

**‘ENSURING ACCOUNTABILITY IN YOUR ALLIANCE CONTRACT
– NATIONAL MUSEUM OF AUSTRALIA EXPERIENCE’**

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to

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Australia and the Australian Institute of Aboriginal and Torres Strait Islander Studies)*

Introduction

Thankyou for the opportunity to speak today on our experience of auditing the Construction of new facilities for the National Museum of Australia and the Australian Institute of Aboriginal and Torres Strait Islander Studies ('Museum project').

Recent parliamentary interest in Commonwealth procurement and contract managementⁱ emphasises the importance Parliament places on these aspects of public sector management. As noted by the Joint Committee of Public Accounts and Audit (JCPAA):

The search for excellence in contract management is arguably one of the most pressing challenges for the Australian Public Service.ⁱⁱ

The Australian National Audit Office (ANAO) strongly concurs with the JCPAA and considers contract management will be one of the biggest challenges for the APS over the next few years. The ANAO has demonstrated its endeavour with respect to Commonwealth procurement and contract management through a number of audits including:

- the construction of new facilities for the Museumⁱⁱⁱ in the Department of Communications, Information Technology and the Arts (the Department);
 - the Jindalee Operational Radar Network (JORN) Project^{iv} and the New Submarines Project^v in the Department of Defence;
 - Green Corps^{vi} in the Department of Education, Training and Youth Affairs; and
 - Migrant Settlement Services^{vii} in the Department of Immigration and Multicultural Affairs;
- and the production of better practice guides^{viii}.

Mr Costello spoke earlier of the Department's experience with alliancing for the Museum project. I will present the auditor's perspective of the procurement processes used and the means by which proper accountability has been achieved, and can be, maintained under project alliancing.

The ANAO and the audit

The Commonwealth Auditor-General has the mandate to undertake, at his or her discretion, performance audits of all Commonwealth bodies other than Government Business Enterprises (GBEs) although he can be requested to conduct a performance audit of a GBE. This power is in addition to that relating to the conduct of financial statement audits of all Commonwealth entities. Performance audits evaluate the economy, efficiency and effectiveness of the management of public sector entities by examining and assessing resource use, information systems, delivery of outputs and outcomes including performance indicators, monitoring systems and legal and ethical compliance. Our performance audit reports provide assurance to Parliament and, together with our Better Practice Guides, improve public administration.

In 1999, having regard to concerns expressed by the Parliamentary Standing Committee of Public Works (PWC) and the materiality of and public interest in the project, the ANAO undertook an audit of the management of the construction of the new Museum facilities. The PWC concerns related to the cost of the project, the costing of the design brief and submissions, and the relatively new alliancing method of construction contracting.

The objectives of the audit were to examine the project's compliance with the Commonwealth requirements for the procurement of public works (that is, the Commonwealth Procurement Guidelines) and the effectiveness of project management. We were particularly interested in the openness and transparency of the selection process and the probity of those involved in selection panels and the fairness shown to proponents.

We found that the processes for the appointment of the Architects, Building and Services Contractors and Museum Exhibition Designers ('the commercial alliance partners') substantially complied with the Commonwealth Procurement Guidelines. We also found that the Department and the commercial alliance partners had sound processes and procedures in place to monitor appropriately the progress of construction and manage the cost, time, quality requirements and other project risks in a timely manner. Successful project alliancing depends importantly on skilful management of the particular risks involved. With respect to this project, we

considered that appropriate financial incentives were in place to encourage ‘best for project’ behaviour from the Department and the commercial alliance partners.

I will confine my presentation today to the procurement of the Building and Services Contractors – the first of two project alliance procurements of the Department – and the establishment of the Alliance Agreement.

Commonwealth Procurement Guidelines

The Commonwealth Procurement Guidelines have been in their current format since early-1998. They are designed to allow procuring agencies flexibility in the way they procure property and services while maintaining accountability and providing sufficient guidance to ensure that resources are used efficiently, effectively, and with probity. The six core principles that underpin the procurement activities of agencies are:

- Value for money
- Open and effective competition
- Ethics and fair dealing
- Accountability and Reporting;
- National competitiveness and Industry Development; and
- Support for other Commonwealth Policies.

