to the board's consideration of the issue' as per paragraph 20(1)(b) of the Act. Having a Board member from Major Projects Canberra, as has occurred since July 2019, is problematic, given the number of capital works project proposals being presented to the Board, in which Major Projects Canberra has participated or supported in one form or other. Also problematic is a member declaring an interest as the proponent, and then the member and others in the proponent's directorate, participating in the minute preparation process. Evidence was found of this in one instance in August 2018. 4.30

### Nature of advice

Throughout the period July 2017 to June 2022, proponents explicitly sought the Board's endorsement or approval of their procurement proposals. This accords with Procurement ACT guidance at the time. Board members advised that the use of the term *endorse* has been a matter of custom and practice for many years and that the Board has carefully considered and reflected on its use periodically. The Board's statements in each of the CMTEDD annual reports between 2016-17 and 2021-22 refer to the Board's *endorsement* of proposals. Furthermore, the schema that was developed for the purpose of implementing the two-pass review process in 2017 also identified that the Board would have responsibility with respect to a proposal's *validation, approval or endorsement* and in the case of the two-pass process, this was to occur on more than one occasion. 4.49

Since 30 June 2022, however, there has been a change to the Board's position of approving or endorsing procurement proposals. *Procurement Factsheet: PFW-08-202111* states 'it is important to remember that the Board's purpose is to review and provide advice on procurement proposals. The Board does not have the power to 4.50



approve, endorse or reject procurement proposals'. A review of Board meeting minutes from July to December 2022 shows that the Board has adjusted its advice accordingly. The Board's recent avoidance of the term 'endorse' is consistent with the Act but overturns a practice that has been in place for a long period (at least five years).

Records over the period of the audit (2017-18 to 2021-22) show the Board has a significant workload that it has undertaken reliably and with sensitivity. The Board provides on average about a page of advice on each proposal comprising a set of actionable and non-actionable points of advice (about equal in number). Few points of advice, fewer than one per proposal, explicitly request the proponent to demonstrate to the Board how the advice has been considered. Most advice is either an observation made to or by the Board (i.e. noted) or it is advice that should be at least considered (and documented) by the proponent in accordance with sound administrative practice. 4.62

The Board's practice of giving advice (including its endorsement or approval prior to 28 June 2022) demonstrates the Board has applied an 'intervention' hierarchy: from not endorsing (no occurrence, based on the sample) or withholding endorsement (few occasions) through to endorsing and offering additional advice for consideration (frequent occasions) and making observations which may be either important or gratuitous but do not need further consideration (frequent occasions). The hierarchy applied by the Board is understandable but is not efficient or effective. Much effort goes into carefully crafting the output of the Board which, according to Board members, seeks to sensitively signal the Board's concerns to the delegate. The Board is rarely assertive in its advice and the combination of endorsing and offering advice 'for consideration' is confusing. 4.63

### Proponents' response to advice

There is no comprehensive system operated by the Board through its Secretariat that revisits all advice that has been given and seeks to understand whether the Board's advice was appropriately considered, recognised and responded to by the proponent. At its August 2022 annual planning meeting, however, the Board agreed to undertake follow-up audits of two selected procurement proposals each quarter. Some insights may also be gained through: 4.71

- second-pass reviews, which are capable of capturing the first-pass advice and the proponents' response to it; and
- the Secretariat maintenance of a control spreadsheet, which identifies specific issues for follow up.

Consideration was given to follow-up activity on the part of proponents in response to the Board's advice. For single-pass reviews, it is not evident from records in many cases whether the Board's advice is acknowledged, accepted, acted upon, rejected or ignored. On the other hand, for two-pass reviews there is an increased prospect of the Board overlooking the proponent's response to the Board's advice. For the proposals reviewed twice by the Board in accordance with the two-pass review process it was evident that for: 4.86

- 70 per cent of the advice provided, the documentation contained sufficient information to conclude the proponent had largely accepted the recommendations and had updated the procurement documentation in response;
- 19 per cent of the advice provided the documentation indicated an equivocal or partial response; and
- 9 per cent of advice provided the documentation did not address the recommendation.

The Board is not maximising its impact. It is not routinely and consistently assessing how its advice has been received by the proponent and how it has been acquitted, noting the Board is not explicitly required to do so by the Act or Regulation. 4.87

### Administrative and procedural efficiency

The Board cannot be assessed as optimally effective in the absence of a clear expression of the Board's purpose. The efficiency of the Board is questionable as long as it serves an unclear purpose, is associated with a range of additional direct and indirect costs and introduces delay and uncertainty to a large volume of procurement activity. A reformed Board that is less constrained, considers fewer proposals and operates according to a statement of purpose and with increased autonomy and independence, is likely to deliver improved outcomes and do so with more efficiency. Procurement ACT's Procurement Reform Program has the potential to progress Board reforms identified in this report. 4.104

## Preparation of advice

- 4.2 The development of advice on a procurement proposal is facilitated by:
- a business planning session at the beginning of each Board meeting; and
  - a face-to-face question and answer session with the proponent of the procurement proposal.
- 4.3 Written advice takes the form of formal minutes of the Board meeting, of which relevant extracts are shared with the proponent.
- 4.4 Following each meeting:
- the Secretariat prepares draft meeting minutes;
  - the Chair reviews the draft minutes before they are circulated to other Board members for sign-off;
  - the Board members consult as necessary via email (in circumstances where the members have provided feedback on the draft minutes); and
  - the Chair approves the draft minutes.

- 4.5 The relevant extracts of the minutes are shared with the proponent by the Secretariat and the Board formally approves the minutes at its next meeting.
- 4.6 Emails between the Secretariat, Board members, the Chair of the Board and the proponent indicate that in nearly all cases the advice is formulated and shared with the proponent within three days of the meeting. Interactions between members are timely and productive and issues are resolved effectively. The written advice formulation process is mature and efficient. One member attributed this to the Secretariat:

The first draft of advice after the meeting is done very well and is down to the skills of the Secretariat.

## Departures from standard practice

- 4.7 One exception to the standard practice is when an 'out of session' review and advice process is conducted, where an item is urgent and not capable of being slotted into a meeting schedule. In these instances, the process is conducted via an exchange of emails.
- 4.8 Another exception to the practice relates to occasions where the Board communicates directly, via the Chair, with the proponent's delegate for the proposal through other means than a minute extract. At the Select Committee on Estimates meeting on 26 August 2022 the Board Chair advised:

We receive procurement proposals from proponents. We read and have discussions with them and a weekly meeting of the Government Procurement Board, provide and advice and recommendations to proponents about how they could get better procurement outcomes and the extent to which their procurement aligns with the Government Procurement Act. And where there are some recommendations that are important for us to ensure that the procurement delegate understands our recommendations. Sometimes those conversations go offline also.

- 4.9 Board members referred to this process as rare and only recalled three instances of it occurring. As a matter of sound administrative practice these escalated matters should be documented. In these instances they were not.
- 4.10 A third exception is the facility in legislation, through paragraph 6(e) of the Act, to escalate a matter raised by the Board to the Minister responsible for procurement (i.e. the Special Minister of State). In response to a question on notice on 5 September 2022 arising from the meeting of the Select Committee on Estimates on 26 August 2022, the Minister advised:

Based on available records, the Government Procurement Board has not formally provided advice to the Minister on issues of procurement activities of Territory entities or the operation of the Act in the last five years under section 6(e) of the Government Procurement Act 2001 (the Act).

- 4.11 The Board's advice on a procurement proposal is facilitated by: a business planning session at the beginning of each Board meeting; and a face-to-face question and answer session with the proponent of the procurement proposal. Written advice takes the form of formal minutes of the Board meeting, of which relevant extracts are shared with the proponent. The administrative process for developing the Board's advice is mature and is efficient.

- 4.12 On rare occasions matters are escalated directly through discussion between the proponent's delegate and the Chair of the Board, but as this is not recorded in minutes it is not possible to gauge with certainty the frequency of this. As a matter of sound administrative practice these escalated matters should be documented. Paragraph 6(e) of the Act also allows the Board to escalate a matter to the Minister responsible for procurement (i.e. the Special Minister of State). This option has not been taken up.

#### RECOMMENDATION 10 ESCALATION POST REVIEW

In the light of wider consideration of the Board's purpose and functions, the Government should consider providing the Board with an express power to provide written advice directly to a director-general (or chief executive) following the Board's consideration of a procurement proposal.

### Independence of the Board

- 4.13 The Board is comprised of public and non-public employee members. In accordance with sections 11 and 12 of the Act, the Board is chaired by a public employee member and public employee members form the majority of the Board.

- 4.14 One public employee Board member described the challenges of being a public official on the Board when needing to escalate matters:

There is no formal mechanism for escalation. Going to the minister is (as per legislation) antagonistic and is a nuclear option. It isn't used. Going to the D-G is a little dangerous because it can appear the delegate does not have autonomy, which they should have. However, this happens. Whispers happen, and it might make the delegate rethink but not be visibly pushed in front of the team. A [tricky] discussion takes place before in the closed session or after the proponent's session at the Board. The chair writing to the delegate? Probably not. Too exposing and clumsy.

- 4.15 Another commented that:

Things get observed and raised, but you have to decide what to hold out for. It is worth the hassle, how serious is this issue? ... On occasion there was an issue so substantial it needed to be called out. ... Eventually after two (rollover) extensions, we said enough is enough, knowing there would be pushback from the D-G.

- 4.16 Public employee Board members are well-placed to directly gauge the receptiveness of directorates to advice, particularly where a public employee Board member has worked, or is working, within a directorate. Having such knowledge risks influencing the advice that is formulated.

- 4.17 As part of the report of its *Inquiry into the Auditor-General's Report No. 7 of 2021: Procurement Exemptions and Value for Money* (June 2022) the Standing Committee on Public Accounts made the following recommendation:

The Committee recommends that the Government Procurement Act 2001 is amended to ensure that, as an independent body, the Government Procurement Board Chair is a non-government member.

- 4.18 One public employee Board member described the challenges of being an ACTPS official on the Board. Revising the balance of Board membership in favour of the non-public employee members has the potential to provide the Board with more autonomy and independence and be less constrained by the expectations of peer ACTPS colleagues. A non-public employee Chair would potentially have a similar impact.

#### RECOMMENDATION 11 ENHANCING BOARD INDEPENDENCE

In the light of wider consideration of the Board's purpose and functions, the Government should consider:

- a) revising the constitution of the Board to achieve a majority of non-public employee members; and
- b) revising the constitution of the Board to ensure a non-public employee member chairs the Board.

### Board members' observations on the preparation of advice

- 4.19 With respect to the advice formulation process, Board members commented:

The Chair is keen for it not to be a 'contest of ideas'.

On occasion some proposals are 'shaky' and this is evident before the proponent is in the room. Proponents rarely rescue a shaky proposal in the meeting.

There's nothing worse than learning something at the Board that shifts your whole understanding of the procurement. 'If only we knew what we know after the briefing'.

The way advice is framed is a double-edged sword in respect of responsibility for procurement.

Minutes confirm advice but in general it materialises during the course of the session with the proponent.

Asking for issues to come back to the Board provides a better chance of matters getting to the delegate.

- 4.20 These comments emphasise the importance of the tone of the interaction between the Board and proponent, and the tone adopted in framing advice at the meeting and in the minutes.

### Declaration of interests

- 4.21 Section 20 of the Act provides for Board members' disclosure of interests and for the Board member to be excused from deliberating on the matter subject to the declaration. Subsection 20(3) states:

The disclosure must be recorded in the board's minutes and, unless the board otherwise decides, the member must not—

- (a) be present when the board considers the issue; or
- (b) take part in a decision of the board on the issue.

- 4.22 A review of Board meeting minutes shows that declarations of interests had been made and dealt with. While more straightforward for the non-public employee members, for public employee members it is apparent that there are regular occurrences of potential interests that 'could conflict with the proper exercise of the member's functions in relation to the board's consideration of the issue' as per paragraph 20(1)(b) of the Act.
- 4.23 Potential interest arises from the member being a senior official within the Territory Entity proposing the procurement. There is routinely a potential for a conflict of interest because:
- the majority of the Board members (five) will be public employee members, in accordance with section 11 of the Act;
  - by number, three directorates (CMTEDD, Health and TCCS) account for 65 per cent of proposals, and
  - routinely either one or two members of the Board are employed within these three directorates.
- 4.24 In addition, capital works projects, the core business of Major Projects Canberra, made up 157 of the 411 proposals presented to the Board between 2017-18 and 2021-22 (38 per cent of all proposals). Since the formation of Major Projects Canberra in July 2019, there has been one public employee member from Major Projects Canberra appointed to the Board.
- 4.25 Public employee members made the following observations with reference to declarations of interest:
- ... hearing from the member declaring an interest was useful as their perspective was valuable.
  - ... being present and hearing other members' 'take' on a proposal is useful...
  - ... the independence of Board members can be overplayed.
- 4.26 Public employee members also described the action they may take when an interest is apparent to them:
- I withdraw if I have declared an interest
  - I will ensure I have not seen the paperwork prior to the meeting and will stay but will not engage in the discussion.
- 4.27 While transparency is important to Board members, so is flexibility. Automatically withdrawing from deliberation on one's own organisation's proposals is considered overly cautious by some members. However, given the Board's primary function is *de facto* to provide advice on individual proposals, this appears to be a reasonable exercise of judgement.
- 4.28 However, having a Board member from Major Projects Canberra, as has occurred since July 2019, is problematic, given the number of capital works project proposals being presented to the Board, in which Major Projects Canberra has participated or supported in one form or other. It is apparent from minutes that Board members have considered the matter of the Major Projects Canberra Board member's interests and over time Board members have

become content with the Major Projects Canberra Board member's attendance and deliberation.

- 4.29 Also problematic is a member declaring an interest as the proponent, and then the member and others in the proponent's directorate, participating in the minute preparation process. Evidence was found of this in one instance in August 2018. On this occasion, a Board member declared an interest to the Board as they were the proponent, and then participated in the minute drafting process. At the request of the proponent, a more senior official from the proponent directorate also sought to 'correct' the draft minutes.
- 4.30 Section 20 of the Act provides for Board members' disclosure of interests and for the Board member to be excused from deliberating on the matter subject to the declaration. A review of Board meeting minutes shows that declarations of interests are made and dealt with. While more straightforward for the non-public employee members, for public employee members it is apparent that there are regular occurrences of potential interests that 'could conflict with the proper exercise of the member's functions in relation to the board's consideration of the issue' as per paragraph 20(1)(b) of the Act. Having a Board member from Major Projects Canberra, as has occurred since July 2019, is problematic, given the number of capital works project proposals being presented to the Board, in which Major Projects Canberra has participated or supported in one form or other. Also problematic is a member declaring an interest as the proponent, and then the member and others in the proponent's directorate, participating in the minute preparation process. Evidence was found of this in one instance in August 2018.

### Decision-making through voting

- 4.31 Subsections 19(5) to 19(7) of the Act allows for the use of voting for the purpose of decision-making:
- (5) At a meeting of the board each member has a vote on each question to be decided.
  - (6) A question is to be decided by a majority of the votes of the members present and voting but, if the votes are equal, the member presiding has a casting vote.
  - (7) The board may conduct its proceedings (including its meetings) as it considers appropriate.
- 4.32 No instance was found of a minuted vote or any specific 'question to be decided' by a vote. Members stated that their advice is resolved through consensus. Given the Board's primary function is to provide advice on individual proposals, this appears to be a reasonable exercising of flexibility for the circumstances and accords with subsection 19(7).

**RECOMMENDATION 12 INTERESTS AND VOTING**

In the light of wider consideration of the Board's purpose and functions, the Board should review practices with respect to:

- a) the use of formal voting and the recording of that vote; and
- b) the management of declared interests and the action taken as a result of the declaration.

## Nature of advice

4.33 For 2021-22 the Secretariat analysed and categorised the nature and focus of the Board's advice. The results of the Secretariat's analysis are shown in Table 4-1.

**Table 4-1 Secretariat categorisation of Board advice**

Key advice themes	Items of advice referencing theme
COVID-19	10
Considered using an existing panel arrangement	5
Tailored / reviewed / update Risk Plan	47
Market Sounding	11
Independent Evaluation Panel Member	4
Considered ATSIPP, Social or Sustainable Procurement Policies	17
Clarify pricing arrangements	34
Review / update / clarify the criterion in the Evaluation Plan	63
Transition Plan	22
Panel Management Plan operation clarification	11
Consideration of outcomes-based procurement	7
Probity	24
<b>Total items of advice</b>	<b>255</b>

Source: Secretariat tracker spreadsheet for 2021-22 (44 meetings of the Board)

4.34 For 2021-22 the highest frequency themes of the Board's advice were:

- Risk Plans (47) (18 per cent of all advice);
- Evaluation Plans (63) (24 per cent of all advice); and
- clarification of pricing arrangements (34) (13 per cent of all advice).



## Two-pass review advice

4.35 For the purpose of implementing the two-pass review process in 2017 a set of templates with associated guidance was introduced. The guidance has since been adjusted in subsequent years, notably in November 2022. The guidance provides a schema<sup>6</sup> for providing advice. Table 4-2 shows the guidance for the conduct of the Strategic Review.

**Table 4-2 Guidance for the conduct of the Strategic Review (the first pass)**

Strategic Review suite 14 June 2017
<p><b>Consider</b> – the proposed procurement in regard to the Territory’s procurement policy and principles of transparency, accountability, competition and value for money;</p> <p><b>Determine</b> – whether the proposed procurement method demonstrates sufficient consideration of the procurement options and their validity in regard to the type, nature and complexity of the goods and/or services being sought;</p> <p><b>Advise</b> – on strategic input to the proposed sourcing options; and</p> <p>In undertaking the Strategic Review Submission, as well as providing strategic input earlier in the procurement planning phase, the Board will also seek to provide the procurement Delegate with the assurance that the proposed process provides the Delegate with sufficient opportunity to:</p> <p><b>Approve</b> the approach to the market methodology; and</p> <p><b>Establish</b> resources for the procurement activity and the ongoing contract management and implementation.</p> <p>The Board will inform the Project Owner and/or Delegate of the Review Outcome, and may:</p> <p><b>Identify</b> actions, which it recommends the Project Owner and/or Delegate consider before seeking the Delegate’s approval to proceed (identified as either Information or Mandatory).</p> <p><b>Provide</b> other notes and or guidance for the Project Owner and/or Delegate as it deems necessary to support the project in achieving good procurement outcomes for the Territory</p>
Strategic Review suite additional guidance 5 November 2020
<p>The Board’s review outcome may have three types of approval:</p> <p><b>Endorsed</b> – means the Board has endorsed the procurement activity to proceed to the next stage.</p> <p><b>Conditional Endorsement</b> – means the Board has made recommendations that should be considered when proceeding to the next stage.</p> <p><b>Not Endorsed</b> – means the Board does not endorse the procurement activity to proceed to the next stage. Note that the Board, when endorsing a Select Tender (single or select tender), can provide only a conditional endorsement, pending the Delegate’s approval of an exemption in accordance with the ACT Government Procurement Regulation 2007 Part 2 S. 10(1).</p> <p>The Board’s recommended actions can be of the following type(s):</p> <p><b>Information</b> – means the Board has provided information it considers should be taken into account to ensure the procurement process is fully informed of the options and outcomes, before it proceeds to the next stage.</p> <p><b>Mandatory</b> – means the Board has provided Conditional Approval and the recommended action should be taken before proceeding to the next stage and the Board is to be notified of how and when the recommended actions have been addressed.</p>

Source Procurement ACT Goods and Services team and Board Secretariat SharePoint records

4.36 Table 4-3 shows the guidance for the conduct of the Procurement Review.

<sup>6</sup> Schema: a structured, conceptual framework or plan, in this case categorising advisory options.

**Table 4-3 Guidance for the Procurement Review (the second pass)**

Procurement Review suite 14 June 2017
<p>Procurement Review enables the Board to:</p> <p><b>Review</b> – the outcomes and recommended actions from the Strategic Review;</p> <p><b>Consider</b> – the market documentation, including evaluation methodology and approach to contract and risk management;</p> <p><b>Advise</b> – on any other matters relating to the ATM prior it being submitted to the procurement Delegate.</p> <p>In undertaking the Procurement Review the Board will seek to provide the procurement Delegate with the advice regarding the ‘market ready’ status of the proposed approach and any outstanding risks and issues</p>
Procurement Review suite replacement guidance 5 November 2020
<p>The Procurement Review enables the Board to:</p> <p><b>Validate</b> – the outcomes and recommended actions from the Strategic Review;</p> <p><b>Consider</b> – the market documentation, including evaluation methodology and approach to contract and risk management;</p> <p><b>Determine</b> – whether the Approach to Market (ATM) suite is considered ‘market ready’; and</p> <p><b>Endorse</b> – the ATM prior it being submitted to the procurement Delegate.</p> <p>In undertaking the Procurement Review the Board will seek to provide the procurement Delegate with the assurance that the ATM is ‘market ready’ and has been endorsed by the Board.</p> <p>The Board’s review outcome may have three levels of approval:</p> <p><b>Endorsed</b> – means the Board has endorsed the Procurement Review and it is ready to be submitted to the procurement Delegate;</p> <p><b>Conditional Endorsement</b> – additional information / action is required. The Board may or may not require the business area to resubmit to the Board; or</p> <p><b>Not Endorsed</b> – means the Board has not endorsed the Procurement Review.</p>

Source Procurement ACT Goods and Services team and Board Secretariat SharePoint records

- 4.37 It is sound in principle to develop such a schema, and for this to be based on an interpretation of the legislation. The schema that was developed shows a further development in the Board’s understanding of its role, namely that:
- it has a responsibility with respect to a proposal’s *validation, approval or endorsement*; and
  - in the case of the two-pass process, this is to occur on more than one occasion.
- 4.38 While the legislation uses the word *endorse*, it does not use the words *approve* or *validate*. Further, the word *endorse*, in the Act and Regulation, is not used with respect to an individual procurement proposal. It is only used with respect to procurement practices (paragraph 6(d) of the Act) and Strategic Procurement Plans (subsection 11(2) of the Regulation).
- 4.39 With respect to *endorsement* or *approval*, Table 4-2 and Table 4-3 indicate that the point in the Board’s review process at which this consideration is prompted changed between 2017 and 2020. It was at the first pass in 2017 (i.e. the Strategic Review point) and it was at both passes in the 2020 guidance.

