

Independent Review of Services Australia and NDIA Procurement and Contracting: Independent Reviewer's Report

6 March 2023



Introduction

On 1 December 2022, the Minister for Government Services and the Minister for the National Disability Insurance Scheme (NDIS), the Hon Bill Shorten MP announced that Ms Rebecca Skinner PSM, CEO, Services Australia (SA) and Ms Rebecca Falkingham PSM, CEO, National Disability Insurance Agency (NDIA), had jointly established the Independent Review of Services Australia and NDIA Procurement and Contracting (the Review).

A joint NDIA-SA Taskforce ('the Taskforce') was established to support the Review led by the Independent Reviewer, Dr Ian Watt AC (the Reviewer).

Since then, the Taskforce has assessed whether internal agency procurement and contracting processes related to matters raised in the media regarding Synergy 360 and associated entities were consistent with the Commonwealth Procurement Rules (CPRs) and good practice, where applicable. A list of entities with procurements in scope for the Review is included in the Taskforce Report.

Media reporting alleged that Synergy 360 was lobbying government officials on behalf of companies, and was paid a commission if a contract was successfully secured.¹ The media reports included copies of alleged leaked Synergy 360 emails from 2017 and 2018.

The Taskforce considered procurements from 2015-16 to present, to ensure the review was comprehensive. It considered contracts with Synergy 360, other entities named in media reporting, and entities acquired by entities named in the media.

As per the Terms of Reference, the Review considered, among other things:

- Whether the process undertaken in these procurements was consistent with the Commonwealth Procurement Rules and whole-of-APS best practice, where applicable.
- If the processes for, and circumstances surrounding, these procurements were consistent with comparable procurements undertaken by Services Australia and the NDIA within the same reference period.
- Any real or perceived conflicts of interest, or possible misconduct in these procurements, by Services Australia and NDIA employees and related contractors.

¹ A Brown and A Mitchell, 'MP Robert's lobbying contract links probed', *The Canberra Times*, 24 November 2022;

D Crowe and N McKenzie, 'Senior Coalition MP Stuart Robert gave secret advice to lobbyist', *The Sydney Morning Herald*, 24 November 2022;

D Crowe and N McKenzie, 'Bill Shorten orders review into deals linked to Stuart Robert', *The Sydney Morning Herald*, 24 November 2022;

D Crowe and N McKenzie, 'Leaked files reveal meetings with minister over contracts', *The Sydney Morning Herald*, 1 December 2022;

D Crowe and N McKenzie, 'Robert denies pressuring officials over leaked emails', *The Sydney Morning Herald*, 2 December 2022;

J Robertson, 'Revealed: Stuart Robert's new connection to business partner', *The New Daily*, 24 November 2022;

K Murphy and P Karp, 'Labor orders investigation into government contracts linked to Stuart Robert', *The Guardian*, 24 November 2022;

P Karp, 'Bill Shorten reveals review into Stuart Robert 'lobbying scandal' claims', *The Guardian*, 1 December 2022.

In its only departure from the Terms of Reference, the Taskforce focused on 'good practice' not 'best practice'. 'Best practice' is something of an aspirational rather than a practical standard for analysis. 'Good practice' (defined as at least consistent with the CPRs) was considered a more relevant comparison for the Report. Further, given the overall standard of the procurements assessed, it is a more useful standard. Relatively few of the procurements were able to be considered unambiguously 'best practice'; but many were assessed as 'good practice'. The Reviewer agrees with the changed standard.

The Taskforce produced a detailed report outlining its findings – *the Independent Review of Services Australia and NDIA Procurement and Contracting: Taskforce Report to the Independent Reviewer* (Taskforce Report).

The Reviewer emphasises that, while the Taskforce Report has been discussed with him, and he has provided comments on drafts, it remains the work of the Taskforce.

The Taskforce found:

- The majority (71 per cent) of the 95 procurements determined to be in scope for the Review (the procurements) were consistent with the CPRs and broadly demonstrated good practice.
- Nineteen procurements were flagged for further investigation due to inconsistencies with the CPRs or good practice. Within these 19, common issues included:
 - lack of appropriate documentation and/or records (7 of 19 procurements)
 - delays in reporting contracts and amendments on AusTender within 42 days of entering into or amending a contract (9 of 14 SA procurements)
 - insufficient value for money justifications (12 of 19 procurements)
- The processes undertaken for the procurements were broadly consistent with, and had similar shortcomings, to comparable procurements undertaken by the NDIA and SA within the same reference period. That said, the standard of the comparator procurements against the CPRs was similarly not always high.
- Of the 19 procurements flagged for further investigation, which had an approximate value of \$374 million:
 - 10 procurements were found to be of a similar standard to the comparators
 - 4 were found to be of a higher standard and
 - 5 were found to be of a lower standard.
- Many procurements lacked appropriate conflict of interest documentation in accessible records. Further, a small number of procurements had poorly managed actual, potential or perceived conflicts of interest.
- Consideration of some individual procurements also suggests that there was sometimes a poor understanding of procurement processes and requirements.
- Finally, limited documentation and the extensive use of limited tenders and single supplier approaches makes it difficult to determine whether or not value for money, which is at the heart of the CPRs, was being achieved in many procurements.

