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## Choosing the consultant

### Some basics

Choosing consultants is analogous to a staff selection process:

- Interview the short-listed bidders to provide an opportunity to probe claims and methodology. But make sure that it is the nominated team that is interviewed as part of a consultant's presentation, not just one of the firm's 'professional presenters'. The box below ('quick-check questions') provides a useful basis for discussion during the consultant's presentation.
- For large contracts, consider having an outsider sit on the evaluation committee, both for probity and to gain an external perspective; preferably someone from an agency with relevant expertise. Even an industry person not connected with the bidder can be used, but first seek agreement from all bidders, in case of a potential breach of any confidentiality provisions in their bids. For probity, external advisers need to sign confidentiality and conflict of interest declarations.
- Compare candidates only against the evaluation criteria set out in the request documentation.
- Interview referees, consult peers, or others who may have worked with the consultant. And don't just ask if everything was okay. Ask for examples of things that went well, *as well as* things that did not. Are the same personnel still involved?

- Don't promise the job to anyone before a final decision has been made.
- Provide debriefing for unsuccessful candidates.

Some degree of subjective or professional judgement will inevitably be required, but the primary evaluation should be carried out as objectively as possible against the evaluation criteria set out in the tender documentation. One of the reasons for the successful action against Airservices Australia by Hughes Aircraft Systems International was the failure by its predecessor organisation (the Civil Aviation Authority) to evaluate tenders in accordance with the priorities and methodology specified in the Request for Tender (AGS 1997a, 1997b).

If considered desirable, clarification of terms or outputs can be achieved through discussion after the receipt of submissions. The best results can be achieved before selection of a preferred bidder, but ethics demand that discussions should not merely be a means of playing bidders off against each other. In complex cases, use of trained negotiators is advisable. Prior legal and probity advice should be sought in any case, to avoid inadvertent breaches of contract law. Where none of the submissions received is considered to be satisfactory, an option is to relet the tender.

#### Exhibit 5.1. Questions to ask during a consultant's bid presentation

- What do you regard as our principal need or problem?
- Can you please analyse for us the principal strengths and weaknesses of your proposed approach/methodology?
- What alternative methodologies could be used? (As a check on whether the consultant will only apply preconceived ideas or proprietary 'packages'.)
- What specifically can you offer us that others cannot?
- How will we measure or evaluate your success in meeting our needs?
- What related experience have you (the actual personnel nominated, not the firm as a whole) had in working with similar organisations, or with other organisations in this industry or field?
- What assurances can you offer on the availability of nominated personnel?
- How do you plan to maintain communication with our contact officer?
- What related experience have you had in working on similar issues?
- If you plan to use sub-contractors, what are the arrangements?
- From your (consultant's) point of view, what are the major risks in the project, and what strategies do you intend to adopt to mitigate them? What risks do you see facing us (the client)?

- Can you confirm that your stated fees (*and* expenses) are likely to represent all costs to be incurred? If expenses are based on cost recovery, then what is the likely overall expense to be incurred? Do you propose to charge for meeting time, time spent travelling, telephone calls, taxis, etc.?
- Do all quoted costs and fees include GST?
- What penalties should be imposed on you for under-performance or late delivery?
- What other work do you have in hand at the moment? Do you have the capacity to meet the timeframe specified?
- How do you propose to work with our nominated resources (where some of the client's staff will be working on the project alongside the consultant)?
- What quality assurance procedures do you have? What procedures do you have in place to ensure that files are maintained adequately?
- Do you have any conflict of interest (name a few obvious parties to provide a prompt), and how will you handle this situation?

Source: Adaptation and expansion of list in Shenson (1990: 47).

## Australian Government requirements

Evaluation of value for money offered by submissions should be on a whole-of-life basis, taking into account factors relevant to the project under consideration. Costs and benefits should be compared on a common basis over time, including through the calculation of 'equivalent annual value' rather than net present value, where appropriate.

Entities can claim GST input tax credits for services provided, but only if the consultant is registered for GST purposes. This may be a relevant consideration in the case of individual consultants or community groups.

Chapter 4 of the CPRs lists factors other than cost that should be taken into account in assessing value for money.

### Confidentiality during the tendering process

'In the Hughes Aircraft case ... one of the breaches of the tender process identified by Finn J was breach of confidentiality. Information about the bidders' prices was provided by the Civil Aviation Authority Board to the portfolio minister and to personnel from another department, including the permanent head and minister of that department. Finn J had no doubt that passing on this information to personnel (including the minister) from the other department was a breach of the strict confidentiality which was part of the package of terms of the request for tender. The department's role was to assess the Australian Industry Involvement commitments of the two bids and providing the prices to that department was irrelevant to that task.

Providing that information to the portfolio minister also constituted a breach of confidentiality in the circumstances. This was because the information was, as it were, volunteered by the Board rather than requested by the minister. Finn J was in no doubt that the minister ... could have made a direction to the Board to provide the information ... But this [legislative] power had not been used.'

Source: Seddon (2004: 320).

## Debriefing

Clause 7.15 of the CPRs states that:

following the rejection of a submission or the award of a contract, officials must promptly inform affected tenderers of the decision. Debriefings must be made available, on request, to unsuccessful tenderers outlining the reasons the submission was unsuccessful. Debriefings must also be made available, on request, to the successful supplier(s).

Clause 6.8 of the CPRs further advises that:

if a complaint about procurement is received, relevant entities must apply equitable and non-discriminatory complaint-handling procedures. Relevant entities should aim to manage the complaint process internally, when possible, through communication and conciliation.

### The gun buy-back scheme

Following the tragic events at Port Arthur in Tasmania in April 1996, the Australasian Police Ministers' Council met and agreed to a 10-point plan for the regulation of firearms on a national basis.

