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Case summary

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3. s47G has been asked to undertake an independent case assessment of the complaint material, to advise whether investigation under the department's counter-fraud framework, or any other action, is practical and warranted.
4. Certainly, the ANAO report identifies a range of procedural shortcomings in the department's handling of the procurement, primarily in the form of significant departures from the Tender Evaluation Plan and, secondarily, in failing to demonstrate compliance with the Commonwealth Procurement Rules. In addition to the ANAO audit, the department commissioned a further review of the procurement (to inform the department's response to draft ANAO findings, and with a view to also advising of measures the department might take to strengthen governance arrangements). Neither of those processes identified indications of fraud or corruption.
5. s45 and s37
6. s37
- 7.

(signed)

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Engagement

8. The Australian Government Department of Industry, Science and Resources (the department) has engaged s47G¹ (we/our) to conduct an independent case assessment relating to the procurement of the *Delivery Partners for the Entrepreneurs' Programme* (ref: AusTender PRI-00004142).² More information about the Scope and Limitations of our engagement are set out in Appendix A to this report.
9. An earlier version of this report was provided to the department on 20 March 2023. This final report reflects requests within the department for clarification on some matters. However, the methodology, basic analysis, and conclusions have not changed. The update also recognises the commencement, on 1 July 2023, of the *National Anti-Corruption Commission Act 2022*.

Background

10. The Entrepreneurs' Programme procurement activity (concluded in April 2020) was a "covered procurement" for the purposes of the Commonwealth Procurement Rules, the *Government Procurement (Judicial Review) Act 2018* (Cth) and the corresponding Procurement Complaint Policy³ of the department.
11. It is relevant to note that key elements of the department's procurement and subsequent contract management processes for the Entrepreneurs' Programme were criticised in an Auditor-General's report, which was tabled in the Parliament two years later (in June 2022).⁴
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12. s37 and 45
- 13.
14. s45
15. s37 and 45
16. A list of documents consulted and meetings held is compiled in Appendix D.

¹ This case assessment was conducted by s47G

² At the time the procurement was undertaken, the entity was known as the Department of Industry, Science, Energy and Resources (DISER).

³ <https://www.industry.gov.au/contact-us/feedback-and-complaints/procurement-complaints>

⁴ Working Paper 1: Australian National Audit Office (2022) *Performance Audit: Procurement of Delivery Partners for the Entrepreneurs' Programme*. Auditor-General Report Number 42, 2021-22.
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Objective

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Jurisdiction

22. The case assessment adopted the Commonwealth's fraud definition⁹—namely:
- “dishonestly obtaining a benefit or causing a loss by deception or other means”.¹⁰
23. More broadly, the assessment also considered “corrupt conduct”¹¹ and “abuse of office”, having regard to the corresponding *Criminal Code Act 1995* (Cth) offences (and maximum penalties) potentially disclosed by the alleged conduct—namely:
- Section 142.1—*Corrupting benefits given to, or received by, a Commonwealth public official* (imprisonment for up to 5 years), and/or
- Section 142.2—*Abuse of public office* (imprisonment for up to 5 years).
24. ^{s37}
- 25.
26. The Australian Government's 2017 *Commonwealth Fraud Control Framework* has also informed this Assessment—namely:
- a) the Commonwealth Fraud Rule (see section 10 of the *Public Governance, Performance and Accountability Rule 2014*)
 - b) the Commonwealth Fraud Control Policy (August 2016)
 - c) Resource Management Guide No. 201—*Preventing, detecting and dealing with fraud*, and
 - d) the Australian Government Investigation Standards (AGIS).
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Analysis

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Conclusion

65. Based on our assessment of the complaint material we find no basis for the department to take further investigation or other related action under its counter-fraud framework.²¹

(signed)

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Appendix A—Statement of Responsibility

Objective

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has been engaged to conduct a Case Assessment.

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Limitations

Our report is prepared in good faith, based on a fair evaluation of the information available to us, informed by our professional judgement and experience. Our work consisted of our review of information provided to us from people, documents, and data during the course of the engagement. Our work included us making inquiries as we deemed relevant, based on our experience and the information provided to us.

We have considered and relied upon information which we believe to be reliable, complete and not misleading. s47F(d)
s47E(d)

Our findings are based solely on the information provided to us during our review to date. We reserve the right to amend any findings, if necessary, should any further information become available.

Statement of independence and competence

All professional personnel involved in this engagement have the necessary qualifications and experience to complete their engagements to an appropriate standard.

Staff of s47G working on this engagement have no conflicts of interest to declare, or other matters to raise affecting impartiality.

Appendix B—ANAO Report Summary

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Conclusion

8. The design and conduct of the procurement did not comply with the Commonwealth Procurement Rules (CPRs), and the signed contracts are not being appropriately managed.

9. In its conduct of the procurement the department did not demonstrate achievement of value for money, the core rule of the CPRs. Although the Request for Tender (RFT) resulted in 53 compliant tender responses being received suggesting a competitive selection process, the department's approach was deficient in significant respects such that there was not open and effective competition for the delivery partner roles. In particular, the significant majority of tenders received were not fully evaluated against each of the published criteria. The department's conduct of the procurement process also fell short of the ethical requirements set out in the CPRs, with key aspects of the approach employed either not outlined in the RFT or inconsistent with the RFT, competing tenders not being treated fairly or equitably, and probity risks not being appropriately managed.