While the Taskforce found some procurements had poorly managed conflicts of interest, or questionable judgements about the choice of procurement method and repeated use of

limited or sole sourcing, the Taskforce did not find clear misconduct within the 95 procurement processes.²

The Taskforce Report is specifically focused on the procurements determined to be in in-scope for the Review, including drawing findings and conclusions from these. While the Taskforce Report highlights potential areas for improvement, it does not provide recommendations.

The Reviewer considers the Taskforce Report appropriate and supports its findings.

The Taskforce Report, along with this Report, is provided to the CEOs of the NDIA and SA, Ms Rebecca Falkingham PSM and Ms Rebecca Skinner PSM, as per the Terms of Reference of the Review.

In preparing this report, the Reviewer has taken into consideration the findings and conclusions drawn by the Taskforce.

The Reviewer has also taken into consideration insights from a series of targeted consultations with a range of key stakeholders. People consulted included those currently or formerly in relevant roles within the NDIA and SA, as well as those across the APS who have an interest in or connection to broader policy matters related to the Review.

In total, the Reviewer had formal consultations with 18 people across eight APS agencies.

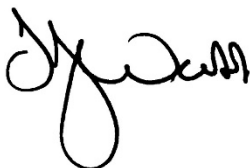
Finally, the Reviewer also took into account Australian National Audit Office (ANAO) reports on procurements over the last decade or so and internal audit reports from both the NDIA and SA.

The findings and recommendations in Part I of this report draw extensively on the Taskforce findings. They are directed to the CEOs of the two agencies concerned. The additional recommendations and findings detailed in Part II are the Reviewer's alone and are directed to the senior leadership of the APS more generally.

The Terms of Reference provide that a copy of the report or part of the report may be provided to other agencies, where it raises issues relevant to their functions or activities.

The Reviewer's clear conclusion is that both reports should be shared with at least selected agency heads across the APS. The issues found within the procurements reviewed are far from unique to the NDIA or SA. There are lessons within these findings that should be applied across the APS.

Further, there is a need for capability uplift across the APS to ensure the challenges identified through the Review are fully addressed.



Dr I.J. Watt AC
Independent Reviewer
6 March 2023

² 'Misconduct' meaning behaviour that does not meet the requirements of the APS Values, Employment Principles and Code of Conduct. *Public Service Act 1999* ss 10,10A,13.

Part I: The NDIA and SA

The following discussion and recommendations draw extensively on the analytical work of the Taskforce. The recommendations are directed to the CEOs of the NDIA and SA, but do have much wider applicability.

The Taskforce concluded that:

1. Of the 95 procurements, 67 (71 per cent), which had a value of \$267 million, were found to be broadly consistent with the CPRs and good practice. Twenty-eight (29 per cent) procurements, with an approximate value of \$351 million, were found to have CPR breaches and/or be inconsistent with good practice.
2. On the whole, the procurements were largely comparable to comparator procurements also undertaken by the NDIA and SA during the reference period.
3. Overall, the problematic issues identified within the procurements were consistent in kind and extent to issues identified in previous ANAO audits into procurements across the public sector, and in some internal audit reports of the NDIA and SA.
4. Procurement processes within both agencies have improved significantly over time, but there is still scope for further improvements.
5. There were no examples of clear misconduct related to the procurements. However, there were clear examples of poor practices and seemingly too close relationships between APS officials and suppliers that were not properly managed. Conduct was sometimes well below usually acceptable practice.

Based on the information and analytical work undertaken, it is the Reviewer's view that the Taskforce findings are broadly appropriate. Further, using as a rough point of comparison a decade or so of published ANAO audits on procurements, there is no reason to suggest that NDIA and SA procurement processes, procurement capability and contract management are markedly worse than those across the Australian Government as a whole. That said, it must also be acknowledged that the level is not always high.

Despite the substantial efforts made by both agencies to improve procurement processes, guidance and training over the Review period, there is scope for further improvement in procurement processes, capability and contract management. This will, however, require further changes at both the agency and whole-of-government level.

Procurement: Initial Steps

Limited tender and single supplier approaches

A key decision taken when initiating a procurement is the method to be used. There are two procurement methods available under the CPRs: open tender and limited tender.

Commonwealth Procurement Rules: Definitions

“*Open tender* involves publishing an open approach to market and inviting submissions. This includes multi-stage procurements, provided the first stage is an open approach to market.



Limited tender involves a relevant entity approaching one or more potential suppliers to make submissions, when the process does not meet the rules for open tender”.

Source: *Commonwealth Procurement Rules 2022*

Open tender allows for increased competition in procurement processes, which makes it more likely that value for money is achieved. While limited tenders may be less competitive overall, they are an essential procurement tool including when:

- competition is restricted or absent from the market
- there is an urgent need for the procurement
- the procurement is low value and low risk
- the nature of the procurement would preclude an efficient outcome via open tender

Limited tenders do, however, have downsides. For example:

- it may be more difficult to secure and demonstrate value for money
- they are less transparent
- they do not offer every current vendor the opportunity to tender
- they do not encourage competition

When assessing the 95 procurements in scope for the review in accordance with the CPR definitions, the Taskforce found:

- 44 were classified as open tender (46 per cent of the procurements, or \$555 million in value)
- 51 were classified as limited tender (54 per cent of the procurements, or \$63 million in value)

This is a slightly higher rate of limited tender compared to the APS overall. Analysis of AusTender data by the ANAO showed that the reported use of open tender procurement

methods across the APS was approximately 54 per cent in 2021-22. This is an increase from approximately 45 per cent across the APS in 2017-18.³

In reality, the reliance on single source or limited tender procurements is much greater than the above data suggests, and the degree of competition applied in procurements is lower than may be thought, because of the way the different categories of procurements are defined.

