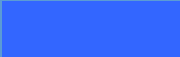




INDEPENDENT ADVICE ON IMPLICATIONS OF
THE PROPOSED REPORT OF THE ANAO INTO
THE PROCUREMENT OF DELIVERY PARTNERS
FOR THE ENTREPRENEURS' PROGRAMME



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TERMS OF REFERENCE

1. Deliver a timeline of the facts and circumstances of the procurement and relevant activities.
2. Deliver a report and briefing that provides advice on the response to the ANAO and actions to be taken immediately or pursued over the longer timeframe to address the findings.
3. Identify and provide advice to:
 - a) verify the department's understanding of the facts and circumstances of the matters covered by the ANAO proposed report
 - b) guide the department's response to the ANAO
 - c) identify the implications of the ANAO's proposed report for the department including preliminary consideration of legal exposure
 - d) identify options for addressing the findings of the audit.
4. Attached is the full Terms of Reference (refer Attachment A)

METHOD AND APPROACH

5. The approach employed for the assignment was designed to surface the material facts underpinning significant matters raised in the proposed report. It included a commissioning meeting with the Secretary and ongoing engagement with the Deputy Secretary. The proposed report and response to the report preparation papers were examined. The branch head and nominated EL2s from the programme area briefed on programme design. A deep dive with the programme branch head and the members of the tender evaluation panel, as well staff from the legal, procurement and financial areas, was conducted. A small number of interviews were held with key staff, including the delegate for the procurement, in-house counsel, the Chief Financial Officer, and Chief Economist.
 - a) The deep dive methodology included verifying with staff the accuracy of key facts outlined in the proposed report, and, where material matters were disputed, seeking additional evidence from staff.
 - b) Substantiating the existence and status of a sample of key documents, including those provided following the deep-dive, and for a selection of documents, verifying statements contained within those documents.
 - c) Commissioning advice from departmental experts.

- d) Discussions with the Deputy Secretary on matters in the proposed report requiring immediate attention and the proposed response.
- 6. The department received permission from the Auditor General to grant me, as the Independent Expert, access to the Proposed Report under s.19 of the *Auditor-General Act 1997*: "Procurement of delivery partners for the Entrepreneurs' Programme".
- 7. The consultant was supported by an SES officer and an EL2.
- 8. This advice is limited by the nature, terms of reference and time allocated to the assignment. The assignment was not an audit of the procurement and therefore did not include a detailed and complete examination of the programme and key documents. An assessment of the quality and effectiveness of policies and practices was not within the scope of this assignment. Given the nature of, and time allocated to the assignment, the adviser was not required to engage more broadly, including external stakeholders.
- 9. This report details:
 - a) the timeline of the facts and circumstances
 - b) the facts and circumstances of the matters raised in the ANAO's proposed report
 - c) recommended actions.
- 10. Other matters required in the terms of reference have been agreed to be provided separately.

SURROUNDING CIRCUMSTANCES

- 12. Some key facts as they relate to the Entrepreneurs' Programme's objective, performance, history and operating context are highlighted below.

Objective

- 13. The objective of the Entrepreneurs' Programme is to connect small and medium businesses with the capabilities and networks that they need to grow, innovate and commercialise in Australian markets, and/or markets in other countries.

Performance

14. Since launching in 2014, the department has advised that the Entrepreneurs' Programme has provided grants and advice to over 22,000 companies to help them to innovate, commercialise, strengthen and grow.
 - a) An independent monitoring evaluation undertaken in 2019 found the services were having positive impacts on companies that participated in the programme.
 - b) Clients under the Accelerating Commercialisation element of the Entrepreneurs' Programme have proven successful at attracting private capital upon completing the programme. On average, client companies have raised \$3.75 of private sector capital for every dollar of grant funding provided.
 - c) As at December 2021, businesses participating in the Growth element of the Entrepreneurs' Programme have experienced on average, an increase of 3.5 new jobs and \$1.47 million in turnover.
 - d) Since 1 July 2020 over 7500 firms have accessed Entrepreneur's Programme services.
 - e) A 2021 customer satisfaction survey found 93% of respondents were 'highly likely' or 'likely' to recommend the Entrepreneur's Programme to other businesses.
 - f) An external impact evaluation of the Programme is currently underway and will be completed later in the year.

