The Financial Management Guidance series of publications

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No. 3 Guidance on Confidentiality in Procurement.


No. 7 Guidelines for the Management of Special Accounts, October 2003.

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No. 4  *Commonwealth Authorities and Companies Legislation*, February 2006.


No. 6  *Handbook of Cost-Benefit Analysis*, January 2006.

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1 Purpose

1.1 The Commonwealth Procurement Guidelines (CPGs)\(^1\) set out the Australian Government’s requirements for publishing information relating to the procurement of property or services. These include requirements for annual procurement planning, public notification of opportunities and reporting of contracts awarded. AusTender\(^2\) is the Australian Government’s central location for publication and reporting of information relating to procurement activity.

1.2 This guidance applies to departments and agencies subject to the Financial Management and Accountability Act 1997 (FMA Act) and to relevant Commonwealth Authorities and Companies Act 1997 (CAC Act) bodies\(^3\) (agencies). For relevant CAC Act bodies, publishing and reporting requirements set out in this guidance only apply to covered procurements (as defined in the CPGs).

1.3 This guidance has been developed to assist agencies to implement procedures which meet procurement publishing requirements and includes:

- principles for determining the information that needs to be published; and
- explanations of the specific requirements.

What this Guidance does not Address

1.4 This guidance does not provide detailed information on how agencies should enter data in AusTender. This is addressed in the AusTender Agency User Guide\(^4\).

1.5 These requirements relate to procurement and not to any other form of expenditure of public money (for example: grants, loans or investment).

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\(^1\) Available from www.finance.gov.au (under Government Finances menu)

\(^2\) www.tenders.gov.au

\(^3\) Relevant CAC Act bodies are those bodies listed in schedule 1 to the Commonwealth Authorities and Companies Regulations 1997.

\(^4\) Available to registered agency users from the AusTender website www.tenders.gov.au
2 The Government’s Policy

2.1 The Australian Government is committed to ensuring accountability and transparency in its procurement activities.

2.2 Accountability and transparency support the efficient, effective and ethical use of Commonwealth resources. Accountability means that officials are responsible for the actions and decisions that they take in relation to procurement and for the resulting outcomes.

2.3 Transparency enables scrutiny of procurement activity to provide assurance that procurement processes undertaken by agencies are appropriate and consistent with the financial management framework. Transparency is facilitated through publishing information relating to agencies’ procurement activities, both approaches to market and contracts awarded.

2.4 The CPGs require agencies to publish on AusTender:
   • an Annual Procurement Plan containing information about planned procurement;
   • details of all open approaches to the market (to the extent practicable, all related documents must also be available for download from AusTender); and
   • details of Commonwealth contracts and agency agreements (including standing offer arrangements).

2.5 This guidance advises how these requirements are to be met.
3 Annual Procurement Plans

Policy

3.1 An Annual Procurement Plan (APP) is a mandatory feature of the procurement policy framework. It is a tool that facilitates early procurement planning and draws potential suppliers’ early attention to agencies’ planned procurement for the forthcoming financial year.

3.2 Australian Government policy requires agencies to publish an APP on AusTender by 1 July each year. An agency may publish its APP at an earlier date, but no earlier than 1 June. APPs may have an outlook that is greater than the mandatory 12 months as long as a new APP is published annually.

3.3 For relevant CAC Act bodies the requirement to publish an APP only applies to covered procurements.

3.4 If a covered procurement is published as a planned procurement in an APP, the CPGs allow an agency to reduce the submission time frame for that procurement to less than the standard 25 day time limit but no shorter than 10 days, provided reasonable time is still available for potential suppliers to prepare their submissions.

3.5 Agencies that do not anticipate any covered procurements may publish an APP based on any other procurement that would benefit from the early notice provided by an APP.

3.6 If agencies have no significant procurements planned in the forthcoming year, they should provide either an APP with no detail of planned procurement or a notice on AusTender that they expect to have no significant procurements over the coming year.

3.7 Agencies may also publish their APP on the agency website or establish a link to the APP on AusTender on the agency website, to enhance visibility of the plans.