## Endorsement of procurement proposals

- 4.40 Proponents have explicitly sought the Board's endorsement or approval of their procurement proposal, in accordance with the Board's guidance.
- 4.41 The Audit Office reviewed a sample of Board advice for procurement proposals presented to the Board between 2017-18 and 2021-22; 41 in total, which represented 10 per cent of all proposals reviewed by the Board in this period. The prefacing or concluding advice statement from the Board for each proposal:
- referred to the term *endorse* in 18 of the procurement proposals in the sample (44 per cent);
  - referred to endorsement but made this conditional upon some form of action by the proponent in a further five of the procurement proposals in the sample (12 per cent); and
  - did not directly refer to either the proposal's endorsement or non-endorsement in a further two of the procurement proposals in the sample (5 per cent).
- 4.42 In the remaining 39 per cent of proposals (16 proposals), endorsement would have been either premature or not relevant to the matters being reviewed by the Board.
- 4.43 In no case did the Board explicitly state it had *not endorsed* a proposal. A review of the minutes of all 173 meetings showed only one instance of a proposal being explicitly *not endorsed* by the Board.
- 4.44 Board members advised that the use of the term *endorse* has been carefully considered and reflected on periodically. It has been a matter of custom and practice for many years by the Board, even prior to the implementation of the two-pass review process. The Board's statements in each of the CMTEDD annual reports between 2016-17 and 2021-22 refer to the Board's *endorsement* of proposals.
- 4.45 The Board's endorsement of proposals was also a matter raised by proponents, delegates and also some Board members as a problematic concept, since it could be viewed as conflicting with section 31 (or section 55) of the *Financial Management Act 1996*, which provides for the responsibilities of directors-general (or chief executives).

## Policy change

- 4.46 At its meeting of 28 June 2022 the Board was briefed by Procurement ACT on a change to the position of the Board 'approving' or 'endorsing' procurement proposals. The briefing referred to proposed changes to the Board's review and advisory processes, as reflected in the draft *Procurement Factsheet: PFW-08-202111*:

... in relation to procurement proposals, it is important to remember that the Board's purpose is to review and provide advice on procurement proposals. The Board does not have the power to approve, endorse or reject procurement proposals.

4.47 The policy position on the word ‘endorse’ proposed by *Procurement Factsheet: PFW-08-202111* is a fair reflection of the Act, but it is a different position to that promulgated and applied to the Board’s advice over at least the preceding five years.

4.48 The audit considered whether the Procurement ACT advice had been adopted by the Board since June 2022. A review of minutes from July to December 2022 shows that the Board has adjusted its minuted advice accordingly. At its meeting on 13 December 2022 the Board also sought to ensure proponents do not continue to mistakenly seek the Board’s endorsement with:

... [Procurement ACT] committed to reviewing the templates that come to the Board for references to seeking the Board’s endorsement.

4.49 Throughout the period July 2017 to June 2022, proponents explicitly sought the Board’s endorsement or approval of their procurement proposals. This accords with Procurement ACT guidance at the time. Board members advised that the use of the term *endorse* has been a matter of custom and practice for many years and that the Board has carefully considered and reflected on its use periodically. The Board’s statements in each of the CMTEDD annual reports between 2016-17 and 2021-22 refer to the Board’s *endorsement* of proposals. Furthermore, the schema that was developed for the purpose of implementing the two-pass review process in 2017 also identified that the Board would have responsibility with respect to a proposal’s *validation, approval or endorsement* and in the case of the two-pass process, this was to occur on more than one occasion.

4.50 Since 30 June 2022, however, there has been a change to the Board’s position of approving or endorsing procurement proposals. *Procurement Factsheet: PFW-08-202111* states ‘it is important to remember that the Board’s purpose is to review and provide advice on procurement proposals. The Board does not have the power to approve, endorse or reject procurement proposals’. A review of Board meeting minutes from July to December 2022 shows that the Board has adjusted its advice accordingly. The Board’s recent avoidance of the term ‘endorse’ is consistent with the Act but overturns a practice that has been in place for a long period (at least five years).

#### RECOMMENDATION 13      ENDORSEMENT

In the light of wider consideration of the Board’s purpose and functions, the Government should clarify and affirm the express power and authority of the Board’s advice.

### Features of Board advice

4.51 A review of Board records over the period of the audit (2017-18 to 2021-22) shows the Board has a significant workload that it has undertaken reliably and with sensitivity. Board papers are sent on a Friday afternoon prior to the Board’s meeting on a Tuesday morning and regularly comprise more than 100 pages for members to read and synthesise. Members generally referred to this being half a day’s reading per week in advance of the meeting.

4.52 A review of minuted advice establishes that the volume of advice provided by the Board in response to its review of each proposal is substantial. The Board is silent on very few proposals. One member commented:

Well, it's our job to provide advice and we'll always find something to add, and we'll dig down into the minutiae if there's nothing apparent at the strategic level.

4.53 A quantitative and qualitative analysis of minuted advice was undertaken in order to inform an understanding of:

- the strength (intent) of advice, other than the overall endorsement; and
- the scope of advice.

4.54 Systems and processes applied by the Board for the purposes of following up its advice were also considered.

4.55 A review of 41 procurement proposals considered in an audit sample (10 per cent of the 411 proposals presented to the Board between 2017-18 and 2021-22) shows the average word count for minuted advice was 380 words. This represented approximately one page of minutes comprising dot points, sub-dot points and paragraphs.

### Strength of advice

4.56 Advice can be categorised according to the emboldened words in the minutes of the Board's meetings. Figure 4-1 is an example of the minuted advice, of an average length, for one proposal.

**Figure 4-1 Extract from minutes 29 September 2020**

<p><u>Provision of Orthopaedic and Plastic Trauma Implants (Goods and Service Procurement First Pass)</u></p> <p>The Board thanked the attendees for the papers and overview provided. The Board:</p> <ul style="list-style-type: none"> <li>• <b>Noted</b> there are four large companies and several smaller companies in the market that could supply the necessary products.</li> <li>• <b>Noted</b> that CHS have not experienced any delays in implant supplies this year due to COVID-19 and where their vendor has experienced an issue with consumable item, they have been able to source from a different supplier.</li> <li>• <b>Noted</b> that CHS consider this procurement approach to provide the volume of supplies required by the ACT, along with value for money and other efficiencies. For example, staff would require training in each different item supplied so supplies are limited to what the ACT require.</li> <li>• <b>Suggested</b> CHS updating and revising the documentation to:             <ul style="list-style-type: none"> <li>– clarify that CHS are seeking different supplier for each category;                 <ul style="list-style-type: none"> <li>❖ The Board <b>noted</b> that there is currently one supplier for all categories and this is not the preferred approach requested by the surgeons for at least one of the implant categories, which is why the current contract is not being considered for its final extension.</li> </ul> </li> <li>– inform that CHS will negotiate with the successful contractor(s) any price changes after 12 months and a review;</li> <li>– clarify that if a surgeon requires a product from a supplier who is not the successful contractor, there is a process in place for this and the contract with the successful contractor allows for this to occur (a minimum of 80 per cent of supplies will be provided by the successful contractor);</li> </ul> </li> </ul>
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- provide estimates of typical volumes on the various categories that CHS are seeking to procure, so tenderers get a sense of size and scale;
  - request tenderers to respond with Business Continuity Plans and how a continuous supply to the Canberra Hospital will be ensured; and
  - seek information from the tenderers on the requirements for market request information recall and warranty on the products.
  - **Suggested** reviewing the timeframes for the procurement, especially the January and February 2021 milestones.
  - **Suggested** including an independent member on the tender evaluation panel from another directorate and/or jurisdiction with the relevant expertise.
- The Board **endorsed** this proposal, with the proponents giving consideration and responding to the comments above in the second pass documents.

Source: Government Procurement Board SharePoint records

4.57 Figure 4-1 shows that discrete points of advice are:

- actionable by the proponent giving consideration to the advice (via words such as *suggested* or *recommended*);
- actionable by the proponent giving consideration to the advice and returning to the Board with their response (via words such as *requested*); or
- non-actionable (via words such as *noted*, *confirmed*, *clarified* or *acknowledged*).

4.58 Applying this coding to the 10 per cent sample of the Board's advice (by discrete dot point and sub-dot point) shows the advice was:

- actionable, with consideration prompted, an average 5.7 points of advice per proposal;
- actionable, with consideration and a response from the proponent prompted, an average of 0.8 points of advice per proposal; and
- non-actionable an average of 6.8 points of advice per proposal.

4.59 Few points of advice, fewer than one per proposal, explicitly request the proponent to demonstrate to the Board how the advice has been considered. Most advice is either an observation made to or by the Board (i.e. *noted*) or it is advice that should be at least considered (and documented) by the proponent in accordance with sound administrative practice (refer to paragraph 1.39).

4.60 The Board's practice of giving advice (including its endorsement or approval) demonstrates the Board has applied an 'intervention' hierarchy:

- not endorsing (no occurrence);
- withholding endorsement (few);
- conditionally providing explicit endorsement (infrequent);
- explicitly endorsing but also asking for follow-up action (infrequent);
- endorsing and offering additional advice for consideration (frequent);

- identifying factors the Board wishes the proponent to (re)consider but that the Board has no further interest in (frequent); and
- making observations which may be either important or gratuitous but do not need further consideration (frequent).

4.61 Given that the Board is not the delegate for the procurement, the hierarchy applied by the Board is understandable. However, it is not efficient or effective. Much effort goes into carefully crafting the output of the Board which, according to Board members, seeks to sensitively signal the Board's concerns to the delegate. However, the Board is rarely assertive in its advice and the combination of endorsing and offering advice 'for consideration' is confusing.

4.62 Records over the period of the audit (2017-18 to 2021-22) show the Board has a significant workload that it has undertaken reliably and with sensitivity. The Board provides on average about a page of advice on each proposal comprising a set of actionable and non-actionable points of advice (about equal in number). Few points of advice, fewer than one per proposal, explicitly request the proponent to demonstrate to the Board how the advice has been considered. Most advice is either an observation made to or by the Board (i.e. noted) or it is advice that should be at least considered (and documented) by the proponent in accordance with sound administrative practice.

4.63 The Board's practice of giving advice (including its endorsement or approval prior to 28 June 2022) demonstrates the Board has applied an 'intervention' hierarchy: from not endorsing (no occurrence, based on the sample) or withholding endorsement (few occasions) through to endorsing and offering additional advice for consideration (frequent occasions) and making observations which may be either important or gratuitous but do not need further consideration (frequent occasions). The hierarchy applied by the Board is understandable but is not efficient or effective. Much effort goes into carefully crafting the output of the Board which, according to Board members, seeks to sensitively signal the Board's concerns to the delegate. The Board is rarely assertive in its advice and the combination of endorsing and offering advice 'for consideration' is confusing.

#### RECOMMENDATION 14    ADVICE SCHEMA

In the light of wider consideration of the Board's purpose and functions, the Board should review and revise its advice schema.

## Proponents' response to advice

4.64 The majority of the Board's workload relates to its review of, and advice on, individual proposals. Of interest is whether the Board has established systems and practices for checking up on the efficacy of its advice. For example, is its advice routinely:

- ignored by the proponent;

- considered and rejected by the proponent; or
- considered and accommodated by the proponent?

4.65 As a further matter of interest, if the Board's advice was appropriately considered and recognised by the proponent, is it possible to determine whether the amended procurement strategy and its implementation improved the procurement outcome? For example, did the revised approach to market result in a wider field or a higher quality field of suitable suppliers or improvements to tenders or greater competitive tension? It is noted, however, that identifying such an impact is very difficult, in the absence of two or more concurrent and analogous procurement activities.

4.66 The Board Chair and senior official with responsibility for Procurement ACT discussed the impact of the Board's advice in an Estimates Hearing on 26 August 2022, noting that:

... often the Government Procurement Board is not aware of how that advice is undertaken or that advice is taken to be a mechanism through which we follow up and understand what has actually happened to the procurement advice that we have provided.

4.67 At that hearing a Question on Notice was raised seeking information on instances where the Board's advice had not been recognised by a proponent:

... the last five years, where there has been an instance, and I understand the Chair has confirmed that they were not necessarily aware of what happens to the advice that the board gives, but where the board has raised significant issues with a procurement and the proponent has gone ahead anyway. Is that something that you can provide on notice?

4.68 The Minister's response to the Question on Notice confirmed that such information is not readily available:

The Board comments on every proposal that comes before it and, while the Board secretariat has documents recording Board comments on proposals, any evidence or documentation of how those comments are acted upon by proponents would be difficult to ascertain. Any such documentation is not held centrally, and it would be necessary to analyse what actually went to market compared to what was in the documents provided to the Board for review. Based on the volume (five financial years) and complexity of the request, providing a response would be an unreasonable diversion of public sector resources.

4.69 While there is no comprehensive system operated by the Board through its Secretariat that revisits all advice that has been given, there are specific mechanisms that provide for some insights to be obtained:

- second-pass reviews are capable of capturing the first-pass advice and the proponents' response to it; and
- the Secretariat maintains a control spreadsheet which identified specific issues for follow up.

4.70 At its August 2022 annual planning meeting the Board also agreed to undertake follow-up audits of two selected procurement proposals each quarter. This initiative was in the process of being planned at the conclusion of Audit Office fieldwork in December 2022. The other two mechanisms are discussed below.



- 4.71 There is no comprehensive system operated by the Board through its Secretariat that revisits all advice that has been given and seeks to understand whether the Board's advice was appropriately considered, recognised and responded to by the proponent. At its August 2022 annual planning meeting, however, the Board agreed to undertake follow-up audits of two selected procurement proposals each quarter. Some insights may also be gained through:
- second-pass reviews, which are capable of capturing the first-pass advice and the proponents' response to it; and
  - the Secretariat maintenance of a control spreadsheet, which identifies specific issues for follow up.

## Implementation of follow-up

- 4.72 Advice may eventuate from any interaction between the Board and the proponent. In some cases, Board advice is given to a proponent on three separate occasions for the one proposal.

### Single-pass and two-pass review follow-up

- 4.73 A review was undertaken of follow-up activity on the 41 procurement proposals considered in the audit sample (10 per cent of the 411 proposals presented to the Board between 2017-18 and 2021-22). Thirty-three proposals were reviewed for follow-up activity. For a further eight proposals, follow-up activity was not relevant, e.g. the proposal may have been withdrawn. The review showed that:
- the Board was able to review proponents' responses to advice formulated from the first pass at the second pass in 11 out of 12 instances;
  - the Board was able to review the proponent's response to advice formulated at the second pass at a subsequent meeting in 6 out of 7 instances. It is often noted under 'any other business' without the attendance of the proponent; and
  - for a single-pass proposal, the Board was able to review the proponent's responses to its single-pass advice in 7 out of 14 instances, either through a follow-up meeting or through a specific submission from the proponent provided to the Board.
- 4.74 The review shows there is a follow-up mechanism in place for proposals subject to the two-pass review process. While information is provided by the proponent at the second pass with respect to the Board's earlier advice, it is rare for minutes to record the acquittal of that earlier advice, or to record the Board's satisfaction with the response (i.e. the specifics of the advice or overall satisfaction). Single-pass advice is less likely to be followed up. There was no evidence of Board follow-up in half of the instances.

- 4.75 Noting that the Board infrequently comments directly on the proponent's response to the Board's earlier advice, the audit reviewed a further ten randomly selected single-pass and a further ten randomly selected two-pass proposals in order to assess the coverage of the proponent's response in:
- the second-pass documentation; and
  - any other documentation that was provided to the Board in support of the proposal.

#### *Two-pass follow up*

- 4.76 For the ten proposals reviewed twice by the Board in accordance with the two-pass review process there were 61 points of advice that related to recommendations of the Board.<sup>7</sup> Of these 61 points of advice:
- for 43 of those points (70 per cent), the documentation contained sufficient information to conclude the proponent had largely accepted the recommendations and had updated the procurement documentation;
  - for 12 of those points (19 per cent), the documentation indicated an equivocal or partial response; and
  - for 6 of those points (9 per cent), the documentation did not address the recommendation.
- 4.77 The review of proponents' responses to the Board's advice shows that some proponents respond diligently.
- 4.78 On the other hand, some proponents were identified as only 'partially addressing' the Board's advice because their response (if it contained specifics) may have:
- referred to the matters raised, but it was not clear if the matters had been addressed because the response avoided making a statement that any change has been made;
  - referred to a review being done but did not indicate whether any changes had been made as a result; or
  - referred to the matters raised, but made a statement that is unclear as to whether the proponent agreed or disagreed.
- 4.79 Accordingly, for about one third of the advice provided as part of two-pass reviews, the proponent appears not to have embraced the advice but did at least attempt to explain their perspective on the matter. In approximately one in ten instances, it appears that the proponent has not responded to the advice in any way.

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<sup>7</sup> The action words used in the minutes were: *recommend, suggest, review, recognise, clarify, include, update, and consider.*

4.80 From the perspective of sound administrative practice, most of the Board's advice in the sample was accepted or at the very least a response was provided that goes some way towards explaining an alternative viewpoint. Little of the Board's first-pass advice is 'ignored' in the two-pass follow-up process.

#### *Single-pass follow up*

4.81 With respect to single-pass proposals, for the ten proposals selected it was apparent that:

- a total of 37 points of advice (e.g. dot-pointed recommendations) had been made;
- in three of the ten proposals, a follow-up meeting to the single-pass meeting did take place and provided an opportunity for the Board to review the proponent's response to the previous advice;
- in one of these three proposals there was documented evidence of how the previous advice had been responded to; and
- in the other (seven) proposals there was no evidence in Board records between the single-pass review meeting and the approach to market of any follow up by the proponent or by the Board of the Board's earlier advice.

4.82 Accordingly, based on the analysis of this sample of ten proposals, and the ten per cent sample (refer to paragraph 4.73), there is a more limited follow-up mechanism for single-pass reviews than there is for two-pass proposals. For single-pass reviews, in many cases it was not evident from records whether the Board's advice was acknowledged, accepted, acted upon, rejected or ignored. On the other hand, the two-pass process has merit in that it increases the prospects of the Board oversighting the proponent's response to the Board's advice.

#### *Procurement ACT follow-up*

4.83 Procurement ACT officials' records refer to a process whereby proponents acquit advice arising from a single-pass process using a *Procurement Review Response Form* at the request of Procurement ACT:

Whilst there are a number of items that need to be addressed (as outlined in the GPB feedback) an important step is also completing a Procurement Review Response Form (attached) – this is where [the proponent] outlines what actions it will take (or not take) to address each of the issues/advice the GPB provided in their feedback. This document [Procurement ACT] forwards to the GPB Secretariat/GPB for information and provides a record of the [proponent's] responses/actions. To align with this response, the advised actions in the Procurement Review Proforma need to be implemented in the various procurement documents as appropriate..... (email 11 January 2022 from Procurement ACT official to proponent)

4.84 In two of the three case studies considered for the purpose of the audit there was no evidence in records systems of such documentation being received by the Secretariat. Accordingly, it is likely this mechanism is unreliable for the purposes of Board assurance that its advice is being acquitted.

### Secretariat control ‘tracker’ spreadsheet

4.85 Since July 2019 the Secretariat has maintained spreadsheets for tracking Board activity including ‘further information requested’ and ‘further information provided’ columns. Analysis of this data indicates this tracking system is used for extraordinary requests by the Board, rather than the follow-up of all advice provided. The data in the tracking spreadsheets suggests specific requests have become less frequent and are not necessarily followed up. The Secretariat’s advice was that once a reminder had been sent ‘a couple of times’ to a proponent, if there was no reply then the matter was no longer pursued.

**Table 4-4 Use of Secretariat tracker spreadsheet for requests and responses**

	2019-20	2020-21	2021-22
Further information request	16	16	10
Further information provided	14 of the 16	3 of 16	5 of the 10
Total items reviewed by Board	69	97	103

Source: Secretariat provided tracker spreadsheets 2019-20 to 2021-22

4.86 Consideration was given to follow-up activity on the part of proponents in response to the Board’s advice. For single-pass reviews, it is not evident from records in many cases whether the Board’s advice is acknowledged, accepted, acted upon, rejected or ignored. On the other hand, for two-pass reviews there is an increased prospect of the Board overlooking the proponent’s response to the Board’s advice. For the proposals reviewed twice by the Board in accordance with the two-pass review process it was evident that for:

- 70 per cent of the advice provided, the documentation contained sufficient information to conclude the proponent had largely accepted the recommendations and had updated the procurement documentation in response;
- 19 per cent of the advice provided the documentation indicated an equivocal or partial response; and
- 9 per cent of advice provided the documentation did not address the recommendation.

4.87 The Board is not maximising its impact. It is not routinely and consistently assessing how its advice has been received by the proponent and how it has been acquitted, noting the Board is not explicitly required to do so by the Act or Regulation.

#### RECOMMENDATION 15 BOARD FOLLOW UP

In the light of wider consideration of the Board’s purpose and functions, the Board should develop a risk-based practice for the review of proponents’ consideration and acquittal of Board advice.

## Administrative and procedural efficiency

### Costs associated with the Board

4.88 In the five years to 30 June 2022 the Board reviewed 411 separate procurement proposals. The Board also reviewed Annual Procurement Plans and developed and implemented various governance and administrative functions associated with its operation.

4.89 The existence and operation of the Board adds time, effort and cost to the Territory's procurement processes. There is time and effort on the part of:

- Board members, i.e. the nine public employee and non-public employee members;
- procurement proposal proponents across the Territory Entities;
- Procurement ACT and Major Projects Canberra, through their support for procurement proponents; and
- Procurement ACT, through its secretariat support function for the Board.

4.90 There are:

- direct costs of the Board associated with allowances due to the non-public members; and
- indirect costs of the Board associated with the remuneration costs of ACT Public Service members and the time they spend on Board-related activity. These include public employee members of the Board, Procurement ACT and Major Projects Canberra officials and procurement proposal proponents across the Territory Entities.

4.91 Public employee members of the Board are at the senior executive level, while many senior executive and other senior staff are involved in the:

- preparation and presentation of procurement material to the Board; and
- other and ongoing interactions with the Board.

4.92 Procurement proposal proponents would (or should), as a matter of course, prepare much of the procurement-related documentation presented to the Board as a matter of policy and better practice. However, some of the procurement-related documentation is only prepared for the purpose of informing and engaging with the Board. This is documentation that would be unnecessary if the proposal did not need to be referred to the Board. This includes, for example, material associated with:

- the preparation and review of two-pass review related documentation;
- documentation and other related enquiries for the acquittal of advice by the proponent and by Procurement ACT; and
- briefs and other documents developed as part of the proponents' preparations necessitated by engagement with the Board.

## Administrative efficiency

- 4.93 After more than twenty years of operation, the Board functions on a week-by-week basis very smoothly. Its operation is a matter of well-established routine. This is now supported by a standard operating procedure.
- 4.94 The Board has an effective Secretariat, which supports the Board's consideration of procurement proponents' proposals. The Secretariat communicates with members and proponents in a timely manner, often when time is of the essence. The speed with which Board members interact with each other and with the Secretariat indicates the Board and Secretariat are conscientious and disciplined in attending to the business of the Board. This indicates that the Board is administratively efficient in its consideration of procurement proposals that are presented to it.