History

15. From 2014 until 2020, the department contracted ten sector-based private sector partners, and directly engaged business consultants, to provide services to businesses under the programme. In July 2018, the department commenced a re-design of the service delivery model for the programme to deliver better outcomes and increase impact. This project was completed in May 2019, and the high level model was approved by the Entrepreneurs' Programme Steering Committee in June 2019.
 - a) The department decided to approach the market to engage delivery partners for the programme. The estimated value of the procurement was \$182 million for the maximum contract term of five years.
 - b) The department continued to co-design elements of the service delivery model with personnel from five of the seven incumbent service providers up until 2 September 2019. Matters under discussion included the customer journey and customer experience, performance outcomes and services to be provided.
 - c) Contracts with the existing providers were originally due to end on 30 June 2018. On 27 June 2018, the department varied the contracts to extend the term until 30 June 2019. Between 11 December and 25 January, the department varied the contracts to extend the term for a further six months, ending 31 January 2020. In January 2020, the department varied the contracts to extend the term until 30 June 2020. No further options for extension were available in the contracts.

- d) New delivery partners needed to be selected, on-boarded and in place by 30 June 2020.

Operating context

16. The procurement was conducted during a period where a restructure of the Entrepreneurs’ Programme Branch occurred on 1 July 2019, a machinery of government change in the department in February 2020, several changes in personnel, and the December/January 2020 bushfires. The contract management period coincided with the COVID-19 pandemic.

Outcome of the procurement

17. The statistics included at paragraph 16 of the proposed report were confirmed as correct by the evaluation team. The table below outlines the tenderers contracted at the end of the process. Five are incumbents. Three are SMEs. Following the procurement, the department extended the contracts of four unsuccessful incumbent providers until 31 December 2020.

Growth		Innovation	Commercialisation
VIC/TAS and WA	Ai Group (national)	CSIRO (national)	I4Connect (national)
NSW/ACT	NSWBC (NSW, ACT, QLD, NBQ, SEQ, NT, VIC, TAS, the Hunter, Geelong and surrounds)		
QLD (incl. specialist roles)	Deloitte (national)		
NT	Darwin Innovation Hub (NT)		
SA	Business SA (SA)		
VIC/TAS and WA	Ai Group (national)		

MATTERS RAISED BY THE ANAO

18. For the purposes of this report, the material matters have been categorised into three topics: procurement process, contract management and probity management.

PROCUREMENT PROCESS

19. There were numerous procurement process matters raised in the proposed report. This section summarises the material facts as they relate to the:

- a) Tender Evaluation Plan
- b) Request for Tender transparency and timing
- c) Tender evaluation

- d) Procurement of expert advice.

Tender Evaluation Plan

20. The key facts about the approval of the Tender Evaluation Plan, as represented by the ANAO, are accurate. The Tender Evaluation Plan continued to be amended up until 19 December 2019 (note that the Request for Tender (RFT) closed on 27 November 2019, tenders were opened on 28 November 2019 and technical evaluation was complete on 19 December 2019).
 - a) The final plan was circulated to the panel for signature on 19 December 2019. No evidence was provided that the final Tender Evaluation Plan was approved or signed by the delegate. It was signed by one panel member on 23 December 2019. The second panel member agreed to its terms and conditions via email on 19 December 2019 but did not sign it. The third panel member sent an email confirming they could sign in person or electronically but there is no evidence they signed it.
 - b) Departmental records are consistent with the facts presented in the proposed report that support the ANAO position that the Tender Evaluation Plan was not substantially complete before the RFT was released, and that it was inconsistent with the RFT and Procurement Plan. The final plan included different selection criteria, evaluation methodology and timelines. The composition of evaluation panel, and role of experts also differed from the draft plan.