3.8 The CPGs allow an agency Chief Executive to choose not to publish an APP or not to publish details of a procurement in an APP where publication of such information may pose a risk to essential security interests.

3.9 Agencies and potential suppliers should be aware that an APP is a planning document and that strict adherence to information contained in an APP is not expected.

Details to be Published

3.10 An APP should cover planned strategic and key procurements for the forthcoming financial year (1 July to 30 June). Focus should be on major and key initiatives, whether cyclical or one-off.
3.11 An APP must contain a short strategic procurement outlook for the agency, supported by details of any planned procurement. The detail should include the subject matter of any planned procurement, the estimated date of publication of the approach to market and how to obtain request documents.

3.12 Agencies determine the level of information that they will include in their procurement plans to meet their disclosure requirements and encourage competition whilst maintaining the integrity of information. It is a matter of judgement, for agencies, as to what anticipated procurements to include.

**Strategic Procurement Outlook Statement**

3.13 Each agency must prepare a concise strategic procurement outlook statement for the forthcoming financial year. The statement should broadly discuss any key, major or strategic initiatives from which the agency expects procurements to arise. An agency may wish to prepare more than one strategic procurement outlook statement, for example along business lines or procurement activity, to enhance the effectiveness and usefulness of the plans for suppliers. For example, strategic procurement outlook statements could be prepared for each of: corporate, legal, and information and communications technology.

**Detail of Planned Procurement**

3.14 Each agency must prepare details of their planned procurements, including:
   - detail of the subject matter of the procurement;
   - estimated date of the approach to the market or the timeframe within which it will occur; and
   - the procedure to obtain request documents.

3.15 There are no value thresholds for inclusion of a procurement in an APP. It is a matter of judgement, for agencies, as to what anticipated procurements to include. The APP is intended to draw potential suppliers’ early attention to potential procurement opportunities, particularly major projects.

3.16 There are a number of factors an agency may wish to consider when deciding which procurements to publish in the APP. These may include:
   - information that would add value to the agency’s relationships with industry, potential suppliers and contractors;
   - the level of meaningful information available;
   - whether the agency wishes to have the option to reduce time limits for submissions;
   - the likely significance of the procurement;
   - the likely value;
• the likelihood of the procurement actually occurring; and
• the method of procurement.

Reduction in Time Limits

3.17 The CPGs prescribe minimum time limits for submission periods for covered procurements of not less than 25 days.

3.18 If a procurement is published as a planned procurement in an APP, and the following criteria are met, the CPGs allow for an agency to reduce the minimum submission time frame to not less than 10 days in lieu of the standard 25 day minimum time limit, provided reasonable time is still available for potential suppliers to prepare their submissions.

3.19 The criteria that must be met are that:
• the procurement is detailed as a planned procurement in an APP, which has been published more than 30 days and less than 12 months before the approach to the market; and
• the published details include:
  – a description of the procurement;
  – the estimated date of the approach to the market or the timeframe within which it will occur; and
  – the procedure to obtain request documents.

Reasonable Time Period

3.20 Despite the capacity to reduce time limits provided in the CPGs, an agency is responsible for ensuring that procurement processes are transparent and that any shortened time frame does not detract from the open competition aspect of the procurement process, nor the outcome.

Updating the APP

3.21 Following the publication of an agency’s APP, it is prudent to insert details of new planned procurements and amend or strike out inaccurate information to keep the APP current and to keep industry up to date.

3.22 The strategic procurement outlook statement should reflect thinking at a point in time and, unless there are significant or fundamental changes within an agency, it would not be necessary to update within the year.
4 Notification of Approaches to the Market

Policy

4.1 Notification of approaches to the market enhances an agency’s ability to achieve value for money by encouraging competition.

4.2 The CPGs require agencies to publish open approaches to the market on AusTender. Relevant documentation providing information on the request must also be available, to the extent practicable, for download from AusTender.