## Procedural efficiency

- 4.95 The overriding matter is whether the Board is efficient, when considering the additional direct and indirect costs associated with its operations.
- 4.96 Notwithstanding the relative efficiency of the Board and Secretariat once a procurement proposal has been provided, there are also indirect costs associated with poor or delayed procurement outcomes related to time associated with the existence and operation of the Board. These may include:
- time the proponent is required to factor into a procurement proposal's timeline, for the purpose of engaging with the Board; and
  - the uncertainty the proponent has in not knowing what may eventuate from the Board's review and advice.
- 4.97 Any costs associated with these activities do not align with the 2007 Bill's intent of removing 'unnecessary administrative obligations', improving 'the efficiency of relevant government operations' or reducing 'the timeframes for individual procurement activities' (refer to paragraph 3.25).
- 4.98 The commentary in Chapters 2 to 4 and the case studies in Chapters 5 to 7 indicates that the Board reviews a large volume of procurement proposals each year and each proposal can comprise a large volume of documentation. In turn the Board provides a large volume of advice. While the Board is very 'busy', it cannot be gauged as optimally effective in the absence of a clear expression of the Board's purpose. Similarly, the Board's efficiency is questionable as long as it serves an unclear purpose and introduces delays and uncertainty to a large volume of procurement activity. In addition, there is limited evidence that the Board has prevented fundamentally flawed proposals from progressing.

## Reform

- 4.99 Paragraph 1.23 refers to review work undertaken between 2019 and 2021 that has highlighted elements of the Territory's Procurement Framework that require improvement. In recognition that procurement is a whole-of-Government priority area for reform, the Treasury Division has established the Procurement Reform Program.
- 4.100 A program of work was approved by the Strategic Board on 22 June 2022. The Program recognises that transformation of procurement will necessarily be accomplished by a:
- ... streamlined and contemporary legislative framework to clarify key concepts with clear lines of decision and accountability.
- 4.101 To that end, included in medium term actions to 31 December 2023 is the:
- ... review and amendments of the *Government Procurement Act 2001* and *Government Procurement Regulation 2007*.
- 4.102 Dependent on what purpose the Government determines for the Board, there is potential for the Board to review fewer proposals and to review them more effectively. There is also potential for the Board to interact with the proponent and the delegate of a proposal more efficiently by being more assertive, and if necessary, by being directive. This will require the Board to have more autonomy and independence. This may include the Board having the ability to define the rules under which proponents are required to refer proposals and the introduction of a 'call in' facility. To date this has not been a facility exercised by the Minister.
- 4.103 If the Board were to review fewer proposals in more depth, the Board could benefit from a foundation level of assurance or compliance work for all other procurements being undertaken by Procurement ACT or Major Projects Canberra. The results of such assurance work, reported in aggregate to the Board would complement the Board's focus on higher risk procurements.
- 4.104 The Board cannot be assessed as optimally effective in the absence of a clear expression of the Board's purpose. The efficiency of the Board is questionable as long as it serves an unclear purpose, is associated with a range of additional direct and indirect costs and introduces delay and uncertainty to a large volume of procurement activity. A reformed Board that is less constrained, considers fewer proposals and operates according to a statement of purpose and with increased autonomy and independence, is likely to deliver improved outcomes and do so with more efficiency. Procurement ACT's Procurement Reform Program has the potential to progress Board reforms identified in this report.

#### RECOMMENDATION 16 RISK-BASED REFERRALS

In the light of wider consideration of the Board's purpose and functions, the Government should:

- a) develop a range of automatic and discretionary triggers that can be activated by the Board, such that the Board receives and reviews fewer procurement proposals, but which are higher risk; and
- b) consider including a Board 'call-in' process, which can be informed by the Board's early oversight of procurement activity being supported by Major Projects Canberra and Procurement ACT.

4.105 This recommendation is in addition to reviewing the Board referral value thresholds (Recommendation 1).

4.106 Recommendations 4, 6, 7 and 9 relate to enhancing administrative efficiency through reviewing the Board's current interest in the two-pass process, variations, Strategic Procurement Plans and Annual Procurement Plans.



## 5 LINEAR ACCELERATORS CASE STUDY (CHS)

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- 5.1 This chapter discusses the first of the three case studies. It considers advice provided by the Board, and the response to that advice, by ACT Health and Canberra Health Services relating to the procurement of linear accelerator devices that deliver radiation therapy.

### Summary

### Conclusion

In 2019 Canberra Health Services' Radiation Oncology Department replaced two of its four linear accelerator (Linac) machines. In 2021 the department replaced the other two. There are few suppliers in the Australian marketplace for Linacs. Canberra Health Services approached the market through a select process in the first instance and a single select in the second. Two ageing Varian machines were replaced with two new Varian machines in both instances. The cost of replacing the four machines, excluding the cost of the ten-year maintenance plan, was \$14.545 million (GST inc).

The Board reviewed Canberra Health Services' procurement plans between two to four weeks before each approach to market was due to take place. The interactions between the Board and the proponent reflect some of the systemic challenges the Board has in fulfilling its functions. There were missed opportunities for better procurement outcomes because the Board was not assertive with its advice.

### Challenges and missed opportunities

- The Board's advice was constrained by the proponent's late referral of the proposal for review.
- The timing of the delegate's approval of the 2018 procurement plans was unsatisfactory for the Board's purposes and for the purpose of accountability.
- The proponent did not prepare procurement plans with sufficient diligence, and in doing so omitted to establish the viability of the preferred procurement option.
- The Board's review of the procurement proposal in 2018 was incomplete as it did not review the matters specified in the Act and Regulation that were required for a select procurement process.
- The proponent's documentation used terminology loosely, and this led to the potential for misunderstanding and unsound advice.
- The Board was insufficiently probing in its review of the procurement proposal in 2021 and it provided advice based on a misunderstanding about a purported panel arrangement.

### Learnings

- The timing of the proponent's referral of the proposal to the Board was suboptimal. It would have been better to have presented the proposal to the Board for the first-pass review two years earlier, before the nominal ten-year lifespan of the first Linac had expired. It would also have been better to have planned for the phased replacement of all four machines, and to have avoided the pressure of supplier discounts tied to imminent deadlines.
- The Board's review of the procurement proposal in 2018 was unsatisfactory, as to all intents and purposes the outcome had already been predetermined by the proponent: replacement with like-for-like devices. The Board's two-pass review of the procurement proposal in 2021 was redundant, because a decision over the approach to market had been made six months earlier.
- On 31 July 2018 the proponent acquitted the initial advice of the Board but did not update the Board when there was a substantial change in circumstance that was capable of invalidating the Board's earlier advice. In March 2021 the Board did not require Canberra Health Services to provide a response back to it, but in that instance Canberra Health Services satisfactorily acquitted the Board's advice.

## Background

5.2 Canberra Health Services was formed on 1 October 2018 when ACT Health was separated into two directorates. Canberra Health Services is responsible for the provision of health services and the ACT Health Directorate is responsible for health system stewardship, including policy and planning.

### Overall intention of procurement

5.3 The Canberra Health Services Radiation Oncology Department owns and operates four linear accelerators. Linear accelerators (Linacs) are specialised medical devices that provide radiation therapy. All four machines operate at full capacity when working.

5.4 Linacs attract Commonwealth funding of approximately \$300,000 per machine per year. The machines have a notional lifespan of ten years. Once a machine's notional lifespan is passed, Commonwealth funding is no longer available. Newer equipment provides advantages in terms of reliability and availability of Commonwealth funding and improved functionality.

5.5 In June 2018 ACT Health developed a proposal for the procurement of two devices as:

- Linac #2 had reached the end of its notional life in 2016; and
- Linac #3 had reached the end of its notional life in 2017.

5.6 In March 2021 Canberra Health Services developed a proposal for the procurement of the other two devices as:

- Linac #4 was due for replacement in October 2021; and
- Linac #1 was due for replacement in May 2022.

## Potential Suppliers

5.7 A Linac is a highly specialised medical device. A single device may cost between \$4 million and \$5 million to purchase and install. Purchasing a Linac involves consideration of its compatibility with existing equipment, as well as its functionality. Consideration also needs to be given to maintenance, training and installation costs.

5.8 KLAS Research, an independent research body, identified two vendors that manufacture Linacs that cater to the radiation oncology sector in Australia: Elekta and Varian. According to a Procurement Plan Minute dated 29 June 2018:

All existing and previous Linacs ... in the ACT Health Directorate have been supplied by Varian Medical Systems.

5.9 Due to the costs associated with the shipping, installation and commissioning of a Linac, there are economies of scale to be gained by either purchasing two or more devices simultaneously or by collaborating with other Australian jurisdictions in the process of purchasing these devices.

## Nature of services

5.10 New South Wales HealthShare is 'a statewide organisation established to provide high-quality shared services to support the delivery of patient care within the NSW Health system'. In planning a procurement strategy for the first two replacement Linacs in 2018, ACT Health considered using New South Wales HealthShare's Standing Offer Agreement. According to minutes of the 11 September 2018 Board meeting, the advantage of this option was that both manufacturers (Elekta and Varian) were listed as suppliers for a known price under the agreement and:

This option affords the Territory significant cost savings in the magnitude of \$1M (AUD) due to a range of discounts offered by the Vendors as a result of bulk procurement through HealthShare and end of financial year discounts.

5.11 A further advantage of progressing the procurement through the New South Wales HealthShare Standing Offer Agreement was that it was understood (in mid-2018) that the procurement could proceed rapidly, as the two suppliers had already responded to an approach to market. In June 2018 ACT Health's timeline indicated that an order for the two new Linacs needed to be in place by 15 September 2018, in order to secure \$900,000 in savings.

5.12 The alternative, a public tender, would have taken considerably longer, not least because it would have needed to satisfy Free Trade Agreement open tender rules.

- 5.13 When planning for the second procurement in March 2021 one of the two older devices (Linac #1) had already failed (and was deemed uneconomical to repair) and some of its key functionality had been offline since July 2020.
- 5.14 One factor relevant to the decision-making process in 2018 and in 2021 was having sufficient time to plan for the option of a transition of all four devices from one manufacturer to another. Without sufficient time, it was expedient to replace 'like-for-like', i.e. to remain with the incumbent manufacturer.

## Approach to market and market response

- 5.15 ACT Health issued a Request for Quotation (RFQ) for Linac #2 and Linac #3 on 14 August 2018 via Tenders ACT. Two suppliers Elekta and Varian were invited and both responded. Their quotations were evaluated by a panel, and Varian was selected in September 2018. The delegate's approval minute emphasised the urgency needed in decision making in order to secure \$1 million in savings. A contract was executed with Varian on 28 March 2019 for the two Linacs at a cost of \$7,187,439 (GST inc).
- 5.16 In this instance a select procurement process was used to identify the preferred supplier and to inform the contract price of the goods and services. The New South Wales HealthShare Standing Offer Agreement was not used.
- 5.17 By July 2020, Canberra Health Services had begun to explore the replacement of Linac #1 and Linac #4. On this occasion, the procurement strategy comprised a single select procurement process and included a minute seeking permission for the procurement to be exempt from the requirement to conduct an open tender (as per section 10 of the Regulation). This was agreed on 17 September 2020 by the delegate on the basis that:
- Standardising the supply of linacs to one supplier will create clinical efficiencies through seamless integration and provide the ability to easily move patients between machines while on treatment. Use of Elekta would require duplication of treatment planning processes resulting in delays to the start of treatment and resource shortfalls.
- 5.18 Varian, the incumbent provider, was invited to provide a quotation. This was evaluated and selected, and a contract was executed with Varian on 29 March 2021 for \$7,358,494 (GST inc) for Linac #1 and Linac #4. Reference was also made in procurement documentation in March 2021 to Canberra Health Services potentially being able to collaborate with the Queensland Government as the timing of the two jurisdictions' purchases of Varian Linacs coincided.
- 5.19 As at March 2023 all four linear accelerators have been provided by one manufacturer. They are less than four years old, with the oldest being installed in 2019. Because each has a nominal lifespan of ten years, planning for new machines from Varian or a move to another manufacturer will need to commence by 2027, which would allow at least 12 months procurement planning time. Leaving matters until the nominal lifespan of one or two

machines has passed will reduce the merits of any option other than like-for-like replacement.

5.20 There are few suppliers in the Australian marketplace for linear accelerators. ACT Health used a select procurement process for the replacement of Linac #2 and Linac #3 in September 2018 and used a single select procurement process for Linac #1 and Linac #4 in March 2021. The timing of the decision to remain with Varian in 2018 was suboptimal as both Linacs were past their nominal ten-year lifespan. In addition, the decision to remain with Varian in 2018 practically limited the choice of supplier for the subsequent purchase of two more Linacs in 2021. The 2021 purchases were also subject to suboptimal timing. Where there are significant standardisation and interoperability factors, it would be preferable to commence a procurement strategy for the phased replacement of all four devices well ahead of the end of life of the oldest device.

5.21 The Board acknowledged Canberra Health Services' intentions for better preparatory work and noted in its minutes in March 2021 that Canberra Health Services:

... will look to consider the best strategic approach for the next full round of these units' asset replacement to account for the pros and cons of different suppliers, given the flow on system integration needs and patient impacts.

...

... anticipate that they will conduct a market sounding exercise towards the end of the term of this procurement.

## Government Procurement Board interest

5.22 The Board has reviewed proposals for linear accelerators on three occasions between July 2017 and June 2022:

- on 17 July 2018 the Board reviewed a proposal from ACT Health titled *Replacement of Linear Accelerators (First Pass, Select Tender)*. The Board considered the proposal out of session;
- on 2 March 2021 the Board reviewed a proposal from Canberra Health Services titled *Replacement of a Linear Accelerator 1 and 4 at the Canberra Hospital (Goods and Services Procurement assisting – First Pass)*; and
- on 16 March 2021 the Board reviewed a proposal from Canberra Health Services titled *Replacement of a Linear Accelerator 1 and 4 at the Canberra Hospital (Goods and Services Procurement assisted – Second Pass)*.

5.23 In each case the proposal had an estimated value of more than \$5 million. Accordingly, it was required by Regulation to be referred to the Board and was required by policy to be subject to a two-pass review process.

## Documentation provided to the Board

5.24 The Board was provided with a suite of documents comprising 10 to 50 pages of information about the procurement on each of three occasions. Table 5-1 summarises the documentation that was provided to the Board for its review.

**Table 5-1 Proposal documentation for the Board’s review**

Initial contact with Board secretariat	Meeting	Purpose	Artefacts
Unknown	17 July 2018 out of session meeting	To undertake the first-pass review (i.e. Strategic Review) of the procurement proposal	Strategic Review Submission (6 pages) Risk Plan (4 pages) clearance and attachments (3 pages) Minutes
24 February 2021 (the Secretariat offered a cancellation slot)	2 March 2021	To undertake the first-pass review (i.e. Strategic review) of the procurement proposal	Strategic Review Submission (6 pages) Procurement Plan Minute (35 pages) Risk Plan (5 pages) Minutes
11 March 2021	16 March 2021	To undertake the second-pass review (Procurement Review) of the procurement proposal	Statement of Requirements (13 pages) Procurement Plan Minute (5 pages) Evaluation Plan (26 pages) Risk Plan (6 pages) clearance sheet (1 pages) GPB Brief (1 page) Minutes

Source: Audit Office review of records in the Board’s SharePoint records management system

5.25 Not contained in the Board’s SharePoint records management system, but provided to the Board on 31 July 2018, was an acquittal document prepared by ACT Health, which responded to the advice provided by the Board in relation to its out of session consideration of the July 2018 proposal.

## Interaction with the Board

5.26 Across the three instances where the Board considered the two Linacs procurement proposals, the Board offered actionable advice on two occasions:

- the 17 July 2018 out-of-session item resulted in five recommendations in the minuted advice; and

- the 16 March 2021 meeting (that was not attended by the proponent) resulted in four recommendations in the minuted advice.

5.27 For the purpose of audit analysis the Board’s advice has been categorised by the Audit Office into ‘major’ and ‘minor’ advice:

- major advice is advice that is capable of substantially influencing the proponent’s procurement strategy and its overall outcome; and
- minor advice is advice that is more likely to achieve greater compliance or transparency or where it assists in mitigating risks.

5.28 Table 5-2 shows an analysis of:

- the Board’s advice that solicited action;
- the Board’s overall advice; and
- the follow-up action requested by the Board.

**Table 5-2 Audit Office analysis of the Board’s advice**

Meeting date	Advice items	Advice impact	Overall advice	Follow up
17 July 2018	5 Recommendations (& 2 ‘Noted’)	2 major and 3 minor points of advice	‘Endorsed’ conditionally	A written reply was provided to the Board and the Board then endorsed the proposal on 9 August.
2 March 2021	No Recommendations made (& 7 ‘Noted’)	N/A	No overall endorsement or non-endorsement	Nothing to follow up other than to provide for the second review
16 March 2021	4 Recommendations	1 major, 3 minor points of advice	Endorsed and matters raised for consideration	No further information provided to the Board

Source: Audit Office review of records in the Board’s SharePoint records management system and the Board’s Outlook account

## Consideration of Board advice

5.29 The following sections of the report consider the advice from the Board and the proponent’s response to that advice. This occurred on two occasions: 17 July 2018 and 16 March 2021.

### 17 July 2018 instance

5.30 In respect of the agenda item entitled *Replacement of Linear Accelerators (First Pass, Select Tender)* the Board provided the following advice through Board minutes:

The Board considered the Replacement of Linear Accelerators out of session, noting that it is a first pass and further information will be required. Board:

- **Noted** the demand for access and that ACT Health is the sole provider in the ACT;
- **Noted** that the existing Linacs 2 and 3 passed their economic life in 2016 and 2017;

- **Suggested** including in the risk register as a critical risk ‘equipment fails to fully integrate with current infrastructure’”
- **Requested** clarification on “Demand for EBRT services is increasing on average 4% annually since month/year”;
- **Requested** further information on how the \$900,000 saving was calculated; and
- **Requested** further information regarding the value for money.
- **Requested** confirmation that ACT Health have approached NSW Health to seek permission to utilise the NSW Health Arrangement

Upon receipt of the clarification as requested above, the Board is happy to endorse the Select Tender approach of this tender.

5.31 The minutes show that there are five points of advice where the Board seeks a response from the proponent and explicitly requests a response to that advice. Two items relate to major points of advice, namely that the proponent should:

- provide further information about value for money; and
- confirm the NSW Health arrangement is indeed accessible to ACT Health.

5.32 The minor advice related to a risk rating and two clarifications.

### *Soundness*

5.33 The review undertaken by the Board for this proposal was a first-pass review (i.e. Strategic Review) that was supported by a Strategic Review Submission. The proponent’s preferred approach to this procurement, as articulated in the Board’s 17 July 2018 documentation, was to obtain the delegate’s written exemption from an open tender (as per section 10 of the Regulation) and approach the two identified companies via a ‘select tender accessing the NSW Healthshare standing offer agreement’ in order to obtain ‘discounts offered by the vendors as a result of bulk procurement through Healthshare’.

5.34 Given the two suppliers had already tendered volume-related fixed pricing as part of the NSW HealthShare Standing Offer Agreement it was odd to refer to the proposal as a ‘select tender’. The suppliers that have a standing offer agreement had already tendered, been evaluated and selected by the New South Wales authority, with pricing agreed. To address ACT Health’s procurement needs in 2018, either:

- the two suppliers were to be approached (independent of NSW Healthshare) as a select tender (and with an exemption minute), in which case no volume discounts or fixed pricing would be assumed; or
- ACT Health would be part of a NSW-coordinated ‘bulk buy’ and with no new approach to market being necessary.

5.35 The two approaches are distinct and require a wholly different set of documentation: one involves a new approach to market and the other uses an existing approach to market.



- 5.36 The 17 July 2018 Strategic Review Submission raised the possibility of a risk in the Risk Plan that ‘Purchasing cannot proceed as Territory applicable terms cannot be negotiated with HealthShare’. One Board member raised this as a potentially fundamental issue to ACT Health’s preferred procurement approach. Accordingly, the Board’s two points of major advice sought more certainty on this and on how value for money would be established.
- 5.37 With support from Procurement ACT officials, on 31 July 2018 ACT Health officials provided the Board with a written point-by-point acquittal of the Board’s five recommendations within which the issue of the NSW HealthShare option was addressed:
- NSW HealthShare Standing Offer Agreement (SOA) panel is open to ACT Health care providers. ACT Health has an ongoing relationship with NSW Health for access of the SOA panel and this has been utilised from time to time. The NSW SOA panel can be accessed in two ways, either directly with the listed vendors on the panel or via NSW HealthShare Medical Equipment Unit. The first option is going to be used for this procurement and a RFX sent directly to the vendors. Any ensuing contracts will be executed as per the Territory’s regulations.
- 5.38 ACT Health officials advised that when Procurement ACT looked into this matter in early August 2018 it became apparent that it was not possible to participate in the NSW HealthShare arrangement. However, there was nothing in the exchanges of emails between 31 July 2018 and the Board’s eventual unconditional endorsement of the proposal on 9 August to indicate the Board was informed that the NSW HealthShare arrangement could not be utilised.
- 5.39 The ACT Health delegate initially approved ACT Health’s intention to participate in the NSW HealthShare Standing Offer Agreement panel on 29 June 2018 for the purchase of two Linacs from Varian. The delegate then later approved a different procurement approach (namely, a wholly new approach to market with a select tender via RFQ to two suppliers). However, the delegate’s later approval was provided on 20 September 2018, after ACT Health had approached the market, and after ACT Health had received and evaluated the two quotations.
- 5.40 Furthermore, the 20 September 2018 delegate approval minute made two statements:
- Approval for the single select process was provided in COR18/12440: Minute – Single Select Procurement for the replacement of two Linear Accelerators under the HealthShare New South Wales (NSW) Government Standing Offer Agreement (SOA No RTE1794).
- The ACT Government Procurement Board (GPB) approved the select procurement process however requested that the two vendors on the NSW HealthShare SOA panel be approached for quotes.
- 5.41 Neither statement reflects the facts in respect of the Board’s interest. In its first-pass review (based on the Strategic Review Submission) the Board considered ACT Health’s proposal for a *select tender* process and not the *single select* process approved by the delegate on 29 June 2018. In its advice following the Board’s 17 July 2018 consideration of the proposal, the Board did not request two vendors be approached for quotes. The two vendors were referred to in the Strategic Review Submission, which was written either by or for the proponent.