Procurements from panels that were established by an open tender are subsequently classified as open tender regardless of how many suppliers are approached, or how long the period since the panel was established. The Taskforce uses the term 'single supplier approach' as a better description and that is being used by the Reviewer as well.

Commonwealth Procurement Rules: Paragraph 9.13

"Officials should report the original procurement method used to establish the standing offer when they report procurements from standing offers."



Source: *Commonwealth Procurement Rules 2022*

The Taskforce found that of the 95 procurements, 74 (78 per cent), with a combined value of approximately \$472 million (76 per cent of the total value across the 95 procurements), were undertaken using a single supplier approach (i.e. only one supplier was approached through *either* an open tender (25) or limited tender procurement method (49).⁴ Of the 74 single supplier approaches, 51 (69 per cent) were from a panel with only one supplier.

The result is reduced transparency, less competition, less equitable treatment of vendors, and reduced clarity in the procurements undertaken. It is harder to demonstrate value for money using a single supplier approach, and value for money is in itself likely harder to achieve. Accordingly, their use needs to be justified and properly documented. The Reviewer also considers that this makes them poorly suited to large tenders and/or high risk tenders.

Additionally, there were a number of the procurements (both single supplier and otherwise) that led to multiple subsequent procurements, and/or a series of variations to increase the size and scope of the initial procurement. While there may be sound business reasons for this, they may result from a too convenient relationship between agencies and suppliers, and produce a compatibility, which undermines competition and increases inequitable treatment of suppliers.

When combined with often poor or sometimes absent or missing documentation in key procurements, it is impossible to assess whether value for money was achieved and (in some cases) even sought.

Finally, some of the limited tenders analysed show signs of urgency that seemed more contrived than necessarily real. Better planning and the absence of such a convenient fall back might have seen procurements undertaken through a more competitive approach

³ Australian National Audit Office, Submission No 12 to Joint Committee of Public Accounts and Audit, *Commonwealth procurement: Inquiry into Auditor-General Reports 6, 15, 30, 42 (2021-22) and 5 (2022-23)* (2 February 2023) p 7, para 30.

⁴ This includes instances where the procurement was from a single supplier panel.

(approaching multiple suppliers through open or limited tender approaches) and a more comprehensive value for money assessment.

Limited tenders do have a significant role to play in procurements, but application of Paragraph 10.3b of the CPRs should be restricted to genuinely demonstrated and documented urgent procurements.

Commonwealth Procurement Rules: Paragraph 10.3b

“10.3 A relevant entity must only conduct a procurement at or above the relevant procurement threshold through limited tender in the following circumstances:”



“b. When, for reasons of extreme urgency brought about by events unforeseen by the relevant entity, the goods and services could not be obtained in time under open tender.”

Source: *Commonwealth Procurement Rules 2022*

Under the NDIA procurement policy, the Branch Manager of the Procurement and Corporate Services Branch is required to approve the procurement method for all Division 2 procurements (including the use of paragraph 10.3b). This was introduced in 2019. Similarly, SA updated its AAIs in mid-2022 to require limited tenders that use paragraph 10.3b to require sign off by its Procurement Branch. These are steps in the right direction.

Recommendation 1

The NDIA and SA tighten up the use of limited tenders justified by claims of urgency and closely monitor the extent of their usage including requiring clear, fully documented justification for the decision.



Recommendation 2

The agencies should require the use of limited tender or single supplier procurements to be justified and fully documented. They should also require a particularly compelling justification when limited tenders or a single supplier approach are used for procurements that may trigger a subsequent chain of procurements.



The above recommendations are not designed to make limited tenders impossible to use, or limit their justifiable use. They are, however, intended to limit their usage on an ‘urgency’ basis to genuinely unavoidable matters, to ensure better documentation and avoid limited tenders and single supplier procurements that may advantage a long term incumbent at the start of a series of procurements. Other justifications for limited tender will remain, such as where a limited tender is of low value and risk or when the goods and services can be supplied only by a particular business and there is no reasonable alternative or substitute.

Transparency

Officials can seek quotes from a wide range of suppliers in procurements, whether through an open or limited tender process or through an existing standing offer. There are circumstances where officials may choose to approach a narrower field of suppliers because it could be simpler and more efficient, and less burdensome to the agency and vendors as a whole. However, this may also result in procurements that are less open, less fair, potentially discriminating in some circumstances and that advantage long-term incumbents or favoured participants.⁵

Small tender fields may be appropriate in certain circumstances. However, there would be more transparency and less likelihood of repeated single supplier approaches with the same supplier if the number of suppliers approached was made public. This would not prevent small or single source procurements. It would, however, allow the judgements to be more transparent and, if necessary, more easily tested.

The Department of Finance has advised the Reviewer that they intend to introduce a requirement to publish the number of suppliers invited to submit quotes for a procurement as part of its forthcoming update to AusTender. This proposal has previously been raised by the Auditor-General.⁶ Including data around the number suppliers invited to submit quotes for major procurements in the agency's annual report would allow the regularity of the approach to be easily monitored.

The Reviewer supports the proposal and suggests that the NDIA and SA put arrangements in place to adopt such a system as soon as possible, noting that the AusTender changes will not necessarily impact the NDIA as it is not required to publish or report on AusTender.

