

Procurement by the National Capital Authority

National Capital Authority

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Canberra ACT

2 June 2022

Dear Mr President
Dear Mr Speaker

In accordance with the authority contained in the *Auditor-General Act 1997*, I have undertaken an independent performance audit in the National Capital Authority. The report is titled *Procurement by the National Capital Authority*. Pursuant to Senate Standing Order 166 relating to the presentation of documents when the Senate is not sitting, I present the report of this audit to the Parliament.

Following its presentation and receipt, the report will be placed on the Australian National Audit Office's website — <http://www.anao.gov.au>.

Yours sincerely



Grant Hehir
Auditor-General

The Honourable the President of the Senate
The Honourable the Speaker of the House of Representatives
Parliament House
Canberra ACT

AUDITING FOR AUSTRALIA

The Auditor-General is head of the Australian National Audit Office (ANAO). The ANAO assists the Auditor-General to carry out his duties under the *Auditor-General Act 1997* to undertake performance audits, financial statement audits and assurance reviews of Commonwealth public sector bodies and to provide independent reports and advice for the Parliament, the Australian Government and the community. The aim is to improve Commonwealth public sector administration and accountability.

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Audit snapshot

Auditor-General Report No.30 2021–22

Procurement by the National Capital Authority



Why did we do this audit?

- ▶ Procurement is core business to the National Capital Authority (NCA). It had been more than 13 years since the NCA has had a performance audit focused on it.
- ▶ This audit provides assurance to the Parliament over the effectiveness of the NCA's procurement activities.



What did we find?

- ▶ The NCA's insufficient use of open and competitive procurement processes, non-compliance with the CPRs and poor transparency and record keeping means it cannot demonstrate value for money across its procurement activities.
- ▶ The NCA makes insufficient use of open and competitive procurement processes.
- ▶ Procurement decision-making has not been sufficiently accountable and transparent.



Key facts

- ▶ The NCA is a non-corporate Commonwealth entity and is subject to the Commonwealth Procurement Rules (CPRs).
- ▶ Payments to suppliers represented 40 per cent of the NCA's total expenses in 2020–21, and 38 per cent of its total budgeted expenses for 2021–22.
- ▶ In 2019–20 and 2020–21, there were 327 contracts with a total value of \$69.9 million reported by the NCA on the AusTender website.



What did we recommend?

- ▶ The Auditor-General made eight recommendations, seven to the NCA and one to the Department of Finance. The recommendations were aimed at improving the use of open and competitive procurement, and accountable and transparent decision-making.
- ▶ The NCA agreed to all seven recommendations. The Department of Finance agreed to the recommendation to it.

11%

of contracts were reported by the NCA on AusTender as being let through open tender during 2019–20 and 2020–21.

62%

of contracts examined, where suppliers were directly approached by the NCA, limited the candidates to those known to or previously engaged by the NCA.

10%

of contracts examined were accurately reported on AusTender within the required 42-day timeframe.

Summary and recommendations

Background

1. The National Capital Authority (NCA) was established in 1989 under the *Australian Capital Territory (Planning and Land Management) Act 1988* (PALM Act) following the introduction of self-government to the Australian Capital Territory. Its mission is ‘to shape Canberra as a capital that all Australians can be proud of by ensuring it is well planned, managed and promoted, consistent with its enduring national significance.’
2. The NCA is a non-corporate Commonwealth entity within the Infrastructure, Transport, Regional Development and Communications portfolio. As such, the NCA is subject to the Commonwealth Procurement Rules (CPRs) issued by the Finance Minister under section 105B of the *Public Governance, Performance and Accountability Act 2013*.
3. The accountable authority for the NCA is the Authority (also referred to as the Board). The Assistant Minister for Regional Development and Territories has administrative responsibility for the PALM Act. The NCA reports having around 60 staff.
4. According to its financial statements, payments to suppliers represented 40 per cent of the NCA’s total expenses in 2020–21. Of its total budgeted expenses for 2021–22, 38 per cent are attributable to supplier expenses. In 2019–20 and 2020–21, there were 327 contracts with a total value of \$69.9 million reported by the NCA on the AusTender website.

Rationale for undertaking the audit

5. Procurement is core business to the NCA. It had been more than 13 years since the NCA has had a performance audit focused on it (Auditor-General Report No.33 2007–08 *The National Capital Authority’s Management of National Assets*). This audit provides assurance to the Parliament over the effectiveness of the NCA’s procurement activities.

Audit objective and criteria

6. The objective of the audit was to examine whether the NCA’s procurement activities are complying with the CPRs and demonstrating the achievement of value for money.
7. To form a conclusion against this objective, the following high-level criteria were applied.
 - Have open and competitive procurement processes been employed?
 - Has decision-making been accountable and transparent?

Conclusion

8. The NCA’s insufficient use of open and competitive procurement processes, non-compliance with the CPRs and poor transparency and record keeping means it cannot demonstrate value for money across its procurement activities.
9. The NCA makes insufficient use of open and competitive procurement processes. Where open tenders were conducted, it was common for request documentation to limit the extent of effective competition. Where suppliers were directly approached, the pool of potential tenderers was often limited to those previously engaged by the NCA, or described by the NCA as being

known to the NCA or its advisers. With respect to the assessment processes undertaken, just over half of the contracts were awarded to the candidate where documentation demonstrated that it offered the best value for money. The conduct of procurements was also not to a consistent ethical standard.

10. Procurement decision-making has not been sufficiently accountable and transparent. Approval had been obtained by an appropriate delegate in most of the contracts examined. It was common for there to be gaps in the records of the planning and conduct of procurements. The NCA's reporting of contracts and amendments on AusTender was largely non-compliant with the requirements under the CPRs.

Supporting findings

Open and competitive procurement

11. The majority (64 per cent) of procurements valued above the \$80,000 threshold in the CPRs undertaken by the NCA in 2019–20 and 2020–21 did not involve open competitive approaches. In comparison, other non-corporate Commonwealth entities are much more likely to report using competitive procurement approaches. (See paragraphs 2.3 to 2.26)

12. For just over half of the procurements examined by the ANAO, appropriate written records were made of the justification for using limited tender processes and how value for money was achieved. (See paragraphs 2.30 to 2.32)

13. When undertaking competitive procurement processes the NCA's approach has not been sufficiently open, fair and non-discriminatory. Where open tenders were conducted, it was common for request documentation to include conditions for participation and/or other mandatory requirements which limited competition. Where suppliers were directly approached, the pool of potential tenderers was often limited to those previously engaged by the NCA, or described by the NCA as being known to the NCA or its advisers. (See paragraphs 2.36 to 2.51)

14. For 60 per cent of the contracts examined in detail, it was evident that relevant evaluation criteria were included in request documentation. For the remaining 40 per cent, either the request documentation did not include any evaluation criteria or there were no records of the request documentation on file. (See paragraphs 2.54 to 2.57)

15. With respect to the assessment processes undertaken, just over half of the contracts examined in detail by the ANAO were awarded to the candidate where documentation demonstrated that it offered the best value for money. In the remaining 45 per cent of contracts where value for money outcomes had not been demonstrated, this was primarily the result of insufficient analysis being presented commensurate with the scale of the procurement or the result of poor record keeping practices. Of note was that the essential requirements and/or evaluation criteria applied during the evaluation process were not consistent with the approach to market in 88 per cent of contracts examined (where sufficient documentation was maintained). (See paragraphs 2.60 to 2.68)

16. The NCA has not conducted procurements to a consistent ethical standard as required under the CPRs:

- conflict of interest declarations were not completed by all evaluation team members in 39 per cent of the contracts examined in detail by the ANAO where there was sufficient information to enable reliable examination;
- where advisers were appointed during the procurement process, it was common for there to be missing conflict of interest declarations and no clear statement as to the extent of the advisers' involvement; and
- of the 12 instances where an external probity adviser was appointed (typically for larger value procurements), only one had sufficient records maintained documenting the probity adviser's role and a report completed by the adviser confirming probity had been maintained during the procurement process. (See paragraphs 2.69 to 2.88)

Accountable and transparent decision-making

17. Approval had been obtained by an appropriate delegate prior to the NCA entering into the contract in 83 per cent of contracts examined in detail by the ANAO. For one third of the contracts examined, the available records indicated that services or works had started prior to the contract being signed. (See paragraphs 3.3 to 3.15)

18. The NCA did not maintain records commensurate with the scale, scope and risk of the procurement. While records of approvals and the contracts awarded were largely maintained, it was common for there to be gaps in the records of the planning and conduct of the procurements. (See paragraphs 3.16 to 3.26)

19. The NCA's reporting of contracts and amendments on AusTender was not compliant with the CPRs with only 10 per cent of contracts being accurately reported within the required timeframe. While 62 per cent of contracts examined by the ANAO were reported within 42 days of being entered into as required, most variations were not reported within the 42 days. In addition, the accuracy of contract reporting was not to an appropriate standard with errors commonly found in the reported procurement methods, contract value and contract start date. (See paragraphs 3.27 to 3.38)

Recommendations

Recommendation no. 1 Paragraph 2.10

The Department of Finance develop and issue guidance on applying the definition of 'construction services' when relevant entities are considering which procurement threshold to use for the purposes of the Commonwealth Procurement Rules.

Department of Finance response: *Agreed.*

National Capital Authority response: *Noted.*

- Recommendation no. 2**
Paragraph 2.27
- The National Capital Authority:
- (a) increase the extent to which it employs open competitive procurement processes; and
 - (b) improve the accuracy of its AusTender reporting on the manner in which contracts have been let.
- National Capital Authority response:** *Agreed.*
- Recommendation no. 3**
Paragraph 2.33
- The National Capital Authority improve its controls over the making of appropriate records of the justification for using limited tender procurement approaches and outlining how value for money was achieved.
- National Capital Authority response:** *Agreed.*
- Recommendation no. 4**
Paragraph 2.52
- The National Capital Authority's Audit Committee monitor and provide assurance that the National Capital Authority employs open, fair and non-discriminatory approaches when undertaking procurements.
- National Capital Authority response:** *Agreed.*
- Recommendation no. 5**
Paragraph 2.58
- The National Capital Authority strengthen its procurement controls to ensure that procurement request documentation includes a complete description of the evaluation criteria that will be applied.
- National Capital Authority response:** *Agreed.*
- Recommendation no. 6**
Paragraph 2.84
- Where a probity adviser has been appointed, the National Capital Authority actively engage and manage the adviser to ensure services are delivered as agreed and that probity has been maintained during the procurement process.
- National Capital Authority response:** *Agreed.*
- Recommendation no. 7**
Paragraph 3.34
- The National Capital Authority implement a monitoring and assurance framework over its compliance with the Commonwealth Procurement Rules, including AusTender reporting.
- National Capital Authority response:** *Agreed.*
- Recommendation no. 8**
Paragraph 3.39
- The National Capital Authority place greater emphasis on timely and accurate reporting of its procurement activities, and making and retaining appropriate records of those activities.
- National Capital Authority response:** *Agreed.*

Summary of entity responses

20. The proposed audit report was provided to the NCA. Extracts of the proposed report were also provided to: the Department of Finance, Maddocks, BGIS Pty Ltd and Griffin Legal Pty Ltd.

The letters of response that were received for inclusion in the audit report are at Appendix 1. Entities' summary responses are provided below.