Value for money is the most important of these principles. The CPGs consider that *‘value for money is the essential test against which agencies must justify any procurement outcome’*.^{ix}

Determining value for money in a project alliance

Under more traditional contracting methods, clients specify in great detail their requirements and use the price tendered by bidders as the major determinant of value for money. More often than not, one of the lower priced bids that meet the specifications is selected. Although price alone is not necessarily the most reliable indicator of value for money, it is a factor that cannot be excluded from value for money considerations. However, under a project alliance situation all tenderers know

the construction budget before tenders are lodged. Determining value for money now becomes an exercise in determining which tenderer would make the best of use of the money available. We considered that the best test to determine if value for money had been achieved was through comparisons with other bidding suppliers as well as against a supplier's past prices and/or other industry norms.

The Museum Construction Selection Panel considered the relative merits of proponents on the value for money question through one of the selection criteria which was '*Demonstrated ability to minimise project capital and operating costs without sacrificing quality*'. Evaluation guidelines produced by the Department allowed the selection panel members to appropriately score proposals on this criterion. Proponents were assessed on a number of factors including the quantum of variation claims on past projects, past use of life-cycle analysis, credible suggestions for cost savings on the Museum project and the methodology proposed to minimise costs without sacrificing quality.

Value for money considerations did not end once the preferred alliance consortia were identified. The selection panel reviewed the proposed margins of the preferred alliance consortia against financial information provided by the preferred consortia (including tendered and actual profit margins) on each major project they had been involved with over the previous three years. The selection panel then verified that the proposed margins were at or below the consortia's average outcomes. Subsequently, the project's Probity Auditor provided independent confirmation that the proposed margins were at or below the consortia's average outcomes and the margins were in line with industry norms. We consider that the Probity Auditor's examination provided valuable assurance that the Department and the project received value for money.

Once this 'Business as Usual' overhead and normal profit margin had been established, negotiations began on the risk/reward regime outlined earlier by Mr Costello from the Department.

Accountability and Procedural fairness

I do not intend to cover the CPGs principle by principle. Instead I will highlight the features of the Building and Services Contractors procurement that satisfied us the process was fair and open.

Planning

A good procurement process and contract starts well before proponents or tenders are called for. More often than not the time spent on developing a well-conceived procurement plan will repay you back with interest by the time the contract is executed. A previous Australian Government Solicitor observed that:

There is often an inverse relationship between the amount of time spent in preparing tender and contract conditions and the resources required to deal with problems in contract administration and disputes after the contract has been formed.^x

The benefits of good procurement planning are evidenced in the Building and Services Contractors selection process of the Museum project. Before calling for proposals, the Department carefully considered:

- the selection process to be followed that would identify suitable alliance partners in a relatively short space of time (included in Call for Proposals document);
- the selection criteria (of differing importance) that would be used to score and rank proponents (included in Call for Proposals document);
- the evaluation guidelines the Selection Panel would use to score proponents against the selection criteria;
- the Commonwealth policies (including industry development) that the successful proponent (and any sub-contractors) would have to agree to apply (included in Call for Proposals document);
- the draft Alliance Agreement terms and conditions (included with Call for Proposals document);

- probity guidelines issued to each member of the Selection Panel and its advisers that covered issues including confidentiality, information disclosure procedures, proposal receipt and security arrangements; and
- the engagement of a probity adviser and probity auditor.

The inclusion of the draft Alliance Agreement with the Call for Proposals document allowed the Selection panel to assess proponents on their substantial acceptance of the draft Alliance Agreement and ability to achieve or exceed nominated Commonwealth policy requirements. This paved the way for a relatively smooth agreement establishment process due to the selected proponent's familiarity with the proposed Agreement.

We considered that the engagement of a probity adviser to oversee the fairness and equity of the Building and Service Contractors selection process gave added confidence to the probity and propriety of the selection process. The probity guidelines were also a valuable tool for managing the probity issues that arose during the selection process. Our report notes an instance where the probity guidelines may have been contravened during the Building and Services Contractors selection process. On the advice of the probity auditor, the Department investigated the matter. The Department and the probity auditor satisfied themselves that the integrity of the selection process had not been compromised. We agreed with their assessment.