Recommendation 3

The NDIA and SA should publicly report on the number of suppliers invited to respond for each procurement through their websites. Reporting for SA could occur through AusTender, when the Department of Finance introduces this functionality. Data for procurements above a certain threshold should be included in the Annual Report.



In light of the value of procurements generated across the Australian Government, the Reviewer considers that the changes to AusTender should be a high priority for the Department of Finance.

⁵ ANAO, *Procurement of Delivery Partners for the Entrepreneurs' Programme*, ANAO, Australian Government, 2022.

⁶ Department of Finance, Submission No 11 to Joint Committee of Public Accounts and Audit, *Commonwealth procurement: Inquiry into Auditor-General Reports 6, 15, 30, 42 (2021-22) and 5 (2022-23)* (2 February 2023) p 11.

Conflict of interest

Under the APS Code of Conduct, which is set out in the *Public Service Act 1999*, all APS employees must:

- 'take reasonable steps to avoid any conflict of interest (real or apparent) in connection with the employee's APS employment; and
- disclose details of any material personal interest of the employee in connection with the employee's APS employment.'⁷

In addition, the NDIA and SA require agency heads and Senior Executive Service (SES) employees to submit, at least annually, a written declaration of their own and their immediate family's financial and other material personal interests.

These requirements are essential to ensure ethical decision making, including for procurement decisions.

Both agencies have policies and guidelines in place to ensure staff are aware of their obligations in relation to declaring, documenting and managing conflicts of interest in accordance with these requirements.

Additionally, NDIA and SA staff participating in a procurement process are also required to declare, document and manage actual, potential or perceived conflicts of interest as part of the procurement process. SA requires that separate conflict of interest declarations be made for any procurement over \$10,000, whereas the NDIA requires a separate conflict of interest declaration to be made for any procurement above \$1 million, or when a procurement is deemed to be complex in nature. This ensures conflict of interest declarations are captured and current at the time a procurement is initiated.

Despite these requirements, around half of the 19 procurements flagged by the Taskforce as requiring further investigation did not appropriately document or maintain records of conflicts of interest. These 10 procurements had a total value of approximately \$235 million. As a result, some conflicts of interest in relation to procurements were not adequately managed by the NDIA and SA. Over time, internal processes and procedures show improvement, as indicated in the documentation of the procurements conducted more recently. However, there is still some way to go.

One way to help ensure conflicts of interest are better managed is to require all staff involved in a procurement process to explicitly declare conflicts at the start of the process, and to update them for any change during the process. This should help bring home the requirement in a way that the current requirements do not, and is a very useful way to focus participants' minds on the subject.

Recommendation 4

The NDIA and SA require all staff involved in a procurement process to declare any conflict of interest – actual, potential or perceived – at the start of the process, to update it as necessary during the procurement, and that the declaration be recorded and retained as an important part of tender documentation.



⁷ *Public Service Act 1999*, s 13(7).

Procurement: Decision Making

Approvals

The approval/sign off by both the evaluation panel chair and financial delegate is an important part of the process because it sets the accountability for the decision and outlines the factors that went into it (the 'who' and the 'why'). This enables an external party (for example, as part of a review or an audit) to better understand how and why the decision was made. Without this clarity, accountability is weakened, perhaps substantially.

Both agencies require sign offs that the procurement is value for money, and an indication of the reasons for the choice of supplier. However, the procurement documentation that supports delegate decisions varies in form and content, and some is limited in specifying the factors considered in value for money assessment. The Taskforce found that value for money justifications were occasionally perfunctory and sometimes lacking in detail around fitness for purpose, a potential supplier's relevant experience and whole of life costs.

The agencies would benefit from reviewing their procurement templates to ensure that they are clear and unambiguous, and that they require all factors taken into account in assessing value for money and the tender decision to be clearly specified. These factors may include government policy and any stakeholder views received during the process that were taken into account in the decision.

That should also help more clearly focus the procurement team officials and the decision maker on their obligations and responsibilities.

Recommendation 5

The NDIA and SA review and, as necessary, modify their procurement approval templates to ensure they provide clarity as to the factors that are taken into account in determining value for money and the preferred tenderer, and are clear about the obligations of the signatories.



Probity and legal and 'industry' advice

To ensure the defensibility, transparency and success of procurement processes, appropriate probity and legal support is necessary.

Many of the procurements reviewed by the Taskforce included probity and legal process advice to at least some degree, although it has not been easy to assess the extent of it. Eleven (58 per cent) of the 19 procurements flagged for further investigation had probity or legal process advice in place (approximately \$341 million in value), although eight procurements (42 per cent), with an approximate value of \$33 million, did not. External probity and legal advisors were included in five of the 11 procurements.

Probity and legal process advice should be available on all procurements to minimise the risk of poor outcomes. If the procurement is straightforward and low value and/or risk, the probity and legal advice needed would be very minimal. If it's not, or if the procurement becomes more complex, it would be advantageous to have probity and legal process advice from the start and throughout the procurement.

As noted above, the use of external probity and legal process advisors was quite reasonably much less common. However, large and/or high risk procurements are likely to benefit from external support. Although it adds to cost, that is usually small compared to the size of the procurement, the implications of the risks involved and the result of not having appropriate support. External probity and legal process advisors do have the ability to significantly strengthen procurement outcomes as seen in some procurements the Taskforce analysed and in ANAO reports.⁸

Recommendation 6

- a) The NDIA and SA should review their requirements in relation to probity and legal advice, to ensure that internal advice is available for all procurements, and is used on all procurements over a certain value, risk, and/or complexity threshold, external probity and legal advice should be considered for all complex high risk and/or high value procurements, with the final decision on whether to use advice made and declared by the decision maker.
- b) The NDIA and SA should also consider using an independent adviser on large, complex and high risk procurements.