5.42 The Board's two points of major advice were sound and well targeted. The risk identified by the Board eventuated. Use of the NSW HealthShare Standing Offer Agreement was not an available option, and it is apparent that ACT Health officials took the pragmatic decision in early August 2018 to proceed with an RFQ and make a new approach to the two suppliers. This was without the delegate's express authority, which was not provided until 20 September 2018. It was also without the proponent providing the appropriately revised documentation to the Board for its review i.e. the circumstances described in paragraph 2.28. For example, for a select procurement, which is what eventuated, the Board under normal circumstances would have reviewed the Evaluation Plan. It did not do so.

#### *Response by ACT Health*

5.43 In response to the advice provided by the Board in July 2018, ACT Health provided a one-page acquittal document that addressed each of the five items of advice. This was circulated to Board members to inform its final endorsement on 9 August. Accordingly, the proponent gave the Board the opportunity to review the proponent's response to the Board's advice, at least, as far as the proponent had progressed with its understanding as at 31 July 2018.

5.44 The Audit Office reviewed documentation to verify that ACT Health's response was subsequently reflected in revised proposal documentation. One point of advice capable of impacting documentation, relating to risk, led to an appropriate revision in the documentation suite. However, the overriding issue was that ACT Health's proposal needed to be wholly reconsidered once it was clear that the NSW HealthShare Standing Offer Agreement was not able to be used. The proponent's response on 31 July 2018 to this matter was premature. It was not known to ACT Health on 31 July 2018 that ACT Health would not be able to access the NSW HealthShare Standing Offer Agreement. Once either the Board or ACT Health knew this, a full submission of the second-pass documentation based upon the revised procurement approach should have been prepared and referred to the Board. Pressure of time evident in the email trail appears to have overridden this.

5.45 In summary, in this first instance that it considered the procurement of Linac #2 and Linac #3, the Board's advice was sound, and particularly prescient in one respect, but it was insufficiently probing. While ACT Health acquitted the advice initially, these matters were overtaken by events, namely that the NSW HealthShare Standing Offer Agreement was not able to be utilised. The Board should have requested ACT Health to advise it if any alternative was to be pursued, and to re-present the revised documentation as part of the Procurement Review Submission. This did not happen.

#### **2 and 16 March 2021 instances**

5.46 First-pass documentation was reviewed by the Board on 2 March 2021. No recommendations were made in the Board's advice:

The Board looks forward to considering the second pass.

During discussion with the proponents the Board also noted:

The single select procurement approach has already been approved by the delegate.

CHS will look to consider the best strategic approach for the next full round of these units asset replacement to account for the pros and cons of different suppliers, given the flow on system integration needs and patient impacts.

There are two main vendors who can supply this product in the Australian market, with one supplier demonstrating greater innovation than the other and the ability to meet the desired CHS outcomes.

Innovation has allowed for more targeting of effected patient areas and reduced the side effects for patients.

If CHS are able to place their order for the units at the same time as Queensland Health, they will be able to negotiate savings with the supplier.

CHS anticipate that they will conduct a market sounding exercise towards the end of the term of this procurement.

The infrastructure works required to support the replacement of the linear accelerators will be a separate procurement, with CHS being assisted by MPC. CHS anticipate the single select tenderer will provide input into the scope of infrastructure works required for that procurement.

5.47 One further document titled *Government Procurement Board Brief Replacement of Linear Accelerator at Canberra Hospital* was also provided by email to the Board by Procurement ACT on 11 March 2021. The concept of the Government Procurement Board briefing document as a means by which Procurement ACT can raise issues/questions with a proposal was discussed in paragraphs 3.61 and 3.67. The briefing document was not uploaded to the Board's SharePoint records system by the Secretariat. The one-page brief prepared by Procurement ACT was supportive of the procurement proposal.

5.48 The proponent returned to the Board with its second-pass documentation (i.e. Procurement Review Submission) on 16 March 2021. On 16 March 2021 the Board provided four actionable points of advice:

The Board endorsed this proposal. The following advice from the Board is provided for proponents' consideration:

**Request** clarification if the proponents still intend to utilise the medical imaging device panel and Queensland arrangements. The documentation makes no reference to this.

**Recommend** updating the timeframe for the closing date for responses and when the evaluation plan will be completed. The current timeframes state that the Evaluation Plan will be completed on 17 March but the closing date for responses is 23 March.

**Recommend** reviewing and updating the documentation as required to ensure that there is a clearer delineation of responsibilities between the Territory and the Contractor. This risk should be captured in the Risk Plan, given the Territory need to complete certain actions in their capacity to ensure timeframes can be met.

**Recommend** the treatment for Risk 5 in the Risk Plan is changed. The Board should not be referenced as a treatment for a risk and as described currently, this is not a function of the Board.

5.49 The advice that was provided contained one major point of advice, i.e. the request for 'clarification if the proponents still intend to utilise the medical imaging device panel and Queensland arrangements'. This is a major point because the issue had the potential to impact the required documentation. The other three items are minor in nature. The Board

endorsed the proposal while offering advice for ‘consideration’, thus making it optional advice, and with no necessity to return to the Board.

### *Soundness*

- 5.50 The major point of advice from 16 March 2021 (i.e. the requested action) should have raised doubt as to what procurement approach the latest documentation was responding to since the *medical imaging device ‘panel’* and *Queensland arrangements*, or no use of either, are different options. Given the previous uncertainty about access to the NSW HealthShare Standing Offer Agreement it would have been prudent for the proponent to have sounded out these options in order to know whether these were viable, and for this to be apparent. It was not. The Board’s advice was superficially sound but indicates the details of the procurement approach were still to be resolved.
- 5.51 Canberra Health Services advised the Audit Office that the Medical Imaging Device Scheme is *not* a panel. It was a form of Services Agreement that Canberra Health Services intended to use. If the Board understood the Medical Imaging Device Scheme to be a panel, then such a misunderstanding was capable of affecting their advice.
- 5.52 Two of the three minor items of advice were sound but inconsequential, while the second, relating to ‘clear delineation’, was sound but could have been more precise for it to be actionable.

### *Response by Canberra Health Services*

- 5.53 The Board did not make a response by the proponent back to the Board a condition of its endorsement on 16 March 2021. No further communication took place between the Board and the proponent prior to the proponent seeking final approval from the delegate on 25 March 2021. Accordingly, the Board would not have known if and how its advice had been responded to by the proponent prior to the proposal going to market, or that its advice relating to the ‘panel’ was mistaken.
- 5.54 With respect to the major point of advice, the document suite accompanying the delegate’s 25 March 2021 approval identified that the *Queensland arrangements* were available if the tight timescale could be met, and that the *Medical Imaging Device Scheme Services Agreement* was to be used.
- 5.55 With respect to the other three points of minor advice, these were addressed in the finalised document suite.
- 5.56 In summary, in the second instance (16 March 2021), the Board was insufficiently probing, and although its advice was sound in part it was unassertive. One aspect of its advice (i.e. its reference to a ‘panel’) was not sound. It required no response back to the Board. Canberra Health Services did, however, acquit the advice satisfactorily.

## Compliance with regulation

### July 2018

- 5.57 For the proposal put to the Board on 17 July 2018, ACT Health complied with its obligations to refer the 'procurement proposal' to the Board according to the value thresholds (as per paragraph 11(1)(b) of the Regulation).
- 5.58 ACT Health provided sufficient documentation, and the Board was able to satisfy the scope of the Board's Strategic Review, i.e. the first-pass review. Although referred to as a two-pass review proposal, and although qualifying as a two-pass review proposal, documentation for the purpose of a second review (the Procurement Review) was not provided. The Board did not have access to and did not examine: the Procurement Plan Minute; a Statement of Requirements; a Contract Management Plan; or an Evaluation Plan. This means the Board did not satisfactorily consider the specified matters in the legislation prior to concluding its review on 9 August 2018, namely:
- VFM, as per section 22A of the Act;
  - or evaluation and contract management matters as per subsection 12(2) of the Regulation).
- 5.59 While the 17 July 2018 procurement proposal was appropriately referred to the Board, the Board's review was incomplete. The Board's review was non-compliant with the Act and Regulation relating to the specified content of a Board review.

### March 2021

- 5.60 For the second proposal put to the Board on 2 and 16 March 2021 Canberra Health Services complied with its obligations by referring the 'procurement proposal' to the Board according to the value thresholds (as per paragraph 11(1)(b) of the Regulation). It also provided the appropriate procurement proposal documentation to enable the Board to undertake a review of:
- the matters specified in the subsection 12(2) of the Regulation, i.e. VFM (as per section 22A of the Act), evaluation and contract management matters; and
  - other matters it is directed to review (as per subsection 8(1) and section 22B of the Act) such as the *Government Procurement (Charter of Procurement Values) Direction 2020*.
- 5.61 For the second proposal on 16 March 2021 the Board complied with its obligations with respect to:
- undertaking a review of the proposal in accordance with paragraph 6(c) of the Act of the matters as specified in subsection 12(2) of the Regulation and under section 22B of the Act;

- formulating and give advice on such matters in accordance with the paragraph 6(a) of the Act; and
- minuting proceedings (as per subsection 19(11) of the Act) and utilising minutes as the means of communicating its advice to the Territory Entity.

### Conformance with policy and procedure

5.62 The proponent did not prepare and provide sufficient documentation to enable a two-pass review to be undertaken in July and August 2018. ACT Health did not conform with Government policy relating to two-pass reviews. It is apparent that ACT Health was aware of the risk of non-conformance at the time. Emails between the Board, Procurement ACT and the proponent highlight that the issue of whether a second review was necessary was raised:

The main concern is whether the process will require a second pass. Would you kindly confirm this? (Email from the proponent to the Board Secretariat, 12.46pm, 9 August 2018)

What does this mean, do we have to go through a second pass? (Email from the proponent to the Board secretariat 5.22pm, 9 August 2018)

Would please clarify what “the Board will be happy to endorse the select tender approach proposed:” means? Does it mean we do not have to present to the board for a second pass (procurement review)? (Email from the proponent to the Board Secretariat 10.33am, 10 August 2018)

If you are happy comfortable with this clarification, can you please confirm that the Board endorses the select tender approach and whether it needs to come back for a Procurement Review. (Email from the Board Secretariat to the Board 12.13pm, 10 August 2018)

5.63 The matter was not satisfactorily resolved in writing. Neither Board members nor the Secretariat provided a definitive answer in writing to the proponent. Accordingly, it is not clear who, if anyone, determined that further review by the Board was unnecessary.

5.64 The Audit Office did not identify any inconsistency with policy in the ACT Health and Canberra Health Services documentation, other than those identified by the Board, and those identified above and in paragraphs 5.30 and 5.46.

### Accordance with sound administrative practice

#### Urgency of review

5.65 In both instances, the level of urgency signalled by ACT Health and Canberra Health Service officials placed an unreasonable burden on themselves and those with responsibilities to facilitate the procurement activity, namely Procurement ACT and the Board. Urgency was signalled in:

- the timing of ACT Health and Canberra Health Services officials’ interaction with the Board Secretariat, for example in necessitating an ‘out of session’ Board consideration; and

- the timing of the turnaround time between the Board’s consideration and the proponent’s desired timeframe to approach the market and to commit to an order or execute a contract.
- 5.66 The compressed timescale in both cases was linked to the availability of time-limited ‘discounts’. For example, documents refer to a potential gain of \$900,000 that would eventuate, should an order be placed before 15 September 2018 with NSW HealthShare.
- 5.67 It is also evident that in the case of the replacement of the first two Linacs (Linac #2 and Linac #3), the interaction with the Board in July 2018 was already at least two years later than ideal (in order to allow for a twelve-month planning period prior to implementation). A loss of \$600,000 had already eventuated due to the ten-year lifespan of both devices having already passed, and yet it was asserted that it still warranted urgency from the Board. In the second instance, for the procurement of replacements for Linac #1 and Linac #4, by March 2021 one of the machines had already been functioning with limited capacity for nine months. A paper examining replacement options had been agreed by a senior executive in July 2020.
- 5.68 The urgency with which the proposal was brought to the Board by the proponent limited the Board’s capacity to provide sound and thorough consideration. While urgency may be a necessity at times, serial urgency indicates the likelihood of a systemic problem.

### Redundancy of advice

- 5.69 The Board’s role is one of many checks and balances in the Government’s Procurement Framework. Automatically categorising the procurement of Linacs as requiring two passes<sup>8</sup> signals that there was a choice of procurement strategy that the Board needed to consider. It is apparent, however, that the choice in Linacs was limited to Varian as there was not enough lead-in time to plan for an alternative to a like-for-like replacement by the time the proposal was put to the Board in 2018.
- 5.70 In the case of the July 2018 proposal, which was presented to the Board as a select procurement between the two suppliers (Elekta and Varian), the Director-General had already approved a Procurement Plan Minute for a single select procurement of two Varian Linacs on 29 June. The minute presented a compelling case for replacing like-for-like, such that no alternative was even contemplated. It was disingenuous to present the procurement to the Board as a select procurement (with two potential suppliers) or to state that ACT Health had been persuaded by the Board that there was value in examining an Elekta option.
- 5.71 In the March 2021 instance, a single select route was proposed, and sustained throughout the process from July 2020 onwards. The rationale was apparent and was consistently

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<sup>8</sup> Based on the type of proponent Territory Entity and the estimated value of the proposal

presented in documentation. In its Strategic Review on 2 March 2021 the Board did not advise otherwise, although it observed that:

The single select procurement approach has already been approved by the delegate.

- 5.72 Whether or not the delegate had already approved this preferred procurement route, it appears in this instance that there had been no consideration of the alternative supplier (Elekta) at any stage. It would then have been odd, when the Board got to review the proposal, for Canberra Health Services to then change its approach.
- 5.73 A further development in the 2021 instance is that the proposal had already progressed through Canberra Health Services' Procurement Committee and been approved on 8 September 2020 as a single select exemption. It is therefore unsurprising that the first-pass Strategic Review by the Board six months later, on 2 March 2021, yielded no actionable advice.
- 5.74 The Board's two-pass reviews of the two Linacs proposals in 2018 and 2021 served little purpose. The 2018 review process was incomplete and in the 2021 instance the Board noted that a decision had already been made. The Board's activities were compromised by suboptimal timing, by incomplete disclosure of the proponent Territory Entity's intentions, and by following a procedure (i.e. the two-pass review process) that had limited relevance to the circumstances.
- 5.75 This case study is illustrative of the need for a reformed Government Procurement Board and a reconsideration of the two-pass review process.

### **Omission of important information**

- 5.76 As identified in paragraphs 5.39 and 5.41, there were inconsistencies between the minuted intentions of ACT Health's Procurement Plan Minute and the proposal, as outlined in the Strategic Review Submission. In addition, ACT Health officials' briefing to the delegate following the Board's consideration did not fully reflect the Board's review and advice.

### **Procurement outcomes**

- 5.77 The following commentary relates to ACT Health and Canberra Health Services procurement documentation subsequent to the closure of the quotation process. This includes documentation relating to the evaluation and selection process and contract documentation. There is no basis to assume this information was systematically available to the Board.



## July 2018 instance

5.78 Following the last interaction with the Board on 9 August 2018 the proponent prepared the requisite documentation for the approach to market: a Request for Quote (RFQ No. 30286.110); and an Evaluation Plan. The Evaluation Plan identified a gateway criterion:

The solution is compatible and integrates with the existing systems and linear accelerators -  
Pass / Fail

5.79 The RFQ was sent to the two suppliers, Varian and Elekta, and two responses were received and evaluated. The Evaluation Panel prepared a report for the delegate, signed on 20 September 2018, which recommended that Varian be accepted. The report noted:

Elekta was unable to demonstrate compliance with the [gateway] criteria and were therefore not considered further.

5.80 It is not clear from the documentation whether the lack of integration of the Elekta system with the existing (Varian) systems was a surprise to the Evaluation Panel or to Elekta. Nevertheless, one supplier failing the gateway or mandatory criterion for a selective, two-supplier RFQ calls into question either the quality of the sourcing research or the integrity of the request. It is possible ACT Health sought to recognise the Board's support for a select procurement process that could introduce at least an element of competitive tension but that ACT Health had no intention of procuring anything other than the Varian Linacs.

5.81 An order for two Varian Linacs was placed on 10 September 2018, which included:

Discount TrueBeam 1

- 10% Bulk Purchase discount 5 - 9 Linacs
- 2% End of Varian Financial Year discount
- 2% First linac of type in LHD
- (18% Discount off iCBCT functionality only- -\$20,499 Discount off \$113,855AUD)

**\$556,525AUD**

Discount TrueBeam 2

- 10% Bulk Purchase discount 5 -9 Linacs
- 2% End of Varian Financial Year discount

**\$449,440 AUD**

NSW SOA Fee 1.5% RTE1704 Standing Offer Agreement

**\$96,562 AUD**

5.82 The purchase did secure a bulk discount of 10 per cent at a cost of a 1.5 per cent fee in respect of the NSW standing offer agreement. The urgency appears to relate to a 2 per cent 'End of Varian Financial Year discount'. While ACT Health progressed the procurement in June to September 2018, it was Canberra Health Services that concluded the procurement on 29 March 2019 with the execution of the contract.

## 16 March 2021

- 5.83 The Board provided four items of advice on the second-pass review on 16 March 2021 but had no further interest in Canberra Health Services' procurement of replacements for Linac #1 and Linac #4.
- 5.84 Canberra Health Services made a single request for quotation to Varian in accordance with its proposal. The delegate's approval of the Procurement Plan Minute on 29 March 2021 was accompanied by a single select exemption approval, a Statement of Requirements, a Risk Plan and an Evaluation Plan. In this instance a factor influencing the timing was a discount available until 31 March 2021 if the order was placed at the same time as Queensland Health. A work order was issued to Varian on 25 March 2021 in respect of a contract executed on 29 March 2021 with a value of \$7,358,494. It is not known whether the discounts eventuated.
- 5.85 A common theme in both instances of the Linacs replacements is an urgency created by apparent time-limited discounts being offered by the suppliers. This was brought to the attention of the decision maker (i.e. the delegate) and the Board late in the process. This is less than ideal. A longer lead-in time between the need for new devices being evident and the placing of orders would allow a more considered process to take place and would reduce the risk that 'discounts' drive the decision-making process.

## 6 ASPHALT CASE STUDY (TCCS)

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- 6.1 This chapter discusses the second of the three case studies. It considers advice provided by the Board, and the response to that advice by Roads ACT, relating to the supply of asphalt.

### Summary

### Conclusion

In 2016 Roads ACT approached the market and established a panel arrangement for the supply of asphalt to the Territory for a maximum of three years and for a maximum contract value of \$4 million. Through contract variations Roads ACT sought to extend the 2016 panel arrangement to a maximum of \$13.087 million and for a further 21 months beyond the three years. This was an excessive use of variations that undermined the integrity of the original approach to market in 2016. While the panel initially comprised two suppliers, by 2020 only one supplier was reportedly responding to work order requests. Following interaction between the Board and Roads ACT in late 2020, a new approach to the open market was made, and a new panel was established in 2021 comprising three suppliers, offering the potential for improved procurement outcomes.

The interactions between the Board and Roads ACT over the procurement of asphalt in the period 2017 to 2022 reflect some of the systemic challenges the Board has in fulfilling its functions. These interactions also illustrate the positive impact the Board is able to have in improving procurement processes when the Board is more assertive with the advice it provides.

### Challenges and missed opportunities

- The Board reviewed proposed variations that were triggered by the value thresholds. By the time the value thresholds for Board referral had been reached, there had already been other variations. The history of the variations was not straightforward, and it was not fully disclosed to the Board by the proponent. This was likely to have affected the Board's advice.
- One variation was not referred to the Board when it should have been. This delayed the Board's involvement in the procurement.
- Interactions between Roads ACT and the Board about variations were 'last minute' at the behest of Roads ACT. This constrained the Board's advice.
- In November 2020, when Roads ACT sought the Board's advice about varying the existing panel arrangement, it asserted to the Board that it was not ready to approach the market. It decided to do so anyway just two weeks later. Roads ACT's stated unpreparedness in November is likely to have affected the Board's advice at that time.
- The subsequent procurement proposal by Roads ACT (with the support of Major Projects Canberra) to return to the market was not referred to the Board. It would

have been prudent to have done so given the likely maximum value of the procurement (based on initial estimates and track record).

- The Board was unaware of what eventuated with this procurement, following its advice to *not endorse* the variation in November 2020. There was no feedback to the Board on the impact of its advice. The Board's advice was unusual in this case as it stated explicitly that the variation was *not endorsed*.

### Achievements

- The review of variations by the Board is not a statutory requirement. However, in this instance the Board had a role to play in ensuring variations were not used where this would bypass the reasonable expectations of other potential suppliers to access a commercial opportunity. The Board was effective, but it could have been more efficient if it had been given more timely and more complete information by the proponent.
- The proponent reacted to the Board's non-endorsement of a proposed variation (on 24 November 2020) by planning a new approach to market. This yielded three panel members (one new and two existing). The Board's advice was directly influential on the proponent's reconsideration of its options, and indirectly influential in the proponent's ultimate course of action, which was to reapproach the open market. The Board was effective in the instance but could have been more effective and efficient if it had been given more timely and more complete information by the proponent.
- Roads ACT demonstrated better practice in reflecting on panel performance and using this as an opportunity for improving procurement and contract outcomes. A procurement reform program is now underway in the directorate.

## Background

6.2 Asphaltic concrete, or 'asphalt', is a construction material principally used in the construction, repair and maintenance of the road surface or 'pavement'.

6.3 A review of the Government Contracts Register and Board records shows there have been a number of asphalt-related procurements in the period of interest of the audit. Some relate to works and some to supply. This case study considers procurement activity for the *supply* of asphalt.

6.4 A proportion of the road maintenance work of the Territory's road system is conducted by the ACT Government's in-house asphalt laying crews. In 2016 Roads ACT, a business unit of the Transport Canberra and City Services Directorate (TCCS), identified its asphalt contract objectives as:

The supply of asphalt, emulsions and other materials sought under this Contract is for use in the repair and maintenance of existing road pavements by the Territory.

[To enter into] agreements with a group of asphalt suppliers to meet the Territory's needs for asphalt supply for self-performed road maintenance.

## Overall intention of the procurement

- 6.5 According to a 27 June 2016 Procurement Plan Minute, Roads ACT sought to establish a panel arrangement for the supply of asphalt through a Request for Tender (RFT) approach to the open market. The panel arrangement was expected to yield an average rate of supply of 10,000 tonnes per year, which would be sufficient to resurface about 650,000 square metres of road pavement.

## Potential Suppliers

- 6.6 Asphalt is manufactured in bulk from raw materials: aggregate and bitumen. Bitumen pricing can rise or fall as it is linked to the commodity market. The manufacture of asphalt involves specialist plant. The location of the asphalt plant and the rate of supply were important factors for Roads ACT for operational reasons. Roads ACT established an evaluation criterion in the tender documentation accordingly:

TC2 Supply and Continuity of Product: The tender has nominated an asphalt plant located within 25km radius of the Canberra City GPO which has demonstrated capacity to supply asphalt at the rate of 500 tonnes per 8 hours shift.

