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## Establishing the need for a consultant

### Some basics

Busy managers often have little patience with advice that suggests careful planning and consideration at the outset. Their impatience is understandable. Experience, however, has shown that much time and effort can be saved over the course of a project if a few extra hours are invested at the beginning. Defining the problem, considering alternatives and drafting a clear statement of requirement are key factors in minimising potential problems later on.

Recourse to external consultancy services should, in normal circumstances, occur only after carrying out, and documenting for file, a business case which addresses the following:

- a clear exposition of the problem or issue being solved: both consultants and experienced public sector users of consultancy services stress that clarity of purpose is the key factor in a successful tender process;
- relevance to government policy or programs, including coordination with other entities;
- scope and quality of outputs required;
- the timeframe for completion;

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- whether the proposal was included in the entity's Annual Procurement Plan;
- likely GST-inclusive cost (fees *and* expenses) and availability of funding, including a contingency allowance, compared to benefits gained;
- degree of any required skill transfer to the entity;
- security considerations, including access to classified information;
- the alternative of carrying out the work in-house; and,
- how value for money will be achieved on the basis of clauses 4.1 to 4.15 of the Commonwealth Procurement Rules (CPRs).

Whether an agency should engage external consultants will often depend on factors such as the following:

- a temporary lack of in-house people resources;
- the need for specialised skills or experience;
- provision of independent advice, either to the entity itself, or to enhance public credibility;
- diagnostic management advice to the entity, including facilitation or management of change;
- a need for advice on how best to meet a new government requirement; and,
- assistance with a review of an agency's service delivery as part of a Performance Improvement Cycle approach.

If unsure of your justification for proceeding with a consultancy, it is worth testing your reasoning with your entity's procurement adviser or the Department of Finance.

Although the justification for hiring external consultancy services will differ according to individual circumstances, the golden rule is that the engagement should provide value for money. The concept of 'value for money' is presented in Chapter 4.

## Australian Government requirements

The *Public Governance, Performance and Accountability Act 2013* (PGPA Act) specifies that a Commonwealth entity must be governed in a way that promotes the proper use and management of public resources.

Chapter 2 of the PGPA Act places the onus for promoting the ‘proper use and management of public resources’ on the accountable authority (that is, the head or Chief Executive, or board) of each Commonwealth entity (e.g. a department or a government corporation). Under the PGPA Act, the accountable authority ‘must govern the entity ... in a way that is not inconsistent with the policies of the Australian Government’, and may issue entity-specific ‘Accountable Authority Instructions’ (called the Chief Executive’s Instructions under previous legislation) to this end to officials of their entity. For their part, officials are required under the PGPA Act to perform their functions ‘honestly, in good faith and for a proper purpose’.

In the past, agencies had some latitude in the conduct of procurement processes because the government emphasised achievement of outcomes, rather than the observance of detailed procedures. In January 2005, however, the new Commonwealth Procurement Guidelines (CPGs) introduced a more directive approach. For example, it became virtually mandatory (with some exceptions) to begin with an open tender process in the case of procurements above specified monetary levels; the previous option of moving immediately to a select tender was no longer available.

The CPRs that replaced the CPGs in 2014 appear to have tightened procurement processes further. For example, an official who took action that was inconsistent with the CPGs was able to redress the inconsistency to some extent by making ‘a written record of his or her reasons for doing so’ (Financial Management Act Regulation 8(2)). The new CPRs do not afford a similar circumvention. On the contrary, it is the ‘accountable authority’ (the Secretary of the Department in the case of a Commonwealth entity) who must report all known instances of non-compliance in their annual Compliance Report to the minister (Resource Management Guide (RMG) no. 208).

Because it is the primary legislation covering resource management, the PGPA Act sets out the key principles and requirements for a coherent administrative system that emphasises planning, performance and reporting. It is supported by rules and other legislative instruments that provide greater detail about requirements and procedures. The CPRs are one of these legislative instruments.

## Commonwealth Procurement Rules

Issued by the Minister for Finance under the PGPA Act, the CPRs came into effect on 1 July 2014. They apply to Non-Corporate Commonwealth Entities (NCCEs) and to the 20 Corporate Commonwealth Entities (CCEs) listed in section 30 of the *Public Governance, Performance and Accountability Rule 2014* (PGPAR). (These two sets of entities are referred to collectively in clause 2.2 of the CPRs as ‘relevant entities’.) The CPRs and associated materials are available on the Department of Finance website: [www.finance.gov.au/procurement](http://www.finance.gov.au/procurement).