Implementing this recommendation will require agencies to establish a decision making matrix that helps determine when to engage external probity and legal process advice based on levels of complexity, price and risk for a particular procurement. Should it be decided not to use the suggested advice, the reason should be documented.

There are times when other forms of external support and advice may help produce a better procurement outcome and better value for money results. For example, the use of external advisers who understand the relevant industry and ways to get the best outcome from the acquisition of a good or service is common on large procurements, including for the Department of Finance and Department of Defence.

They would not be regularly used, but may be invaluable on large, complex and/or higher risk procurements. They would be best included from the start of the procurement to the final negotiations of a contract.

There would be a cost involved but, compared with the size of the procurements, it would be minimal. Claims from inside the agency that it already has the necessary expertise to play this role should be scrutinised carefully.

Record keeping

Record keeping is an essential part of a successful procurement that:

- ensures transparency and accountability
- provides information on all aspects of the process, including securing value for money and demonstrating it has been secured, and
- provides the basis for ensuring and demonstrating that the procurement process was consistent with the CPRs.

⁸ ANAO, *Procurement of Delivery Partners for the Entrepreneurs' Programme*.

Records should be comprehensive, comprehensible and accessible. They are, however, the Achilles' heel of procurements across the Australian Government, as addressed in recent ANAO reports and the ANAO's submission to the recent Joint Committee of Public Accounts and Audit (JCPAA) inquiry into Commonwealth procurement.⁹

Both the NDIA and SA have made substantial efforts to improve record keeping for procurements. The NDIA has established a team that includes monitoring and regular reviews of procurements and helps ensure that documentation is properly prepared and filed. SA has already established a suite of procurement and contract management templates, and is developing further templates for evaluation plans, reports and spending proposals to ensure consistency and best practice.

These improvements made the analysis of more recent procurements easier than for some of the early ones. That said, records remain imperfect, evaluation committees often seem to consider them an impediment, and considerable effort was required to find some records. Moreover, even after additional searching, major gaps in records remained. The Taskforce found that over one-third of the procurements identified for further review, with an approximate value of \$229 million, did not have sufficient documentation and records in place to meet the requirements under paragraphs 7.2-7.5 of the CPRs. That is a poor result.

Commonwealth Procurement Rules: Paragraphs 7.2 – 7.5

7.2 Officials **must** maintain for each procurement a level of documentation commensurate with the scale, scope and risk of the procurement.



7.3 Documentation should provide accurate and concise information on:

- k. the requirement for the procurement;
- l. the process that was followed;
- m. how value for money was considered and achieved;
- n. relevant approvals; and
- o. relevant decisions and the basis of those decisions.

7.4 Relevant entities must have access to evidence of agreements with suppliers, in the form of one or a combination of the following documents: a written contract, a purchase order, an invoice or a receipt.

7.5 Documentation **must** be retained in accordance with the Archives Act 1983.

Source: *Commonwealth Procurement Rules 2022*

⁹ Australian National Audit Office (ANAO), *Procurement by the National Capital Authority*, ANAO, Australian Government, 2022, *Procurement of Delivery Partners for the Entrepreneur's Programme*; Australian National Audit Office, Submission No 12 to Joint Committee of Public Accounts and Audit, *Commonwealth procurement: Inquiry into Auditor-General Reports 6, 15, 30, 42 (2021-22) and 5 (2022-23)* (2 February 2023).

Recommendation 7

The NDIA and SA should review the adequacy of their current record keeping arrangements, and their plans to improve them, in light of the findings of the report.



Expansion of scope and scale

A number of the procurements analysed by the Taskforce began with a small procurement leading on to much larger procurements. They often included several extensions of scope alongside significant additional resources for the existing procurement. Six of 11 variations increased the value of the contract by 200 per cent or more.

These changes may have been appropriately justified in dealing with the evolving demand/needs of the procurement. That said, they may also indicate poor or deficient procurement procedure and/or perhaps too close a 'relationship' with the existing supplier. If either of these factors plays a role, the procurement is unlikely to deliver genuine value for money.

Regardless of the cause, there should be a point at which the overall procurement is considered at a more senior level in the organisation than the original decision maker (including by the agency's CEO). Moreover, all options for the future of the procurement should then be on the table.

The Department of Finance has advised the Reviewer that AusTender will be further developed to provide a signal to agencies when a contract has been varied a number of times. The Reviewer considers such a change well worth introducing, and that the agencies should support it. If the Department of Finance does not introduce this change, it should be done within the individual agencies.

Recommendation 8

The NDIA and SA CEOs support the introduction of an AusTender change to provide advice to agencies when a contract has been varied a number of times. As the NDIA does not report on AusTender, it should develop its own system. If the change is not introduced as a priority, then SA should develop its own system as well.



Again, in light of the value of procurements involved, the Reviewer considers this should be a priority for the Department of Finance.

Procurement: The Underpinnings

Perhaps the most important underpinning of good procurement processes and value for money outcomes are the skills of the officials undertaking the procurements, and of their advisers. Both the NDIA and SA have moved to introduce and expand training programs for officials. Better training is essential to better procurement across the APS as a whole.