- 6.7 The market rate for the various types of asphalt is in the region of \$140 to \$210 per tonne. Pricing was identified as a 30 per cent weighted criterion in Roads ACT's tender evaluation process.
- 6.8 Given Roads ACT's requirements for local manufacture and the volume requirement, the marketplace has only a small number of suitable suppliers.

## Approach to market and market response

- 6.9 Roads ACT approached the market to establish a panel for asphalt supply on 29 June 2016; Request for Tender *Asphalt supply panel 2016-2019*. Roads ACT sought to establish a panel of two suppliers for the supply of asphalt up to a value of \$4 million over a maximum term of three years (2016 to 2019).
- 6.10 On 18 June 2020 Roads ACT issued an Advanced Tender Notice for *Asphalt Material Supply 2020-2023*. Roads ACT then re-approached the market on 17 December 2020: Request for Tender *Supply asphaltic concrete under a panel arrangement*. On this occasion, Roads ACT sought to establish a panel of up to three suppliers for the supply of asphalt up to a value of \$4.8 million over a maximum term of three years (2021 to 2024).
- 6.11 In 2016 two suppliers, Downer EDI Works and Boral Asphalt, responded to the RFT. When a new RFT was presented to the market in December 2020 Capital Asphalt also responded, as well as Downer EDI Works and Boral Asphalt.

6.12 In both instances when Roads ACT sought to establish a panel, all tenderers were accepted on the panel and panel contracts (deeds) were let. There were no unsuccessful tenderers.

### Contract value

6.13 The Government Contracts Register identifies that two companies accounted for the vast majority (95 per cent) of asphalt supplied under the two panel arrangements:

- Downer EDI Works, under the 2016 panel; and
- Boral Asphalt, under the 2021 panel.

**Table 6-1 Value of asphalt supplies under panel arrangements**

Contract Number	Value at 30 June 2022 (or expiry)	Executed	Supplier
2016.27928.110.01	\$6,231,242	5 October 2016	Downer EDI Works
2016.27928.110.02	\$206,901	31 October 2016	Boral Asphalt
31011-NCT-011-01	\$4,320,000	21 March 2021	Boral Asphalt
31011-NCT-011-02	\$240,000	21 March 2021	Capital Asphalt
<b>Total</b>	<b>\$10,998,143</b>		

Source: ACT Audit Office based on Government Contracts Register information

### Variations

6.14 Contracts under the 2016 and 2021 panels have been varied through time extensions. Contracts under the 2016 panel have been varied through contract price changes.

#### *2016 Panel variation: time extensions*

6.15 The Downer EDI Works contract (2016.27928.110.01) has been varied three times:

- Variation 1 time extension to 31 March 2020;
- Variation 2 time extension to 31 December 2020; and
- Variation 3 time extension to 31 March 2021.

#### *2021 Panel variation: time extensions*

6.16 The Boral Asphalt contract (31011-NCT-011-01) has been varied twice:

- Variation 1 time extension to 22 March 2023; and
- Variation 2 time extension to 31 August 2023.

6.17 The Capital Asphalt contract (31011-NCT-011-02) has been varied twice:

- Variation 1 time extension to 22 March 2023; and
- Variation 2 time extension to 31 August 2023.

### 2016 Panel variation: Price variations

6.18 Not evident from the Government Contracts Register, but evident from records provided by Roads ACT to the Board, is that the total value of the 2016 panel contract has also been varied. The RFT and the Panel Contract referred to a contract value of no more than \$4 million in October 2016. This was varied as follows:

- on 12 October 2018 a TCCS delegate authorised an increase in contract value from \$4 million to \$6 million;
- on 16 September 2019, a TCCS delegate authorised an increase in contract value from \$6 million to \$6.6 million (at the same time as the variation for a time extension from 30 September 2019 to 31 March 2020);
- sometime between 16 September 2019 and 3 April 2020, a further undocumented variation increased the contract value from \$6.6 million to \$7.026 million; and
- on 3 April 2020, a further variation increased the contract value from \$7.026 million to \$10.087 million.

6.19 On 18 November 2020, a TCCS delegate authorised an increase in contract value from \$10.087 million to \$13.087 million (at the same time as the variation for a time extension from 1 January 2021 to 30 June 2021). This variation, however, was not ultimately executed. This variation, if executed, would have extended the Contract Value from \$4 million in 2016 to \$13.087 in 2020, i.e. a 227 per cent increase.

## Government Procurement Board interest

6.20 Between July 2017 and June 2022 the Board did not receive any procurement proposals for the supply of asphalt. It did, however, receive notification and accompanying documentation in respect of variations, which were reviewed by the Board at meetings on two occasions:

- 20 November 2018 *Roads ACT Asphalt Supply Panel 2016-2019 Contract Variation*; and
- 24 November 2020 *Asphalt Supply Panel Extension (Capital – Variation)*.

6.21 As discussed in paragraph 2.33 variations are not specified in the Act or Regulation as needing to be referred to, or reviewed by, the Board. However, Procurement ACT's *Contract Variations* (MNG-03-202206) factsheet states:

Contract variations do not need to be reviewed by the Government Procurement Board (Board). That said, a substantial change in scope may give rise to a new procurement which the Board would need to review under section 6(c) of the Government Procurement Act 2001.

## Documentation provided to the Board

- 6.22 There is no written guidance as to what documentation is to be provided to the Board for the purpose of a variation. Nevertheless, a reasonable expectation of the Board would be for it to compare the scope of the work subject to the variation with the scope of work in the original contract and original approach to market. To this end the briefing documents should re-familiarise the Board with the terms of the original approach to market (and contract, if different).
- 6.23 A review of the two instances where the Board reviewed the Roads ACT variations shows:
- for the 20 November 2018 *Roads ACT Asphalt Supply Panel 2016-2019 Contract Variation*, the Board received a completed Procurement Plan Variation dated 10 October 2018 and the original Procurement Plan Minute from 2016 (10 pages in total); and
  - for the 24 November 2020 *Asphalt Supply Panel Extension (Capital – Variation)*, the Board received the original Procurement Plan Minute from 2016, and separate Procurement Plan Variations for four of the five variations (refer to paragraph 6.18) (34 pages in total).
- 6.24 The Board did not receive any briefing material on how the Contract Price increased from \$6.6 million in September 2019 to \$7.032 million in April 2020.

## Interaction with the Board

- 6.25 While noting that it is a matter of Procurement ACT policy, and custom and practice, that the Board receives variations, the Board is not required by legislation to provide advice. However, if it does provide advice it would be a matter of sound administrative practice for the proponent to appropriately consider the advice and document its consideration of the advice.

## Consideration of Board advice

- 6.26 The following sections examine the advice from the Board and Roads ACT's response to the advice. This occurred on two occasions.

### 20 November 2018 instance

- 6.27 In respect of the agenda item *Roads ACT Asphalt Supply Panel 2016-2019 Contract Variation*, the Board provided the following minuted advice:
- The Board **noted** the contract variation is due to an increase of anticipated spending from \$4 million to \$6 million.
- The Board also **noted** the TRIM Director-General Minute provided to the Board suggests the variation to \$6 million has been considered by the Delegate.



### Soundness

- 6.28 The Board made two observations but provided no actionable items of advice. It is unclear what the purpose of the second observation is. When such a statement is provided it ordinarily means, according to members, that the Board finds it constraining that the procurement matter has already been decided upon by the delegate. It is likely to mean the same in this instance.
- 6.29 A more significant omission from the advice is that while the Board notes the \$2 million increase in value, it did not comment on the scale of this increase. The increased value of the contract (a 50 per cent increase) had not been signalled to the market as part of the original RFT. At some point, sooner or later, increases in value of this magnitude would no longer be tenable. The Board neglected to comment on this issue as part of its advice.

### Response by TCCS

- 6.30 The Board's comments did not require a response and no response from Roads ACT was forthcoming.
- 6.31 Roads ACT gave practical effect to this and other price variations through the issuing and acceptance of work orders.

### 24 November 2020 instance

- 6.32 In respect of the agenda item *Asphalt Supply Panel Extension (Capital – Variation)*, the Board provided the following advice through the meeting minutes:

The Board thanked the attendees for the papers and overview provided.

The Board **did not endorse** this proposal on the basis that an extension of a panel arrangement with only one panel provider effectively constitutes a single select process. The following advice from the Board is provided for proponents' consideration:

**Recommend** that delegates are made aware of the state of the existing panel arrangement and providers, and the difficulty obtaining more than one quote through this panel over an extended period.

**Recommend** that "calling it for what it is" and proceeding down a single select procurement path for the immediate or near future procurements will provide greater transparency for the market of the procurement approach and achieve greater integrity and defensibility for government should the approach be scrutinised in the public domain.

**Recommend** that a procurement approach that provides for market inclusion be considered in a timely manner, to provide for options beyond a single select that enables delivery of immediate/near future needs.

**Recommend** that TCCS and MPC review the procurement approach accordingly and revise as TCCS see appropriate.

**Recommend** exploring options to determine whether incentives exist for suppliers of asphalt to the Territory to enter into a future panel arrangement, and whether competitive tendering and value for money for ACT government is a likely outcome of proceeding down this path.

**Recommend** exploring options to determine whether incentives exist for suppliers of asphalt to the Territory to consider recycling materials.

**Recommend** the documentation is updated to include detail on:

- the past history of the panel;
- the second (of two) panel members retiring from the panel, with detail on the current arrangements;
- the reasons for the short timeframes; and
- the justification for the extension.

During discussion with the proponents the Board also **noted**:

- documentation provided does not include the richness of history and detail that was provided as part of discussions at the meeting with TCCS and MPC. The history and experience of the use of this panel is important and valuable context.

This is the fourth variation and there has been three variation extensions completed since the creation of the panel in 2016.

In Canberra, there are currently only two suppliers for these types of asphalt works. A third business is in the process of establishing, and TCCS anticipate that over the next 12 months the third business will grow its capacity to undertake new works. The introduction of a new business to the market may enable competition in future procurements.

TCCS found that the second member of the existing panel – when they were still on the panel – did not often respond to work order requests.

There is currently only one supplier on the existing panel, the second member declined to agree to the last variation to the panel contract.

As there is only one supplier on the current panel, any use of the panel arrangement would effectively constitute a single select procurement.

Stimulus funding for asphalt works has been announced by the government, which has created a time pressure for TCCS to undertake these works.

The decision over whether to brief the Minister on this procurement is a decision of TCCS.

The status of the new procurement to replace the panel is that the documentation is currently with MPC for completion of the Procurement Plan Minute, Risk Plan and Evaluation Plan. TCCS anticipate that the new procurement will be released to market early in 2021. The new procurement to replace the panel will include an element around the recycling of asphalt materials, as this is a government objective and included in government strategies.

After the proponents had left the meeting, the Board discussed that under Part 3 of the Act, it is appropriate to advise TCCS to ensure that the notifiable invoices and work orders established under this current panel arrangement are notified on the contracts register.

### Soundness

- 6.33 The advice provided by the Board in response to its review of the four variations in November 2020 is unusual. The Board determined to explicitly state that it *did not endorse* the latest variation. As stated in paragraph 4.43 this is the one instance of the Board not endorsing a procurement proposal in 173 meetings of the Board between July 2017 and June 2022.

6.34 In addition, the Board provided seven items of actionable advice. Particularly striking is the Board's reference to:

... "calling it for what it is" and proceeding down a single select procurement path for the immediate or near future procurements will provide greater transparency for the market of the procurement approach and achieve greater integrity and defensibility for government should the approach be scrutinised in the public domain.

6.35 In summary, the Board's advice addressed:

- the apparent urgency of the requirement, in part triggered by stimulus funding, meaning a successor arrangement (i.e. a new panel) was not sufficiently advanced to provide the solution;
- the indefensibility of referring to a *panel* when there was, for all intents and purposes, only one member; and
- the inadequacy of the documentation, and incompleteness of Government Contracts Register data.

6.36 The matters commented on by the Board are reasonable. The Board is exercising a responsibility as conferred by the Procurement ACT policy, to challenge a variation that appears to warrant a wholly new procurement proposal. Given the pressing nature of the need to procure more asphalt, the Board accepted the proponent was not in a position to re-establish the panel in November but would be ready to do so early in 2021.

6.37 One observation that is at odds with the Board's powers and responsibilities is the statement that the 'decision over whether to brief the Minister on this procurement is a decision of TCCS'. The Board is able to advise the Minister, by virtue of paragraph 6(e) of the Act, but elected not to do so.

6.38 In respect of progressing a variation or originating a wholly new procurement opportunity (albeit a single select, and therefore offering the opportunity to re-appraise value for money), the Board's advice was sound and assertive. The Board accepted Roads ACT's explanation that there was insufficient time to re-test the market, and if need be, to support market development and to re-establish the panel. The Board pragmatically encouraged a single select process (and the potential for a new contract under new terms) as an interim measure, while noting Roads ACT's intention to re-establish the panel in early 2021.

#### *Roads ACT response to the Board's advice*

6.39 The Board did not request any follow-up action be brought back to the Board, and no reference to the proposal was made in Board records following the meeting. The Board Chair advised that there had been no further communication between the Chair and others relating to this variation, such as Roads ACT or TCCS officials, or the Minister for Transport and City Services and Special Minister of State. Given the nature of the Board's advice, it would have been relevant to the Board's functions to have followed up on how its advice was responded to.

6.40 However, by 17 December 2020, Roads ACT had approached the market with a Request for Tender in order to establish a new panel. Evidently, Roads ACT did not pursue its intention to vary the existing contract(s) and did not pursue the advice of the Board to approach the market with a single select procurement. It took a third option, to approach the market with the intention of re-establishing the panel. (This was an option which Roads ACT had previously indicated was premature, in its procurement documentation provided to the Board on 24 November 2020). The Board Chair stated they were unaware of the outcome of the Roads ACT proposal, i.e. to approach the market afresh.

6.41 Information was sought from Roads ACT as to how it had come to that decision. Roads ACT advised the Audit Office:

Roads ACT accepted the logic behind the Board's statement indicating the panel was no longer functioning as intended, given one panel member was actively responding to Work Order requests. Due to the short timeframes to act on GPB advice (prior to contract expiry), there were discussions rather than formal briefings. TCCS decided to conduct a replacement market-based procurement, rather than undertaking a single select procurement. Wherever feasible, Roads ACT's preference is to avoid single select procurements to maximise market opportunity and ensure value-for-money.

6.42 Roads ACT also provided documentation in support of the new approach to market on 17 December 2020:

- a Request for Infrastructure Procurement was signed on 7 December 2020, seeking support from Major Projects Canberra's Infrastructure Delivery Partner. This stated an intention to approach the market with a public (open) tender in order to establish a panel with up to three members for the supply of asphalt for up to three years and to a maximum value of \$14.4 million; and
- a Procurement Plan Minute was signed on 17 December 2020 by the delegate to go to the market. Accompanying documents included a Statement of Requirements, an Evaluation Plan and a Risk Plan. However, the Procurement Plan Minute presented to, and signed off by, the delegate only specified an estimated value of \$4.8 million over the three-year term. This contrasts with the maximum value of the procurement as \$14.4 million flagged in the 7 December 2020 Request for Infrastructure Procurement. Because it was estimated in the Procurement Plan Minute to be less than \$5 million in value, the minute also stated it did not need to be 'signed off' by the Government Procurement Board.

#### *Appropriateness of the TCCS response*

6.43 The Roads ACT decision to undertake a wholly new approach to market on 7 December 2020 raises two issues:

- the accuracy of the Roads ACT assertion to the Board on 24 November 2020 about the quantity of work necessary to approach the market afresh; and
- the basis of the stated value of the procurement.

- 6.44 Firstly, it is unlikely that substantial work could have been undertaken between 24 November and 7 December, a period of just two weeks, in order to improve the prospects of a more effective approach to market taking place (for the purpose of establishing a panel) than was possible two weeks earlier. In that case, the request for the Board to review Roads ACT's contract variation on 24 November appears to be an attempt to take the administratively most expedient route at the expense of probity.
- 6.45 Secondly, the maximum value of the panel had been stated as being \$14.4 million on 7 December 2020 and not \$4.8 million. The total value of asphalt supply contracts based on the 2016 to 2020 period, taking into account all contract variations, was likely to easily surpass \$4.8 million within the three-year maximum timeframe of the proposed panel contract. In other words, it was foreseeable that variations would likely be needed again if a \$4.8 million panel contract were to eventuate. Procurement planning based on an underestimated total value of \$4.8 million, whether it was to avoid Board referral (and delay), or some other reason is not sound. If it was not underestimated, but was a reduced requirement, such a sudden change would warrant a documented explanation.
- 6.46 While the scaling back of the value of the proposal had the potential to provide a *prima facie* reason for not referring the proposal to the Board, it also had the potential to affect the applicability of other policies, such as the *Canberra Region Local Industry Participation Policy*. The scaling back of the proposal is something that both Major Projects Canberra and Roads ACT officials were aware of.
- 6.47 Roads ACT did not follow the Board's advice from 24 November 2020. Roads ACT did, however, react to the Board's advice by determining to go out to the market afresh in order to reconstitute the panel. In this respect the Board's advice was effective in preventing a variation from being progressed that would have given the incumbent (Downer) an unfair advantage. A different panel member (Boral) has become the major beneficiary of orders under the new panel.

## Compliance with Regulation

- 6.48 There is no requirement established in the Regulation for the proponent to refer, or the Board to review or provide advice on, variations. However, since Roads ACT decided to conduct a wholly new approach to market following the 24 November 2020 Board review, the resulting procurement proposal should have been referred to the Board afresh on the basis that the maximum total estimated value was \$14.4 million over three years, and not \$4.8 million, which was an amount initially proposed for the first year only. The Board did not receive or review documentation sufficient for it to consider the specified matters in the Act and Regulation.
- 6.49 Roads ACT did not seek to refer the new supply of asphalt approach to market (17 December 2020) to the Board. It should have done so on the basis of the maximum value of the opportunity. Previous documentation provided to the Board on 24 November 2020 was insufficient for Roads ACT to meet its obligations.

## Conformance with policy and procedure

6.50 The Board did not have an opportunity to review three of the five variations in respect of the 2016-2019 panel contract. Having noted the Contract Price increase of \$4 million to \$6 million in November 2018, the Board was unaware of three subsequent variations, which collectively increased the value of the contract to \$10.087 million. These may have provided an earlier opportunity to challenge the basis of each variation, and therefore to prompt the proponent to reconstitute the panel.

6.51 The following variations were considered for referral to the Board according to the dollar value thresholds (refer to paragraph 2.4):

- the 12 October 2018 variation, which varied the value of the contract from \$4 million to \$6 million. A \$2 million increase on the original contract value warranted referral on the basis that the variation will increase the contract by at least \$1 million and on the basis that the new estimated contract value would be greater than \$5 million. *This warranted referral and was referred.*
- the 16 September 2019 variation, which varied the value of the contract from \$6 million to \$6.6 million. A \$0.6 million increase *did not warrant referral and was not referred.*
- a third variation (sometime between 16 September 2019 and 3 April 2020), which varied the value of the contract from \$6.6 million to \$7.026 million. A \$0.426 million increase *did not warrant referral and was not referred.*
- the 3 April 2020 variation, which varied the value of the contract from \$7.026 million to \$10.087 million. A \$3.06 million increase warranted referral on the basis that the variation would increase the contract by at least \$1 million. *This warranted referral but was not referred.*
- the 18 November 2020 proposed variation, which sought to vary the value of the contract from \$10.087 million to \$13.087 million. A \$3 million increase warranted referral on the basis that the variation will increase the contract by at least \$1 million. *This warranted referral and was referred.*

6.52 Roads ACT conformed with Procurement ACT policy on Board referrals of variations on four occasions and did not comply on one occasion. If Roads ACT had referred this variation (3 April 2020) to the Board and the Board had provided the same advice as it did subsequently, Roads ACT would have had a further six months to progress the establishment of a new panel, and a further \$3.061 million in the supply of asphalt could have been competed for in the market. The circumstances surrounding the beginning of the COVID-19 pandemic were not ideal for doing this. However, it was ultimately the delegate's decision to continue with variations from November 2018 onwards, a decision that was made four more times by delegates through to November 2020.

## Accordance with sound administrative practice

### Separation of responsibilities

6.53 Roads ACT did not ensure a separation of responsibilities between the contract delegate and the delegate approving each variation. Such a separation would provide a further safeguard against expedient variations that benefit the incumbent and are unfair to other suppliers. One example of this safeguard is the City Renewal Authority's delegations register, which states:

Delegation Type C: Authority to Approve Variations to Contracts - The delegate must not approve a variation to a contract managed by the delegate (Financial Delegations Register – August 2021, page 5)

### Urgency

6.54 The timing of the referral of proposals to the Board and the sign-off from the delegate was suboptimal. In respect of the five variations proposed for the 2016 panel arrangement, very tight timescales or contract price ceilings close to being reached were observed in four instances. The timing of procurement proposals presented to the Board and other key dates is shown in Table 6-2.

**Table 6-2 Timing of procurement proposals presented to the Board**

Variation purpose	Date presented to the Board	Date signed by delegate	Percentage of Contract Price expended	Expiry date to be amended
Value	<b>20 November 2018</b>	12 October 2018	<b>92.5 per cent</b>	N/A
Value and time	N/A	<b>16 September 2019</b>	Not known	<b>30 September 2019</b>
Value	N/A	Not known	Not known	Not known
Value and time	Not referred	<b>30 March 2020</b>	Not known	<b>30 March 2020</b>
Value and time	<b>24 November 2020</b>	18 November 2020	<b>100 per cent</b>	<b>31 December 2020</b>

Source: ACT Audit Office, based on TCCS and Board documentation

6.55 The late referral of procurement proposals to the Board, or advice to the relevant delegate, impairs effective decision-making. It undermines consideration of any alternative course of action and effectively ties the hands of the Board and the delegate.

6.56 The urgency placed upon the Board and the delegate limited the opportunity for sound and thorough consideration of any alternative course of action than the one proposed. The eleventh-hour presentation of the proposal constrained the choices the Board and the delegate had. To the Board's credit, and particularly through the actions of the Board Chair, in November 2020 it was assertive in advising Roads ACT not to perpetuate an unfair

procurement strategy. The Board advised, and the proponent responded to that advice, and progressed an approach to market that was fair and provided a better possibility of achieving value for money.

## Procurement outcomes

6.57 The two asphalt supply panels established by Roads ACT in 2016 and 2021 have resulted in the following services provided by three suppliers:

- \$6,231,242 with Downer EDI Works, 5 October 2016;
- \$206,901 with Boral Asphalt, 31 October 2016;
- \$240,000 with Capital Asphalt, 22 March 2021; and
- \$4,320,000 with Boral Asphalt, 22 March 2021.