Request for Tender transparency and timing

21. As context, the ANAO states that the RFT did not disclose to tender participants that the department would employ a staged procurement approach.
 - a) The Commonwealth Procurement Rules (CPRs) establish two procurement methods – open tender, and limited tender. Open tender may involve a single stage, or multiple stages, provided the first stage is an open approach to the market.
 - b) Multi-stage procurement is defined and has specific rules. A multi-stage procurement is one that “involves an initial approach to market, followed by one or more subsequent approaches to market.”
 - c) In multi-stage procurement it is mandatory for the Approach to Market to include the criteria that will be used to select potential suppliers at every stage, and any limitation on the number of potential suppliers that will be invited to make submissions.
 - d) There was a single Approach to Market for this procurement.
22. I was provided with a copy of the department’s RFT and all related addendum. The department’s request documentation included six evaluation criteria and stated the criteria were not listed in order of importance.
 - a) Departmental officials confirmed that the majority of tenders were not evaluated against each of the published criteria and this is supported by the tender evaluation records. Proposals were shortlisted on the basis of a sub-set of the published criteria.

- b) The RFT said the panel could “use its discretion to shortlist a sub-set of tenderers at any time during the RFT process.” It was silent on the approach that would be followed in relation to the creation of any shortlist.
 - c) The evaluation plan states that the technical evaluation criteria were ‘to be the criteria contained in Clause 16 of the RFT,’ which includes all six criteria.
 - d) In the department’s Industry Briefing officials did not refer to shortlisting, and did not disclose that shortlisting could be undertaken on the basis of a sub-set of the evaluation criteria.
 - e) In the Industry Briefing the Chair of the Tender Evaluation Panel confirmed that tenders would be evaluated consistently with “Section 16 of the RFT ... [and] the response schedules published in conjunction with the RFT have been aligned to ensure tender responses include the level of detail required.”
 - f) The department did not issue an addendum to the RFT disclosing the approach to shortlisting.
23. The department approached the market via an RFT published on AusTender on 27 September 2019 seeking proposals by 28 October, 2019.
- a) The closing date for the RFT was extended three times.
 - i. On 15 October 2019 the Tender Evaluation Panel advised that the RFT was extended to 4 November 2019.
 - ii. On 23 October 2019 the Tender Evaluation Panel advised that RFT was extended to 11 November 2019.
 - iii. On 29 October 2019 the Tender Evaluation Panel advised that the RFT was extended to 27 November 2019.
 - b) The RFT was also amended on 6 November 2019 to include amended response schedules.
 - c) The RFT closed on 27 November 2019.
24. Five tenderers made complaints about the procurement process, summarised in Appendix 6 of the Proposed Report.

Tender Evaluation

25. At the deep dive key tender evaluation facts outlined in the proposed report were confirmed as factually correct by the evaluation team, being:
- a) The majority of tenders were not evaluated against all the criteria.
 - b) 39 of the 53 proposals were assessed for shortlisting against two criteria and 7 of 53 proposals were assessed for shortlisting against one criteria.
 - c) Of the 30 tenders rated as ‘acceptable’ or better against the first two criteria, 14 were shortlisted whereas 16 were not.

- d) While some proposals were assessed by all of the panel members, others were assessed by two members, and some were only assessed by one member.
- e) Six proposals were scored 6. Of these, four were shortlisted and two were not. A shortlist of 14 potential delivery partners was assessed as suitable to progress to Step 3 (Pricing Evaluation).
 - i. The evaluation report stated the Tender Assessment Panel agreed if a response scored 5 or below it was not shortlisted. The documented rationale for excluding two responses that scored 6 was not examined as part of this assignment.
 - ii. It was noted that the Approach to Market for the financial advisor to the procurement estimated that 14 proposals would require a pricing evaluation. I have not surfaced any specific record that the department intended to cap the number of proposals shortlisted for pricing evaluation.
- f) Two shortlisted tenderers were provided the opportunity to revise tender submissions, with one being able to bid for “national specialist” services, the possibility of which was not included in the RFT.