The procurements reviewed by the Taskforce and external consultations suggest that team members sometimes have little, if any, experience in procurement, and limited understanding of how to secure value for money.

Many of the procurements reviewed were complex; some had multiple shortcomings and/or were significantly inconsistent with good practice and the CPRs. It is hard to see that this will significantly and sustainably improve without several of the changes recommended in this review, including better training and in some respects, making it mandatory.

Procurement officials will be more effective in discharging their duties if they have undertaken procurement training. Evaluation team chairs will be similarly more able if they have participated in a number of procurements before they become a chair.

It is also desirable that decision makers have undertaken procurement training, but it is not always essential. They are there to provide the benefits of judgement and experience.

Recommendation 9

The NDIA and SA should review the adequacy of their procurement training programs, and their officials' procurement experience, and enhance them as necessary. They should also require specified levels of training and experience for procurement team members and procurement team chairs.



Procurement Partnering

Both agencies have procurement partnering in place.

Services Australia has recently undergone a restructure to bring the Technology Sourcing Branch alongside the Procurement Branch, under the Chief Financial Officer. This structural change brings the agency's procurement functions into a centralised place, and provides greater alignment between the agency's ICT procurement and other procurement processes. SA requires all proposed procurement activities above \$10,000 to be reviewed and supported by the Procurement Branch or Technology Sourcing Branch. Internal SA policies and procedures require certain procurements to be endorsed by the National Manager of the Procurement Branch or the National Manager of the Technology Sourcing Branch.

The NDIA requires business areas to work with the Procurement Business Partner for procurements valued at \$100,000 or more. The Procurement and Corporate Services Branch then works with business areas to provide templates, guidance and advice to manage the procurement process. NDIA procurements valued over \$400,000 require endorsement from the Procurement and Corporate Services Branch Manager.

The procurement partnering model has the ability not just to provide contacts and occasional advice, but to add substantial value and better manage risk. This is consistent with the emphasis the ANAO puts on establishing a central procurement unit, and the role it might play inside an agency.

Contract Management

Although the Review is not directed to the subject of contract management, it is the Reviewer's conclusion that the shortcomings in procurements are matched by shortcomings in contract management. Indeed, some of the series of procurements seem to, in turn, reflect failures of contract management.

For example, a substantial contract for three and a half years was terminated after just nine months, and replaced with a number of incremental contracts reflecting a complete change in delivery approach, with impacts on the value for money assessment.

In another example, a procurement was commenced under an existing panel arrangement, and subsequent procurements undertaken under a different deed. However, contract information was copied across incorrectly from the initial procurement documentation, or not properly amended in the subsequent procurement documentation. Not taking care in the detail of these spending proposals led to unclear and misleading documentation, reflecting poor management overall.

Finally, value for money is only realised through the contract that results, and not from the procurement per se. That makes good contracts and good contract management – things sometimes forgotten – essential.

Additional efforts to improve procurements should also be reflected in efforts to improve contract management. Some thoughts on this are continued in the next section of the Report.

Stakeholder management

Finally, it is important that various stakeholders, including senior members of the APS, Ministerial advisers and Ministers understand the way the CPRs and the PGPA Act designate responsibility. Specifically, the CPRs are unambiguous in that they are directed at officials, and it is officials that set, shape, undertake, decide on and manage the procurement. The PGPA Act does the same. This requirement applies unless the Government specifically determines otherwise.

Ministers and Ministerial advisers are, for example, not precluded from expressing views and interests but, if they are taken into account in the assessment of value for money between vendors or the procurement method chosen, that needs to be recorded. Ministers and ministerial advisers are not able to direct officials as to procurement outcomes. The same applies to senior officials in the agency or in the APS more generally.

It is important that agencies brief Ministers, especially incoming Ministers, on the role of officials under the CPRs, and the requirements around them. However, neither the NDIA nor SA specifically briefed incoming Ministers on procurement processes at or around the time of the incoming government in the last three elections. The Reviewer considers most departments and agencies are likely to be in a similar position. Early briefing would help establish shared understanding of procurements and their responsibilities. This should also apply to Ministerial advisers. Similarly, senior agency officials and other members of the APS should also be advised. A refresher of these accountabilities for agency officials would also be worthwhile.

Recommendation 10

The NDIA and SA brief incoming Ministers on the CPRs and the PGPA Act, which set the role of officials as those who undertake and decide on procurements. Senior agency officials be similarly advised.



Ministers could be briefed as part of a wider conversation about the engagement of Ministers and ministerial staff with officials.

Officials and Appropriate Conduct

The Review's Terms of Reference included reference to misconduct in the procurements reviewed. The Taskforce investigation did not find examples of clear misconduct in the procurements. However, it did find a few examples of what the Reviewer considers to be behaviour that appears well below the standard usually expected of members of the APS. That is disappointing. While the Review does not have the power to conduct further investigation of these behaviours, the Reviewer suggests that the CEOs of the NDIA and SA consider their options for further investigation.

Part II: The Australian Government as a whole

In the first section of the Report (pp. 5-17), the Taskforce findings in relation to the NDIA and SA procurements suggest that the two agencies procurement processes are capable of further improvement. This is despite the significant steps taken by both agencies over, particularly, the past few years to improve procurement processes, and to expand the guidance provided to and improve the capability of, their staff.