## Roads ACT learnings

6.58 Roads ACT undertook a 'lessons learned' review in June 2020, that is, at least six months prior to its presentation of the November 2020 variation to the Board.

6.59 In June 2020 officials documented the strengths and shortcomings of the performance of the 2016 panel and identified lessons and actions that could have a bearing on the specification of the new Statement of Requirements. For example:

Lesson: There are some larger projects that the Territory self performs e.g. overlay of a whole road with 5,000 tonnes of asphalt. In these cases, suppliers are keen to get the business and the rates they will offer are significantly lower than for small orders.

Action: Consider having two rates - minor and major supply. Need to determine the cut-off qty - daily asphalt plant productivity of 500 tonnes? Note. Need to be clever about how to administer as e.g. 501 would be cheaper than 499 tonnes.

Lesson: Meeting TCCS's sustainability goals. Incentives for higher proportion of recyclable products and locally sourced waste products? Incorporation into KPIs?

Action: KPIs in the [Statement of Requirements] are really all key non-performance indicators, so it probably doesn't fit this framework. Also, mixes are nominated at the time of tender, not during the contract month-by-month, so this could be in the tender evaluation criteria.

6.60 In this respect, Roads ACT demonstrated better practice in reflecting on panel performance and using this as an opportunity for improving procurement and contract outcomes.

6.61 However, it is also evidence of Roads ACT's contemplation of new panel arrangements at least six months before presenting the Board with a variation to the 2016 panel contract in November 2020. Roads ACT appears not to have utilised that six months to prepare for a new approach to market. In this respect, Roads ACT did not prioritise the renewal of the panel.



## TCCS procurement reform

6.62 Transport Canberra and City Services Directorate officials advised the Audit Office that a procurement reform program has been underway within the Directorate and that this has had a bearing on procurement practices within Roads ACT:

The TCCS Assurance Program is integral to continuous improvement within TCCS and ensures operations within the Directorate are systematically reviewed. The program includes internal audit and compliance reviews which support the Directorate in meeting its regulatory and statutory obligations. TCCS has undertaken a number of reviews pertaining to the effectiveness of TCCS' oversight of purchasing, procurement and contract management activities facilitated both internally and through third parties and consider whether processes conducted external to the Directorate are compliant with statutory requirements and organisational policies. In addition, RoadsACT has had an independent review of procurement activities within their branch to identify and analyse opportunities to improve the efficiency and effectiveness of procurement practices within their span of control.

In order to achieve systematic and holistic change to deliver better procurement outcomes for TCCS, the Directorate has established a Roads Procurement Steering Committee. The first reform tranche was established in July 2022 to focus specifically on RoadsACT given the level of potential risk exposure and complexity of procurement activities within their remit.

The current objectives of the Roads Procurement Steering Committee are to improve procurement activities by:

Refining and simplifying procurement processes, procedures and systems to maintain compliance with regulatory and legislative obligations and clearly define roles and responsibilities;

Enhancing skills and training of staff undertaking procurement activities, and ensuring effective resourcing;

Improving procurement planning and introducing a risk-based triaging of procurement activities; and

Leveraging the whole of Government procurement reforms being managed by Procurement ACT.

To date, the working group have achieved a number of key milestones relating to the procurement reform project and embedded a significant amount of operational controls to address key issues identified through internal and external reviews, including but not limited to:

- Onboarding 2 procurement specialists within RoadsACT;
- refined, documented and implemented streamlined processes and consistent templates;
- improving procurement practices to consider potential whole of life costs and associated levels of financial delegations;
- undertaken a training needs analysis and developed a skills matrix;
- clearly defined and documented roles and responsibilities between internal and external stakeholder bodies; and
- identified effective workflow tools to streamline procurement processes (still to be implemented).

The working group is expected to finalise the reform within RoadsACT in 2023, with lessons learnt and key risk management controls to be implemented at whole of directorate level. This

will be a phased implementation utilising a risk-based approach to target higher risk areas of the directorate in the first instance.

- 6.63 In summary, work has been underway since July 2022 within the Directorate to improve procurement practices, and the improvement of practices within Roads ACT is a priority as evidenced by the establishment of a Roads Procurement Steering Committee.

## 7 ORGANISATIONAL TRANSFORMATION CASE STUDY (CIT)

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- 7.1 This chapter discusses the last of three case studies. It considers advice provided by the Board, and the response to that advice, for proposals relating to the organisational change agenda of the Canberra Institute of Technology (CIT).

### Summary

#### Conclusion

CIT sought suppliers to support its organisational transformation ambitions and approached the market on at least six occasions since 2017. This resulted in six sequential, and at times overlapping, contracts with a series of related companies (referred to as the 'contractor'). The combined value of the contracts was \$8.78 million.

Three procurement proposals were provided to the Board on four occasions in 2018, 2020 and 2021. The Government Procurement Board (the Board) provided similar advice on each occasion, noting that the proposal lacked clarity, specificity, measurability and simplicity. On the last occasion (December 2021), CIT evolved its procurement approach from seeking a variation of an existing contract with the contractor to proposing a single select procurement of the contractor. The single select procurement did not proceed as planned and CIT made a new approach to the open market instead. Nevertheless, a new contract with the contractor eventuated with a value of \$4.99 million.

The interactions between the Board, Procurement ACT and CIT over the procurement of organisational transformation services in the period 2017 to 2022 reflect some of the systemic challenges the Board has in fulfilling its functions. There were missed opportunities for better procurement outcomes because the Board was not assertive with its advice.

#### Challenges and missed opportunities

- The Board's review process was put under pressure in each instance by the proponent's claims of urgency (e.g. urgency to proceed to market, to execute a contract and to deliver outcomes). This constrained the Board's advice.
- The Board's advice was compromised by the omission of important information by the proponent (e.g. the existence of an incumbent contractor and that the proponent had already approached the market). This was likely to have affected the Board's advice.
- The Board was insufficiently sceptical and probing. Although its advice was sound it was unassertive and equivocal (e.g. identifying fundamental weakness but avoiding stating the proposal was 'not endorsed' in its current state).

- CIT did not acquit the Board's advice satisfactorily on any occasion, and only attended to minor matters. The proposals' lack of clarity, specificity, measurability and simplicity remained unaddressed.
- In its communication with the Board, CIT overstated the extent to which it had recognised and implemented the Board's advice.
- The Board was unaware of what eventuated following its review of the CIT procurement proposals, even when CIT was expressly asked to provide a follow-up briefing (September 2018). While feedback was provided in relation to the December 2021 procurement proposal, it was between the proponent and Procurement ACT and did not involve the Board.
- It is apparent that the Board was concerned, from 21 January 2020 onwards, about the risk of CIT having a predetermined outcome in mind from a seemingly open competition. The Board's advice sought to strengthen the propriety and defensibility of the open approach to market, but this did not change the risk of CIT seeking a predetermined outcome.

### Learnings

Relying on a single, small business supplier to provide multi-million dollar consultancy services for the purposes of 'organisational transformation' was high-risk for CIT. A preferred approach would have been to:

- approach the open market at the outset for the maximum extent of the work necessary up to the end-of-contract transition point;
- invite solutions (e.g. via an REOI or RFP) before commencing a formal tendering process (i.e. at least a two-stage process);
- plan for substitution, so that the success of CIT's organisational transformation was not reliant on any one supplier or consultant;
- have the facility to terminate the contract and reapproach the key contractor via a single-select process based on a strong, compelling and evidence-based rationale if further work was required;
- design the approach to market documentation (whether open or single select) based on a Statement of Requirements that was clear, specific and measurable; and
- design the approach to market documentation (whether open or single select) so that the basis for payments was for discrete and demonstrable elements, with clear outputs and outcomes.

Basing a \$4.99 million contract on five time-based payment milestones, with the contractor's performance considered with reference to a limited set of KPIs, represented a major risk to delivery and obtaining value for money.

## Background

### Overall intention of procurement

7.2 In 2016 CIT developed its organisational transformation plan; *Strategic Compass*. Following this, CIT sought to secure consultancy services for one component of the plan, referred to as *Evolving Together*. In 2017 the estimated budget for this component of the plan was \$250,000 per annum for three years (through to 2020), i.e. \$750,000. Commonwealth funding was also available. Specific organisational change activities were redefined in 2020 as *CIT Futures 2025*.

### Potential suppliers

7.3 The consultancy services were intended to build internal capability and capacity. There was no need for the supplier to be located in Canberra, though a good proportion of the services would need to be delivered in person. There were likely to be many suppliers, each presenting a unique ‘product’ or ‘value proposition’.

7.4 In these circumstances, *substitution* and *transitioning* can be challenging and need to be taken into account in designing the procurement. *Substitution* is where an alternative resource is necessary in the event that the supplier is unable to fulfil the contract. *Transitioning* is planning for transition beyond the contract. This ensures there is an end-point and that the contracting entity prepares for a business-as-usual operating environment without the supplier.

### Nature of services

7.5 A December 2021 document provided to the Government Procurement Board (the Board<sup>9</sup>) gave a high-level summary of the nature of the consultancy services that had been provided to that point for the *Evolving Together* component of the organisational transformation plan:

In late 2017 Think Garden was engaged by CIT to provide organisational transformation strategic guidance and mentoring services to assist with CIT’s Strategic Compass 2020 (Strategic Compass) and the Evolving Together project. The Evolving Together project was one of nine projects nested within the Strategic Compass which received a total of \$8M funding and were designed to ‘transform’ CIT.

The Evolving Together project was initially considered a small component of the transformation, receiving only a small proportion of the overall funding. Over time the project’s funding allocation was increased as both the CIT Board and CEO recognised the project’s significance as an underpinning and overarching enabler for the long-term relevance and sustainability of the CIT.

The relationship and services provided by Think Garden have been unlike traditional consultant relationships where the consultant, utilising their knowledge and expertise,

<sup>9</sup> All references in this case study to the ‘Board’ refer to the Government Procurement Board. While CIT has a governing Board, established in section 9 of the *Canberra Institute of Technology Act 1987*, it was not the subject of this audit.

develops a solution and does the work for the organisation. A guiding consultant builds knowledge, situational awareness and internal capability and structures for the work to be done by the organisation, taking full advantage of the knowledge of our context and landscape. It requires practice, guidance, feedback and honest critique.

## Approach to market and market response

7.6 The Government Contracts Register indicates there has been a series of approaches to market related to CIT's organisational change agenda:

- a Request for Tender (RFT) issued on 14 May 2018. The market response to this RFT has not been examined as part of this audit because it was not (and did not need to be) referred to the Board as a procurement proposal;
- a Request for Tender (RFT) issued on 14 September 2018. This RFT has been considered as part of the audit because it was referred to the Board. Twelve suppliers responded with a price range of \$346,000 to \$3,340,000;
- a Request for Tender (RFT) issued on 26 February 2020. This RFT has been considered as part of the audit because it was referred to the Board. Fourteen suppliers responded with a price range of \$254,620 to \$2,917,200;
- a Request for Tender (RFT) issued on 5 August 2021. This RFT has not been considered as part of the audit because it was not referred to the Board. One supplier responded;
- an Advanced Tender Notice issued on 11 November 2021 for a *CIT Futures 2025* procurement. This notice was withdrawn by 17 December 2021; and
- a Request for Proposal (RFP) issued on 17 January 2022. The RFP has been considered as part of the audit because it was referred to the Board. Three suppliers responded with a price range of \$805,183 to \$5,680,000.

7.7 Six contracts relating to CIT's organisational change agenda have been executed according to the Government Contracts Register. Table 7-1 shows the details of each of these contracts.

**Table 7-1 Contracts considered for the purpose of the case study**

Title	Date executed	Term	Contracted entity	Value
Transformation of CIT Strategic Compass 2020	27 July 2017, following a single select process	18 months, shortened to 9 months by variation on 17 April 2018	Trustee for The Patrick Hollingworth Family Trust	\$198,000
Provision of Transformational Consultancy Services	1 July 2018, following a single select process	3 months	Redrouge	\$151,250

Title	Date executed	Term	Contracted entity	Value
Provision of Organisational Transformation Strategic Guidance and Mentoring Services	9 Nov 2018, following a public tender	24 months	Redrouge	\$1,220,000
Provision of Organisational Transformation Strategic Guidance and Mentoring Services to CIT 2020 to 2021	9 April 2020 following a public tender	20 months, then extended by a further 6 months by variation on 9 December 2021	Think Garden	\$1,705,000
Development of Structures for the Analysis of CIT Service Offerings	22 Sept 2021 following a public tender	6 months	Redrouge	\$512,050
CIT Futures 2025	28 March 2022 following a public request for proposals	24 months	Think Garden	\$4,999,990

Source: Contracts Register entries extracted 22 December 2022

7.8 For the purpose of the audit the contracted entities identified in documentation as either *Think Garden*, *Redrouge* or the *Trustee for The Patrick Hollingworth Family Trust* will be referred to as the 'contractor'. This is because one consultant (the same consultant) has played a major role in managing and delivering services in each of the three contracted entities. The contractor entered into at least six contracts with CIT with a total value of \$8,786,290 between 27 July 2017 and 28 March 2022.

## Government Procurement Board interest

7.9 Procurement activity related to CIT's organisational change agenda was presented to the Board on four occasions, in respect of three separate procurement proposals:

- *Provision of Organisational Transformation Strategic Guidance and Mentoring Services* (presented to the Board on 11 September 2018);
- *Provision of Organisational Transformation Strategic Guidance and Mentoring Services to CIT 2020 to 2021* (presented to the Board on 21 January 2020);
- *Provision of Organisational Transformation Strategic Guidance and Mentoring Services to CIT 2020 to 2021* (a 'come-back' item for the Board on 3 March 2020); and
- *CIT Future 2025* (between 17 and 23 December 2021 the Board considered the procurement proposal out of session, by a written procedure through an exchange of emails between Board members).

## Audit evidence

7.10 Documentary evidence for this case study was obtained from open sources such as:

- documentation made publicly available as a result of Freedom of Information requests made by others; and
- the ACT Government Contracts Register.

7.11 Documentary evidence was also obtained through specific and general requests made to CIT and Procurement ACT officials and to Government Procurement Board members.

7.12 Clarification or explanation has not been sought from the CIT officials that were responsible for the three procurement proposals. This is because:

- none of the relevant CIT officials identifiable from documentation were readily available during the audit fieldwork period; and
- an ACT Integrity Commission investigation into CIT contracts (announced 23 June 2022) was already underway.

## Documentation provided to the Board

7.13 The Board was provided with a suite of documents comprising 50 to 170 pages of information on three occasions (refer to Table 7-2). Documents included a Procurement Plan Minute, a Statement of Requirements, a Risk Plan, a Contract Management Plan and an Evaluation Plan.

**Table 7-2 Documentation provided to the Board**

Initial contact with Board Secretariat	Meeting	Purpose	Artefacts
4 September 2018	11 September 2018	To undertake a single-pass review of the procurement proposal	Procurement Plan Minute (5 pages) Procurement Review Submission (3) Statement of Requirements (7) Risk Plan (5) Evaluation Plan (17) Contract Management Plan (10)
16 January 2021	21 January 2020	To undertake a single-pass review of the procurement proposal	Procurement Plan Minute (8 pages) Procurement Review Submission (3) Statement of Requirements (9) Risk Plan (8) Evaluation Plan (36) Contract Management Plan (10)
27 February 2020	3 March 2020	Return to the Board to in response to request from 21 January meeting	No artefacts. A verbal presentation was given.



Initial contact with Board Secretariat	Meeting	Purpose	Artefacts
2 December 2021 agreed to be taken out of session	21 December 2021 out of session meeting	To undertake a single-pass review of the procurement proposal	Procurement Approval Minute (8 pages) Statement of Requirements (9) Risk Plan (11) Exemption Minute (10) Evaluation Plan (35) Contract Management Plan (17) Links to the previous two iterations to the Board and RFQ suite of 6 docs (105 pages)

Source: Audit Office, based on Government Procurement Board SharePoint records system

## Interaction with Board

7.14 Following the four meetings in which the Board considered the three CIT proposals the Board offered actionable advice through meeting minutes:

- 21 points of advice soliciting action;
- 17 non-actionable points of advice; and
- one point of advice was explicitly requested for follow up at the 11 September 2018 meeting.

7.15 For the purpose of audit analysis the Board's advice has been categorised by the Audit Office into 'major' and 'minor' advice:

- major advice is advice that is capable of substantially influencing the proponent's procurement strategy and its overall outcome; and
- minor advice is advice that is more likely to achieve greater compliance or transparency or where it assists in mitigating risks.

7.16 Table 7-3 shows an analysis of:

- the Board's advice that solicited action (the 21 points of advice);
- the Board's overall advice; and
- the follow-up action requested by the Board.

**Table 7-3 Audit Office analysis of the Board's advice**

Meeting date	Points of advice	Advice impact	Overall advice	Follow up by Board
11 September 2018	4 Recommended actions (and 3 Noted)	2 major, 2 minor points of advice	'Supports' unconditionally	Return with feedback once contract is up and running

Meeting date	Points of advice	Advice impact	Overall advice	Follow up by Board
21 January 2020	6 Recommended actions (and 5 Noted)	2 major, 4 minor points of advice	No overall endorsement or non-endorsement	Requested update on incumbent
3 March 2020	1 Recommended action (and 4 Noted)	1 major point of advice	Conditionally endorsed if matters raised are given consideration	None
21 December 2021 out of session meeting	10 Recommended actions (and 4 Noted)	5 major, 5 minor points of advice	No overall endorsement or non-endorsement	None

Source: Audit Office review of minutes in Government Procurement Board SharePoint records system

7.17 On the four occasions the Board reviewed matters related to the CIT organisational change proposals and provided advice including 21 recommended actions, the Board endorsed the proposal unconditionally in one instance and conditionally in another. On two occasions the Board did not signal its support either way.

## Consideration of Board advice

7.18 The following section of the report considers the advice from the Board and the response to the advice by CIT. This occurred on four occasions.

### 11 September 2018

7.19 In respect of the agenda item entitled *Provision of Organisational Transformation Strategic Guidance and Mentoring Services to CIT (Open Tender – Procurement Review)* the Board provided the following advice in an extract from minutes on 12 September 2018:

The Board thanked the proponents for their proposal, and for their explanation of the need to procure these services. The Board:

**Noted** that through this procurement, CIT are looking for a business partner. CIT have undertaken market testing around a more procedural approach and used that input model as the basis for costing this procurement.

**Noted** CIT have been working closely with unions.

**Suggest** the proponents consider summarising the required service outcomes, ensuring there are clear KPIs, to measure the consultant's performance at the end of the engagement. Examples provided included staff engagement and capability uplift.

**Suggest** the proponents simplify the statement of requirements with plain language and KPIs are measurable and achievable early in the engagement.

**Noted** the timeframes outlined to go to market and for evaluation were tight.

**Suggest** an external member be included on the evaluation team (GB can assist CIT regarding the panel composition).

**Suggest** the proponents consider including a sub-criteria under Criterion 4 ('Qualifications, Organisational Structure and Suitability of Specified Personnel') concerning the availability and time commitment of nominated personnel.

Noting the suggestions and considerations outlined above, the Board **supports** the proposal to conduct an open market tender process to identify an organisation to provide organisational transformation strategic guidance and mentoring services to guide CIT over the next two years. The Board asked the proponents to provide an update during 2019 to share feedback on KPIs and how the market and staff responded.

**ACTIONS:**

1. Secretariat to invite the proponents of the “Provision of Organisational Transformation Strategic Guidance and Mentoring Services to CIT” procurement back in 2019 to share feedback on the procurement outcome and the status of the transformational services.

...

7.20 The minutes contain four points of advice where the Board seeks to elicit a response from CIT. Two points may be characterised as major advice:

- CIT should ‘simplify the statement of requirements with plain language and KPIs are measurable and achievable early in the engagement’; and
- CIT should ‘[summarise] the required service outcomes, ensuring there are clear KPIs, to measure the consultant’s performance at the end of the engagement’.

7.21 Advice characterised as minor was to have an external tender evaluation panel member and to add to the wording of one of the criteria.

### *Soundness*

7.22 The Board’s major advice was pertinent and capable of strongly influencing the market response to what was envisaged to be a contract worth more than \$1 million over two years. This was also a prerequisite to CIT being able to exercise control over making contractual payments related to deliverables. The advice was essential and not gratuitous or optional. The proponent’s response to the Board’s major advice was capable of changing the proposal significantly and therefore a further Board referral and review of the proposal would have been warranted, as discussed at paragraph 2.28.

7.23 However, the Board’s advice was:

- not expressed in the minutes with sufficient emphasis and risked being lost amongst other items of advice; and
- undermined by the Board’s ultimate statement of support for the procurement, which was unconditional.

7.24 Essential to the Board’s consideration of the proposal, but not commented upon in the Board’s advice or contained in the documentation accompanying the proposal, was that there was an incumbent contractor. At this point in time a relationship (between the contractor and CIT) had been maintained over the preceding 18 months through at least

two prior contracts.<sup>10</sup> If this had been known or fully comprehended by the Board its advice may have been different.

#### *Response by CIT*

- 7.25 CIT's approach to the market was made on 14 September 2018, via a Request for Tender (RFT). This was three days after the Board's consideration of the proposal, and two days after receiving written confirmation of the Board's advice. CIT's documentation was revised to accommodate the two points of minor advice. The major points of advice were not substantially addressed.
- 7.26 Although minor edits were made, they did not substantially affect the RFT documentation and the Board's request for clarity, specificity, measurability and simplicity. No documentation was returned to the Board either prior to, or following, CIT's approach to market that would have enabled the Board to gauge whether its advice had been responded to.
- 7.27 CIT subsequently (on 21 September 2021) sought an external member to be included on the evaluation team via Procurement ACT.
- 7.28 The follow-up request made by the Board at its 11 September 2018 meeting did not relate to matters relevant to the approach to market but to a retrospective review of the market response, which was to be provided in 2019.
- 7.29 In summary, in the first instance:
- the Board's advice was sound but insufficiently assertive; and
  - CIT did not acquit important aspects of the Board's advice satisfactorily.

#### **21 January and 3 March 2020**

- 7.30 In January 2020 another procurement proposal was referred to the Board by CIT. Following its meeting on 21 January 2020 the Board provided both actionable and non-actionable points of advice. It did not endorse or otherwise state its support for the proposal. Instead, a request was made for CIT to provide further information. However, it was not stated how or when this request should be addressed.
- 7.31 The Board's advice was:
- The Board noted a similar item was provided to the Board on 11 September 2018 for consideration [the previous points of advice were then reprised in the minutes]
- The Board noted that proponents did not provide an update during 2019 to share their feedback on KPIs and how the market and staff responded.