The fundamental objective of procurement by entities subject to the PGPA Act is to achieve value for money by delivering the government’s programs efficiently, effectively and ethically. Both financial and non-financial costs and benefits need to be considered in any procurement activity.

The CPRs contain two divisions. Division 1 sets out rules for all procurements that are mandatory for all ‘relevant entities’. However, NCCEs listed in section 30 of the PGPAR are further subject to ‘additional rules’ listed in Division 2 of the CPRs where the procurement exceeds a specified total monetary amount (‘procurement threshold’) and the entity is not otherwise exempted under Appendix A of the CPRs. Both divisions contain mandatory and advisory (best practice) provisions.

Most of the content of the CPRs is reflected throughout this guide. But officials considering the engagement of consultants should always consult the CPRs and their Accountable Authority Instructions directly, as well as any additional web-based guidance issued by the Department of Finance such as the RMG series. The Procurement Policy Branch of the Department of Finance may be another potential source of advice.

## Accountable Authority Instructions

Accountable authorities are enabled by the PGPA Act to give instructions regarding finance law to officials in their entities using Accountable Authority Instructions (AAIs) (called the Chief Executive's Instructions in previous legislation). AAIs may cover a large range of matters that involve management of public resources, including procurement.

The Department of Finance (2015) has published model AAIs in RMG no. 206, but relevant entities may differ in their approach to procuring goods and services. A first step in considering the use of a consultant should therefore be to consult the AAIs for the entity concerned. In cases where an official of one Commonwealth entity performs a task for one or more other Commonwealth entities, it will be prudent to first determine which entity's AAIs will apply.

## Coordinated and cooperative procurement

Relevant entities need not necessarily take procurement action alone.

It is possible to collaborate with another relevant entity in making a joint approach to market, or even to piggy-back on an existing contract of another relevant entity (CPR clause 4.9). However, it is possible to join an existing contract only if the contract and the request documentation on which it is based have specified the possibility of utilisation by other relevant entities, and the goods and services are comparable to those sought (CPR clause 4.12). In any case, the core principle of achieving value for money must be satisfied.

Where whole-of-government arrangements for procuring goods and services already exist, such arrangements are referred to as 'coordinated procurement'. NCCs are required to make use of them, rather than approaching the market independently (CPR clauses 4.9 and 4.10). CCEs may also opt-in to coordinated procurement arrangements. A list of existing arrangements that are suitable for coordinated procurement is published online by the Department of Finance [www.finance.gov.au/procurement/wog-procurement](http://www.finance.gov.au/procurement/wog-procurement).

## Approval of spending proposals

The accountable authority is responsible under the PGPA Act for promoting the proper use of 'relevant money'; that is, its 'efficient, effective, economical and ethical' use. Where the authority is delegated to an official, the official is required under the PGPA Act to act with care and diligence, and for a proper purpose.

The terms 'efficient, effective, economical and ethical' are not defined in the PGPA Act. Clauses 6.1 to 6.5 of the CPRs provide the following guidance, and point out that, for NCCEs, the collective term 'would also include being not inconsistent with the policies of the Commonwealth':

- Efficient relates to the achievement of the maximum value for the resources used. In procurement, it includes the selection of a procurement method that is the most appropriate for the procurement activity, given the scale, scope and risk of the procurement.
- Effective relates to the extent to which intended outcomes or results are achieved. It concerns the immediate characteristics, especially price, quality and quantity, and the degree to which these contribute to specified outcomes.
- Economical relates to minimising cost. It emphasises the requirement to avoid waste and sharpens the focus on the level of resources that the Commonwealth applies to achieve outcomes.
- Ethical relates to honesty, integrity, probity, diligence, fairness and consistency. Ethical behaviour identifies and manages conflicts of interests, and does not make improper use of an individual's position.

RMG no. 400, issued by the Department of Finance in 2014, includes a more general set of principles of relevance to the broader issue of resource management, rather than just a procurement context. For example, the term economical is stated to emphasise 'the requirement to avoid waste'.

Australian Government public servants are also bound by the Australian Public Service (APS) Values and Code of Conduct under sections 10 and 13 of the *Public Service Act 1999*. Relevant behaviours include accountability to the parliament through the government,

the need to behave with honesty and integrity, avoidance of conflict of interest, prohibition of the improper use of inside information or the employee's position to gain (or seek to gain) benefit or advantage for the employee or others, and the need to act with care and diligence. (As at 5 January 2016, section 4.10 of the Code of Conduct on the Australian Public Service Commission website had last been updated in August 2015, with a note that it may not reflect current legislation.)