Further, the two agencies' procurement experiences and outcomes are far from unique across the Australian Government. ANAO reports over at least the last decade or so have highlighted similar scope for improvement, and opportunities for improvement, whether they have been reviewing individual agencies/departments or groups of them. This is also despite departments and agencies across the Australian Government improving processes and building capability. Finally, it is also despite the Department of Finance making CPRs generally easier to use, and providing additional support and guidance.

Growth in the value and complexity of goods procured, along with the growing reliance of the Australian Government on procuring from Australian and international business, may explain some of the continued problems faced, and the indifferent outcomes of some procurements.

For example, in 2021-22, all contracts published on AusTender had a combined value of \$80.5 billion – more than double than in 2012-13 (where all contracts had a combined value of \$36.5 billion).¹⁰

The Reviewer considers that procurement outcomes and enhanced value for money will not be achieved by improved processes and capability at the department/agency level alone, no matter how energetically, how vigorously and how expensively they were to be pursued. Instead, it also needs a whole-of-government approach including professionalisation of the procurement capability, changes to the CPRs, and clearer identification of accountabilities. The recommendations in this section are, accordingly, directed primarily at the Australian Government and APS leadership.

Procurement professionalisation

While better processes, improved capability and enhanced support from the Department of Finance have made some procurements easier, the procurement environment seems harder over all, nullifying much (if not all) of those improvements.

For over two decades the Reviewer has been a keen student of ANAO performance audit reports. The reports on procurement seem to continually throw up the same or similar challenges, in similar areas. The problems overall don't go away. For every agency that improves its procurement outcomes, there seems to be another that goes backward.

The Reviewer's conclusion is (somewhat reluctantly) that if the Australian Government is to seriously improve procurements it requires action at the whole-of-government level.

¹⁰ Statistics taken from AusTender, data collated and provided by Services Australia Procurement Branch.

The Independent Review of the Australian Public Service (the Thodey Review) made a number of recommendations about professionalisation. Some of those are already in train. Others are yet to be considered. In particular, the Thodey Review suggested the use of ‘the professions model and APS learning and development strategy to build service wide capability in procurement, contracting and commissioning’.¹¹ At present, the APS has 3 professional streams, all introduced in 2019-20 – the Human Resources, Digital and Data Professions.¹² This Review proposes to add a fourth.

The ANAO has also previously suggested that introducing a procurement professional stream within the APS could improve capability and outcomes in public-sector procurement.¹³ A professional stream presents the opportunity to increase procurement knowledge and experience, as well as attract professionals to the APS and help encourage their retention. The Department of Finance is currently working towards developing professionalisation pathways for both procurement officers and contract management officers.¹⁴ These steps are also important.

The Reviewer endorses these conclusions and the emphasis on both procurement and contracting. The Reviewer recommends that the CEOs of the NDIA and SA support whole-of-government change along these lines. This should come out of the public sector reform work underway, led by Dr Gordon de Brouwer as Secretary for Public Sector Reform and this needs to be fully supported by the Department of Finance and the APSC. The current work underway in the JCPAA on procurements may also become relevant in due course.

Recommendation 11

That the CEOs of the NDIA and SA support the professionalisation of procurement along the lines recommended in the Thodey Review, and this be included in the Public Sector Reform Agenda.



¹¹ Commonwealth of Australia, *Our Public Service, Our Future: Independent Review of the Australian Public Service*, Australian Government, 2019, p 268.

¹² Australian Public Service Commission (APSC), *APS Professional Streams*, apsc.gov.au, 2022.

¹³ Australian National Audit Office, Submission No 12 to Joint Committee of Public Accounts and Audit, *Commonwealth procurement: Inquiry into Auditor-General Reports 6, 15, 30, 42 (2021-22) and 5 (2022-23)* (2 February 2023) p 13-14.

¹⁴ Department of Finance, Submission No 11 to Joint Committee of Public Accounts and Audit, *Commonwealth procurement: Inquiry into Auditor-General Reports 6, 15, 30, 42 (2021-22) and 5 (2022-23)* (2 February 2023) p 14.

Potential enhancements to the CPRs

The CPRs have been regularly refreshed over the last decade. This has included, among other things, updates to reflect changes in policy and to address ANAO recommendations. The key basis of the CPRs, however, has not changed:

- value for money at the core
- engaging competition
- a non-discriminatory approach
- ethical behaviour by officials
- accountability and transparency by officials
- record keeping to validate the value for money decision, hold officials to account, and allow a subsequent reviewer the ability to assess the decision.

Finally, the CPRs and the relevant section of the PGPA Act are directed at officials – they undertake the procurements, they make the decisions, they are required to follow the CPRs, and they are accountable for every aspect of the procurement process and outcome. A change in that clear direction would require a government decision.

While the CPRs are directed at officials, other stakeholders may also have an interest in the outcome and are able to provide views, advice, etc. to the procurement officials. However, under the current CPRs, they are not able to direct the officials to reach certain conclusions on the procurement type, process or the outcome – indeed on any aspect of the procurement.

If the views of stakeholders are taken into account in determining any aspect of procurements, this should be recorded in procurement documentation. Similarly, if underlying government policy influences an outcome, this should also be recorded.

Should any stakeholder seek to direct aspects or outcomes of a procurement, this should be done in writing and the determination published on the department's/agency's website along with details of the completed procurement. The Reviewer acknowledges that this is likely to be very rare, and limited to significant issues relating to government policy.