National Capital Authority

The National Capital Authority (NCA) undertakes its procurements in accordance with the Commonwealth Procurement Rules (CPRs) and in a manner consistent with the Department of Finance's guidelines, particularly in relation to construction activities. The NCA's procurement practices strive to achieve the best value for money for the Commonwealth within the CPRs and guidelines while being as practical as possible in maintaining and enhancing over \$1 billion of Commonwealth assets.

The NCA has a complex ageing heritage asset base and operates in a relatively specialised area, often with unique or bespoke equipment and/or requirements. Over many years staff have built a solid knowledge of the various areas of operations. NCA officers use this knowledge to optimise the best approach to maintain Commonwealth assets effectively and efficiently. As such, procurement processes are designed to deliver the best results often within narrow markets of specialist skills and expertise. On occasion, assets fail unpredictably, requiring that procurement activities be reactive, responding to unforeseen and unprogrammed events or driven by a situation that must be addressed immediately.

The NCA is progressively implementing a number of new arrangements and further education of staff to address the recommendations of this Report.

Department of Finance

The Department of Finance agrees to the recommendation and will review and update procurement guidance material in consultation with key stakeholders and procuring entities. Updated guidance will guide and support procuring officials' application of the definition of 'construction services' when considering relevant procurement thresholds.

Key messages from this audit for all Australian Government entities

21. Below is a summary of key messages, including instances of good practice, which have been identified in this audit and may be relevant for the operations of other Australian Government entities.

Procurement

- Achieving value for money is the core rule of the Commonwealth Procurement Rules. Generally, the more competitive the procurement process, the better placed an entity is to demonstrate that it has achieved value for money. Given this, entities should seek to employ competitive procurement processes and, where possible, have them openly competitive rather than restricting the field to known or previously engaged suppliers.
- Incumbency can provide, or be perceived to provide, advantages that can undermine the integrity of a procurement process. This risk is best addressed by entities designing and conducting the procurement in a demonstrably open and competitive manner, such that it is evident that incumbent providers and other candidates each have had a fair and equitable opportunity to compete.
- Evidence and advice are required to be retained and documented at all stages of a procurement. Not maintaining adequate records impairs the ability of an entity to demonstrate that its conduct of a procurement has met the Commonwealth Procurement Rules as well as to evaluate performance and plan effectively for the future.

Audit findings

1. Background

Introduction

1.1 The National Capital Authority (NCA) was established in 1989 under the *Australian Capital Territory (Planning and Land Management) Act 1988* (PALM Act) following the introduction of self-government to the Australian Capital Territory. Its mission is ‘to shape Canberra as a capital that all Australians can be proud of by ensuring it is well planned, managed and promoted, consistent with its enduring national significance.’

1.2 The NCA is a non-corporate Commonwealth entity within the Infrastructure, Transport, Regional Development and Communications portfolio. As such, the NCA is subject to the Commonwealth Procurement Rules issued by the Finance Minister under section 105B of the *Public Governance, Performance and Accountability Act 2013*.

1.3 The accountable authority for the NCA is the Authority (also referred to as the Board).¹ The Assistant Minister for Regional Development and Territories has administrative responsibility for the PALM Act. The NCA reports having around 60 staff.

1.4 The functions of the NCA are set out in section 6 of the PALM Act and are as follows:

- to prepare and administer a National Capital Plan;
- to keep the Plan under constant review and to propose amendments to it when necessary;
- on behalf of the Commonwealth, to commission works to be carried out in Designated Areas in accordance with the Plan where neither a Department of State of the Commonwealth nor any Commonwealth authority has the responsibility to commission those works;
- to recommend to the Minister the carrying out of works that it considers desirable to maintain or enhance the character of the National Capital;
- to foster an awareness of Canberra as the National Capital;
- with the approval of the Minister, to perform planning services for any person or body, whether within Australia or overseas; and
- subject to subsection (2) and with the Minister’s approval, on behalf of the Commonwealth, to manage National Land designated in writing by the Minister as land required for the special purposes of Canberra as the National Capital.

1.5 In addition, the *National Land (Road Transport) Ordinance 2014* established the NCA as the administering authority for enforcement of parking regulations on National Land.

NCA’s procurement activities

1.6 According to its financial statements, payments to suppliers represented 40 per cent of the NCA’s total expenses in 2020–21. Of its total budgeted expenses for 2021–22, 38 per cent are attributable to supplier expenses. In 2019–20 and 2020–21, there were 327 contracts with a total

¹ The Authority comprises the Chair, the Chief Executive of the NCA and three non-executive members. The Chief Executive has the responsibility of an Agency Head under the *Public Service Act 1999* and manages the day-to-day affairs of the NCA.

value of \$69.9 million reported by the NCA on the AusTender website. Recently completed procurements have included a five-year \$20.2 million contract to deliver open space management services, a five-year \$7.4 million contract to operate and maintain Scrivener Dam, and a four-year \$7 million contract for pay parking operations on National Land.²

Rationale for undertaking the audit

1.7 Procurement is core business to the NCA. It had been more than 13 years since the NCA has had a performance audit focused on it (Auditor-General Report No.33 2007–08 *The National Capital Authority's Management of National Assets*). This audit provides assurance to the Parliament over the effectiveness of the NCA's procurement activities.

Audit approach

Audit objective, criteria and scope

1.8 The objective of the audit was to examine whether the NCA's procurement activities are complying with the Commonwealth Procurement Rules and demonstrating the achievement of value for money.

1.9 To form a conclusion against this objective, the following high-level criteria were applied.

- Have open and competitive procurement processes been employed?
- Has decision-making been accountable and transparent?

1.10 The audit scope encompassed the NCA's:

- procurement framework (such as processes and systems); and
- procurement activities for contracts entered into in the last two completed financial years.

Audit methodology

1.11 NCA records relating to procurement planning, conduct and decision-making were collected and analysed. All procurement contracts entered into during 2019–20 and 2020–21 with a start date on or before 30 June 2021 were included in the scope of the audit. Examination of a sample of 42 procurement contracts was undertaken to provide coverage across the different procurement approaches employed by the NCA.³ In addition, the ANAO had meetings with key staff from the NCA.

1.12 The audit was conducted in accordance with ANAO Auditing Standards at a cost to the ANAO of approximately \$310,000.

1.13 The team members for this audit were Tiffany Tang, Nicole Harrison and Brian Boyd.

2 The values are the total contract values as reported on AusTender by the NCA as at 30 June 2021.

3 For the purpose of selecting the sample for detailed examination, the ANAO identified from NCA records 112 contracts with a recorded value of \$80,000 or above that were for goods/services other than for utilities, personnel or legal services and that were procured by methods other than mandatory arrangements or between government entities. From these 112 contracts, the ANAO selected a sample of 42 contracts. The sample comprised: all 12 contracts valued over \$1 million; all 20 of the remaining contracts recorded as being let by open tender, prequalified tender or standing offer; and then 10 randomly selected contracts from amongst the 80 recorded as being let by limited tender.

2. Open and competitive procurement

Areas examined

The ANAO examined whether open and competitive procurement processes had been employed.

Conclusion

The National Capital Authority (NCA) makes insufficient use of open and competitive procurement processes. Where open tenders were conducted, it was common for request documentation to limit the extent of effective competition. Where suppliers were directly approached, the pool of potential tenderers was often limited to those previously engaged by the NCA, or described by the NCA as being known to the NCA or its advisers. With respect to the assessment processes undertaken, just over half of the contracts were awarded to the candidate where documentation demonstrated that it offered the best value for money. The conduct of procurements was also not to a consistent ethical standard.

Areas for improvement

The ANAO made one recommendation to the Department of Finance to develop and issue guidance on the definition of 'construction services' for the purposes of applying the threshold under the Commonwealth Procurement Rules (CPRs) that requires an open and competitive procurement approach be employed.

The ANAO also made five recommendations aimed at the NCA: increasing its use of open competitive procurement processes and improving the accuracy of its AusTender reporting about how it conducts procurements; improving its controls over the making of appropriate records when using limited tender procurement approaches; increasing assurance through its Audit Committee that it employs open, fair and non-discriminatory approaches; ensuring that procurement request documentation includes a complete description of the evaluation criteria; and actively engaging and managing appointed probity advisers to ensure services are delivered as agreed and probity is maintained during the procurement process.

2.1 Competition is a key element of the Australian Government's procurement framework. Effective competition requires non-discrimination and the use of competitive procurement processes.

2.2 Generally, the more competitive the procurement process, the better placed an entity is to demonstrate that it has achieved value for money. Competition encourages respondents to submit more efficient, effective and economical proposals. It also ensures that the purchasing entity has access to comparative services and rates, placing it in an informed position when evaluating the responses. Openness in procurement involves giving suppliers fair and equitable access to opportunities to compete for work while maintaining transparency and integrity of process.

To what extent were competitive procurement approaches used?

The majority (64 per cent) of procurements valued above the \$80,000 threshold in the CPRs undertaken by the NCA in 2019–20 and 2020–21 did not involve open competitive approaches. In comparison, other non-corporate Commonwealth entities are much more likely to report using competitive procurement approaches.

2.3 Under the CPRs, procurement is conducted by open tender or by limited tender.⁴

- An open tender involves the entity publishing an open approach to market and inviting submissions. This includes multi-stage procurements provided that the first stage is an open approach to market. An open approach to market is any notice inviting *all* potential suppliers to participate in a procurement.⁵
- A limited tender involves the entity approaching one or more potential suppliers to make submissions. Limited tender includes the procurement approach previously termed as 'direct source'.⁶

2.4 Under the CPRs, the expected value of a procurement must be estimated before a decision on the procurement method is made.⁷ When the expected value of a procurement is at or above the relevant 'procurement threshold' additional rules in the CPRs must also be followed unless an exemption applies. Primarily, those additional rules require that, except under specified circumstances, procurements valued above the threshold must be conducted by an open approach to the market. For non-corporate Commonwealth entities, the threshold for procurements of construction services is \$7.5 million and for non-construction services the threshold is \$80,000.

2.5 The Department of Finance advised the ANAO in December 2021 that:

Under the devolved Commonwealth Procurement Framework, it is up to the entity conducting the procurement to determine if the goods and services being procured meet the definition of 'construction services' in the CPRs. Where a procurement is made up of a mix of both goods and services that meet the definition and those that do not, it is again up to the procuring entity to determine to what extent the definition would apply (for the purposes of applying the construction threshold). It may be reasonable, for example, for a procuring entity to determine that, where the majority (but not all) of a procurement meets the definition of construction services, the construction threshold would be applied.

2.6 In applying the procurement thresholds, the NCA has adopted an interpretation of 'construction services' to encompass goods or services not explicitly covered by the definition as set out in the CPRs and relevant legislation.⁸ Examples of the types of goods and services procured by the NCA which it defined as 'construction services' include⁹:

4 Prior to 1 January 2019, there was another category of procurement method termed 'prequalified tender' which involved publishing an approach to market inviting submissions from all potential suppliers on: a shortlist of potential suppliers that responded to an initial open approach to market on AusTender; a list of potential suppliers selected from a multi-use list established through an open approach to market; or a list of all potential suppliers that have been granted a specific licence or comply with a legal requirement, where the licence or compliance with the legal requirement is essential to the conduct of the procurement.

5 This may include a request for tender, request for quote, request for expression of interest, request for information and request for proposal.