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<sup>10</sup> Two contracts were let on 27 July 2017 and 1 July 2018 (Table 7-1). In addition, a payment made in January 2017 indicates other activity with the incumbent contractor was also being purchased prior to July 2017.

The Board:

**Noted** the procurement will be undertaken by an open tender to market.

**Noted** the timeframes outlined to go to market and for evaluation were tight.

**Suggested** the documentation is revised to clearly articulate the role of the contractor, the work to be undertaken, and what outcomes and deliverables are expected (including around cultural and systemic change). This will assist CIT in evaluating responses to the Tender.

**Suggested** the documentation is revised to clearly articulate how any additional services to those listed in the contract will be entered and how the rates for these services will be negotiated.

**Suggested** the documentation is more prescriptive in sections to provide clarification about the procurement to those responding to the tender.

**Suggested** the risk plan is updated to be tailored for this procurement.

**Noted** the KPIs have been developed from CIT's experiences and the Board **suggested** these are reviewed to ensure they are measurable.

**Noted** the length of the contract and extension is due to the timing of the current contract ending.

**Noted** the current contract is not mentioned in the documentation provided. **ACTION:** The Board **requests** an update on the performance of the current contractor against the current contract and if outcomes have been achieved.

**Suggested** CIT undertake an industry briefing once the tender has been released.

- 7.32 On 27 February 2020 CIT officials sought for the Board's advice of 21 January 2020 to be considered at the next Board meeting, as part of a different CIT procurement item that was already on the agenda. The Board agreed to this request. Following its 3 March 2020 meeting the Board provided the following advice:

The proponents also discussed the Board's advice from the meeting of 21 January 2020, item 4.2 *Organisational Transformation Strategic Guidance and Mentoring Services for CIT*. The Board:

**Noted** that CIT consider the current contractor has been successful in achieving against the outcomes.

**Noted** that the current contractor has developed a range of tools that are being used by CIT.

**Noted** that change has been slower than forecasted, but it is not a result of the consultant.

**Noted** there is a CIT Board planning day in April where new measures will be discussed.

**Recommended** CIT put in place measurable key performance indicators.

The Board **endorsed** this proposal with the proponents giving consideration and responding to the comments above.

- 7.33 The Board observed that the 2020 proposal was similar to the 2018 one, and that the request made in 2018 for CIT to come back to the Board on three specific matters had not happened. At the 21 January 2020 meeting, the major advice from the Board again referred to clarifying the work to be undertaken, including through more effective KPIs. The minor advice related to risk plans, industry briefings, non-contracted services and being 'more

prescriptive in sections to provide clarification about the procurement to those responding to the tender'.<sup>11</sup>

7.34 On this occasion the Board also noted the existence of an incumbent and noted the lack of reference to this in the documentation. In this respect, it is noted that the proposal had been made after three contracts had already been agreed (refer to Table 7-1) with the incumbent contractor relating to the same organisational change objective.

### *Soundness*

7.35 The Board's minutes identify that the Board:

- was aware of the incumbent contractor already undertaking very similar work to that being proposed; and
- recognised that pertinent information about the contractor, including information about the contractor's performance and track record, had not been disclosed.

7.36 The Board's minutes also recognise the lack of information that had been provided by CIT on matters raised the previous time a similar proposal was referred to the Board.

7.37 Similar advice was provided to CIT by the Board to that which was provided following its September 2018 meeting.

7.38 Notwithstanding these considerations, the Board's advice on 21 January 2020 was not strong or requiring of a specific response from CIT. Although the Board requested further information about the contractor's performance, it did not:

- expressly request any follow-up on the major points of advice; or
- signal its conditional support for the proposal (or its non-endorsement).

7.39 As in September 2018, the proponent's response to the Board's major advice was capable of changing the proposal significantly, and therefore a further Board referral and review of the proposal would have been warranted, as discussed at paragraph 2.26.

7.40 On 3 March 2020 CIT addressed the Board's request relating to the contractor's performance with verbal commentary from officials who attended the meeting. However, by 3 March 2020 CIT had already gone to the market with the RFT (on 26 February 2020). It was too late for CIT to amend its approach to market documentation should the Board not have been content with the information provided.

7.41 There is no indication in Board documentation for the 3 March 2020 meeting that Board members were aware that the approach to market had already taken place. On the contrary, the Board's suggestion that measurable KPIs be put in place would suggest Board members were unaware of where the procurement was in its lifecycle. The Board advice that it now 'endorsed' the proposal on 3 March subject to consideration of its advice is a further sign

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<sup>11</sup> This advice could be major but because it was presented as a generalisable statement it lacked impact.

that it was unaware that the RFT had already been issued. The Board's endorsement of the procurement proposal and its advice was redundant at this point.

- 7.42 While an update to Board members by CIT officials occurred on 3 March 2020, this is limited to an update on the incumbent contractor's performance. Other matters (both major and minor points of advice) raised with respect to the original procurement proposal (11 September 2018) and again on 21 January 2020 remained unaddressed in the documents available to the Board and in minutes.
- 7.43 In respect of the attention the Board gave to the procurement in January 2020, the Board Chair described to the Audit Office that:

There was certainly concern that the proponent appeared to already have in mind a particular outcome, and our job was to allow the proponent to pause and to explore other options sufficiently so that the risk of predetermination was mitigated.

#### *Response by CIT*

- 7.44 Examination of documentation prepared by CIT prior to CIT going to the market on 26 February 2020 indicates that for the two major points of advice (i.e. relating to making the Statement of Requirements simpler, clearer and supported by relevant KPIs) the Statement of Requirements essentially remained the same. There is no evidence that the Board's key points of advice were actioned by CIT. The Board would have been unaware of this, as no documentation was returned to the Board either prior to, or following, CIT's approach to market that would have enabled the Board to gauge whether its advice had been responded to.
- 7.45 In summary, in the second and third instances, the Board was insufficiently sceptical and probing. Although its advice was sound it was unassertive. CIT did not acquit the advice satisfactorily and by 3 March 2020 on its return to the Board, CIT had already gone to the market.

#### **21 December 2021 instance**

- 7.46 Interactions between CIT officials, Procurement ACT officials and the Board Chair took place in November 2021 as CIT officials sought the Board's review of the next procurement proposal for CIT's organisational change objectives. By 11 November 2022 an Advanced Tender Notice had been published with the intention of approaching the market with an open tender. However, by late November the possibility of obtaining further organisational transformation services through a contract variation was being discussed.
- 7.47 The Board Chair recalled their involvement at that time:

Prior to 24 November I was aware of another CIT Organisational Change proposal coming forward. No documentation had been received by the Board Secretariat, but a slot was being sought on the agenda before Xmas, and it was being pushed by CIT as 'urgent'. Conversations were had between myself and [the Senior Executive overseeing Procurement ACT], sufficient to understand that CIT's intention was to propose a variation, and that it was a sizeable variation but the specific amount was not known to me. [We] both were concerned at the CIT

proposed 'way forward' and agreed a 1:1 with the CEO was necessary. An invite was posted on 24 November [for a meeting on 10 December 2021].

The meeting took place on 10 December without the CEO, but with [another CIT official], at which I and [the Senior Executive overseeing Procurement ACT] made it crystal clear that reliance on a variation was not OK, and neither was just going through the motions and holding an open tender if the result was already determined. [We] asked [the CIT official] to consider getting [the contractor] on the staff as a better solution.

There was no further contact between me and CIT officials. The paperwork arrived and was duly considered out of session around 21 December 2021.

This is one of [a small number of] escalation situations where I recall I felt it necessary to raise matters direct with the proponent's DG/CEO.

7.48 The senior executive overseeing the work of Procurement ACT recalled their involvement at that time:

My role in that discussion [10 December 2021] was to provide any technical procurement solutions to some of those problems, and a major part of my contribution was around addressing the probity requirements presented whenever the work of an incumbent supplier forms the pivotal element of what is sought in subsequent procurements.

7.49 Documents for the *CIT Futures 2025* proposal were circulated to Board members by Procurement ACT on 17 December 2021. A range of documents were provided, as shown in Table 7-2.

7.50 One further document titled *EBM PACT briefing for GPB* was also provided by email to the Board by Procurement ACT. The concept of the GPB briefing document as a means by which Procurement ACT can raise issues with, or questions about, a proposal was discussed in paragraphs 3.61 to 3.67. The briefing document was not uploaded to the Board's SharePoint records system by the Secretariat. Table 7-4 shows the information provided in this briefing document.

**Table 7-4 Procurement ACT Briefing 'EBM PACT briefing for GPB'**

Procurement component	Comments
<b>Risk Assessment</b>	Refer to Attachment 2 – minor edits made by PACT
<b>Sourcing Strategy</b>	The initial open market approach has been revised to a direct source (single select). Procurement ACT were not participants in the sourcing selection.
<b>Proposed Schedule</b>	Note that the urgent schedule has only permitted cursory review and input from Procurement ACT.
<b>Procurement Value Consideration &amp; Policy Alignment</b>	Nil
<b>Statement of Requirements</b>	<p>PACT observations:</p> <ul style="list-style-type: none"> <li>• The SOR is general in nature – no specific milestones, KPI details</li> <li>• There is little to no qualitative guidance provided to the Respondent in what is required to be done at monthly report milestones.</li> <li>• It appears that further scope definition will occur post contract commencement.</li> </ul>



Procurement component	Comments
	<ul style="list-style-type: none"> <li>• Pricing (therefore future payments) are not based on deliverables.</li> <li>• One milestone/output is required – the submission of a Summary Report.</li> <li>• There is an annual fee/price to be submitted with an estimation of hours involved in providing the Summary Report.</li> </ul>
<b>Evaluation Plan</b>	CIT has developed the Evaluation Plan used in this procurement from a PACT open market/multiple Respondent approach template. This is not an ideal basis. PACT has made edits to the text to better reflect the single assessment proposed, within the time provided.
<b>Contract Management Plan</b>	PACT recommend a Services (Consultancy) Agreement be used rather than a general Services Agreement.
<b>Summary Comments</b>	The constrained timeframe for this procurement has not permitted PACT to provide detailed review and feedback.

Source: Extract of EBM PACT briefing for GPB (GS3003590 – CIT FUTURES 2025)

7.51 This briefing document provides advice to the Board relating to the Statement of Requirements that is consistent with:

- the advice subsequently provided by the Board in relation to the proposal; and
- the advice previously provided by the Board in relation to the 11 September 2018, 21 January 2020 and 3 March 2020 proposals.

7.52 It is apparent from Procurement ACT's use of this brief and its contents that Procurement ACT officials held a different view to the proponent on the strengths and weaknesses of the proposal. However, it is also noted that the brief was not assertive of the possible impact of letting a contract with an estimated value of \$4.5 million with 'Pricing (therefore future payments) ... not based on deliverables', a 'SOR ... general in nature [with] no specific milestones, KPI details', and with 'further scope definition ... [occurring] post contract commencement'.

7.53 Following the circulation of the document, comments were shared between members prior to consolidation and communication with CIT officials of the Board's formal advice on 23 December 2021. The minute extract records:

The Board **noted** this procurement proposal approach has already been approved by the CEO of CIT.

The Board **acknowledges** that:

CIT has cited tight timeframes to achieve delivery dates by April and June 2022, which are reliant on the change management advice. It is not clear whether these deliverables and timeframes are new or have been brought forward from a previous plan.

Given the reliance CIT have on this particular change management advisor and their particular science-based methodology, it would be difficult to construct a competitive tender process however this argument can't be relied upon without constant rigour and a nominated timeframe for when reliance on these consultancy services would end. The Board's advice is primarily aimed to assist in this area.

The Board also **notes**:

This procurement proposal approach has already been approved by the CEO of CIT.

Such an approach risks significant criticism as the full scope of these services have not previously been notified to the market and the current arrangements increase the current provider's remuneration significantly.

The detail around both the market sounding process and basis for rates comparison to make an assessment about value for money is limited.

There is no description in the Request for Quote of the services that CIT are expecting to be provided, and no defined deliverables or measures of performance.

The following advice from the Board is provided for the proponent's consideration:

**Recommend** that CIT consider if its delivery timeframes can be amended to allow for a full open approach to market.

**Recommend** that the rationale to have chosen a single select method of procurement is clearly documented so the Delegate is able to reference this should there be any public scrutiny.

**Recommend** the Request for Quote is updated to include clear outcomes that the provider needs to achieve, and how this will be measured.

**Recommend** one of the outcomes of the procurement is knowledge transfer to CIT staff such that there is no reliance on this provider at the end of the next contract term.

**Recommend** considering extending the timeframes for the response given the quantum of work and significance of this procurement. A longer period may be appropriate to prepare and submit enough information in the quotation to allow for a value for money assessment (even for a Single Select).

**Recommend** considering how value for money can be determined. This is a requirement for all procurements, including and especially for single selects. Using previous work to benchmark pricing is not the best indication of fair market rates, as the previous work was undertaken by the same contractor. One suggestion is to compare the quote received with other providers based on same numbers of staff and a rate card. The market for strategic consultancy services of the type being sought is not limited.

**Recommend** CIT develop some transition strategies now to mitigate any risk of their single supplier being unable to fulfil the current contract – given the tight timeframes and reported narrowness of market have been factors to date.

**Recommend** considering applying higher weightings to the evaluation criteria around methodology, program and price to test for value for money.

**Recommend** tailoring the Evaluation Plan to a single select process. The Board noted that the Evaluation Plan is currently drafted for a competitive process.

**Recommend** CIT implement processes to consider all contracts and commence any required procurement activities 12-18 months out from the contract end dates.

7.54 The Board's advice of 23 December 2021 comprised ten recommendations, but no explicit endorsement or support for the proposal. The Board's advice was 'provided for the proponent's consideration'. Of the ten actionable points of advice, two appear to be longer term (i.e. the fifth and tenth recommendations) and not directly related to the proposal. The first recommendation seeks to trigger reconsideration of whether an open tender could still be achieved. The remaining recommendations assume a single select route has been determined and seek to create greater internal consistency and defensibility on that basis.

### Soundness

7.55 The Board minutes ‘note’ observations made by the Board which *prima facie* make the proposal as presented untenable, whether taken to the market as a single select or by public, open tender. The Board’s advice points to a fundamental flaw at the centre of the proposal: the lack of specificity as to what the services and outcomes are that the contract will buy. This is particularly so when considering the contract value was estimated by CIT to be in the region of \$4.5 million in December 2021:

There is no description in the Request for Quote of the services that CIT are expecting to be provided, and no defined deliverables or measures of performance (23 December 2021 minutes extract).

7.56 On the basis the proponent accepted this, the proponent’s response to the Board’s observation was capable of changing the proposal significantly and therefore a further Board referral and review of the proposal would have been warranted.

7.57 While the Board observes that the proposal lacks ‘defined deliverables or measures of performance’, the Board did not comment on how the successful tenderer’s payment schedule would be structured. The draft Contract Management Plan provided to the Board referred to invoiced monthly payments in arrears, while the draft Services Agreement envisaged a negotiated instalment schedule.

7.58 The Board’s advice was not definitive and directive about the need for clarity around what is being procured. Instead, the recommendations predominantly seek to create greater internal consistency and defensibility, being heavily focused on matters of procedural integrity (or probity).

7.59 Another ‘noted’ observation of the Board is that:

... given the reliance CIT have on this particular change management advisor and their particular science-based methodology, it would be difficult to construct a competitive tender process.

7.60 Regardless of this observation, the first recommendation made by the Board is ‘that CIT consider if its delivery timeframes can be amended to allow for a full open approach to market’. This advice of the Board is weak given the fundamental problems it appears to have recognised in the procurement proposal.

### Development of advice

7.61 Unlike the previous two instances where the Board considered CIT organisational change procurement proposals, the 21 December 2021 instance was considered out of session, and therefore Board members shared their observations on the proposal by email exchanges. No CIT official was party to this deliberation process.

7.62 The following comments are illustrative of the insights brought to the process by which members developed advice, prior to the minutes being finalised:

... the evaluation criteria could be restated to simply validate that the organisation capability / specific individuals which support the single select are available to undertake the work.

My general impression is that it's not a difficult procurement, but I think they've put themselves in a difficult situation. While I recognise it's a decision for the delegate, I wouldn't be comfortable recommending on procurement grounds that the delegate approve this as a Single Select.

... it's difficult for me to support this based on what they've submitted, because I start from the position with all of these that the Territory should be running open and transparent processes. I think it's quite a high threshold to meet to depart from that - particularly as a procurement board - rather than a delegate who has other considerations.

[The new work] should have resulted in an open approach to market for the full scope of the work requirement at an earlier stage, rather than a piece-by-piece approach. The current proposal is an order of magnitude higher in value than all the previous procurements. It's more than double the two most recent engagements combined. My recommendation would have been to conduct an open approach earlier than this - given they haven't, I don't think the correct approach is to just go with a Single Select.

An open approach for the full scope of work should have been conducted earlier. Now that it hasn't, that doesn't justify not undertaking an open approach. CIT should be transparent with the market and see what is available. The market for strategic consultancy services of the type they are seeking is not exactly limited.

It would have been beneficial to hear from CIT why the particular 'science-based' methodology of Think Garden was suitable to their requirements. The delegate is probably in a better position to make this call, but I find it hard to think there are limited suppliers that could undertake this work. The size of this procurement may have encouraged more to bid for it.

This documentation set is indicating a new additional single select contract for \$4.5m with the same company for what is showing on an internet search as a four-person company.

There is a strong argument for continuing to go with the same company you have worked with since 2017 in a transformational change but at what point will that ever have the chance to end if one is single selected each time? What is the proposed end point of the change process which CIT is aiming to wrap up this single select arrangement.

The PPM states that the CEO of CIT has already provided approval to proceed with the procurement. In that case what are we being asked for? Surely, we can't endorse at this point just note?

The Evaluation Plan has criteria that given the entity has worked with them for five years it would be hard not to score well, especially given it references what is a consultancy approach that is argued is specific to the way this entity undertakes their consultancies.

At the end of the day if the delegate has already approved and they are happy with the arguments and feel VFM is justified not sure what value we can add. I'd be concerned that if they did go to open tender the criteria would be written in a way to ensure the same outcome.

Also didn't love their comment in the risk plan about benchmarking pricing based on previous work - which is with the same contractor, so arguably, not the best indication of fair market rates.

Given that tight timeframes and reported narrowness of market have been factors along the way to date, and the stated complexity of being able to 'codify their transformation sufficient for a new provider' to rapidly pick up and continue the change process, it would be a good idea to develop some transition strategies now to better place them going forward to future

open market options as well as mitigation of any risk of their single supplier being unable to fulfil the current contract.

Agree with your comments – my main concern is that it is a large amount of money, it appears that they are captured by this vendor – and the RFQ doesn't make clear deliverables or outcomes.

- 7.63 The members' comments demonstrate significant reservations with respect to the CIT proposal. Members' comments, however, make limited reference to the fundamental issue of the lack of specificity of the contractual outcomes required, taking into consideration the proposed contract value and the method of payment based on achievement of milestones.
- 7.64 The comments also demonstrate the tension between the desire to provide fairness and transparency (i.e. competitive neutrality) to all interested suppliers and the importance of continuity afforded by an incumbent that is potentially able to provide better value for money.

#### *Response by CIT*

- 7.65 The Board's advice to CIT, as represented in the minutes of 23 December 2021, did not explicitly request CIT to provide a response. Nevertheless, as discussed in paragraph 2.28, the Board should have anticipated the need for the re-referral and review of a revised set of documentation.
- 7.66 Although the CIT proposal to the Board was a single-pass proposal, Procurement ACT sought from CIT the completion of a Procurement Review Submission proforma. According to custom and practice, this is the preferred method of acquitting Board advice in two-pass review proposals. The stated intention of this proforma was to outline how the previous Board advice had been acquitted by the proponent, and for this 'to be forwarded to the Board Secretariat/Board for information'.
- 7.67 In early January 2022, CIT officials reconsidered the matter of whether a single select procurement (directed to the incumbent), or an approach to the open market was preferable. By 10 January 2022 the CEO had determined to conduct a new approach to the open market, which was then made on 17 January 2022.
- 7.68 The Procurement Review Submission, which was completed on 12 January 2022, reflected the shift from a single select to a new approach to the open market. The submission summarised the CIT officials' consideration of the Board's advice and described rectification work undertaken by CIT. CIT's actions to review and consider the advice of the Board is shown in Table 7-5.

**Table 7-5 CIT Procurement Review Submission response to Board recommendations**

Rec No.	Board recommendations 23 December 2021	CIT response in submission (summarised or 'verbatim')
1	Recommend that CIT consider if its delivery timeframes can be amended to allow for a full open approach to market.	'CIT's Delegate has determined that the procurement will go to a full open approach to market.'

Rec No.	Board recommendations 23 December 2021	CIT response in submission (summarised or 'verbatim')
2	Recommend that the rationale to have chosen a single select method of procurement is clearly documented so the Delegate is able to reference this should there be any public scrutiny.	'Not applicable.'... 'No decision had been made by the Delegate for single select procurement methodology. The Delegate has considered all information and determined that the procurement will go to open market approach.'
3	Recommend the Request for Quote is updated to include clear outcomes that the provider needs to achieve, and how this will be measured.	Reviewed and amendments made.
4	Recommend one of the outcomes of the procurement is knowledge transfer to CIT staff such that there is no reliance on this provider at the end of the next contract term.	Reviewed and advice not accepted by CIT as the concept is already clearly included in the contract
5	Recommend considering extending the timeframes for the response given the quantum of work and significance of this procurement. A longer period may be appropriate to prepare and submit enough information in the quotation to allow for a value for money assessment (even for a Single Select)	Accepted. A 28-day response period is now to be provided in the request.
6	Recommend considering how value for money can be determined. This is a requirement for all procurements, including and especially for single selects. Using previous work to benchmark pricing is not the best indication of fair market rates, as the previous work was undertaken by the same contractor. One suggestion is to compare the quote received with other providers based on same numbers of staff and a rate card. The market for strategic consultancy services of the type being sought is not limited.	'Not applicable.' ... 'This will be addressed through the open market approach and value for money will be assessed by the Tender Evaluation team, taking into consideration the technical response scores, a pricing analysis and risk assessment of all submissions.'
7	Recommend CIT develop some transition strategies now to mitigate any risk of their single supplier being unable to fulfil the current contract – given the tight timeframes and reported narrowness of market have been factors to date.	'Not applicable.'... 'No decision had been made by the Delegate for single select procurement methodology. The Delegate has considered all information and determined that the process will be an open market approach procurement.'
8	Recommend considering applying higher weightings to the evaluation criteria around methodology, program and price to test for value for money.	Reviewed. Advice not accepted: CIT is content with original weightings.
9	Recommend tailoring the Evaluation Plan to a single select process. The Board noted that the Evaluation Plan is currently drafted for a competitive process.	'Not applicable.'... 'No decision had been made by the Delegate for single select procurement methodology. The Delegate has determined that the process will be an open market approach procurement'.
10	Recommend CIT implement processes to consider all contracts and commence any required procurement activities 12-18 months out from the contract end dates.	'Accepted, noting that national and local decisions at a government and sector level did not allow for this aspiration in the current process'.

