

MEDIA RELEASE**20 July 2023****Activities of the Government Procurement Board**

ACT Auditor-General, Mr Michael Harris, today presented a report on the **Activities of the Government Procurement Board** to the Speaker for tabling in the ACT Legislative Assembly.

The audit looked at the Government Procurement Board's role in reviewing procurement proposals and providing advice on the proposals. Examining the Board's activities over a recent five-year period (2017 to 2022), the audit considered the Board's review of and advice on 411 proposals. Three case studies were also selected for closer examination: proposals related to the procurement of linear accelerators (Canberra Health Services), the supply of asphalt (Roads ACT) and organisational transformation services (CIT).

The audit identified that the Board meets its statutory obligations but that it is not operating optimally, since its 'effectiveness is compromised by the 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 could be improved 'if the Board reviewed fewer, higher-risk procurement proposals'.

Mr Harris says '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'.

The audit report makes sixteen recommendations based on analysis of a substantial body of activity of the Board in recent years, while the three case studies illustrate the particular challenges the Board faces in its interactions with those making the proposals.

Activities of the Government Procurement Board is available to download from the ACT Audit Office's website www.audit.act.gov.au. If you need assistance accessing the report please phone 6207 0833.

SUMMARY

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
Referral processes	
<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
Proposal preparation	
<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.

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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.

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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

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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.

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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.

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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.

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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.

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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.