10. The delivery partner contracts are not being appropriately managed. The contract management framework is inadequate, and the department's approach has not resulted in contract deliverables being provided on time or required that service provision is to an appropriate standard before payments are made. The contracts do not include an effective performance management framework.

Supporting findings

Procurement process

11. Six relevant evaluation criteria were included in the RFT. The RFT did not disclose to tender participants that the department would employ a staged procurement approach involving the first two criteria being employed as the basis for shortlisting, such that most tenders were not evaluated against the remaining four criteria (including the price criterion). In addition, the application of the evaluation criteria was not supported by the timely development and approval of an appropriate tender evaluation plan. The version of the evaluation plan that existed at the time the RFT was issued did not include the same criteria as the RFT. The tender evaluation team was not established at the time the RFT was released or prior to evaluations commencing. (See paragraphs 2.2 to 2.20)

12. DISER's approach to the evaluation of tender responses did not allow for value for money to be demonstrably achieved. The department's evaluation approach:

- shortlisted out 39 of the 53 compliant tender responses (74 per cent) on the basis of an assessment against the first two of the six criteria, although for six respondents an evaluation was conducted against only one of those two criteria. Shortlisting was also not consistently undertaken given, of the 30 tenders rated as 'acceptable' or better against the first two criteria, 14 (47 per cent) were shortlisted whereas 16 (53 per cent) were not;
- involved only 14 of the compliant tender responses (26 per cent) being evaluated against the price criterion, with a significant error made in the price evaluation for one of those tender responses (leading to it being ranked more highly than it should have been);
- evaluated a reduced shortlist of 10 tenders against the 'corporate and financial viability' criterion; and
- did not evaluate any of the tenders against either the risk criterion or the Commonwealth policies criterion.

~~13. In addition, the selection of successful providers in two of the three outcomes areas did not align with the results of the evaluation work. The evaluation work did not support the selection of candidates in the commercialisation and growth outcomes. The successful candidate for the commercialisation outcome was not identified as the first ranked tenderer. For the growth outcome, DISER tailored arrangements to select the successful candidate to provide growth services in Queensland and errors were made in the pricing analysis which supported the selection of the successful candidate to provide growth services in the Northern Territory. (See paragraphs 2.21 to 2.67)~~

14. The procurements were not conducted in accordance with the guidance provided by the CPRs about how to conduct procurements ethically.

- The department involved the probity adviser it engaged in the drafting of the RFT and the conduct of the evaluation activities, an approach that adversely affects the independence of the probity advice.
- The procurement of the probity adviser was deficient, including an absence of open and effective competition for the role.
- While a probity plan was documented, key elements were not implemented, for example:
 - a conflict of interest register was not maintained;
 - the probity register was incomplete;
 - a list of key persons with access to controlled information was not maintained by the procurement manager and conflict of interest declarations were not obtained from all persons that had access to controlled information. Those that did not provide a declaration included the procurement delegate and internal legal and procurement advisers who formed part of the specialist advice and support team; and
 - where declarations were provided not all conflicts were identified and, where conflicts were identified, management actions were not put in place to avoid or mitigate them.
- Incumbency advantages were not transparently managed, in particular:
 - there were no specific contractual or payment arrangements in place to govern the department's engagement of five of the ten existing industry partners to contribute to the redesign and payment for this work;
 - the department did not implement in full the probity risk management measures recommended by its probity adviser (for example, a probity plan and protocols for the redesign work was not in place at the commencement of work and the department did not prohibit the industry partner personnel involved in the redesign from assisting in the preparation of tender responses); and
 - departmental records indicate that information about the redesign of the program was revealed to incumbent tenderers involved in the redesign work providing them with a competitive advantage (this disclosure of information to the incumbents involved with the redesign work, and the seeking of urgent advice from the probity adviser about it, was not recorded in the probity register). (See paragraphs 2.70 to 2.97)

15. Appropriate procurement records were partly maintained. While available records addressed the requirement for the procurement as well as the process that was followed and relevant approvals, evidence to support key decisions was not maintained. In addition, the tender evaluation report did not accurately reflect the evaluation process that was employed or satisfactorily demonstrate that value for money had been achieved. (See paragraphs 2.100 to 2.102)

16. While DISER selected an open tender procurement method and issued an RFT, the procurement did not demonstrate open and effective competition in accordance with the CPRs. The department's procurement approach resulted in incumbent providers receiving greater consideration than non-incumbents and this was reflected in the tender outcomes with 83 per cent of contracts being awarded to an incumbent provider whereas they represented 20 per cent of tenders received. The procurement approach did not give appropriate consideration to Commonwealth policies relating to Small and Medium Enterprises (SMEs). While 81 per cent of tenders submitted were from SMEs, only 20 per cent (9 of 44) of those were shortlisted (15 SMEs rated as 'acceptable' against the two shortlisting criteria nevertheless did not proceed any further in the evaluation). (See paragraphs 2.105 to 2.117)

Appendix D—Information-gathering

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MEETINGS

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WORKING PAPERS

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