6 See Auditor-General Report No.11 2010–2011 *Direct Source Procurement*.

7 The expected value 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.

8 The CPRs define 'construction services' as 'procurements related to the construction of buildings and procurements of works as defined by the *Public Works Committee Act 1969*.' See section 5 of the *Public Works Committee Act 1969* for the definition of 'work' at <https://www.legislation.gov.au/Details/C2017C00098> [accessed 26 May 2022].

9 Contract values are as at contract execution.

- provision of sketch plan design, tender and construction documentation, participation on the NCA tender assessment panel and related superintendency services under a consultancy services contract valued at \$152,432;
- supply and delivery of compost, drainage sand and mulch, with the NCA initially approaching two suppliers in an unsuccessful approach to market and then running a further limited tender that resulted in a \$150,194 contract; and
- supply and delivery of granite plaques for the Old Parliament House Rose Gardens totalling \$115,500.

2.7 In each of the examples listed above, a limited tender approach was used and justified on the basis of being procurements for construction services with an estimated value below the relevant procurement threshold of \$7.5 million (see further detail on the NCA's justification for using limited tender selection processes at paragraph 2.32).

2.8 It is worth noting that limited tendering is not always appropriate for procurements under the procurement threshold. Scope, scale, level of risk and market conditions must be considered to determine an appropriately competitive procurement process that will achieve value for money.

2.9 In March 2022, the NCA advised the ANAO that:

NCA undertakes its procurements in accordance with the Commonwealth Procurement Rules and its interpretation of the Department of Finance's guidelines as they currently stand. In this case NCA may be assessed as undertaking non-competitive processes based on differences in the interpretation of threshold caused by the current policy.

Recommendation no. 1

2.10 The Department of Finance develop and issue guidance on applying the definition of 'construction services' when relevant entities are considering which procurement threshold to use for the purposes of the Commonwealth Procurement Rules.

Department of Finance response: *Agreed.*

2.11 *Competition is a key element of the Australian Government's procurement framework and can support entities to achieve value for money outcomes. The Department of Finance (Finance) will update its guidance material to support entity decision-making regarding applying the relevant procurement thresholds, and publish the updated guidance on its website.*

2.12 *To ensure the guidance is fit-for-purpose and supports effective decision-making, Finance will consult with a range of entities which have recently managed significant procurements for construction services.*

National Capital Authority response: *Noted.*

2.13 *The NCA undertakes its procurements in accordance with the Commonwealth Procurement Rules, consistent with the Department of Finance's guidelines as they currently stand. The NCA welcomes any guidance provided by the Department of Finance which supports the NCA continuing to meet the requirements of the CPRs.*

Proportion of contracts reported as let by open tender

2.14 During 2019–20 and 2020–21, the NCA reported 327 contracts on AusTender valued at \$69.9 million (excluding contract amendments) of which¹⁰:

- 11 per cent by number or 60 per cent by value were reported as being let through open tender;
- 11 per cent by number or six per cent by value through prequalified tender¹¹; and
- 78 per cent by number or 34 per cent by value through limited tender.¹²

2.15 The difference between the NCA's contract number data and its contract value data is influenced by the top one per cent (top three) of the NCA's contracts by number accounting for 47 per cent of the total value of its procurements.

2.16 For the same period, the NCA had internally reported in its financial management system a total of 347 contracts valued at \$10,000 or more totalling \$115.4 million.¹³ Of these 347 contracts:

- six per cent by number or 59 per cent by value were reported as being let through open tender;
- two per cent by number or one per cent by value through prequalified tender;
- 12 per cent by number or four per cent by value through standing offer; and
- 80 per cent by number or 37 per cent by value through limited tender.

2.17 As an indicator of whether the proportion of contracts let by open tender was relatively high or low, the ANAO compared the NCA's data against that reported by other non-corporate Commonwealth entities (given they are also subject to the CPRs and to the same procurement thresholds). To increase the suitability of the comparator, the ANAO used the data reported for contracts valued at \$80,000 or above in its analysis because the CPRs do not mandate (subject to exceptions and exemptions listed in the CPRs) the use of open tenders for procurements below \$80,000.

2.18 As shown in Figure 2.1, the proportion of contracts valued at or above \$80,000 reported by the NCA on AusTender as being let through open tender (23 per cent) is significantly smaller by number than that reported by all other non-corporate Commonwealth entities (63 per cent) during the same period. Whereas the proportion of open tenders reported by the NCA is relatively high by value (66 per cent compared with 46 per cent).

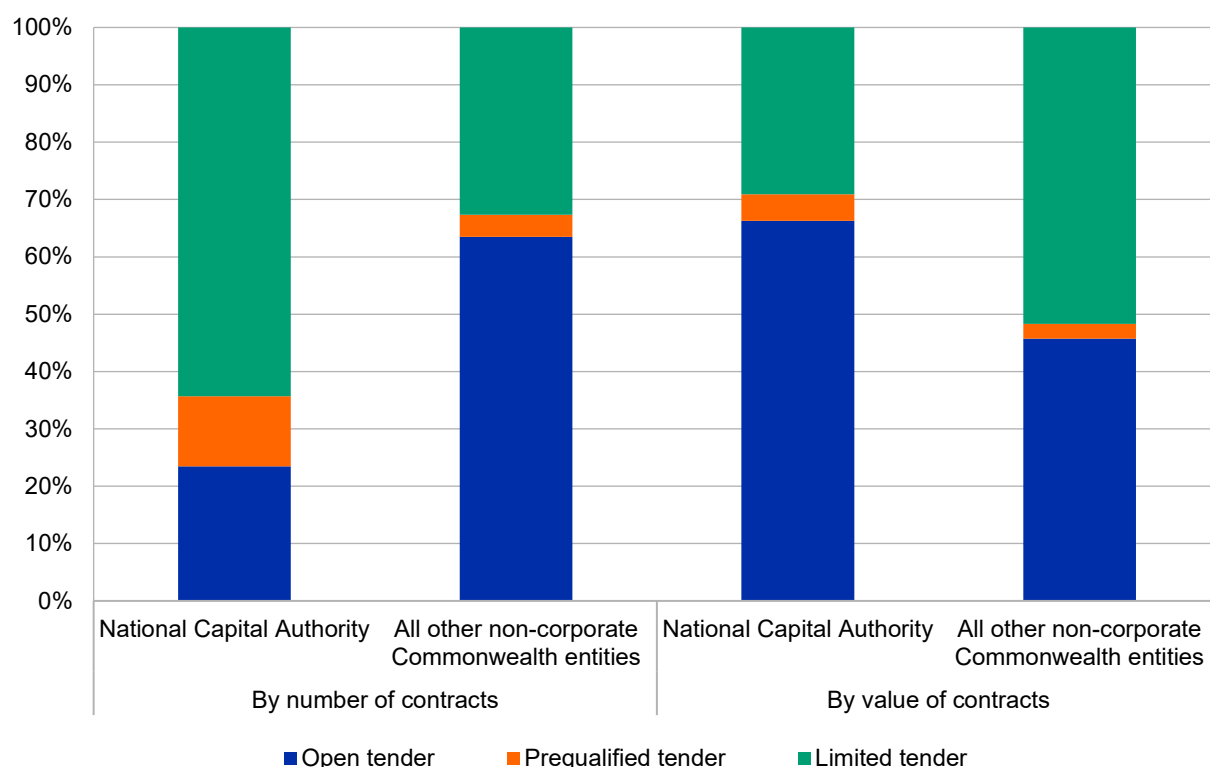
10 AusTender is the central web-based facility for the publication of Australian Government procurement information, including business opportunities, annual procurement plans and contracts awarded. Details of contracts awarded include: supplier details, contract period, contract value, description, procurement method and whether the contract is confidential or for consultancy services.

11 As per footnote 4, the 'prequalified tender' category was removed from the CPRs on 1 January 2019. The NCA continued to report using this method after this date.

12 These figures include all contracts reported by the NCA on AusTender during 2019–20 and 2020–21, regardless of value. By contrast, Figure 2.1 is limited to those contracts valued at \$80,000 or above (see further detail in paragraphs 2.17–2.18).

13 The NCA advised the ANAO in September 2021 that contracts valued below \$10,000 are not necessarily entered into the financial management system as once off payments under \$10,000 can be made by dual approval of the invoice by the relevant delegates. The value reported in the NCA's system is the 'Maximum Contract Value'.

Figure 2.1: Contracts let by procurement method as reported on AusTender during 2019–20 and 2020–21 valued above the \$80,000 threshold



Note: The data presented is as reported by the NCA on AusTender. The ANAO did not examine the accuracy of the information reported except for those procurements examined in detail as part of the audit sample (see further detail on the audit sample at paragraph 1.11 and detail on the accuracy of the NCA's reporting at paragraph 3.32).

Source: ANAO analysis of AusTender data.

Panel arrangements

2.19 Under the NCA's Accountable Authority Instructions, officials conducting procurements must:

- use any mandated whole-of-government arrangement; and
- consider whether there is an existing non-mandatory arrangement available that can be used for the procurement (such as a panel).

Establishment of a panel arrangement by the NCA

2.20 In mid-2015, the NCA established by open tender an Estate Services Panel comprising 60 suppliers.¹⁴ The nine business services provided for under the panel were: tree management; turf, irrigation and landscaping; quantity surveying; engineering; heritage advice;

14 Since the establishment of the Panel in 2015 there have been changes in panel membership with three suppliers added after the creation of the panel and one supplier declining to extend the deed for a further term after the initial term ended. The deeds of standing offer contained a provision that stated '2.2.1. The parties agree that, approximately halfway through the Term, the NCA in its unconfined discretion may invite some or all of the service providers on the Panel to refresh their capability, capacity and pricing and may also invite new services providers to join the Panel.'

construction/accessibility advice; land and property valuation; construction project management; and land surveying.

2.21 The NCA entered into a Deed of Standing Offer with each of the suppliers on the panel for an initial term of four years with an end date of 30 June 2019. Under clause 2.3 and Schedule 1 of the original Deeds, the NCA had the discretion to extend each deed for a further term of two years (commencing on 1 July 2019 and ending on 30 June 2021) 'by issuing a notice in writing to the Service Provider no later than 30 days before the expiry of the Term'. The ANAO's analysis of NCA records indicates that variations to extend the term of the relevant deeds were not made until after the original deeds had already expired.

2.22 Six of the 42 contracts examined by the ANAO, totalling \$567,378 at execution, had been issued under the panel after the relevant deeds had expired and then subsequently varied. One of the six contracts was reported on AusTender as being let through open tender. Of the remaining five contracts, one was reported as being let through limited tender and four through prequalified tender.

Use of procurement arrangements established by other entities

2.23 The NCA may join an existing coordinated procurement or cooperative procurement arrangement that has been established by another Australian government entity.

- Coordinated procurement arrangements are whole-of-government arrangements for goods and services in common use. Where established, these arrangements are mandatory for non-corporate Commonwealth entities.
- Cooperative arrangements involve more than one entity as the buyer and are optional arrangements for Commonwealth entities to use. Multi agency access to these arrangements can be achieved through either: a joint approach to the market, and/or where an entity establishes a contract or standing offer arrangement that allows other entities access (referred to as piggybacking).

2.24 Joining such arrangements can provide benefits including increased efficiencies in the procurement process; better prices, service and quality; increased transparency; standard terms and conditions; and improved contract management for entities and suppliers.