4.3 An agency may choose to publish these notices elsewhere after the notice is published on AusTender. For example, publishing a notice in the print media might be useful where potential suppliers are not likely to be regular suppliers to government. If the notice is published elsewhere, such as in print media, the details selected for inclusion in that notification must be identical to those contained in AusTender and should include a reference to AusTender. Advertising open approaches to the market through other avenues does not diminish the requirement to publish the approach on AusTender.

Open Approaches to the Market

4.4 An open approach to the market is an opportunity for any potential supplier that can meet the conditions for participation to compete for business with the Australian Government. Such opportunities include:

- requests for expressions of interest;
- requests for tender; and
- requests for application for inclusion on a multi-use list.

4.5 Notices of open approaches to the market must include:

- the name and contact information of the procuring agency;
- information necessary for a potential supplier to obtain all relevant documents relating to the procurement;
- a description of the procurement and conditions for participation;
- the address for the submission of responses (including whether they can be submitted electronically);
- the closing date and time for the submission of responses;
- the anticipated commencement date and duration of the contract;
- if the procurement is for a standing offer arrangement; and
- if other agencies may be able to access the procurement arrangement.

5 For relevant CAC Act bodies the requirement to publish extends only to covered procurements.
Notification of Multi-Use Lists

4.6 Requests for application for inclusion on a multi-use list must be either published continuously or re-published annually on AusTender. Agencies may publish the same notice elsewhere in addition to AusTender, for example on their website. If the multi-use list will be open for use by other agencies to conduct select tenders, the notice must include a statement to that effect.

Other Approaches to the Market

4.7 For approaches that are not open approaches to market (such as select tenders), agencies should, to the extent practicable, use AusTender to make request documents available.

4.8 In a two-stage process, such as a select tender following an open request for expressions of interest, the first stage (i.e. the open approach to the market) must be published on AusTender and agencies should, to the extent practicable, use AusTender to make request documents available in the second stage.

Notification of Changes

4.9 The notification of any changes must include the same information for all potential suppliers and be provided to each at the same time. This includes all potential suppliers who have already received or downloaded the notice and/or request documents. Changes to any information included in AusTender need to be made in AusTender. If changes do occur, agencies need to ensure that they provide adequate time for all potential suppliers to address these changes before submissions are due.
5 Reporting of Commonwealth Contracts and Agency Agreements

Policy – Arrangements to be Reported

5.1 Agencies must report on AusTender all procurement contracts, including standing offer arrangements and amendments to these contracts which meet the contract reporting criteria. The contract reporting criteria are that:

- the instrument to be reported is a Commonwealth contract, agency agreement or standing offer arrangement or amendment thereto; and,

- the instrument meets the relevant contract reporting value. That is, the value of the Commonwealth contract (including GST where applicable), agency agreement, standing offer arrangement or amendment thereto is:
  - for FMA Act agencies: $10,000 or above;
  - for relevant CAC Act bodies, above:
    - $400,000 for procurements other than procurement of construction services; or
    - $9 million for procurements of construction services.

5.2 Procurement contracts which meet the contract reporting criteria must be reported within six weeks of entering into the arrangement. If a procurement arrangement is not reported within this timeframe it should be reported as soon as possible.

Standing Offers

5.3 Standing offers are used by agencies to facilitate purchases of property or services over a set period on specified terms and conditions. Standing offers are reported in the standing offer arrangements section of AusTender. Where deeds of standing offer are used to establish a panel, those deeds are collectively reported on AusTender as a standing offer arrangement. Agencies are not required to report a value against standing offers reported in AusTender.

5.4 Contracts made under a standing offer arrangement that meet the contract reporting criteria must also be reported on AusTender and reference made to the standing offer arrangement in accordance with the AusTender Agency User Guide.

Other Transactions

5.5 Agencies are required to report individual credit card transactions if they meet the contract reporting criteria and have not been reported in an overarching contract.

6 Agency agreements may be in the form of a memorandum of understanding.
Agencies are also required to report invoices or purchase orders that meet the contract reporting criteria and have not been made under a contract that has previously been reported.

5.6 Agencies are not required to report on AusTender contracts resulting from property or services procured and used overseas, though they may choose to do so.