An industry briefing was held shortly after the call for proposals was made. We considered that the briefing was a valuable exercise that aided industry's understanding of the project and the alliancing contracting method – which most of the proponents would not have experienced before. We considered that it aided the production of high quality proposals that met the Department's procurement objectives.

Selection

The ANAO's examination of the selection process centred on the principle that each proposal should be assessed on its merits, in accordance with the published selection process and criteria. We expect that Commonwealth procurers should be able to

demonstrate that all proponents were treated equitably. In this regard, the Department maintained procedural fairness by:

- ensuring any questions asked and answered were circulated to all proponents;
- assessing proponents only against the published selection criteria and reassessing proponents against the same selection criteria after each selection stage;
- engaging its own consultants (eg. in relation to construction and costings) to verify the veracity of proponent's claims;
- the selection panel members disclosing potential conflicts of interest,^{xi} which were then considered by the selection panel;
- staggering the announcement of proponents short-listed for the final assessment stage so that each had the same amount of time to prepare; and
- following the published selection process.

The only departure from the published selection process involved a decision by the selection panel to shortlist three instead of two proponents for the final assessment stage. In that case, we agreed with the panel's reasons for the decision in that the scores between the second and third-placed proponents were so close as to warrant the short-listing of an additional proponent. No proponent was unfairly disadvantaged by this change to the selection process.

Post-selection

In keeping with the Commonwealth Procurement Guidelines, the Department offered all unsuccessful proponents individual debriefings. Debriefings aid proponents to submit better proposals in the future. They aid in demonstrating accountability and the rigour of the selection process and also provide valuable feedback to procurers on the selection process. In the case of the Museum project, all unsuccessful proponents provided positive feedback on the use of project alliancing, the selection process and the clarity of the Call for Proposals document.

Up-to-date, accessible, relevant and accurate records can ensure that decisions made by an agency are consistent, based on accurate information, cost-effective, engender a sense of ownership of decisions throughout the agency, and place the agency in a

considerably better position to justify to Parliament and the public any decisions made. It is often not just outcomes that are of concern to Parliament and the public, but also the *process* of decision-making and the *reasons* for decisions made. This transparency is achieved by ensuring that the decision-making process, and the reasons for decisions made, are adequately documented by the agency.

Transparency through record-keeping is an agency's first line of defence against accusations of bias and negative public perceptions. It also promotes confidence in the integrity of the APS and allows the public to perceive the APS as making 'value for money' decisions, especially where procurement is concerned, as well as meeting any requirements for fairness, equity, privacy and freedom of information. In the case of the Museum project, we found thorough documentation of the selection process by the Department, including all key decisions and reasons for decisions. The independent reports of the probity adviser and probity auditor, who oversaw the selection process, also aided the accountability of the procurement.

Alliancing risks that need managing

Project alliancing raises new and different risks that have to be managed. They include (a) designing an appropriate risk/reward regime that meets the need of the client and (b) striking an appropriate balance between the project's commercialism and maintaining the spirit of the alliance.

Mr Costello has mentioned the cost, time, quality and design integrity commercial drivers that make up the risk/reward regime for the Museum project. We consider that they are appropriate to encourage 'best for project' behaviour from the Department and the commercial alliance partners if applied as designed.

In a project alliance all parties work cooperatively to achieve agreed outcomes and share project risks and rewards. However, the underlying goals of both parties remain as they do in any construction contract. The client wants a building that meets or exceeds cost, time and quality parameters. Construction organisations want to meet or exceed their normal profit expectations for the size of their involvement. What happens if the alliance's goals and the goals of the alliance members become difficult to reconcile due to, say, a significant cost overrun trend? This was the very problem

encountered earlier this year on the museum project. Although the Department had no legal obligation to do so, it varied the cost gainshare provisions to the benefit of the commercial alliance partners. The Department justified its decision, in part, by saying that the great pressure on the need to achieve savings was deflecting the Alliance from striving towards an outstanding result, thus acting to the detriment of the project. Underwriting part of the final cost overrun would help to drive the right behaviours for achieving overall outstanding results.