2.25 For six of the 42 contracts examined by the ANAO, the NCA used a procurement arrangement established by another Commonwealth entity.

- In one instance, the relevant panel was established via limited tender and the NCA approached only one supplier.¹⁵
- In one instance, the NCA 'piggybacked' off an existing contract originally let by limited tender between the supplier and another non-corporate Commonwealth entity.¹⁶
- In one instance, the NCA approached three suppliers on a panel established by open tender.¹⁷

15 The contract was inaccurately reported on AusTender as being let through open tender. Note that the standing offer panel arrangement had expired by the time the NCA had signed the work order.

16 The contract was accurately reported as being let through limited tender.

17 The contract was inaccurately reported as being let through limited tender.

- In three instances, the NCA approached only one supplier on a panel established by open tender.¹⁸

Attributing procurements to panel arrangements to avoid competition

2.26 For two of the contracts examined by the ANAO, the NCA had selected the supplier using a direct source approach and then afterwards sought to attribute the purchase to a panel arrangement. The records indicated that this was to avoid employing an open approach to market.

Recommendation no. 2

2.27 The National Capital Authority:

- (a) increase the extent to which it employs open competitive procurement processes; and
- (b) improve the accuracy of its AusTender reporting on the manner in which contracts have been let.

National Capital Authority response: *Agreed.*

2.28 *a) The NCA operates in a relatively specialised area and often with unique or bespoke equipment and/or requirements in relation to maintaining the \$1 billion of Commonwealth assets under its care. As such, procurement processes are selected to deliver the best results often within narrow markets of specialist skills and expertise. The NCA notes during 2019–20 and 2020–21 over 70% of procurements (by value), over the \$80,000 threshold as set by the CPRs, were conducted through open tender process.*

2.29 *b) NCA is progressively implementing a number of new administrative arrangements to further guide staff undertaking procurement, including guidance on AusTender reporting.*

Were appropriate written records made of the justification for using limited tender selection processes and how value for money was achieved?

For just over half of the procurements examined by the ANAO, appropriate written records were made of the justification for using limited tender processes and how value for money was achieved.

2.30 Under the CPRs, for each contract awarded through limited tender, an official must prepare and appropriately file within the entity's records management system a written report that includes:

- the value and type of goods and services procured;
- a statement indicating the circumstances and conditions that justified the use of limited tender; and
- a record demonstrating how the procurement represented value for money in the circumstances.

¹⁸ Only one contract was accurately reported as being let through open tender. The other two contracts were reported as being let through limited and prequalified tender.

2.31 Sixteen (38 per cent) of the sample of 42 contracts examined by the ANAO were let through limited tender. Of those contracts:

- nine (56 per cent) had written records on file that included a statement indicating the circumstances and conditions justifying the use of limited tender, and a record of how value for money was achieved;
- two had records documenting a justification for using limited tender processes but no record demonstrating how the procurement represented value for money;
- four had written records setting out how the procurement represented value for money but no justification for using a limited tender process; and
- one did not have sufficient documentation maintained on file.

2.32 For the 11 contracts where available documentation included a justification for using limited tender selection processes:

- ten were justified on the basis of being procurements for construction services with an estimated value below the relevant procurement threshold of \$7.5 million (see further detail on the NCA's interpretation of 'construction services' in applying the procurement threshold at paragraphs 2.6–2.7); and
- one was justified on the basis that the services would be direct sourced from the incumbent supplier 'rather than undertaking a full tender process and incurring administrative expenses including legal costs associated with such a process, and in light of the standard of services which has been provided' — a basis that is non-compliant with the CPRs.¹⁹

19 A different, compliant basis was reported by the NCA on AusTender for this contract, being limited tender condition '10.3.e. Additional deliveries by original supplier intended as replacement parts, extensions, or continuation for existing goods or services for compatibility.'

Recommendation no. 3

2.33 The National Capital Authority improve its controls over the making of appropriate records of the justification for using limited tender procurement approaches and outlining how value for money was achieved.

National Capital Authority response: *Agreed.*

2.34 *The NCA is progressively implementing a number of new arrangements to further guide staff undertaking procurement, including guidance on documenting decisions about procurement methods and assessment of value for money.*

2.35 *While the NCA does not have a centralised procurement team, the NCA has recently put in place measures to strengthen its procurement framework to assist staff manage procurement processes within their individual projects. This is reflective of the NCA's relatively small size and the resources available to it. The NCA recognises that this approach may result in variations across the organisation, as it relies on each individual undertaking procurement to align their approach with the intricacies of the requirements of the CPRs. In recognising this challenge, and still wanting to ensure NCA staff continue to develop their capability, the NCA has implemented a series of measures to further support and guide the procurement activities across NCA. For example:*

- *we engaged external expertise to review the NCA's internal procurement guidelines and provide more granular instructions to assist officers through the procurement process. The next step is to further review and refine the NCA guidelines to reflect the recommendations of this report.*
- *we have developed and made available internal procurement training for staff.*

For competitive selection processes, were the approaches undertaken open, fair and non-discriminatory?

When undertaking competitive procurement processes the NCA's approach has not been sufficiently open, fair and non-discriminatory. Where open tenders were conducted, it was common for request documentation to include conditions for participation and/or other mandatory requirements which limited competition. Where suppliers were directly approached, the pool of potential tenderers was often limited to those previously engaged by the NCA, or described by the NCA as being known to the NCA or its advisers.

2.36 Openness in procurement involves giving suppliers fair and equitable access to opportunities to compete for work while maintaining transparency and integrity of process. The CPRs state that all potential suppliers to government must be treated equitably based on their commercial, legal, technical and financial abilities. Procurement practices need to recognise that, when an incumbent provider competes for new work, it may have (or be perceived to have) certain advantages, such as understanding of an agency's needs, established relationships with agency staff, and knowledge that is not available to other potential suppliers.

2.37 The NCA used a competitive approach to establish 30 (71 per cent) of the contracts examined in detail by the ANAO, totalling \$50.2 million at contract execution. Sixteen were by open tender and the other 14 by inviting more than one supplier to tender for the work.

Open tenders conducted

2.38 While open tenders (which at a minimum must be published on AusTender) mean any and all interested suppliers can view the opportunity, performance audits have identified that a procurement approach that commences with an open approach to the market does not necessarily mean that the procurement process promoted effective competition.²⁰

Conditions for participation

2.39 Relevant entities may specify conditions for participation with which potential suppliers must be able to demonstrate compliance in order to participate in a procurement. Care must be taken when specifying any conditions for participation, as the CPRs require entities to reject any tenders that do not meet those conditions.

2.40 Conditions for participation must be limited to those that will ensure that a potential supplier has the legal, commercial, technical and financial abilities to fulfil the requirements of the procurement.²¹ Additionally, conditions for participation are not to arbitrarily limit competition by introducing factors that discriminate against a supplier or group of suppliers that would otherwise be competitive and capable in the procurement process. For instance, conditions for participation may require relevant prior experience when that experience is essential to meet the requirements of the procurement but must not specify, as a requirement, that potential suppliers have previous experience with the relevant entity, with the Australian Government or in a particular location.

2.41 Of the 16 contracts examined in detail by the ANAO that were let by open tender, 14 listed in the request documentation conditions for participation and/or other mandatory requirements that potential tenderers were required to meet in order to participate in the procurement process. Common conditions included:

- compliance with relevant legislation including the *Fair Work Act 2009* and/or the *Workplace Gender Equality Act 2012*;
- possession of the required insurances, including a minimum of [\$20,000,000 or \$10,000,000] Public Liability Insurance, [\$20,000,000 or \$10,000,000] Product Liability Insurance and Worker's Compensation Insurance to the amount required by law;
- holding a Valid and Satisfactory Statement of Tax Record (or demonstrate that one has been requested from the Australian Taxation Office)²²;
- existence as a legal entity; and
- achievement of minimum content and format requirements (including submission by the closing time and provision of all returnable schedules).

20 For example: Auditor-General Report No.45 2016–17 *Replacement Antarctic Vessel* and Auditor-General Report No.23 2017–18 *Delivery of the Moorebank Intermodal Terminal*.

21 Any requirements that do not fall under these categories cannot be considered a condition for participation in accordance with the CPRs.

22 Under the Australian Government's 'Black Economy Procurement Connected Policy — Increasing the integrity of government procurement' businesses seeking to tender for Australian Government procurement contracts over \$4 million (including GST) are required provide a statement from the Australian Taxation Office showing they have a satisfactory tax record.

2.42 For 10 contracts the request documentation contained conditions for participation which may have unfairly limited competition despite being open approaches to market. These conditions included:

- a requirement for suppliers to demonstrate financial stability over three years (which may have been detrimental for new market entrants), for contracts that were let for values ranging from \$6,202 to \$663,466 (average of \$254,362);
- a requirement for suppliers to hold a baseline security clearance (as opposed to personnel being capable of obtaining a clearance), and a police check within the last three months; and
- a requirement to hold a current organisational or individual membership with the Australian National Committee on Large Dams (as opposed to tenderers being eligible to hold such membership).²³

2.43 In March 2022, the NCA advised the ANAO that:

The NCA has confirmed it was not its intention to reduce competition in the instances noted...

NCA was not intending to limit competition by the actions noted but agrees it may have had that effect...

These instances were the result of inadvertent wording of evaluation criteria in conditions of participation. Training that will accompany the revised procurement guidance within the NCA will specifically address this point...

On reviewing the conditions there [sic] were intended to protect the Commonwealth's position by reducing risk, however we acknowledge this was done in error. Training that will accompany the revised procurement guidance within the NCA will specifically address this point.

Other approaches to market

2.44 For the 14 contracts where the NCA invited more than one supplier to tender for the work, the ANAO examined how potential suppliers were identified. For the majority of these contracts, the pool of suppliers approached was limited to those previously engaged by the NCA, or described by the NCA as being known to the NCA or its advisers.

2.45 The CPRs provide that conditions for participation may require relevant prior experience when that experience is essential to meet the requirements of the procurement but must not specify that potential suppliers have previous experience with the relevant entity or with the Australian Government or in a particular location. As per case study 1, the NCA breached this requirement in respect of the specified conditions for participation in one of its approaches to market. The records of the 14 sample contracts examined in detail indicated that the NCA commonly treated previous experience as an unspecified requirement for participation. This was reinforced when the ANAO extended its examination to include the basis for selecting the single supplier to approach in the 12 contracts let by non-competitive approaches. Of the 26 contracts examined, the records for:

- nine related to them being suppliers to the NCA;

23 The Australian National Committee on Large Dams Incorporated (ANCOLD Inc) is an incorporated voluntary association of organisations and individual professionals with an interest in dams in Australia.

- four related to being suppliers to the NCA and/or other Australian Government entities;
- one related to being a supplier to the NCA and within the Australian Capital Territory;
- two related to suppliers being based in, or working in, the Australian Capital Territory;
- two related to the suppliers being known by the NCA or by an adviser to the NCA;
- one related to market research undertaken by an adviser to the NCA;
- two advised that all members of the panel would be approached; and
- five were insufficient to identify the basis on which the NCA selected the suppliers to participate.

Conditions for participation

2.46 In two of the 14 contracts sampled, request documentation included a condition of participation that may have unfairly limited competition further. These conditions were:

- a requirement that potential suppliers attend a mandatory site visit (including pre-request for quote briefing) the week after the market was approached (giving an advantage to potential suppliers located close to the site's location); and
- a requirement for 'Proven track records of successful provision of similar services to Commonwealth entities' (further details in case study 1).