**Arrangements not to be Reported**

5.7 Only details of contracts for the procurement of property or services are to be reported in AusTender. Details of the following arrangements must not be reported on AusTender:

- grants (whether in the form of a contract or conditional gift);
- invoices (including monthly accounts), purchase orders or other payments which are payable under a contract which has previously been reported;
- payments or transfers of funds which are not in return for property or services (and are therefore not a procurement);
- contracts for the sale or disposal of public property or assets (such as a contract arising from the sale of Commonwealth land by tender);
- tax payments made to the Australian Taxation Office, including fringe benefits tax, that are not part of a payment made in exchange for property or services;
- contracts for investment or divestment as described in the CPGs;
- statutory appointments, appointments made by a Minister using the executive power (for example, the appointment of a person to an advisory board), or payments to employees;
- refunds to customers for a prior payment made for property or services;
- payments to credit card providers against amounts due;
- multi-use lists, as these do not constitute a procurement in their own right but may be utilised for a subsequent procurement process.

**Exemptions from Reporting**

5.8 An agency Chief Executive may direct in writing that contract details are not to be reported on AusTender if they would be subject to an exemption under the Freedom of Information Act 1982 (FOI Act) and the Chief Executive considers that the information is genuinely sensitive and harm is likely to be caused by its disclosure. Appendix A contains a list of items addressed in FOI legislation.

5.9 Contracts that have been exempted by the Chief Executive from being reported on AusTender will need to be documented in annual reports. Requirements for
Guidance on Procurement Publishing Obligations

Departmental Annual Reports\(^7\) states that agencies must report the fact that the contract has been exempted and the value of the contract (to the extent that doing so does not in itself disclose exempt matters).

5.10 The Chief Executive is responsible for ensuring that notices on AusTender do not disclose information that may contravene legislative requirements, such as those set out in the Privacy Act 1988 or information that may pose a risk to national security.

**Reporting of Cooperative Agency Procurement**

5.11 Agencies may find it efficient to combine with other agencies when undertaking procurement. Reporting of cooperative agency procurement is based on the contractual arrangement. Where more than one agency is a signatory to a contract, the contract value reported on AusTender by each agency should reflect each agency’s commitment under the contract, where it meets the contract reporting criteria. Each agency should not report the total value of the contract.

5.12 An agency may also enter into a standing offer arrangement that is accessed by other agencies. The agency which established the standing offer is the only agency which should report the standing offer arrangement on AusTender, including a list of participating agencies. Other agencies participating in the standing offer arrangement must report each contract entered into under the arrangement where the contract meets the contract reporting criteria and include a reference to the standing offer arrangement in accordance with the AusTender Agency User Guide.

**Policy – Information to be Reported**

5.13 Contract information to be reported on AusTender includes (but is not limited to):

- agency details;
- supplier details; and
- contract details
  - contract value,
  - start and end dates,
  - procurement method,
  - consultancy information (FMA Act agencies only),
  - confidentiality information (FMA Act agencies only).

5.14 The AusTender Agency User Guide provides more information on the details to be reported and, in particular, agency details and supplier details.

\(^7\) Available from the Department of the Prime Minister and Cabinet website at www.pmc.gov.au
Contract Details

Contract Value

5.15 For each contract reported, the agency must report the total value of the contract (including GST where applicable). This does not take into account any options, extensions, renewals, or other mechanisms that may be exercised at a future date to increase the value of the contract.

- In the case of a contract which spans several years, the total value of the contract is reported, not the value on a per-annum basis.
- In the case of a contract where part of the value is a trade-in, the total value must be reported. The fact that some of the contract value will be met through a trade-in on an existing asset is not relevant for reporting purposes.
- In the case of a contract that is entered into by more than one agency, the total value of the contract to be reported by each agency refers to the value of each agency’s commitment under the contract (and not the total contract commitment). For example, if five agencies sign a contract for equal services under a printing contract with a value of $100,000, each agency would report the amount of its commitment ($20,000 in this example). If one agency’s commitment was less than the contract reporting value (for example $8,000), there would be no requirement for that agency to report the contract.