26. The following facts were also verified:

- a) The department did not follow the advice of its probity advisor to exclude one tenderer – Darwin Innovation Hub – on the basis it was non-competitive and did not include material information in its tender. The department decided not to exclude, and to shortlist, without seeking the additional information identified by the probity adviser.
- b) No evidence was produced by the department that each tender was evaluated against the commonwealth policies criterion.
 - i. I was not able to identify a record of any consideration by the department of “the economic benefit of the procurement to the Australian economy” as required by the CPRs for procurements over \$4 million.
- c) While there is commentary in evaluation notes that reflects risk was discussed, there was no evidence that there was a formal risk assessment of each tender consistent with what was outlined in the tender evaluation plan.

Tender Evaluation Report

- 27. As context, the ANAO stated the evaluation report did not accurately describe the evaluation approach. Appendix 4 of the proposed report focuses on errors identified in the department’s tender evaluation report. The statements of fact in that Appendix were verified. For example, while the report stated that each response was reviewed by two of the three technical assessors, 23 of the 53 responses were reviewed by one assessor.
- 28. The Tender Evaluation Report was signed by the delegate on 3 March 2020, with the signed probity clearance of the evaluation report provided on 4 March 2020.

Procurement of expert advice

29. As context, the ANAO has considered three additional procurements related to the core procurement. These were the procurement of the probity advisor (Mills Oakley), the financial advisor (DMV Consulting) and Bevington, a company providing advice on programme performance and evaluation.
30. I am advised that the CPRs do not require the department to include evaluation criteria in request documentation while procuring from a panel, as was the case in relation to the engagement of Mills Oakley as probity adviser.
31. I have confirmed that the probity advisor quotes were evaluated against the criteria of capacity, capability, price and risk, and Mills Oakley's previous experience in delivering services for the programme was recorded as the predominant reason for selection.
32. The department emailed Bevington expressing concerns with the quality of the performance framework. No record was produced to show rectification.
33. For the DMV Consulting procurement, the department approached the market via a limited tender. No evidence was provided that the department estimated the maximum value of the procurement before selecting the procurement method and the delegate did not approve the approach to market.
 - a) An expert evaluation of the CPRs and their application to these procurements, and a view of the value for money of these procurements, was not formed as part of this assignment.

CONTRACT MANAGEMENT

34. There were numerous contract management matters raised in the proposed report. This section summarises the material facts as they relate to the following significant matters:
 - a) contract management plans
 - b) contract performance measures
 - c) contract payments and variations.

Contract Management Plans

35. Contract management plans were approved on 9 March 2022, two years after the contracts were signed.
36. There is a draft standard operating procedure that mandates payments not be made if deliverables are not provided on time.

Contract Performance Measures

37. The contracts state that “performance will be assessed and managed by the department using a combination of quality, volume and outcome measures”.
38. There is no approved and agreed performance framework with metrics and standards. I was advised by officials at the deep dive that there is a draft performance framework.
39. The contract requires contractors to perform in accordance with the Performance and Capability Policy. At the time the contracts were finalised, this policy had not been drafted. It was finalised on 5 May 2022.
40. The policy outlines programme objectives, roles and responsibilities, performance behaviours and expectations, and programme outcomes. It does not include quality, volume and outcome measures.
41. I was advised that the draft performance framework does not include performance standards. I have been advised that performance standards are being worked on but officials were unable to advise on timeframes for completion.

Contract payments and variations

42. Department officials confirmed that contract deliverables were not provided on time before payments were made (ranging from 31 days to 247 days late), as identified by the ANAO.
 - a) Officials advised they had visibility of some services received through the business data and intelligence that delivery partners contribute through the department’s CRM, which officials also advised inform monthly internal reports.
43. Officials have fortnightly meetings with delivery partners to discuss progress, priorities and delivery of services. Records show that meetings are consistently held and minuted, with actions items. I was advised that departmental consent is sought and obtained for engagement of business mentors by delivery partners and the performance of mentors is monitored. Mentor underperformance is discussed and there is evidence that management actions are taken in response to reported underperformance.
44. Contrary to the proposed ANAO finding, I confirm that the department has records of all section 23 approvals for contract variations in its contract management system. I was advised that at the time of the audit, the department was transitioning to a new system so not all records had been migrated to this system.
45. The limited nature of the assignment meant the extent to which conflict of interest declarations and mitigations are in place to cover all those currently involved in

contract management was not established. Conflict of interest is covered in the Standard Operating Procedure and in the current Contract Management Plans to manage Delivery Partners' conflict of interest. The Department's CRM was not inspected as part of this assignment.