Case study 1. Condition for participation that may have limited competition

Summary

- Three suppliers were approached for this opportunity to provide ICT managed services to the NCA.
- The single mandatory participation condition specified in request documentation was: 'Proven track record of successful provision of similar services to Commonwealth entities'. This was not compliant with the CPRs which state that conditions for participation must not specify that potential suppliers have previous experience with relevant entities or the Australian Government (see paragraph 2.40).
- The Chair of the evaluation committee assessed the three tenderers on a pass/fail basis against two different conditions for participation, one being 'Tenderer nominated personnel must hold minimum Baseline Security Clearance'.
- This requirement was not included in the request documentation as a mandatory condition. The request documentation only stated 'Clearances to the level of Baseline will be required' in the Security Requirements section under the Scope of Services.
- One supplier (ultimately unsuccessful) was assessed as failing this condition but was progressed to evaluation assessment and ranked. Comments made by the evaluation committee noted that the supplier had significant experience with 'the NCA and similar government agencies in Canberra with the minimum Baseline Security clearance'.
- Considerable weight was given to suppliers' experience with Commonwealth entities.
- One of the unsuccessful tenderers (same as the one mentioned above) was marked down for not highlighting its experience working with the NCA with the committee commenting:

Whilst it was noted that [the tenderer] had recent experience working with the NCA in their Executive Summary, the TEC highlighted that this was not elaborated on in detail within their submission. The NCA was not referenced in recent experience or organisation capability... Whilst [the tenderer] outlined their ability to gather the functional and non-functional requirements, this was not supported by relevant examples (or outlining their recent relevant experience with the NCA).

Use of a panel arrangement

2.47 A panel is designed to deliver efficiencies for both agencies and the supplier when procuring regularly acquired goods or services. In a panel arrangement, suppliers have been appointed to supply goods or services for a set period of time under agreed terms and conditions, including agreed pricing. Once a panel has been established, an entity may then purchase directly from the panel by approaching one or more suppliers.²⁴

2.48 For three of the 42 contracts examined by the ANAO, the NCA purported to use the Estate Services Panel arrangement and circulated the request for quote (RFQ) documents to all seven panellists on Business Service Package 1 for tree management services. However, the RFQ documents were also sent to two other suppliers who were not on the panel, but had previously been engaged by the NCA, 'to ensure sufficient competition in the procurement process'.

2.49 Although the Estate Services Panel had been originally established via open tender and value for money demonstrated for each of the seven suppliers to be on the panel, the basis of using the panel arrangement was undermined by the NCA approaching two other suppliers. By doing so, the NCA had potentially unfairly excluded other interested suppliers who had not been given the opportunity to compete for the work (that is, not all potential suppliers were able to participate in the procurement). As such, the approach undertaken was not open, fair and non-discriminatory.

Varying contracts

2.50 Contract variations pose particular risk to maximising value for money where they are negotiated in a non-competitive environment with an incumbent supplier. Of the 42 contracts examined by the ANAO, 23 contracts (55 per cent) had been varied at least once as at 30 June 2021. For three contracts, there was insufficient information maintained on file to confirm the total number of variations approved. For the remaining 20 contracts, the individual variations totalled 62 in number and \$8.1 million in value compared with initial contract values aggregating \$21.3 million (representing a 38 per cent increase in aggregate).

2.51 Of the top four contracts in terms of percentage increase, three had been established through competitive procurement processes and one by non-competitive processes. These four contracts were subsequently varied by between 165 per cent and 880 per cent of their initial contract value, increasing them in aggregate from \$771,546 to \$2.8 million.

24 Each purchase from a panel represents a separate procurement process. When accessing a panel, the entity must be able to demonstrate that value for money has been achieved for each engagement. Generating competition between suppliers for each individual engagement from the panel helps to achieve this.

Recommendation no. 4

2.52 The National Capital Authority's Audit Committee monitor and provide assurance that the National Capital Authority employs open, fair and non-discriminatory approaches when undertaking procurements.

National Capital Authority response: *Agreed.*

2.53 *The NCA will put in place appropriate reporting and assurance arrangements, noting outcomes will continue to be the responsibility of NCA senior management rather than the NCA Audit Committee.*

Were relevant evaluation criteria included in request documentation to enable the proper identification, assessment and comparison of submissions on a fair, common and appropriately transparent basis?

For 60 per cent of the contracts examined in detail, it was evident that relevant evaluation criteria were included in request documentation. For the remaining 40 per cent, either the request documentation did not include any evaluation criteria or there were no records of the request documentation on file.

2.54 The CPRs require relevant evaluation criteria to be included in request documentation to enable the proper identification, assessment and comparison of submissions on a fair, common and appropriately transparent basis.²⁵ Request documentation must include a complete description of evaluation criteria to be considered in assessing submissions and, if applicable to the evaluation, the relative importance of those criteria. Additionally, if the entity modifies the evaluation criteria during the course of a procurement then it must transmit all modifications to the potential suppliers (and allow adequate time for the modification or re-lodgement of submissions if required).

2.55 For four of the 42 contracts examined, NCA records did not include the relevant request documentation provided to potential suppliers. Of the other 38 contracts where request documentation was maintained on file:

- 25 included evaluation criteria (the level of detail varied — the application of the evaluation criteria during the evaluation process is discussed in paragraph 2.64); and
- 13 did not include any evaluation criteria.

2.56 The higher value procurements conducted by the NCA that were examined in detail by the ANAO tended to provide greater detail of relevant evaluation criteria and sub-criteria in request documentation, although the relative importance or weightings of the sub-criteria were not always advised to potential suppliers. For example, the procurement of operation and maintenance services for Scrivener Dam request documentation listed the high-level criteria and weightings but did not include relevant sub-criteria. Advising potential suppliers of the relative importance of

25 'Evaluation criteria' is defined in the CPRs as 'the criteria that are used to evaluate the compliance and/or relative ranking of submissions. Evaluation criteria **must** be clearly stated in the request documentation.' The initial approach to market for a multi-stage procurement must include, for every stage, the criteria that will be used to select potential suppliers, and if applicable, any limitation on the number of potential suppliers that will be invited to make submissions.

evaluation criteria and sub-criteria encourages better responses and better outcomes as tenderers can focus their submissions to address the key requirements.

2.57 Inconsistency in records and insufficient information being maintained on file meant that the ANAO was not able to examine whether evaluation criteria had been modified during the course of the procurement for the contracts examined, and if any modifications were appropriately transmitted to potential suppliers. For example, for five contracts the tender evaluation report advised the delegate that: 'During the tender process, the NCA released five addenda via AusTender. The addenda addressed requests for clarifications and provided responses to questions submitted by tenderers. The addenda also contained clarifications to the scope provided by NCA'. However only a copy of addendum 1 was found with no records of the other four addenda maintained on file.

Recommendation no. 5

2.58 The National Capital Authority strengthen its procurement controls to ensure that procurement request documentation includes a complete description of the evaluation criteria that will be applied.

National Capital Authority response: *Agreed.*

2.59 *The NCA is progressively implementing the provision of further guidance on developing procurement request documentation including the need to clearly describe the evaluation criteria and how responses will be assessed.*

Have contracts been awarded to candidates assessed as providing the best value for money, in accordance with the essential requirements and evaluation criteria specified in the approach to market and request documentation?

With respect to the assessment processes undertaken, just over half of the contracts examined in detail by the ANAO were awarded to the candidate where documentation demonstrated that it offered the best value for money. In the remaining 45 per cent of contracts where value for money outcomes had not been demonstrated, this was primarily the result of insufficient analysis being presented commensurate with the scale of the procurement or the result of poor record keeping practices. Of note was that the essential requirements and/or evaluation criteria applied during the evaluation process were not consistent with the approach to market in 88 per cent of contracts examined (where sufficient documentation was maintained).

2.60 Under the CPRs, unless it has been determined by the entity to be not in the public interest to award a contract, a contract must be awarded to the tenderer that the entity has determined:

- satisfies the conditions for participation;
- is fully capable of undertaking the contract; and

- will provide the best value for money, in accordance with the essential requirements and evaluation criteria specified in the approach to market and request documentation.²⁶

2.61 The ANAO examined the NCA's procurements in terms of whether the records demonstrated that successful tenderers were assessed as providing the best value for money, in accordance with the essential requirements and evaluation criteria specified in the approach to market and request documentation. The ANAO factored the scale, scope and risk of the procurement into its examination.

Screening of tenders

2.62 Further consideration must be given only to submissions that meet minimum content and format requirements. In all contracts examined where there was sufficient documentation maintained, tenderers assessed as meeting the requirements were appropriately progressed to evaluation. In two instances, the records indicated that tenderers who had been assessed as failing the minimum requirements were also progressed and assessed (although neither of those tenderers was ultimately successful). In both of these cases, the minimum requirements applied by the evaluation team members against received tenderers were not consistent with those in request documentation.

- Tenderers were assessed on a pass/fail basis against two mandatory participation requirements ('Capable of integration with existing NCA ICT system and its successor' and 'Compatible and capable of sustaining minimum Protective Security Policy Framework (Minimum PROTECTED)'). Neither requirement was included in request documentation. Four of the five tenders received were failed against the second requirement. However, all five progressed through to the evaluation stage and were each scored and ranked against the evaluation criteria. In recommending the preferred supplier, the panel then noted that the other four 'failed to meet tender requirements'.
- Tenderers were advised that the only mandatory criteria was 'Proven track record of successful provision of similar services to Commonwealth entities'. The panel then screened the received tenders against two different requirements (personnel must hold minimum Baseline Security Clearance and be a legal trading entity). One of the three tenderers was assessed as failing to meet the first requirement but still progressed to evaluation. Further discussed in case study 1.

Evaluation of tenders

2.63 In evaluating tenderers, factors commonly considered by the NCA included the tenderers' experience and capacity, financial corporate stability, the proposed approach/methodology, resources including key personnel, compliance with contract terms, price and associated risks.

26 Achieving value for money requires a consideration of the relevant financial and non-financial costs and benefits of each submission. These include, but are not limited to: the quality of the goods and services; fitness for purpose of the proposal; the potential supplier's relevant experience and performance history; flexibility of the proposal (including innovation and adaptability over the lifecycle of the procurement); environmental sustainability of the proposed goods and services (such as energy efficiency, environmental impact and use of recycled products); and whole-of-life costs.

2.64 For five of the 42 contracts examined (12 per cent), the criteria and weightings the NCA applied in the evaluation process were consistent with those advised to potential suppliers in the request documentation. Of the other 37 contracts:

- 27 (64 per cent) had some inconsistency evident (primarily due to the NCA not advising potential suppliers of the criteria and/or sub-criteria, and associated weightings); and
- 10 (24 per cent) had insufficient information on file to demonstrate consistency.

2.65 While there were inconsistencies in the application of evaluation criteria, the records adequately demonstrated that contracts were awarded to candidates assessed as providing the best value for money in 23 (55 per cent) of the 42 contracts examined in detail. For 14 contracts (33 per cent), while the contracts were awarded to the highest ranked or sole tenderer, value for money outcomes had not been demonstrated with insufficient analysis being presented by the evaluation committee commensurate with the scale of the procurement. For instance, tender evaluation reports did not adequately explain the basis on which tenders had been assessed or did not explain why paying above a budgeted or benchmarked price represented value for money. For the other five (12 per cent), insufficient information was maintained on file to enable reliable examination.