5.16 The value of individual invoices or purchase orders should not be reported on AusTender unless they reflect the full value of a contract that has not been previously reported.

Start and End Dates

5.17 Agencies should report the start date identified in the contract. If there is no start date identified, agencies should report the date the contract is signed. If there is no written contract, the date of the first provision of property or services under the contract should be reported.

5.18 For the purpose of reporting on AusTender, the end date is the date that performance of the contract is expected to be completed. It does not take into account any options, extensions, renewals, or other mechanisms that may be exercised to extend the period of the contract. The date does not take into account possible late performance or breach of contract.

5.19 In cases where the end date is not specified, agencies will need to estimate the expected date of receipt of the final instalment of property or services.

Procurement Method

5.20 When reporting the procurement method for a contract, agencies may select one of the following methods provided on AusTender:
• Open Tender – a procurement procedure in which a request for tender is published inviting all potential suppliers that satisfy the conditions for participation to submit tenders.

• Select Tender – a procurement procedure in which the procuring agency selects which potential suppliers are invited to submit tenders. If the procurement is a covered procurement, the select tender process must be undertaken in accordance with the *Mandatory Procurement Procedures* in the CPGs. For covered procurements, agencies must conduct a select tender process from:
  – a multi-use list;
  – a list of potential suppliers that have responded to a request for expressions of interest; or
  – a list of all suppliers that hold a licence or meet a specific legal requirement.

• Direct Source – refers to a procurement process in which an agency invites a potential supplier or suppliers of its choice to make submissions. Direct sourcing may include a competitive process, for example obtaining quotes. For covered procurements, direct sourcing is permitted only under certain conditions that are listed in the CPGs.

5.21 In a two-stage process the procurement method reported will reflect the stage at which the comparative assessment of value for money is made. For example, the procurement method reported for a contract made under a standing offer arrangement will be the same method reported for the creation of the standing offer (generally open tender).

5.22 In the case of a select tender from a multi-use list, the procurement method will be select tender. Although the creation of the multi-use list may involve an open approach to the market, it does not include a comparative procurement assessment of value for money.

5.23 If a two-stage process involves more than one comparative assessment of value for money, for example a purchase from a panel, the procurement method will reflect the first comparative assessment of value for money, in this case the procurement method used to establish the panel.

**Reporting Amendments to the Contract**

*Amending Values of Contracts*

5.24 Agencies are required to report variations to any contracts reported on AusTender which meet the *contract reporting criteria*. Variations include options, extensions or renewals. Further information is provided in the *AusTender Agency User Guide*.
Amending Standing Offer Arrangements

5.25 Agencies are required to report variations to standing offer arrangements, for example when agencies or suppliers are added to a standing offer arrangement or when an extension option is exercised.

Amending Other Details

5.26 Agencies are encouraged to use their discretion to determine whether other changes in contract details will be of sufficient interest to stakeholders to warrant amendment. For example, an agency may wish to update supplier information to reflect a change of name or merger.

Additional Reporting – FMA Act Agencies Only

Consultancies

5.27 FMA Act Agencies are required to identify on AusTender whether contracts are for the procurement of consultancy services. Appendix C provides guidance to agencies on identifying consultancy characteristics.

5.28 The reason for the consultancy must also be reported using the options available in AusTender. The options available in AusTender are:

- need for independent research or assessment;
- need for specialised or professional skills; and
- skills currently unavailable within agency.

Confidentiality Information

5.29 FMA Act Agencies are required to identify on AusTender whether a contract includes confidentiality provisions. Agencies must separately identify whether the requirements are to maintain the confidentiality of:

- contract clauses or other information contained in the contract\(^8\) (such as a description of methodology to be used by a contractor which reveals confidential intellectual property); and
- information obtained or generated as a result of performance of the contract\(^9\) (such as a consultancy report which contains information that is protected since its disclosure would be contrary to the public interest).