Section 18 of the PGPART makes it mandatory for an approval of relevant money to be recorded in writing as soon as practicable after it is given. The purpose of the provision is to lay down an evidentiary trail regarding the proposed expenditure. In this regard, RMG no. 400 (p. 11) cautions that 'the official should consider who is going to rely on the record and ensure that the record is proportionate to the significance, value, level of risk and sensitivities associated with the proposed commitment'. It is worth noting at this stage of the process that the approval needs to be consistent with the CPR clause 9.2 requirement that the estimated value of a procurement 'is the maximum value (including GST) of the proposed contract, including options, extensions, renewals or other mechanisms that may be executed over the life of the contract'.

## Ethical behaviour and non-discrimination

Ethical behaviour and fair dealing make good business sense by engendering trust and allowing the parties to a transaction to minimise conflict and uncertainty.

Clauses 6.6 to 6.8 of the CPRs stipulate that ethical behaviour is mandatory for officials undertaking procurement. Relevant behaviours include dealing with actual, potential and perceived conflicts of interest; dealing equitably with potential suppliers, tenderers, and suppliers; complying with directions relating to gifts or hospitality, privacy principles and the *Crimes Act 1914*; equitable and non-discriminatory handling of complaints; and avoiding any benefit from dishonest unethical or unsafe supplier practices. In particular, contracts should not be entered into 'with tenderers who have had a judicial decision against them ... relating to employee entitlements'.

## Accountability and transparency

Accountability refers to the actions and decisions taken by officials, including outcomes, during the procurement process. The key requirement is that officials maintain a level of documentation commensurate with the scale, scope and risk of a procurement. CPR clause 7.2 specifies that concise and accurate information needs to be recorded about:

- a. the requirement for the procurement;
- b. the process that was followed;
- c. how value for money was considered and achieved;
- d. relevant approvals;
- e. relevant decisions and the basis for those decisions.

Transparency refers to the steps taken by relevant entities to enable appropriate scrutiny of their procurement activity. The AusTender web-based facility [www.tenders.gov.au](http://www.tenders.gov.au) is the key means for ensuring transparency. Clauses 7.7 and 7.8 of the CPRs states:

each relevant entity must maintain on AusTender a current procurement plan containing a short strategic procurement outlook. The annual procurement plan should include the subject matter of any significant planned procurement and the estimated publication date of the approach to market. Relevant entities should update their plans regularly throughout the year.

Specific requirements for reporting on consultancies in Annual Reports were published on 29 May 2014 (but not apparently updated for the PGPA Act as at 5 January 2016).

## Risk management

Managing risk is an essential aspect of project management. Overall risks of using a consultant should be considered as early as possible in the procurement process to maximise the opportunity for adopting mitigation strategies, if required. In the case of complex projects, it is worth seeking professional advice, or consulting older publications such as *Purchasing Australia* (1997) and *Australian Government*

Solicitor publications (AGS 1997a, 1997b). Although some aspects of these publications are now outdated (for example the procurement framework and policy) they still offer a range of practical advice.

As well as the risk of hiring a consultant, the project itself will involve risk. Good consultants will automatically assess the risks associated with a project, either as part of their proposal or once the contract has been signed. Clients should always ask for a risk assessment and the consultant's proposed method of dealing with risks. In the case of large or complex projects, it is a good idea to ask the consultant to produce a Project Charter or Plan, to ensure that both sides have an agreed understanding of both the content of the project, as well as who bears likely risks and implements appropriate mitigation strategies.

Not all risk is borne by the client. When considering how to bid for a project, a consultant will typically take into account a wide range of issues, including dependence on the client for the provision of data, the clarity of purpose demonstrated by the client (and hence risk of goal posts changing during the project), the continued availability of key staff (consultant's and client's), conflict of interest with other clients, the client's 'culture' (and hence the willingness to accept unconventional or 'creative' results), the realism of the client's estimate of the time required to complete the project, political factors beyond the consultant's control, profit levels, and whether the client will pay on time.

Both client and consultant risks are relevant to the success or failure of a project. As the client, you should endeavour to be aware of all of them.

Clauses 8.1 to 8.3 of the CPRs requires relevant entities to establish processes for the identification, analysis, allocation and treatment of risk when conducting a procurement, with the effort involved recommended to be commensurate with the scale, scope and risk of the project. The CPRs recommend that 'risks should be borne by the party best placed to manage them'. The Department of Finance (2014) has also released a Commonwealth Risk Management Policy which addresses action that needs to be taken at an entity level.