2.66 For competitive procurements, a value for money outcome was generally supported by the successful tenderer being the highest ranked against the evaluation criteria.²⁷ For non-competitive procurements, the contract was awarded to the single supplier approached.

2.67 Benchmarking is particularly valuable in non-competitive procurements, as it is more challenging to establish that a single bid is a reasonable market price and represents value for money. Benchmarking by the NCA was primarily undertaken by comparative analysis of the prices proposed by the competing tenders and against the pre-tender estimate. Occasionally, the NCA also used other benchmarks including industry or market rates.

2.68 The ANAO identified the following shortcomings in its examination.

- Where select tenderers were invited to tender, it was common for evaluations to be less robust with tenderers' capacity and capability largely assumed to be sufficient. As set out in paragraphs 2.44–2.45, the pool of suppliers approached was often limited to those previously engaged by the NCA, or described by the NCA as being known to the NCA or its advisers (see also case study 2).
- It was common for records to provide limited or inadequate analysis when assessing price against benchmarks, particularly where the tendered prices were above the benchmark. For instance, in six of the nine instances where the successful tenderer's price was above the benchmark the records did not adequately explain why the price was considered acceptable. In these cases, the accepted prices were between nine per cent and 35 per cent higher than the relevant benchmark.
- The NCA is generally a passive price-taker and often did not seek to negotiate on price to maximise/optimize value for money outcomes.

27 Of the 30 competitive procurements, in four instances suppliers were not ranked and in two there was insufficient information maintained.

Case study 2. Procurement of engineering design and consultation services

This is an example of a value for money outcome not being demonstrated due to insufficient analysis being presented. The procurement was a limited tender approach where the one supplier invited to tender was known to and previously engaged by the NCA.

The record of the assessment in its entirety was as follows:

[The supplier] has an industry reputation and knowledge, experience and capability in delivering high quality civil, TTM and TCD consultancy projects. NCA has engaged [the supplier] for number of past and on-going projects and are satisfied with the deliverables. Further, their past work with NCA showed that [the supplier's] fee proposals represent reasonable value for money.

With contract C19/286 in place, [the supplier is] required to submit fee proposals for each ad-hoc service requests. They will be awarded the work provided the [supplier's] fee proposals represent value for money.

The contract was awarded to the supplier for \$104,500.

Were procurements conducted ethically, including identifying and managing any conflicts of interest?

The NCA has not conducted procurements to a consistent ethical standard as required under the CPRs:

- conflict of interest declarations were not completed by all evaluation team members in 39 per cent of the contracts examined in detail by the ANAO where there was sufficient information to enable reliable examination;
- where advisers were appointed during the procurement process, it was common for there to be missing conflict of interest declarations and no clear statement as to the extent of the advisers' involvement; and
- of the 12 instances where an external probity adviser was appointed (typically for larger value procurements), only one had sufficient records maintained documenting the probity adviser's role and a report completed by the adviser confirming probity had been maintained during the procurement process.

2.69 Under the CPRs, officials undertaking procurement must act ethically throughout the procurement. Amongst other things, ethical behaviour includes:

- recognising and dealing with actual, potential and perceived conflicts of interest;
- dealing with potential suppliers, tenderers and suppliers equitably; and
- carefully considering the use of public resources.

2.70 Officials must also act ethically in accordance with the Australian Public Service (APS) Values and Code of Conduct, as set out in sections 10 and 13 of the *Public Service Act 1999* (Public Service Act).

2.71 Section 15 of the *Public Governance, Performance and Accountability Act 2013* (PGPA Act) requires the accountable authority to govern the entity in a way that promotes the proper use and

management of public resources. The PGPA Act defines 'proper' as efficient, effective, economical and ethical.

Conflict of interest

2.72 Effective management of conflicts of interest should be a central component of an entity's integrity framework. Poor practice, or the perception of poor practice, in the management of conflicts of interest will undermine trust and confidence in an entity's activities. The APS Code of Conduct requires that APS employees take reasonable steps to avoid any real or apparent conflict of interest. Where conflicts cannot be avoided, the relevant provisions of the Public Service Act, the PGPA Act, and *Public Governance, Performance and Accountability Rule 2014* require that persons must disclose details of any material personal interest.

2.73 Department of Finance guidance to entities on ethics and probity in procurement states that 'persons involved in the tender process, including contractors such as legal, commercial or probity experts, should make a written declaration of any actual, potential or perceived conflicts of interests prior to taking part in the process'.

NCA policy

2.74 NCA policy requires staff to complete both an Acknowledgement of Conflict of Interest Policy and a Declaration of Material Interests form at the commencement of their employment. Senior employees (Senior Executive Service and Executive Level 2) are required to provide an annual Declaration of Material Interests. Additionally, personnel involved in procurements from time to time, but not as a regular component of their role, need to complete the relevant Conflict of Interest declaration specific to each process.

Evaluation members

2.75 In the 42 contracts examined by the ANAO, the following patterns were observed.

- In 20 instances (48 per cent) records of completed conflict of interest declarations were maintained for all listed evaluation team members:
 - a perceived and/or potential conflict was declared in four instances. In each case, the tender evaluation report included the following statement (or similar): 'Conflict of interest declarations were signed by all TEC members. It was assessed and agreed between the parties present that there was no conflict of interest'. No other records documenting whether any management actions were required or taken were maintained;
 - a perceived/potential conflict was not appropriately declared in one instance.
- In 13 instances (31 per cent) declarations were not completed by all listed evaluation members.
- In nine instances (21 per cent) there were insufficient information on file to enable reliable examination.

2.76 High value procurements examined in detail by the ANAO tended to have more complete records of completed conflict of interest declarations for evaluation team members maintained on file compared to lower value procurements.

Advisers

2.77 Where advisers were listed as being appointed during the procurement process, it was common for there to be no clear statement as to the extent of the advisers' involvement and role in the evaluation process, and missing records of completed declarations. This shortcoming was found in both high value and lower value procurements.

2.78 In the sample of 42 procurements examined by the ANAO, the following patterns were observed.

- Thirteen had advisers appointed during the procurement process:
 - two had completed conflict of interest declarations for all listed advisers maintained on file; and
 - 11 did not have completed declarations for all listed advisers.
- Twenty did not have advisers appointed.
- Nine had insufficient information to enable reliable examination.

2.79 The ANAO also identified one instance in which a perceived or potential conflict was not appropriately declared.²⁸

2.80 In March 2022, the NCA advised the ANAO that:

The NCA has increased its use of probity advisers to improve management of procurements and to specifically assist staff manage any real or perceived conflicts of interest.

External probity advisers

2.81 Probity advisers may be appointed where justified by the nature of the procurement.

2.82 Of the sample of 42 procurement contracts examined by the ANAO, 12 had an external probity adviser appointed during the relevant procurement process.²⁹ These were generally the higher value and/or more complex procurements with the estimated value of the procurement prior to the approach to market ranging from \$550,000 to \$26 million. The role of the probity adviser was set out in the relevant Probity Plan and included:

- receiving completed Conflict of Interest Declarations and Confidentiality Declarations;
- conducting probity briefings;
- providing probity advice as required; and
- providing 'confirmation that all probity aspects of the Procurement have been satisfactorily followed' at various stages of the Evaluation Phases.

2.83 Despite the NCA identifying a need for a probity adviser during planning, it was common for there to be limited information maintained in the relevant procurement files evidencing the probity adviser's involvement. Additionally, the evaluation reports did not contain a clear statement to decision-makers as to the extent of the probity adviser's role (see case study 3 for example).

28 In that case, two individuals from a tendering company had been involved in the tender development. Neither had declared as a potential conflict that their company would be competing for the work. The company was not ultimately successful.

29 Five of the 12 contracts were established under the same approach to market. A single probity adviser was appointed for the approach to market.

Available records indicate that probity advice sought largely related to reviewing the tender evaluation plans and/or tender evaluation reports. Completed conflict of interest declarations by probity advisers were also not maintained in the relevant procurement files.³⁰ In all but one instance, there were no probity reports or sign-offs by the adviser on file confirming that probity had been maintained during the procurement process.

Case study 3. Procurement for integrated parking services

- The estimated value of the procurement prior to approaching the market was \$14.8 million.
- Maddocks was appointed as the probity adviser, with its role including drafting the Probity Plan and Probity Protocols, probity briefings and providing probity advice.
- Evidence of the adviser's involvement was:
 - the endorsed probity plan prepared by the probity adviser;
 - a calendar invite sent to the evaluation team members for a probity briefing; and
 - two emails with the adviser's review and comments on the request documentation and tender evaluation report.
- Probity advice was not sought in relation to concerns of a conflict of interest or confidentiality breach.
- The evaluation report provided to the delegate listed Maddocks as being involved in the tender process but made no statement as to its role or extent of involvement.
- There were no conflict of interest declarations maintained on file for the probity adviser^a, the Chair of the evaluation committee and the NCA Chief Operating Officer (COO). In November 2021, the NCA advised the ANAO that:
 - the Chair of the evaluation committee 'did not have any relationship or interest that could give rise to a real or apparent conflict of interest in relation to the procurement process to declare and therefore, in accordance with the Probity Plan was not required to complete the declaration'; and
 - the COO was 'not directly involved in the tender process and therefore [was] not required to complete any confidentiality deed or conflict of interest declarations' although the probity register includes as a probity issue that the COO was an adviser to the procurement.

Note a: In February 2022, the NCA provided the ANAO with copies of the conflict of interest and confidentiality declarations completed by the probity adviser.

30 In February 2022, the NCA provided the ANAO with copies of the conflict of interest and confidentiality declarations completed by the probity adviser for one of the 12 procurements.

Recommendation no. 6

2.84 Where a probity adviser has been appointed, the National Capital Authority actively engage and manage the adviser to ensure services are delivered as agreed and that probity has been maintained during the procurement process.

National Capital Authority response: *Agreed.*

2.85 *We provide guidance and assistance to staff (including encouraging the use of external advice) in following due process when undertaking procurement. The results of the ANAO Audit suggest this approach and, in particular, reliance on external probity I [sic] advice to supplement in house knowledge, may not be delivering the pace of improvements and consistency with processes required by the CPRs. To address this, the NCA has established and engaged a Director of Procurement to provide a more centralised and hands on approach to direct all procurement activities in the NCA. The position will monitor and provide reports to management and Executive of procurement activities across the NCA.*

2.86 *The NCA is also considering (when a probity adviser has been engaged) requiring sign-offs from probity advisors that the procurement activity has been conducted in accordance with the requirements of the CPRs, including meeting the probity requirements.*

Gifts and benefits

2.87 The CPRs state that ethical behaviour includes complying with all directions, including relevant entity requirements, in relation to gifts or hospitality. NCA policy refers employees to the NCA's Accountable Authority Instructions which require details of the gift/benefit and decision to be recorded on the NCA's Register of Gifts and Benefits where one is accepted by a NCA official.