Recommendation 12

- a) That the CPRs be amended to explain the deterministic role of officials and that they preclude Ministers, ministerial advisers and senior officials from directing officials in relation to procurements.
- b) Should a stakeholder seek to direct aspects or outcomes of a specific procurement, this should be documented and published on the agencies' website along with details of the procurement outcomes. Should there be a government decision, that would also be documented and published.



Part I of the Report discussed and supported two proposed changes to AusTender to improve transparency. These should be supported at the whole-of-government level.

Briefing stakeholders

The issue of briefing Ministers on the question of the PGPA Act, CPRs and the role of officials was also raised in Part I of this Report. This should also be done for governments as a whole, perhaps by the Department of Finance or as a component of Incoming Government Briefs. While not the most immediate or important issue an incoming Minister will have to address, it is an important part in their understanding of their portfolio and their responsibilities.

Recommendation 13

The CEOs of the NDIA and SA support the briefing of Ministers on procurement and the role of officials as part of the Department of Finance Induction for Federal Parliamentarians. This should also be done by individual agency heads as a component of their Incoming Government Briefings, among other things.



Handling the report

The Report was commissioned by the CEOs of the NDIA and SA and it is accordingly a report to them. However, the Terms of Reference also state that ‘a copy of the report, or part of the report, may be provided to other agencies, where it raises issues relevant to their functions or activities.’

The Reviewer considers that the report would be of broader use, in the context of procurement reform and public sector reform, more generally. The whole-of-government recommendations would be particularly relevant, but so may other parts of the report.

The Reviewer considers that the Report should be circulated to at least selected agency heads with a view to it being able to play a role, albeit a small one, in the public sector reform work that is currently underway and in the continuing task of improving APS procurement overall.¹⁵ The Reviewer has not made a specific recommendation in this regard and is happy to rely on the two agency heads to reach their own judgement.

¹⁵ Senator the Hon K Gallagher and The Hon J Collins MP, [A Better Deal for Australian Businesses Under Commonwealth Contracts](#). [media release], 1 July 2022.

List of recommendations

Recommendation 1

The NDIA and SA tighten up the use of limited tenders justified by claims of urgency and closely monitor the extent of their usage including requiring clear, fully documented justification for the decision (*page 8*).

Recommendation 2

The agencies should require the use of limited tender or single supplier procurements to be justified and fully documented. They should also require a particularly compelling justification when limited tenders or a single supplier approach are used for procurements that may trigger a subsequent chain of procurements (*page 8*).

Recommendation 3

The NDIA and SA should publicly report on the number of suppliers invited to respond for each procurement through their websites. Reporting for SA could occur through AusTender, when the Department of Finance introduces this functionality. Data for procurements above a certain threshold should be included in the Annual Report (*page 9*).

Recommendation 4

The NDIA and SA require all staff involved in a procurement process to declare any conflict of interest – actual, potential or perceived – at the start of the process, to update it as necessary during the procurement, and that the declaration be recorded and retained as an important part of tender documentation (*page 10*).

Recommendation 5

The NDIA and SA review and, as necessary, modify their procurement approval templates to ensure they provide clarity as to the factors that are taken into account in determining value for money, and are clear about the obligations of the signatories (*page 11*).

Recommendation 6

a) The NDIA and SA should review their requirements in relation to probity and legal advice, to ensure that internal advice is available for all procurements, and is used on all procurements over a certain value, risk, and/or complexity threshold, external probity and legal advice should be considered for all complex high risk and/or high value procurements, with the final decision on whether to use advice made and declared by the decision maker (*page 12*).

b) The NDIA and SA should also consider using an independent adviser on large, complex and high risk procurements (*page 12*).

Recommendation 7

The NDIA and SA should review the adequacy of their current record keeping arrangements, and their plans to improve them, in light of the findings of the report (*page 14*).

Recommendation 8

The NDIA and SA CEOs support the introduction of an AusTender change to provide advice to agencies when a contract has been varied a number of times. As the NDIA does not report on AusTender, it should develop its own system. If the change is not introduced as a priority, then SA should develop its own system as well (*page 14*).

Recommendation 9

The NDIA and SA should review the adequacy of their procurement training programs, and their officials' procurement experience, and enhance them as necessary. They should also require specified levels of training and experience for procurement team members and procurement team chairs (*page 15*).

Recommendation 10

The NDIA and SA brief incoming Ministers on the CPRs and the PGPA Act, which set the role of officials as those who undertake and decide on procurements. Senior agency officials be similarly advised (*page 17*).

Recommendation 11

That the CEOs of the NDIA and SA support the professionalisation of procurement along the lines recommended in the Thodey Review, and this be included in the Public Sector Reform Agenda (*page 19*).

Recommendation 12

a) That the CPRs be amended to explain the deterministic role of officials and that they preclude Ministers, ministerial advisers and senior officials from directing officials in relation to procurements (*page 20*).

b) Should a stakeholder seek to direct aspects or outcomes of a specific procurement, this should be documented and published on the agencies' website along with details of the procurement outcomes. Should there be a government decision, that would also be documented and published (*page 20*).

Recommendation 13

The CEOs of the NDIA and SA support the briefing of Ministers on procurement and the role of officials as part of the Department of Finance Induction for Federal Parliamentarians. This should also be done by individual agency heads as a component of their Incoming Government Briefings, among other things (*page 21*).

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