5.30 AusTender reports about confidentiality provisions will include an overarching statement indicating that most contracts contain general confidentiality provisions, and the reasons for inclusion of these provisions. Therefore, general confidentiality provisions such as these do not need to be separately identified on

\(^8\) Described in AusTender as Confidentiality (Contract).
\(^9\) Described in AusTender as Confidentiality (Outputs).
AusTender. Agencies would report requirements to maintain the confidentiality of information obtained or generated as a result of performance of the contract only where a contractual clause sought to protect specific information.

5.31 The reason(s) for confidentiality must also be identified from the options available in AusTender. The table below provides a summary of the categories of contractual provisions that need to be reported on AusTender along with the major reasons that these provisions may have been included in a contract. For more guidance on the identification and reporting of confidentiality in Commonwealth contracts, refer to *FMG 3 Guidance on Confidentiality in Procurement*[^10].

Table: Reasons for including confidentiality provisions in contracts

<table>
<thead>
<tr>
<th>Reasons for identifying confidentiality</th>
<th>Category of confidential provision in a contract</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Provision for confidentiality of information in the contract</td>
</tr>
<tr>
<td></td>
<td>✓</td>
</tr>
<tr>
<td>Costing/Profit information</td>
<td>✓</td>
</tr>
<tr>
<td>Intellectual Property</td>
<td>✓</td>
</tr>
<tr>
<td>Privacy Act 1988</td>
<td>✓</td>
</tr>
<tr>
<td>Public interest</td>
<td>✓</td>
</tr>
<tr>
<td>Statutory secrecy provisions</td>
<td>✓</td>
</tr>
<tr>
<td>Artistic, literary or cultural secrets</td>
<td>x</td>
</tr>
<tr>
<td>Other</td>
<td>✓</td>
</tr>
</tbody>
</table>

5.32 If agencies select ‘Other’ as the reason for including confidentiality provisions, they are required to provide a free-text description of the reason for including a confidentiality provision.

Appendix A: Freedom of Information Exemptions

Exemptions under the *Freedom of Information Act 1982* are based on what is essential to maintain the system of government based on the Westminster system and on what is necessary for the protection of the legitimate interests of third persons who provide information to the Australian Government. The exemptions are designed to provide a balance between the rights of applicants to disclosure of Government held documents and the need to protect the legitimate interests of Government and third parties who deal with Government.

In certain circumstances, documents relating to the following categories (where their release could damage Government or third party interests or other public interests) are exempt:

- documents relating to national security, defence or international relations;
- documents relating to Commonwealth/State relations;
- Cabinet and Executive Council documents;
- deliberative process documents;
- documents relating to enforcement of the law and protection of public safety;
- documents to which secrecy provisions of other laws apply;
- documents relating to financial or property interests of the Commonwealth;
- documents relating to certain operations of agencies;
- documents containing personal information;
- documents subject to legal professional privilege;
- documents relating to business affairs, etc;
- documents relating to the national economy;
- documents containing material obtained in confidence;
- documents disclosure of which would be contempt of Parliament or contempt of court; and
- certain documents arising out of companies and securities legislation.

Exemptions are to be claimed only where the relevant information is genuinely sensitive and real harm will be caused by its disclosure. They should not be claimed simply because they are technically available.
Appendix B: Definitions

*Agency* refers to departments and agencies subject to the *Financial Management and Accountability Act 1997* (FMA Act) and relevant CAC Act bodies.

*Agency agreement* means an agreement for the procurement of property or services under which an agency is obliged, or may become obliged, to make a payment of public money to another agency. An agency agreement will normally take the form of a memorandum of understanding, although this term is also widely used for instruments that are not agency agreements\(^\text{11}\).

*AusTender* is the Australian Government’s tender system and procurement reporting website (www.tenders.gov.au). Any requirement in this guidance to publish procurement information should be read as a requirement to do so on AusTender, unless specifically stated to the contrary.

*AusTender Agency User Guide* is the reference for information on entering information on AusTender and is available at the AusTender website for registered agency users.

*Commonwealth contract* means an agreement for the procurement of property or services under which the Commonwealth is obliged, or may become obliged, to make a payment of public money\(^\text{12}\).