Source: ACT Audit Office analysis of CIT *Procurement Review Submission* (12 January 2022)

7.69 CIT officials interacted with Procurement ACT in early January 2022. A revised suite of documentation was finalised and forwarded to Procurement ACT on 16 January 2022. The Audit Office's review of the January documentation indicates a number of shortcomings

with respect to CIT's stated response to the Board's advice and subsequent changes to procurement documentation made by CIT (refer to Table 7-6).

**Table 7-6 Review of revised proposal documentation 10 to 17 January 2022**

Rec no.	How CIT addressed the Board's advice in the submission	Audit Office review of supporting documentation and observations
1	The CIT written response does not indicate whether an adjustment to 'delivery timeframes' was either necessary or the salient issue in order to make an open market approach.	Nevertheless, the CIT delegate (CEO) approved a full 'open approach to market'. While CIT documentation makes multiple references to urgency, a comparison of the Procurement Plan Minute (17 December 2021) and the revised minute of (12 January 2022) indicates only a one-day delay was anticipated in the approach to market following the decision to make an open market approach. Accordingly, it is apparent the CIT delivery timeframes were not impacted by the choice of approach to market. CIT did not intend to undertake extensive rework, or the issuing of an Advance Tender Notice. <b>The CIT response is insufficient and incomplete.</b>
2	The Board's advice is stated as being superseded.	The CIT response refutes that a decision had been made to proceed with the single select. However, that is the basis on which all the documentation had been prepared and upon which the Board's advice was provided up to 23 December 2021. The Board's advice seeks a documented explanation clearly available to the Delegate for the chosen approach to market (albeit no longer a single select). No such explanation was documented for what is a major change in the procurement strategy. <b>The CIT response is insufficient and incomplete.</b>
3	CIT states it has accepted and acted on the advice.	Changes were made to the proposal's documentation. However, these changes are inconsequential and do not address the lack of clarity observed by the Board relating to 'clear outcomes' and their measurement. This is a fundamental shortcoming. <b>The CIT changes made and the description of those changes were insufficient to address the Board's advice.</b>
4	CIT has not accepted the advice and has provided an explanation.	<b>The CIT response is reasonable and sufficiently complete</b> relating to the matter of transitioning during the contract.
5	CIT states it has accepted and acted on the advice.	<b>The CIT response is reasonable and sufficiently complete</b> relating to extending open tender timeframes.
6	The Board's advice is stated as being superseded. However, the Board's advice states 'this is a requirement for all procurements, ... [and not only] single selects.	The issue of price benchmarking is not discussed in the CIT response or other documentation. The commentary could have referenced the factoring in of 'mean pricing', which is what eventuated (albeit a mean of three tendered prices). <b>The CIT response is insufficient and incomplete.</b>
7	The Board's advice is stated as being superseded.	The CIT response indicates that the need for substitution (in the event a contractor cannot fulfil the contract) is mitigated by the availability of other suitable tenderers. This is satisfactory response if CIT and the Board understood that a range of suppliers and solutions would likely eventuate from the approach to market. The Board does not express confidence this is likely. <b>The CIT response is equivocal.</b>
8	CIT has not accepted the advice and has provided an explanation.	<b>The CIT response is reasonable and sufficiently complete</b> relating to evaluation criteria weightings.
9	The Board's advice is stated as being superseded.	The erroneously prepared Evaluation Plan (i.e. drafted for a competitive process and not a single select) was forwarded to the Board on 17 December 2021. It became relevant once the decision to pursue an open tender had been made (notwithstanding the weak

Rec no.	How CIT addressed the Board's advice in the submission	Audit Office review of supporting documentation and observations
		Recommendation 6 response). Minor amendments were also made. <b>The CIT response is reasonable and sufficiently complete.</b>
10	CIT accepts the principle, but identifies externalities (sector specific, local and national government decision making) as affecting the timeframe of the current process.	While the Board's advice relates to CIT systems and not this procurement specifically, the CIT response provides an implausible explanation about the specific circumstances of this procurement proposal. The procurement of organisational change consultancy services had been on foot since July 2017 and had been undertaken through five preceding contracts. <b>The CIT response is equivocal.</b>

Source: ACT Audit Office analysis of CIT and Procurement ACT documentation (23 December 2021 to 17 January 2022)

7.70 While CIT provided reasonable and sufficiently complete responses to Recommendations 4, 5, 8 and 9 there were shortcomings in the responses to the other six.

7.71 Notably, Procurement ACT officials advised the Audit Office that with respect to the clarity of the Statement of Requirements (a matter relevant to the third recommendation):

The conversation between CIT and PACT about the type of language and terminology used in the SOR and its ease (or otherwise) of interpretation by an open market was not documented. CIT indicated that it was comfortable with the SOR as the industry it was being pitched at would understand it ...

7.72 In the case of Recommendation 10, CIT's reply indicates the truncated timeframe to undertake the procurement process before finally settling on an open market approach in January 2022 was a consequence of 'national and local decisions at a government and sector level' decisions. It is unclear whether this was the extent of the reasoning for the expeditious route CIT officials sought:

- initially, through a contract variation (in November 2021); and
- secondly through a single select process (in December 2021).

7.73 The analysis in Table 7-6 shows CIT did not adequately demonstrate consideration of the Board's advice in its summary response (the Procurement Review Submission) or in the accompanying revised document suite. Most importantly, CIT did not address the matter of the specificity as to what the services and outcomes would be, notwithstanding it asserted it had done so.

7.74 Furthermore, neither the Procurement Review Submission or the accompanying documentation was shared with the Board's Secretariat or the Board despite this being Procurement ACT's stated intention in calling for the information. There was no way for the Board to confirm its advice had been responded to.



7.75 Given the proposal had progressed from being a variation, to a single select with the incumbent, to a new approach to the open market, in January 2022 the Board should have been presented with a new set of documentation for its review that addressed all shortcomings and reflected the eventual approach to market that was to be undertaken. This did not happen.

#### *Decision to conduct a public Request For Proposal*

7.76 Board advice to CIT, as documented in the minutes of the meeting on 23 December 2021, appears to accept CIT's intention to pursue a single select process with the incumbent via the Exemption minute provided to the Board.<sup>12</sup> Within a matter of weeks, however, CIT had determined to approach the market via an open Request for Proposal process. By early January 2021, CIT had determined a different approach to that which it proposed on 17 December 2021, which in turn was a different route to that contemplated by CIT in late November 2021 (being the use of a contract variation).

7.77 Procurement ACT 'Approaching the Market' guidance describes a Request For Proposal as:

The Request For Proposal (RFP) is similar to an REOI but it encourages suppliers to propose solutions to achieve a desired outcome or resolve a specific problem. It offers a broad description of the Territory's needs, and requests suitable proposals to achieve these needs. An RFP is generally followed by a second stage, where shortlisted respondents are requested to complete an RFT.<sup>13</sup>

7.78 A review of emails between CIT and Procurement ACT officials, and of the draft and finalised procurement documentation suite in the period 23 December 2021 and 17 January 2022, does not explain the reasons behind the shift in the approach to market. An email dated 10 January 2022 between a CIT and Procurement ACT official states:

Following consideration of information, including advice from the GPB, our CEO has made the decision that this tender will go to the open market.

7.79 The Procurement Approval Minute signed by the CIT Chief Executive Officer on 14 January 2022, refers to a one-stage RFP process being approved and the single select process not being approved, but otherwise reveals little:

Following feedback from the GPB a Single Select minute was not approved by CIT's CEO and an open market approach will be conducted.

7.80 The Audit Office sought advice from the Senior Executive overseeing Procurement ACT and the Board Chair as to what they had communicated and to whom, given their proximity to the proposal:

- the Senior Executive overseeing Procurement ACT advised that, other than the meeting on 10 December 2021, they had no direct communication with CIT officials, the Board Secretariat, Board members, the Minister or Minister's Office, or anyone else between 1 December and 23 December about the CIT proposal; and

<sup>12</sup> Unsurprisingly most of the recommendations relate to improving the procedural integrity of the CIT proposed single select route.

<sup>13</sup> <https://actgovernment.sharepoint.com/sites/Intranet-CMTEDD/whog/procurement/Pages/Approaching-the-market.aspx>

- the Board Chair advised that, other than the meeting on 10 December 2021, they had no direct communication with CIT officials, Procurement ACT officials, the Minister or Minister's Office, or anyone else between 1 December and 23 December about the CIT proposal.

7.81 While the Board's written advice appears to have played a part, it remains unclear whether the Board advice alone was the catalyst in CIT's reconsideration of the single select option. It is evident that neither Procurement ACT nor the Board Chair escalated the issue further in December, for example, by appealing to the CIT CEO directly or by alerting the Minister.<sup>14</sup>

7.82 In summary, in the fourth instance, the Board was insufficiently sceptical and probing. Its advice was equivocal and unassertive. While CIT officials subsequently took a different direction, the new proposal did not address the essence of the advice satisfactorily.

7.83 In response to the draft proposed report the Chief Minister, Treasury and Economic Development Directorate advised:

As the Board is not performing an auditing or investigative function, it is not appropriate for the Board's advice to be sceptical about the facts put before it. As noted above, it is the responsibility of the Delegate as a public servant to put forward complete and accurate facts to the Board.

## Compliance with Regulation

7.84 For the three proposals put to the Board (11 September 2018, 21 January 2020 and 21 December 2021) CIT complied with its obligations with respect to:

- referring three 'procurement proposals' to the Board according to the value thresholds (as per paragraph 11(1)(b) of the Regulation);
- providing the appropriate documentation that would enable the Board to undertake a review of the matters specified in subsection 12(2) of the Regulation, that is VFM (as per section 22A of the Act), evaluation and contract management matters; and
- providing the appropriate documentation that would enable the Board to undertake a review of any other matters it is directed to review (as per subsection 8(1) and section 22B of the Act, such as the *Government Procurement (Charter of Procurement Values) Direction 2020* (in respect of the third proposal)).

7.85 However, CIT clearly did not comply with its obligations to refer the revised proposal in January 2022 that resulted in the 28 March 2022 contract, since the Board was not given the opportunity to review documentation consistent with the approach to market that eventuated on 17 January 2022.

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<sup>14</sup> Minister Steel is the Minister responsible for procurement (as Special Minister of State) and also Minister responsible for CIT (as Minister for Skills).

- 7.86 For the three proposals that were referred to it (11 September 2018, 21 January 2020 and 21 December 2021) the Board complied with its obligations with respect to:
- undertaking a review on each of the three occasions in accordance with paragraph 6(c) of the matters as specified in subsection 12(2) of the Regulation and section 22B of the Act;
  - formulating and giving advice on such matters in accordance with paragraph 6(a) of the Act; and
  - minuting proceedings (as per subsection 19(11) of the Act) and utilising minutes as the means of communicating its advice to CIT as the proponent.

### Conformance with policy and procedure

- 7.87 The Audit Office did not identify any deficiencies with respect to conformance with policy in the CIT documentation put to the Board, other than those deficiencies identified by the Board, and the matter of how contractor payments would be structured (paragraph 7.57).
- 7.88 CIT officials provided the requisite documentation to the Board in the three cases in order to conform with the single-pass review procedure, as was appropriate for CIT goods and services procurement proposals with an estimated value of less than \$5 million.

### Value of the Board's advice

#### Urgency of review

- 7.89 There were varying degrees of urgency attached to the three procurement proposals:
- 11 September 2018 meeting - the Board's minutes 'noted the timeframes outlined to go to market and for evaluation were tight'. The Procurement Plan Minute and Procurement Review Submission identified an intention to go to the market on 14 September, within three days of the Board's consideration of the proposal.
  - 21 January 2020 meeting - the Board minutes 'noted the timeframes outlined to go to market and for evaluation were tight'. The Procurement Plan Minute and Procurement Review Submission identified an intention to go to the market in February. A margin of five weeks was anticipated following the Board's consideration. On 27 February 2020 CIT officials asked for an agenda slot at the next week's Board meeting (3 March 2020) to address the Board's earlier request (from 21 January 2020).
  - 21 December 2021 meeting - the Board minutes refer to 'tight timeframes to achieve delivery dates by April and June 2022' and CIT's documentation states 'CIT requires the procurement completed by the end of January 2022'. The 17 December 2021 Procurement Approval Minute (provided to the Board) identifies the intention to go to one supplier (the incumbent) via an RFQ on 13 January 2022 and to execute a contract by the end of February 2022. A margin of 14 days (excluding the Christmas shutdown period) was anticipated following Board consideration to go to the market.

- 7.90 In each instance, the level of urgency signalled in CIT officials' documentation placed an unreasonable burden on those with responsibility to facilitate the procurement activity, namely Procurement ACT and the Board.
- 7.91 On all four occasions the commentary available to the Board signalled the urgency of the proposal in respect of getting to market, getting a contract signed and progressing the outcomes from the contract's delivery. Urgency militates against sound and thorough consideration. While urgency may be a necessity at times, serial urgency indicates the likelihood of a systemic problem. The urgency of the three CIT instances spanned a period of more than three years.

### Redundancy of advice

7.92 For the January 2020 procurement proposal, the minutes of the Board meeting on 21 January show the Board requested further information about the contractor's performance. CIT officials attended a meeting of the Board on 3 March 2020 and provided a verbal briefing in response. By then, however, CIT had already gone to the market with the RFT (on 26 February 2020). In this instance, CIT officials proceeded to publish the public tender the week before seeking to resolve outstanding matters with the Board, thus making any further Board consideration redundant. By going to the market on 26 February CIT's actions were inconsistent with the intent of the legislation, and did not accord with sound administrative practice since:

- the advice the Board provided in January 2020 was not capable of being fully resolved; and
- the follow-up discussion on 3 March 2020 was no longer capable of influencing the specific procurement.

7.93 For the third procurement proposal in December 2021, Board members appeared in their email discussion to be particularly concerned with the potential redundancy of their consideration:

The PPM states that the CEO of CIT has already provided approval to proceed with the procurement. In that case what are we being asked for? Surely, we can't endorse at this point just note?

... At the end of the day if the delegate has already approved and they are happy with the arguments and feel VFM is justified not sure what value we can add.

### Omission of important information

7.94 The lack of visibility in documentation presented to the Board of the work of the incumbent contractor is evident in the first two procurement proposals (11 September 2018 and 21 January 2020). Only in December 2021 documentation, relating to a single select process, is it apparent that the incumbent has been the beneficiary of five successive contracts (totalling \$3,786,300 million) since 2017.

7.95 Although the Board pressed for greater clarity at its January 2020 meeting, the lack of visibility in documentation provided to Board is concerning from a procedural integrity perspective. The Board needed to be advised, or at least needed to ascertain at the earliest opportunity the extent to which any alternative to the incumbent was realistic. To encourage or support an open tender process where there was no reasonable prospect of any outcome other than the incumbent being contracted is highly problematic.

7.96 Furthermore, it is unclear from documentation:

- why the *Evolving Together* and then the *CIT Futures 2025* initiatives required a consultant to adopt a ‘scientific approach’ as reflected in Statement of Requirements and Evaluation Plan references, such as:
  - ... an in-depth knowledge of sciences relating to complex adaptive systems, networks, socio-technical systems, and natural (ecological and evolutionary) and social (human and cognitive) systems, ... [with experience] in world-leading practical application of the above sciences to organisational change contexts.
- how the Board reconciled assurances over contractor performance, given successive advice from the Board about the paucity of information on services, outcomes and deliverables; and
- how a lack of clarity with respect to services and deliverables continued to be a feature of the approach to market documentation. While twice challenged by the Board as needing simplification and clarification, this lack of clarity continued to be a feature of the approach to market documentation in January 2022. Figure 5-1 shows an extract of the Statement of Requirements of January 2022.

**Figure 5-1 Part of the specification in the Statement of Requirements (January 2022)**

2.1.2.	<p>To enable this, the Service Provider will be required to guide and codesign with CIT in:</p> <ul style="list-style-type: none"> <li>(a) developing system wide capabilities of situational awareness, early/weak signal detection and noise sorting;</li> <li>(b) developing both context-specific and generalised responses to the multitude of situations it encounters;</li> <li>(c) developing iterative capacity to cycle through adaptive/renewal processes across multiple spatial and temporal scales;</li> <li>(d) the utility and application of relevant knowledge, tools, artefacts and approaches in enabling CIT to become a system that learns; and</li> <li>(e) the utility and application of various organisational structures which promote better adherence to and governance of all the above practices.</li> </ul>
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Source: Extract from CIT Statement of Requirement 17 January 2022

7.97 The emphasis in documentation on a ‘scientific approach’, and latterly on ‘world leading’ experience would have substantially narrowed the field of interest of potential suppliers and therefore needed a fuller explanation.

7.98 Matters relating to urgency, redundancy and omission in the CIT proposals needed exposure, more extensive examination and more timely discussion, none of which were afforded to the Board. However, the Board could have been more assertive in articulating its concerns, and these could have been escalated. Without satisfactorily resolving these matters, and the Board was best placed to do so, doubts will be raised about procedural integrity of the procurement process and outcome.

## Procurement outcomes

7.99 The following commentary relates to CIT procurement documentation subsequent to the closure of the tender process. This includes documentation relating to the evaluation and selection process and contract documentation.

### 11 September 2018 instance

7.100 The procurement proposal for an open tender process with maximum value of \$1,200,000 over two years was considered by the Board on 11 September 2018. Some minor matters were addressed by CIT, which then went to the market on 14 September 2018. There were 12 tenders, ranging from \$346,250 to \$3,389,540. The Tender Evaluation Team (TET) recommended 'the acceptance of the tender submitted by Redrouge Nominees Pty Ltd at a total cost of \$1,287,500 as this tender response represents the best value for money'. The contract was executed on 9 Nov 2018 as per the TET recommendation.

### 21 January 2020 instance

7.101 The procurement proposal for an open tender process with maximum value of \$1,375,000 over 20 months was considered by the Board on 21 January 2020. Some minor matters were addressed by CIT, which then went to the market on 26 February 2020. There were 14 tenders, ranging from \$254,260 to \$2,971,200. The TET recommended the approval of 'the selection of Redrouge Nominees Pty Ltd as the successful Tenderer ... [with a price of \$1,705,000] as representing the best Value for Money outcome for CIT'. The contract was executed on 9 April 2020 as per the TET recommendation.

### 21 December 2021 instance

7.102 This procurement proposal was discussed with the Board Chair and Procurement ACT in November 2021, at which point CIT was exploring procuring further unspecified services for an unspecified amount via a variation to the incumbent's contract.<sup>15</sup> Dissuaded by the Board Chair at a meeting on 10 December 2021 from doing so, CIT proposed a single select approach with the incumbent in order to obtain a new contract. Documentation was then

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<sup>15</sup> Contract No. 2020.2147.220. A contract variation was executed on 9 December 2021, with a six-month extension of time to 10 June 2022 (as permitted under the contract). The contract price was not changed. The scope was not changed. It is likely this variation was being contemplated at the time by CIT officials as the means to also increase the contract price and scope.

circulated, and advice was formulated by the Board between 17 December 2021 and 23 December 2021.

- 7.103 CIT went to market with an open tender on 17 January 2022. There were three tenders, the value of which were \$805,183, \$1,979,000 and \$5,680,000. The TET recommended the approval of 'the selection of Redrouge Nominees Pty Ltd as the preferred Respondent ... [\$5,680,000] as representing the best Value for Money outcome for CIT'. The contract was executed on 28 March 2022 as per the TET recommendation for \$4,999,990 following negotiation prompted by a proposal in the preferred Respondent's tender:

We are pleased to offer CIT a preferred client discount of 12 % should CIT agree to upfront payments of our fees.

- 7.104 As part of those negotiations, both parties agreed to payment on five time-based milestones, with the first occurring on contract execution.

## Commentary

- 7.105 In each of the three instances where a CIT procurement proposal was put to the Board, it is evident that an open tender resulted shortly afterwards. It is also evident an evaluation process eventuated following the tender closing date, and negotiations were entered into, which resulted in a contract with the incumbent, which was the same consultant in each case. The TET reports follow a logical process and step the decision-maker through the requisite stages of the evaluation process, in accordance with the agreed Evaluation Plan.

### *Incumbent contractors in open tenders*

- 7.106 A common theme in the three instances where officials brought CIT's organisational change proposals to the Board for its review and advice is that the approach to market that eventuated was an open tender. In each case CIT officials were aware of the incumbent and the relationship between what the incumbent brought to CIT's organisational change aspirations and the framing of the proposal. It is not apparent until the second instance, in January 2020, that the Board was also fully aware.

- 7.107 The Senior Executive overseeing Procurement ACT advised that in the third instance (in December 2021) the probity of this circumstance was front of mind:

My role in that discussion [on 10 December 2021] was to provide any technical procurement solutions to some of those problems, and a major part of my contribution was around addressing the probity requirements presented whenever the work of an incumbent supplier forms the pivotal element of what is sought in subsequent procurements.

- 7.108 Advice from Board on 23 December 2021, albeit equivocal and unassertive advice, was that an open tender would have been preferable, if appropriately designed, but that this was now implausible. Given the procurement and contracting that had occurred to date, it was highly improbable that an open tender would result in genuinely open competition. Major changes to the procurement design (that is, at least to the Statement of Requirements, the draft contract and the Evaluation Plan) would have been required. There was a substantial

risk that proceeding with an open tender process was only going to provide superficial legitimacy.

7.109 Accordingly, the open tender issued by CIT on 17 January 2022 was problematic. Any number of minor technical fixes between 23 December 2021 and 17 January 2022, with or without the help of Procurement ACT were not able to create an authentic, open tender opportunity.

7.110 On the basis of the evidence presented in this case study, CIT cannot rely on the outcome of its open tender process to demonstrate it pursued value for money in undertaking its procurement activity. In January 2022, CIT did not comply with section 22A of the *Government Procurement ACT 2001* in pursuing 'open and effective competition'.

7.111 In response to the final proposed report, CIT officials advised that since the audit evidence, from which conclusions in this chapter are drawn, did not include the direct testimony of officials who had prepared the proposal documentation, CIT has concerns:

... regarding [its] inability to provide additional information or context about the decisions made in relation to the procurements discussed in [the chapter] ...

... that the conclusions drawn in [this chapter] of the report particularly at 7.110, as they relate to CIT, is premature given that ... the [audit team] have not had the opportunity to speak to relevant CIT officers.



## Audit reports

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