This issue illustrates the difficulty within the Alliance Agreement of determining the appropriate balance between maintaining the spirit of the Alliance and protecting the Commonwealth's financial interests. Careful management and judgement on the part of those responsible for managing the Commonwealth's interests are required. Whatever decisions are made in this regard, we consider that the decision and its reasons should be open, transparent and documented and be subject to Parliamentary or independent scrutiny if necessary – as was the case with the Museum project.

Maintaining accountability

Public sector commentators would contend that it is the nature and extent of accountability that distinguishes the public from the private sector. This is reflected in the following observation:

Ethical behaviour is one of the principal means by which accountability is maintained in the public sector. Indeed, political and administrative accountability depend on the observance of ethical standards and ethical relations between individuals or between institutions.^{xii}

Public Service accountability relies on decisions and reasons for decisions to be open and transparent and available for scrutiny by the Parliament and its Officers, including the Auditor-General. Legislation currently requires the Parliamentary Standing Committee on Public Works (PWC) to scrutinise proposed capital procurement projects with values in excess of \$6 million. It was partly as a result of the PWC concerns that the ANAO became involved with the Museum project.

A significant challenge for Auditors-General in contracting with the private sector is our ability to access the relevant records. We encourage the inclusion of a suitable access to premises and records clause in contracts with the private sector. Such a clause is not necessary for the Auditor-General to seek access to information, as that access is available under Section 32 of the *Auditor-General's Act 1997*. However, it is seen as important to indicate to contractors that they must give full access to the Auditor-General for proper accountability. Such access is also important for the agency in performing its critical oversight of the contract even if it does not eventuate.

While the need for the ANAO to have access to the premises of third party service providers is likely, in practice, to be required in very few situations, the ANAO suggests that such access, where necessary, would contribute to an audit being undertaken in an efficient and effective manner. With respect to the Museum project, we spoke with, and examined some of the records of, the Building and Services Contractors. This was done to gain an understanding of the way the Building and Services Contractors monitored construction expenditure, progress and forecasting in a timely manner. I might add that we received nothing but the utmost cooperation during our examination.

Commercial confidentiality

Although not an issue in the Museum project, I will touch on the subject of commercial confidentiality. The subject of non-disclosure of information through commercial confidentiality clauses is linked strongly to the general access issue. Virtually all traditional accountability mechanisms rely on the availability of reliable and timely information. However, public accountability can be impaired through claims of commercial confidentiality that seek to limit or exclude data in agency hands from wider parliamentary and public scrutiny. For this reason, the issue of commercial confidentiality is an area that has been the subject of considerable parliamentary concern and comment in many constituencies both in Australia and overseas.

The Auditor-General contends that the question as to whether or not commercial-in-confidence information should be disclosed to the Parliament should start from the general principle that information should be made public unless there is a good reason

for it not to be. In other words, there should be, in effect, a reversal of the principle of onus of proof, which would require the party that argues for non-disclosure to substantiate that disclosure would be harmful to its commercial interests. The Senate Finance and Public Administration References Committee have also supported this standard as follows:

The committee agrees [with the ANAO and the Commonwealth Ombudsman] ... where information is withheld on commercial confidentiality grounds, at the very least the reasoning behind the decision should be provided promptly to the committee.^{xiii}

In the ANAO's experience, we have found that, almost without exception, the relevant issues of principle can be explored in an audit report without the need to disclose the precise information that could be regarded as commercial-in-confidence. In this way, the Parliament can be confident that it is informed of the substance of the issues that impact on public administration. It is then up to the Parliament to decide on the extent to which it requires additional information for its own purposes.

As a result of a short inquiry by the Senate Finance and Public Administration References Committee into commercial confidentiality in government contracts,^{xiv} the ANAO has given an undertaking to conduct a performance audit on the use of confidential contract provisions. The Committee asked the Auditor-General to take into account eleven considerations during the audit.^{xv}

The message here is that external scrutiny (through, for example, the activities of parliamentary committee and Auditors-General) is an essential element in ensuring that public accountability is not eroded, by default, through contracting with the private sector. Just as it is incumbent upon public sector agencies to ensure they have a sound understanding of the commercial nature of any contract, public sector entities need to recognise that there are overlaying public accountability issues, not present in purely private sector transactions that need to be addressed.