PROBITY AND CONFLICT OF INTEREST

46. By way of context, the ANAO makes the finding with relation to the ethical requirements set out in the CPRs, in part because probity risks were not appropriately managed.
47. The programme had been delivered in partnership with the incumbent providers for six years. Department officials were working with staff from seven of the ten incumbent providers to redesign the service delivery model prior to the approach to market. In at least once instance, an incumbent was involved in further redesign work during the evaluation of the proposals in January 2020.
48. At the deep dive, officials acknowledged that the department involved the probity adviser in the drafting of the RFT and the conduct of the evaluation activities.
49. I have confirmed that there were conflicts of interest that were not documented on the register. There were instances identified where conflicts were declared and there was either a positive decision to not take action, or no documentation of management actions. Conflict of interest declarations were not obtained from all of the officials with access to controlled information.
50. Departmental officials confirmed at the deep dive that a list of key persons with access to controlled information was not maintained by the procurement manager.
51. Departmental officials confirmed at the deep dive that there were existing contracts with incumbent providers that were involved in the redesign work. I was verbally advised that the re-direction of their services was enacted via direction and this was confirmed by email records. There were no new, specific contractual or payment arrangements in place to govern the department's engagement of existing industry partners for this work.
52. An information breach occurred on 30 August 2019, immediately prior to the issue of the RFT. This was recorded in emails but was not included in the probity register. The advice provided verbally by the probity advisor was not documented or maintained.
53. The probity register records that a departmental official alerted the panel to a cut and paste of information from the design documents, into a tender submission.
54. I confirm that the department only partly implemented the probity risk management measures recommended by its probity adviser. The department did not contractually prohibit incumbent provider staff involved in the redesign from assisting in the preparation of tender responses.

RECOMMENDATIONS

55. The ANAO's recommendations specifically relate to the Entrepreneurs' Programme and not to other programs or processes in the department.
56. I note the department's current intention is to expedite implementation of the recommendations in the proposed report. Based on my inquiries and discussions with various executives, I also recommend the following additional actions:
- a) Considering the facts outlined in this report and the findings of the proposed report, immediately assess the implications for the Department and the Secretary for discharging the duties of an accountable authority under the PGPA Act. I also suggest the department arrange a briefing for the Chair of the Audit Committee.
 - b) Considering the facts on contract management, immediately investigate and/or validate the extent to which contracts are currently being actively managed, expedite the finalisation of the performance framework, performance standards and Standard Operating Procedures and update contract management plans accordingly.
 - c) Prioritise the roll out of a training program that addresses the knowledge, skills and core competencies required to execute procurements and manage contracts. The program should address the value of rules and processes to achieving program outcomes, and the positive role they can have in supporting innovation.
 - d) Implement program management governance arrangements that provide oversight of procurements and ongoing contract management. Arrangements should include an appropriately skilled and configured program board, endorsement of project, risk and other key plans, clarification of roles and responsibilities and reporting, with explicit articulation of escalation and reporting thresholds. Arrangements should not absolve delegates of their obligations.
 - e) Clarify the accountability for the engagement and contract management of professional expertise, and ensure those accountable have the skills and knowledge to manage those procurements and contracts. This should include clarifying the roles and responsibilities of central areas and ensuring a shared understanding of roles, responsibilities and accountabilities.
 - f) Consider assigning an SES officer the ongoing responsibility for working with colleagues subject to audit or scrutiny to improve the quality of responses, feedback and engagement with ANAO on non-financial statement matters.
 - g) Adopt a formal change program approach to addressing all recommendations, and any cultural or systemic improvements sought by the Department.
57. The extent to which these recommendations should apply to procurements, grants and the department more broadly was not considered as part of this assignment and is a matter for the Department's executive.
58. I am grateful for the professionalism of the team that supported me and acknowledge the good will and constructive engagement of all staff I met with during the assignment.

59. I am available to brief further on this assignment on request.

24 May 2022