*Contract reporting criteria* are that:

- the instrument to be reported is a Commonwealth contract, agency agreement or standing offer arrangement or amendment thereto; and,

- the instrument meets the relevant contract reporting value. That is, the value of the Commonwealth contract (including GST where applicable), agency agreement, standing offer arrangement or amendment thereto is:
  - for FMA Act agencies: $10,000 or above;
  - for relevant CAC Act bodies, above:
    - $400,000 for procurements other than procurement of construction services; or
    - $9 million for procurements of construction services.

*Cooperative agency procurement* refers to arrangements involving more than one agency as the purchaser.

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\(^{11}\) As relevant CAC Act bodies are legally and financially separate from the Commonwealth, they cannot enter into agency agreements as defined under the FMA regulations.

\(^{12}\) For relevant CAC Act bodies, an agreement for the procurement of property or services under which the body is obliged, or may become obliged, to make a payment.
**Deed of standing offer** is covered by the definitions of Commonwealth contract and agency agreement. It is a continuing offer to supply property or services for a pre-determined length of time. A contract will arise each time an agency makes a purchase under a deed of standing offer.

**Multi-use list** is a list, intended for use in more than one procurement process, of pre-qualified suppliers that have satisfied the conditions for participation for inclusion on the list.

**Panel** a panel may be established by an agency by entering into contracts or deeds of standing offer (panel arrangements) for the provision of identified property or services. A panel is defined as an arrangement under which a number of suppliers, usually selected through a single procurement process, may each supply property or services to an agency as specified in the panel arrangements.

**Relevant CAC Act bodies** are those bodies listed in Schedule 1 to the *Commonwealth Authorities and Companies Regulations 1997*. 

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**Guidance on Procurement Publishing Obligations**

23
Appendix C: Distinguishing Consultancies from Non-consultancy Contracts

Information detailing how agencies can distinguish consultancies from non-consultancy contracts for reporting purposes is set out below.

Requirements for Reporting of Contracts

FMA Act agencies are required to report in AusTender if a contract is a consultancy for all contracts valued at $10 000 or above.

It is important to note that agencies do not need to separately identify minor consultancy elements in non-consultancy contracts, or particular invoices relating to consultancy work performed under an overarching contract.

There is no obligation for relevant CAC Act bodies to indicate in AusTender whether a reported contract is a consultancy.

Approach to Determining the Nature of Contracts

Individuals and organisations may purport to be providers of consultancy services. This alone is not sufficient basis for an agency to conclude that an arrangement involving the external service provider should be treated as a consultancy for the purposes of AusTender reporting. Officials need to assess the nature of each contract involving the provision of services on a case-by-case basis to determine whether it involves a consultancy for the purposes of AusTender reporting.

The assessment process requires officials to distinguish between consultancy and non-consultancy contracts, taking into account their respective characteristics. These characteristics represent an amalgam of those commonly exhibited across the diverse range of consultancy and non-consultancy arrangements.

In considering these characteristics, officials should focus on the following two key questions, to determine the nature of the arrangement:

- **Do the services involve the development of an intellectual output that assists with agency decision-making?**
  
  Examples of outputs of this nature include, but are not limited to, the expression of an original concept, research, findings, analysis, advice and/or recommendations.

- **Will the output reflect the independent views of the service provider?**
  
  In considering this issue, the emphasis should be on whether the agency has control over the views expressed, regardless of the level of direction and supervision that the agency actually provides in performance of the services. In other words, is the output being produced for the agency (consultancy contract), or on behalf of the agency (non-consultancy contract).
In the event that the answer to both questions is ‘yes’, the arrangement is a consultancy. If, however, the answer to one or both questions is ‘no’, the service would appear to be subject to a non-consultancy contract.

The process for identifying consultancy contracts for reporting purposes is summarised in the process chart contained in Appendix D.

**Similarities Between Consultancy and Non-consultancy Contracts**

When reviewing arrangements officials should be aware that, because of the diverse range of work undertaken by consultants and providers of other services, individual arrangements are likely to exhibit some, and not all, of the characteristics listed for the relevant category. Similarly, some consultancies may exhibit a number of characteristics that are generally attributed to non-consultancy contracts and vice versa. In such cases, officials should consider the key questions to determine the nature of the arrangement.