Guidance on contract management

There is a wide body of administrative case law and procedural guidance applying to government procurement at the Federal Level. For example, in relation to the latter, the following are indicative:

- *Before you sign the dotted line;*^{xvi}
- *Competitive Tendering and Contracting;*^{xvii}
- *Commonwealth Procurement Guidelines;*^{xviii} *and*
- *The Performance Improvement Cycle.*^{xix}

In October 1998, the ANAO published a better practice guide, *Selecting Suppliers: Managing the Risk*,^{xx} that expanded on the above publications and provided detailed guidance and checklists to assist in assessing and managing the risks associated with selecting suppliers prior to awarding the contract.

The ANAO is now soon to publish a better practice guide on Contract Management. This Guide will provide information on, and assistance in, managing the risks associated with transition in (implementation), ongoing management, and evaluation and succession planning. The Guide focuses on the application of risk management to each of these final stages and endeavours to provide both practical advice and examples of better practice to assist contract managers to establish a framework for the transition in, ongoing management and succession planning stages of the contract management lifecycle. The Guide discusses this framework in relation to four common contract relationship types that exist on a continuum – traditional, cooperative, partnering and alliance.

Conclusion

The maintenance of accountability when contracting with the private sector is of paramount importance to the Parliament and its Officers, including the Auditor-General. Project alliancing offers potential benefits over traditional construction contracting methodology but it raises new and different risks that have to be managed – in particular determining the appropriate balance between maintaining the spirit of the alliance and protecting the Commonwealth's financial interests. Nevertheless,

project alliancing is a contracting methodology worth consideration by agencies involved in major construction projects – particularly high profile, prestige Commonwealth projects.

Thank you.

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- i Including JCPAA Report 369 *Australian Government Procurement* and its current inquiry into Contract Management in the Australian Public Service.
- ii JCPAA, *Official Committee Hansard*, 29 March 2000, p. 85.
- iii ANAO Report No.34 1999-2000 *Construction of the National Museum of Australia and Australian Institute of Aboriginal and Torres Strait Islander Studies*.
- iv ANAO Report No.28 1995-96 *Jindalee Operational Radar Network Project*.
- v ANAO Report No.34 1997-98 *New Submarine Project*.
- vi ANAO Report No.42 1998-99 *The Establishment and Operation of Green Corps*.
- vii ANAO Report No.29 1998-99 *Migrant Settlement Services by DIMA*.
- viii Better Practice Guides: *Selecting Suppliers: Managing the risk* and soon-to-be-released *Contract Management*
- ix DOFA 1998, *Commonwealth Procurement Guidelines – Core Policies and Principles*, March (page 3).
- x Australian Government Solicitor 1997, *Competitive Tendering and Contracting – Strategic and Legal Issues*, Legal Briefing Number 35 (page 2).
- xi With respect to major procurement activities, the ANAO considers that such disclosures should be written rather than oral declarations.
- xii O’Faircheallaigh Ciaran, Wanna John, Weller Patrick, 1999. *Public Sector Management in Australia – New Challenges, New Directions*. Centre for Australian Public Sector Management, Brisbane (page 225).
- xiii Senate Finance and Public Administration References Committee 1998 Second Report, *Contracting Out of Government Services*, Canberra, May (page 71).
- xiv Senate Finance and Public Administration References Committee 2000 *Inquiry into the Mechanism for providing Accountability to the Senate in Relation to Government Contracts*, Canberra, June.
- xv *Ibid.* (page 32)
- xvi MAB/MIAC Report 23, *Before you sign the dotted line*, May 1997.
- xvii DOFA 1998, *Competitive Tendering and Contracting: Guidance for managers*, March.
- xviii DOFA 1998, *Commonwealth Procurement Guidelines – Core Policies and Principles*, March
- xix DOFA 1998, *The Performance Improvement Cycle, Guidance for managers*, March.
- xx ANAO, *Selecting Suppliers: Managing the risk*, October 1998.