**Table 1. Establishing the need for a consultant: Risks and mitigation strategies**

Type of risk	Likely consequence	Mitigation strategy
Overlook or breach key provisions of AAIs, CPRs	<ul style="list-style-type: none"> <li>Decision to engage consultant is not compliant</li> <li>Possible legal action, media interest, or probing by Senate Committees</li> </ul>	<ul style="list-style-type: none"> <li>Read key documents, particularly AAIs for your agency</li> <li>Check with procurements section or legal adviser</li> <li>Check for existing or proposed whole-of-government procurement</li> </ul>
Insufficient funding	<ul style="list-style-type: none"> <li>Purchase or availability of services delayed</li> <li>Premature termination of contract</li> <li>Reduced quality of output</li> </ul>	<ul style="list-style-type: none"> <li>Ensure funds and appropriate delegations are available at the outset</li> <li>Allow for contingencies and risk in contract</li> <li>Allow for contingencies. 10 to 15 per cent of total contract value is often used in the commercial sector</li> <li>Check that there are no follow-on costs after completion of the consultancy</li> </ul>
Unrealistic timeframe for completion of task by consultant	<ul style="list-style-type: none"> <li>Delivery schedule not met</li> <li>Lower quality product delivered</li> <li>Bad reputation among consultants (and possibly higher quotes for next tender)</li> </ul>	<ul style="list-style-type: none"> <li>Plan ahead</li> <li>Where the timeframe is unavoidable, select a reputable consultant with large resource base</li> </ul>
Realistic solution not feasible	<ul style="list-style-type: none"> <li>Unnecessary expenditure</li> <li>On the other hand, external confirmation of the lack of a feasible solution may be an advantage</li> <li>Finalisation of the project may be difficult</li> </ul>	<ul style="list-style-type: none"> <li>Perform detailed needs analysis before the decision to hire a consultant</li> <li>If it seems likely that a solution may not be found, provide in the contract for flexibility to terminate the contract</li> </ul>
Misinterpretation of needs, or inability to use results	<ul style="list-style-type: none"> <li>Unnecessary expenditure</li> <li>Failure to implement optimal policy outputs</li> </ul>	<ul style="list-style-type: none"> <li>Specify clear deliverables</li> <li>Check 'needs analysis' with stakeholders</li> <li>Carry out a 'dry run' using dummy results to check how they will be used in practice (e.g. for policy advice, statistical testing)</li> <li>Perform a 'gap analysis' to compare expected outputs of consultancy against what is needed for policy advice, etc.</li> </ul>

## Tips and traps

Users of consultancy services sometimes complain that consultants simply pump them for information and then sell it back to them. (The old joke is that a consultant is someone who borrows your watch, then charges you to tell you the time.) In some areas of government, it will be inevitable that consultants will need to learn enough about your business to be able to provide informed output. But a consultant may also take an inordinately long time to learn about your business. If this is the case, then review your perceived needs for consultancy services. Alternatively, review your selection processes.

It would be difficult to over-emphasise the point that clarity of purpose is essential to a successful consultancy project. If you are not sure what is really needed or how you will use the output, then it may be useful to first engage a consultant on a short-term basis to help you think through the issues. A good test is to ask whether you would be comfortable defending your justification for having hired a consultant in front of a Senate committee or an auditor.

There is an enduring myth in parts of the Australian Public Service that consultants will take any job thrown at them by any client. It may be true that a consultant will eventually be found to take on a badly defined or 'messy' task. But good consultants (who usually have more work than they can handle) will be highly unlikely to accept (or bid for) work that they suspect will involve unnecessary problems and conflicts. Failure by clients to clarify their needs and requirements in a business case can therefore limit the choice of consultants available to them, and may result in lower quality output.

Open tendering processes can be very useful in an unknown market where it is necessary to 'test the water'. However, they can involve significant cost to a client (time spent on selection processes) and consultants (preparation of bids). Because of the time and money required, many consultants try to avoid open tendering processes unless they believe that there is a reasonable chance of winning.