The advertising and public relations contract for the Gun Buy-Back campaign was the subject of a tender process. The responsible agency, the Office of Government Information and Advertising (OGIA), in consultation with, among other agencies, the Attorney-General's Department, developed a list of potential tenderers from its register of consultants. However, the name of another advertising firm was added on the basis of 'a facsimile from the then Chief Political Adviser to the Prime Minister, which suggested inclusion of DDB Needham, Adelaide.' (para. 3.142)

'OGIA advised the ANAO that the decision to include DDB Needham on the shortlist ... was made with the agreement of the evaluation committee ... [but] neither OGIA or the Attorney-General's Department were able to provide the ANAO with adequate written evidence documenting the committee decision.' (paras 3.155, 3.156)

The ANAO concluded that it 'considers that adequate documentation of decisions helps to ensure transparency and accountability. ... A tangible management trail provides protection for all concerned, including those who may have to take decisions later in the process but who ... may not have been involved in the early stages of decision-making or assessment.' (para. 3.159)

Source: ANAO (1997).

## Tips and traps

- Departmental registers and AusTender can provide useful information about previous work done for the department by consultants. However, if use is made of any remarks about a consultant's previous work then the principles of natural justice require that the consultant be given an opportunity to comment on them. If using a '**consultants register**', check whether the same personnel are being proposed again by the consultant, and whether the nature of the job is comparable to previous work carried out for the Department.
- Avoid accepting **hospitality** or favours during a tender selection process, including seemingly innocuous offerings such as a cup of coffee in a coffee shop. Even if there is a long-established relationship with a bidder, or the hospitality is part of another project, probity demands not only impartiality but also the need to avoid being *seen* to be compromised in any way.

- In some entities, the **preferred bidder** has in the past been announced publicly before finalisation of the contract. Where the preferred bidder is made known, it may significantly reduce the agency's scope for further negotiation of terms and conditions with that bidder. If negotiations fall through, the scope for negotiations with alternative bidders is also diminished.
- Some bidders may seek to present their bid at an interview by using specialised presenters who are not part of the consultant's project team. Such **presentations** can be a waste of time, particularly if the presenters are not familiar with the issues or the methodology to be used. Nor is the client afforded the opportunity of meeting the people who will actually carry out the work. *Insist on the actual team of nominated personnel making the presentation.* Apart from getting to know them, you will be better able to assess their capabilities.
- Large consulting firms may cite as part of their '**previous history and experience**' work which has been done within the firm, but in other cities by people other than those nominated in the proposal. The implication is that the experience is available within the firm and can be drawn on if required. Take the time to ask during the presentation about the personal involvement of the team nominated in the proposal in the projects cited. If none of the nominated personnel were personally involved, ask how the firm's experience will be drawn on for your own project.
- Entities do not have discretion to accept **late tenders**, unless the tender is late solely because of the agency's own mishandling. All suppliers must meet a common deadline.

Table 5. Choosing the consultant: Risks and mitigation

Type of risk	Likely consequence	Mitigation strategy
Bidders not treated equally	<ul style="list-style-type: none"> <li>Loss of confidence by suppliers in entity processes</li> <li>Ministerial representations</li> <li>Possible legal action</li> <li>Non-compliance report required</li> </ul>	<ul style="list-style-type: none"> <li>Check before selection process commences that all tenderers received the same request documentation: if necessary, rectify, seek legal and probity advice, and consider need to reopen tenders</li> <li>Check all records of conversation in case of need to correct information provided, or to provide identical information to all bidders</li> </ul>
Premature contract created	<ul style="list-style-type: none"> <li>Loss of confidence by suppliers in entity processes</li> <li>Ministerial representations</li> <li>Possible legal action</li> <li>Non-compliance report required</li> </ul>	<ul style="list-style-type: none"> <li>Avoid any statements on awarding of the contract until the process has been finalised</li> <li>Avoid encouraging any bidder to incur costs (over and above the cost of tendering) before the contract is signed</li> <li>Include in request documentation a statement that a contract will only be created on signature of a written agreement: seek legal advice</li> </ul>
Unsuitable consultant selected	<ul style="list-style-type: none"> <li>Outputs below expectations</li> <li>Output does not represent value for money</li> </ul>	<ul style="list-style-type: none"> <li>Ask referees about any bad experiences with the consultant, as well as good ones</li> <li>Include an informed 'outsider' on the evaluation committee to increase range of judgements</li> <li>Re-tender if no bidder suitable, even if time is lost</li> </ul>
Breach of due process or confidentiality during debriefing	<ul style="list-style-type: none"> <li>Loss of confidence by suppliers in agency processes</li> <li>Ministerial representations</li> <li>Possible legal action</li> <li>Non-compliance report required</li> </ul>	<ul style="list-style-type: none"> <li>During the debrief, compare tenderers' response only against evaluation criteria stated in request documentation, not against responses from other tenderers</li> <li>Do not disclose any information provided by other tenderers</li> <li>Involve other staff in the debriefing in case corroboration is needed</li> <li>Place on file notes of debriefing session as soon as possible</li> <li>Aim for professional, positive debriefing to foster goodwill</li> </ul>

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Type of risk	Likely consequence	Mitigation strategy
Apparent agreement masks different expectations between client and consultant	<ul style="list-style-type: none"><li>• Disputes during project</li></ul>	<ul style="list-style-type: none"><li>• Develop a clear specification of requirements</li><li>• Include in request documentation the draft contract, a list of respective roles and responsibilities, etc.</li><li>• Record all discussions during tendering and selection processes</li><li>• Clarify all outstanding matters before signature of contract</li></ul>

This text is taken from *Managing Consultants: A practical guide for busy public sector managers*, by Leo Dobes, published 2016 by ANU Press, The Australian National University, Canberra, Australia.