2.88 The NCA publishes a Gifts and Benefits Register on its website. For the period 18 October 2019 to 30 June 2021, the NCA reports that no gifts and benefits with an estimated value greater than \$100 (excluding GST) had been accepted by NCA staff.³¹

31 No Gifts and Benefits Registers have been published on the NCA website covering the period prior to 18 October 2019. The guidance issued by the Australian Public Service Commission requiring agency heads to publish a register of gifts and benefits on the agency website on a quarterly basis commenced on 18 October 2019.

3. Accountable and transparent decision-making

Areas examined

The ANAO examined whether decision-making had been accountable and transparent.

Conclusion

Procurement decision-making has not been sufficiently accountable and transparent. Approval had been obtained by an appropriate delegate in most of the contracts examined. It was common for there to be gaps in the records of the planning and conduct of procurements. The National Capital Authority's (NCA) reporting of contracts and amendments on AusTender was largely non-compliant with the requirements under the Commonwealth Procurement Rules (CPRs).

Areas for improvement

The ANAO made two recommendations aimed at the NCA: implementing a monitoring and assurance framework; and placing greater emphasis on timely and accurate reporting of its procurement activities, and making and retaining appropriate records of those activities.

3.1 Accountability means that officials are responsible for the actions and decisions they take in relation to procurement and the resulting outcomes. Transparency involves entities taking steps to enable appropriate scrutiny of their procurement activity, including by maintaining appropriate levels of documentation for each procurement and complying with the publishing and reporting requirements as set out in the CPRs.

3.2 To assess whether the NCA's decision-making had been accountable and transparent, the ANAO examined whether:

- approvals had been obtained prior to entering into a contract and works commencing;
- procurement records had been maintained commensurate with the scale, scope and risk of the procurement; and
- contracts and amendments had been accurately reported on AusTender within 42 days of the contract being entered into or amended.

Was approval obtained prior to entering into a contract and works commencing?

Approval had been obtained by an appropriate delegate prior to the NCA entering into the contract in 83 per cent of contracts examined in detail by the ANAO. For one third of the contracts examined, the available records indicated that services or works had started prior to the contract being signed.

3.3 The CPRs require officials to maintain for each procurement a level of documentation commensurate with the scale, scope and risk of the procurement. Amongst other things, documentation should provide accurate and concise information on relevant approvals.

3.4 Under section 23 of the *Public Governance, Performance and Accountability Act 2013* the accountable authority may enter into, vary and administer arrangements and approve commitments of relevant money.³²

3.5 These powers have been delegated to NCA officials, as per the NCA's Accountable Authority Delegations dated 17 April 2019, with the relevant financial limits varying depending on the individual's classification and position. Delegates may only approve a commitment of money if the value of the contract (including any variations) is within the delegate's delegation. Table 3.1 sets out the applicable financial limits for NCA delegates.

Table 3.1: Financial limits for NCA delegates

Classification	Position	Administered funds limit	Departmental funds limit
Chief Executive	Chief Executive	No financial limit	No financial limit
SES Band 1	All SES	\$5,000,000	\$1,000,000
EL 2	All EL 2s	\$500,000	\$150,000
EL 1	All EL 1s	\$150,000	\$80,000

Note: 'SES' means Senior Executive Service and 'EL' means Executive Level.

Source: NCA's Accountable Authority Delegations dated 17 April 2019.

3.6 The NCA's Accountable Authority Instructions (AAIs) contains additional instructions to officials to:

- record any approval of a commitment of relevant money in accordance with section 18 of the *Public Governance, Performance and Accountability Rule 2014*³³;
- be aware the NCA has a policy that requires approval to be obtained before entering into an arrangement; and
- be aware that NCA has a requirement that a signed contract, agreement or other arrangement be in place before work starts under an arrangement.

3.7 Of the 42 contracts examined by the ANAO, 35 (83 per cent) had obtained approval from an appropriate delegate to both enter into the contract/contract negotiations and commit relevant money prior to entering into those arrangements. Of the remaining seven contracts:

- two had records of an approval to enter into the contract/contract negotiations but no approval to commit relevant money; and
- five had no records of relevant approvals.

Signed contract or other arrangement

3.8 Under the CPRs, relevant entities must have access to evidence of agreements with suppliers, in the form of a written contract, a purchase order, an invoice or a receipt. The *Australian Government Contract Management Guide* advises officials that 'once signed by both parties, your contract is a legally enforceable document, governed by Australian contract law' and that 'this

32 An 'arrangement' includes a contract, agreement, deed or understanding.

33 That provision states that if an accountable authority, or delegate, approves the commitment of relevant money then they must record the approval in writing as soon as practicable after giving it.

means there are legally binding obligations and rights assigned to both parties'.³⁴ Accordingly, it is a requirement for NCA officials to have a signed contract or arrangement in place before work commences under that arrangement.

3.9 The ANAO examined 42 arrangements that included standalone contracts, cooperative agency agreements, work orders associated with Standing Offers, and purchase orders associated with Deeds of Standing Offers.

3.10 Of the 42 arrangements examined by the ANAO, 41 had evidence of the agreements in an appropriate form. For the remaining contract, there was no signed contract available — rather, the letter of acceptance attached to the Commonwealth Purchase Order Terms, the quote provided by the supplier in response to the approach to market and the specifications has been used as evidence of the agreement with the supplier. This was not compliant with the CPRs.

3.11 Of the 41 arrangements that necessitated a signature (purchase orders and the nominated agency order form for the particular arrangement were not required to be signed), NCA officials had a compliance rate of 100 per cent. NCA officials failed to date documents on only three occasions, however overall were largely compliant with the CPRs and internal AAls.

Table 3.2: Number of contracts signed and dated

Contract type	Total number	Number signed	Number dated
Contracts	30	30	27
Purchase orders	8	N/A	8
Work orders	2	2	2
Nominated agency order form	1	N/A	1
Total	41	32	38

Source: ANAO analysis.

Works commencing prior to contracts being signed

3.12 An entity takes on increased risk where it permits a contract to commence before its execution. Problems can arise when suppliers are instructed to commence services or works prior to a contract being signed such as if there is a dispute about what was agreed. While the NCA aims to have a low risk tolerance and has issued AAls to instruct its officials in line with the PGPA Act, of the 42 contracts examined by the ANAO:

- 22 were scheduled to commence before the date of contract execution, of which 11 had evidence of works commencing before the date the contract was signed (see case study 4 for examples); and
- 20 were scheduled to commence on or after contract execution, of which three had evidence of works commencing before the date the contract was signed.

34 Department of Finance, *Australian Government Contract Management Guide*, December 2020, p. 4.

Case study 4. Discrete contracts

Eight of the 14 contracts where available records indicated that services or works had commenced prior to the contract being signed were discrete contracts where BGIS Pty Ltd provided managerial services. As shown in Table 3.3, the number of days between commencement and execution for these eight contracts ranged from 93 to 708 days, with the average number of days being 387 days.

In November 2021, the NCA advised the ANAO that:

While the NCA undertook standard procurement processes for these tenders and issued letters of acceptance, which included terms and conditions, it appears that formal contracts were not concluded prior to the relevant contract period commencing...

It was not until early 2021 that the NCA recognised that signed contracts had not been returned to the contractors and the problem was subsequently remedied after discussions and agreement with each of them.

Table 3.3: Number of days between commencement and execution for eight discrete contracts

Contract description	Commencement date	Signed date	Days between commencement and execution
Chillers and boilers replacement	01/11/2019	02/02/2020	93
External hydraulic services	01/11/2019	19/02/2020	110
External electrical services	01/11/2019	04/02/2021	461
Electrical services	01/12/2019	04/02/2021	431
Safety systems	01/12/2019	04/02/2021	431
Construction elements	01/12/2019	04/02/2021	431
Mechanical services	01/12/2019	08/11/2021	708
Plumbing services	01/12/2019	04/02/2021	431

Note: The descriptions for each contract have been simplified for brevity.

Source: ANAO analysis of NCA records.

Approval to vary contracts

3.13 NCA officials must not vary an arrangement unless:

- it is within the scope of their delegation or authorisation; and
- a new commitment of relevant money has been approved.

3.14 Under the NCA's Accountable Authority Delegations, delegates may only approve a variation to an arrangement and approve the commitment if the total contract value, as altered by the variation, falls within the delegate's financial limits.

3.15 Of the 42 contracts examined, the ANAO observed evidence of 23 (55 per cent) being varied at least once as at 30 June 2021. For three contracts there was insufficient information to confirm

the total number of variations approved. For the remaining 20 contracts, there were 62 individual variations of which:

- 55 (89 per cent) were approved by an appropriate NCA delegate; and
- seven (11 per cent) were approved by NCA officials without the appropriate delegation (see case study 5 for an example).

Case study 5. Approval errors as variations increased total contract value

Approval for the original contract (with a value of \$100,988 at execution) was obtained from the Chief Operating Officer (an SES officer). As at 30 June 2021, the contract had been varied six times totalling \$888,261.

Three of the six variations were approved by an NCA official who was not properly authorised to do so:

- Variation 3 (which had an amendment value of \$38,362 and brought the total contract value to \$376,709) was approved by the EL1 officer. This was outside their delegation limit of \$150,000.
- Variation 5 (which had an amendment value of \$413,906 and brought the total contract value to \$909,822) was approved by the EL2 officer. However, this was outside their delegation limit of \$500,000.
- Variation 6 (which had an amendment value of \$79,426 and brought the total value of the contract to \$989,248) was approved by the EL1 officer which was substantially outside of their delegation.

Were procurement records maintained commensurate with the scale, scope and risk of the procurement?

The NCA did not maintain records commensurate with the scale, scope and risk of the procurement. While records of approvals and the contracts awarded were largely maintained, it was common for there to be gaps in the records of the planning and conduct of the procurements.

3.16 The CPRs state that officials must maintain, and retain in accordance with the *Archives Act 1983*, for each procurement a level of documentation commensurate with the scale, scope and risk of the procurement. Documentation should provide accurate and concise information on:

- the requirement for the procurement;
- the process that was followed;
- how value for money was considered and achieved;
- relevant approvals; and
- relevant decisions and the basis of those decisions.

3.17 Additionally, entities must have access to evidence of agreements with suppliers, in the form of one or a combination of the following documents: a written contract, a purchase order, an invoice or a receipt.

NCA record keeping policies

3.18 The NCA sets out its record management policies in two key documents: NCA National Archives Records Authority and NCA Information Management Policy.

NCA National Archives Records Authority

3.19 The NCA Records Authority authorises arrangements for the disposal of records and determines the classification of records to be retained in accordance with the *Archives Act 1983*. Under the NCA Records Authority the following must be retained as national archives:

- records documenting management, conservation and enhancement of significant NCA managed land and assets;
- arrangements, agreements or Memorandums of Understanding and contracts relating to the management, conservation and enhancement of significant NCA managed land and assets (includes agreements with external parties to undertake major works activities and projects, including those that do not proceed); and
- records documenting the preparation, management and approval of applications relating to major works and development applications.

3.20 Under the NCA Records Authority the following documents must be retained under certain conditions:

- agreements and contracts relating to the management, conservation, maintenance and use of NCA managed land and assets (not classified as significant or as major works) must be retained for 12 years after completion or termination of the agreement;
- records documenting the use of specialist consultancy services on projects, including master planning and planning advice must be retained for 15 years after action completed; and
- records documenting routine operational administrative tasks supporting the core business must be retained for seven years (for renewal and management activities) and 10 years (for planning activities) after action completed.