Following on from the above point, officials will often need to distinguish between procurement arrangements where an external professional is engaged to deliver an intellectual output to assist with management decision-making of the agency and others where a professional is engaged to implement such outputs. Such arrangements are of a different nature. For example, the engagement of a training specialist to independently identify an agency’s training needs and to develop a training plan and relevant materials would involve a consultancy. On the other hand, the subsequent engagement of a training specialist to deliver the training in line with the plan and materials would involve a non-consultancy contract.

Officials should also note that some contracts may involve outputs consistent with consultancies and others that align with non-consultancy contracts. In these cases, agencies will need to consider whether it is appropriate to report them as consultancies. In making such decisions, agencies may wish to consider the value and relative importance of the consultancy element.

**Agency Systems to Ensure Consistency of Treatment Over Time**

As noted previously, there will be cases where the nature of the arrangement is ‘grey’, requiring a judgement call. Agencies should consider ways of capturing and promulgating the approach taken for such cases to promote consistent reporting of similar types of arrangements over time.

**Indicative Listing of Consultancy and Non-consultancy Contracts**

Examples of specific services delivered through consultancy and non-consultancy contracts are listed below. Agencies should bear in mind that the listing is not
intended to be exhaustive or definitive; the lists merely identify common services that would generally be classified as consultancy or non-consultancy contracts. There are likely to be cases where the specific details of an arrangement suggest a different classification to the one shown in the listing. Agencies should examine the characteristics of arrangements on a case-by-case basis to determine the appropriate classification.

**Services that would generally be considered to involve a consultancy include:**

- advice on training needs and development of training plans;
- legal services, such as:
  - general legal advice (not related to litigation or potential litigation or given incidentally in connection with the development of contracts or other legal documents);
  - advice on the application of legislation and on development of new legislation; and
  - legal audit, probity and process advice, in relation to contracting out or tendering;
- design, analysis and reporting of formal market research studies;
- development of advertising and marketing campaigns;
- analysis of technology needs and development of software and hardware specifications;
- development of a framework for benchmarking;
- change facilitation advice;
- business process analysis, design and other advice;
- occupational, health and safety advice and recommendations;
- evaluation of programme performance and recommendations regarding changes;
- probity adviser and audit services; and
- risk assessments.

**Services that would generally be regarded as involving non-consultancy contracts include:**

- delivery of training;
- conduct of recruitment activity;
• legal services, such as:
  – conveyancing and development of contracts or other legal documents (and any incidental advice given relating to such work);
  – litigation services (including any drafting or advice connected with litigation or potential litigation); and
  – drafting of legislation and legislative instruments.

• travel booking services;
• scribe services;
• development of software in line with already developed specifications;
• information technology support services;
• data processing;
• printing and copying services;
• communication – for example, telephone services;
• individuals undertaking operational work within the agency under temporary external labour hire arrangements;
• indoor plant maintenance services;
• cleaning and waste removal services;
• preparation of manuals covering existing processes;
• project management;
• security services; and
• delivery of government programmes – for example, provision of translation and interpreting services in relation to migrants, job network services and construction of buildings.
Appendix D: Process Chart

Process Chart for Identifying Consultancies for AusTender Reporting Purposes

Step 1
Is the contract a procurement contract to the value of $10,000 or more, involving the supply of services (excludes employment contracts under the Public Service Act 1999 and Commonwealth legislation)?

No
Not required to be reported.

Yes

Step 2
Does the contract involve the development of an intellectual output that assists with agency decision-making?

No
Not a consultancy contract.

Yes

Step 3
Does the intellectual output represent the independent views of the service provider (as opposed to the agency’s views)?

No
Not a consultancy contract.

Yes

Step 4
Is the output the sole or majority element of the contract, in terms of relative value and importance?

No
Not a consultancy contract.

Yes

Step 5
The contract should be reported as a consultancy on AusTender.