For a fixed price \$100,000 tender, for example, a consultant might assume that there will be five or so serious bidders, including themselves. The chance of winning is only 0.2 per cent, so the expected value of the job is only \$20,000. Taking into account time

spent obtaining a briefing, thinking through the approach, doing some background research, writing the proposal, and the use of support staff to prepare it for submission, about three consulting days may be involved. The opportunity cost to a consultant with a daily charge-out rate of \$1,200 would be about \$3,600: a substantial reduction in profit if the bid were successful, and a straight loss if it were not. The net expected value is thus \$16,400. At the charge-out rate of \$1,200 per day, this represents 13.6 days of work. If consultants feel unable to complete the job within this time (including time spent on project management, travel, administration, etc.) they will probably not bid. (In some firms any loss would be deducted from the consultant's remuneration, or the consultant would need to make up any shortfall in hours spent on the project in their own time.)

If you expect to hire consultants reasonably frequently, panel arrangements may be worth considering, if they can better achieve value for money. Appointment of a number of good consultants with a broad range of skills saves time later because there is no need to repeat the tender and selection processes. You can then choose the best one to engage for a specific project, as required. Panel arrangements may also involve a fixed fee (often lower than normal if there is an expectation of continuing work) for the period of the panel. Multi-use lists are another possibility in that they establish a list of pre-qualified suppliers. But the establishment of multi-use lists is not in itself a procurement process. Suppliers who satisfy qualification requirements still need to be engaged through an 'approach to market'.

Where guaranteed access to a consultant is required, consider the possibility of a retainer fee. A retainer ensures that a consultant will make themselves available, if required, at no extra cost, although they may not be used at all if a need does not arise. A retainer fee has the advantage of being lower than normal rates because it provides the consultant with a definite stream of income, and the consultant is bound contractually to provide a specified amount of time (for example, three days per week) to the client, if required. On the other hand, if the consultant is not used very often, the total cost in terms of output may become unjustifiably high.

Where the objectives or likely scope of a project are difficult to determine with any certainty at the outset, a decision-tree approach may be appropriate. For example, the project could be structured

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to begin with a short feasibility and scoping study at a fixed price of \$5,000. The scoping study would provide information to the client on likely cost (at least for the next stage), relevant analytical methodologies, and perhaps a refinement of the objectives. On this basis, the client might proceed to the next stage of data collection at a fixed price of, for example, \$50,000. Further stages (such as data collation and interpretation, interviews with stakeholders, production of a report, and implementation of recommendations) could then be considered sequentially. The client retains the option at each stage to abort the project or to continue to the next stage. The advantage is that not all the resources need to be committed at the beginning, when uncertainty is still high. It also offers the potential advantage of being able to bring in different consultants for various stages, particularly where specialist skills are required. In effect, milestones become decision points. A potential disadvantage of staging a procurement is that clauses 9.2 to 9.6 of the CPRs require estimation of the combined maximum value of all the stages. Where estimation is not possible for the entire duration of the contract, the procurement must be treated as exceeding the relevant threshold (e.g. \$80,000 for NCCEs).

An issue that may need to be addressed is the distinction between consultants and employees. If consultants are required to work closely with other staff on-site for lengthy periods, care will be needed to ensure that they do not, as a result, lose their status during the contract period as independent contractors to the extent that they could be regarded as employees. Because of the inherent legal complexities, it is advisable to seek legal advice prior to an approach to market.

If a consultant is engaged because specialist skills are not available in-house, a key consideration to address at the outset is the ability of the Commonwealth entity to select the most appropriate expert and how to manage the contract. One solution to the lack of in-house expertise is to obtain separate advice from a consultant in the same field. For example, a specialist academic economist or engineer could be hired to be part of the selection committee, or to provide advice on outputs during the course of the consultancy. The need for such external expertise should be determined on the basis of risk. If specialist knowledge is important in ensuring successful outputs, or if the consequences of unsuccessful outputs are significant, then the case for external advice is likely to be strong. Even if external advice is obtained, care is still required to ensure that the 'expert' selected is

competent in the relevant area. Simply choosing a generalist economist or engineer may not be sufficient if highly specialised knowledge is required for a high-risk part of a project.

In some cases, it may be desirable or necessary to hire different specialist consultants, such as an economist and an engineer, to work on a single, specific problem. Some consulting firms can provide the whole range of different skills in-house. But it may also be the case that a tender process results in a choice of two different individual consultants or two different firms as the best outcome. In this situation it would be prudent in terms of risk management to have the two different parties sign a protocol that commits them to work collaboratively and cooperatively on the project.

If transfer of knowledge to your agency is a priority, ensure that you have sufficient staff to work with the consultant. Your staff need to have adequate skills to enable them to understand the issues, and will need to be readily available throughout the consultancy.

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