NCA Information Management Policy

3.21 The NCA Information Management Policy establishes a framework for the creation, management, roles and responsibilities of records within the NCA. This policy applies to all ongoing, non-ongoing, seconded employees, contractors and consultants engaged by the NCA and covers hard copy and digital records.

3.22 The NCA has one official business and administrative record keeping system called Content Manager (CM9/TRIM), which is designed to preserve and provide access to documents over time.

3.23 The policy assigns the following responsibilities to staff.

- Executive Management Team — authorisation and promotion of compliance of the policy within the NCA.
- Managing Directors, Directors and Executive Managers — management within their areas to ensure all staff comply with the policy.

- Director Business Systems — oversight of the design, implementation and maintenance of corporate record keeping systems.
- Records Management staff — monitoring compliance and managing the NCA's records consistent with policy standards. As well as delivering record keeping training and advice to staff, managing the disposal of records under an authorised disposal and reporting annually on records management to the Management Committee.
- Information Communication Technology staff — maintaining technology used to support systems that capture and keep records electronically.³⁵
- All staff — understanding of record keeping obligations and responsibilities and adhering to established policies and procedures. Responsible for creating, receiving and keeping accurate and reliable records of daily work/business activities.³⁶

3.24 Non-compliance with documentation requirements can have a broader impact, particularly where goods and/or services are ordered or commenced without the authorisation for, or the price and conditions of, the purchase being documented and retained.

3.25 The ANAO examined 42 contracts in detail, which ranged in value from \$6,202 to \$18.7 million at execution. Of the 42 contracts, 35 (83 per cent) had one or more of the following documents either unsigned/in draft form or missing:

- procurement planning documents (including procurement plans, project plans and/or tender evaluation plans);
- request documentation;
- tender evaluation report (or similar document);
- probity related documents (including conflict of interest declarations and/or probity reports where an external probity adviser was appointed);
- relevant approvals by a delegate; and/or
- a formal contract.

3.26 Commensurate with their size and scale, higher value procurements tended to have a greater volume of documents on file and record keeping practices were more robust although some gaps in the records were identified. To illustrate the extent to which documents were missing or unsigned and to provide a sense of scale, Figure 3.1 shows the number of documents missing or unsigned per contract examined. For the purposes of this analysis, the types of documents considered were limited to four key documents being: planning documents, tender evaluation documents, relevant approvals and contracts. These key documents collectively address the requirements under the CPRs as set out in paragraphs 3.16–3.17. Due to procurements requiring different levels of documentation depending on the scale as well as inconsistencies in documents used by the NCA and poor record keeping practices, the ANAO was unable to conduct this analysis in more granularity. Case studies 6 and 7 provide examples of where insufficient records were maintained and poor record keeping practices were evident.

35 The following statement was included in the policy at the end of this point: '(not sure about this statement, need to amend)'.

36 This section of the policy appears to be incomplete.

Figure 3.1: Number of documents missing or unsigned per contract examined

Source: ANAO analysis of NCA records.

Case study 6. Procurement for estate management security review services

Poor record keeping practices and insufficient records maintained.

- Contract (valued at \$154,000 at execution) was let by open tender.
- Submissions from 16 different suppliers found in relevant TRIM folder.
- In December 2021, the ANAO requested the NCA to advise 'whether a Tender Evaluation Report was completed and subsequently approved by the delegate' and to provide copies of completed conflict of interest declarations for evaluation members.
- The NCA advised in December 2021:
 Available information and documents are in A19/074 – Estate Management Security Review and also an earlier file (A18/042) where the procurement action was commenced but not completed. Some information from the earlier file was used for the later procurement including the procurement approval and in developing tender documents. The team has been unable to locate some documents at this time, including those requested. The line area advises there was a turnover of staff and delays in conducting this procurement. We will continue to look for the requested documents and will advise you if they are located.
- The NCA did not subsequently provide any further documents to the ANAO.

Case study 7. Procurement for chillers and boilers replacement

Insufficient records maintained:

- While advice to the delegate included that the 'TEP members signed the tender evaluation and probity plan before the commencement of the evaluation process' the procurement plan and tender evaluation and probity plan on file were not signed or dated.
- An external probity adviser was appointed (Griffin Legal Pty Ltd) but no report or sign-off was on file confirming that all probity aspects of the procurement had been satisfactorily followed.
- Available records evidence only one of the three evaluation panel members as having attended a probity briefing conducted by the probity adviser.
- The Tender Evaluation Report noted that conflict of interest and confidentiality declarations had been completed by panel members and relevant advisers however no records of declarations were found in relevant TRIM files.
- The Report also noted that three addenda were issued during the tender process but no copies were maintained.
- There was insufficient information to confirm the number of variations executed.

Have relevant contracts and amendments been accurately reported on AusTender within 42 days of a contract being entered into or amended?

The NCA's reporting of contracts and amendments on AusTender was not compliant with the CPRs with only 10 per cent of contracts being accurately reported within the required timeframe. While 62 per cent of contracts examined by the ANAO were reported within 42 days of being entered into as required, most variations were not reported within the 42 days. In addition, the accuracy of contract reporting was not to an appropriate standard with errors commonly found in the reported procurement methods, contract value and contract start date.

3.27 Under the CPRs, non-corporate Commonwealth entities must report contracts and amendments on AusTender within 42 days of entering into (or amending) a contract if they are valued at or above the reporting threshold of \$10,000 (including GST).³⁷ Key details to be included are entity details, supplier details and contract details.

3.28 Reporting entities are responsible for the quality and content of the data that they publish and report on AusTender. To effectively meet their publishing and reporting obligations, entities should implement appropriate measures to quality assure any data published on AusTender for completeness and accuracy. Accurate AusTender reporting achieves two important objectives: transparency for suppliers that the awarded contract was consistent with the representations made

37 Standing offers, regardless of value, must be reported on AusTender within 42 days of the relevant entity entering into or amending such arrangements. Relevant details in the standing offer notice, such as supplier details and the names of other relevant entities participating in the arrangement, must be reported and kept current.

to the market in the approach to market and to meet Australia's reporting obligations under various free trade agreements.

3.29 The NCA advised the ANAO that the NCA finance team manually enters in all contract details into AusTender based on information provided by the relevant line areas.

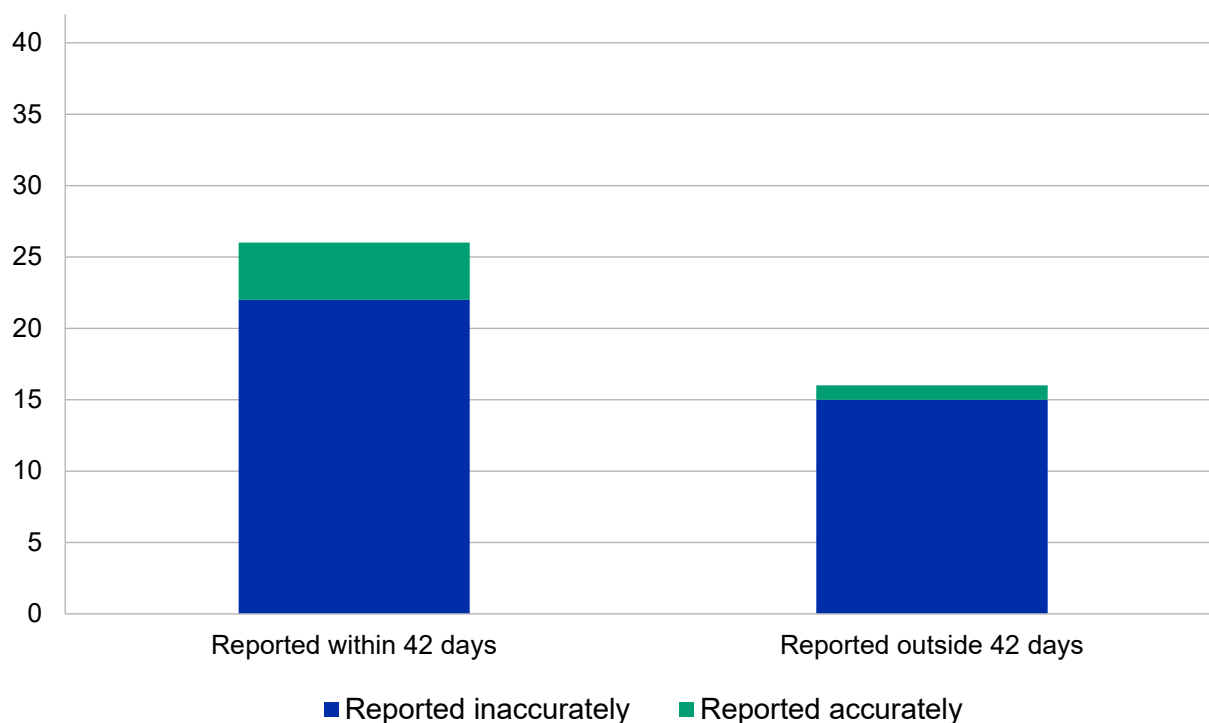
Contract reporting

3.30 During 2019–20 and 2020–21, the NCA published 541 contract notices on AusTender comprising 327 contracts totalling \$69.9 million and 214 amendments totalling \$29.3 million.³⁸ Of those 541 contract notices:

- 397 (73 per cent) were published within 42 days of the reported start date; and
- 144 (27 per cent) were published 42 days or more after the reported start date, with the maximum time taken being 441 days.

3.31 As shown in Figure 3.2, 26 (62 per cent) of the 42 contracts examined in detail were reported within 42 days of the contract being entered into (four of which had contract details accurately reported). The remaining 16 (38 per cent) were reported outside the required reporting period, with only one being accurately reported and the maximum time taken being 622 days.

Figure 3.2: Timeliness and accuracy of contract reporting



Source: ANAO analysis.

3.32 The accuracy of contract data published by AusTender is largely dependent on an entity correctly entering contract particulars. For the 42 contracts examined by the ANAO, accuracy of

³⁸ Note that some of the amendments related to contracts entered into prior to 1 July 2019.

contract reporting was not to an appropriate standard with 37 (88 per cent) having one or more of the following errors:

- one reported the agency reference ID incorrectly;
- one reported incorrect supplier details;
- 12 reported a procurement method that differed from the ANAO's analysis of NCA records;
- nine omitted to report they resulted from a standing offer/panel arrangement and the relevant Standing Offer Notice number³⁹;
- 20 reported a contract value that differed from the ANAO's analysis of the NCA's records⁴⁰;
- 21 incorrectly reported the contract start date⁴¹; and
- 26 incorrectly reported the contract end date.

3.33 The ANAO's audit work indicates that the NCA does not have adequate internal assurance processes to monitor compliance with AusTender reporting and other CPRs.

Recommendation no. 7

3.34 The National Capital Authority implement a monitoring and assurance framework over its compliance with the Commonwealth Procurement Rules, including AusTender reporting.

National Capital Authority response: *Agreed.*

3.35 *The NCA has engaged a Director of Procurement to guide the procurement activities in the NCA, and to monitor and provide reports to management and Executive of those activities. Part of the responsibilities of the Director of Procurement is to ensure the key relevant documents and records are in place to support each procurement activity from beginning to end.*

Contract amendments

3.36 When reporting amendments to contracts to AusTender, entities should report the variation details separate to the parent contract and only after approval by an appropriate delegate. Relevant entities are not required to (although they may choose to) report amendments:

- valued under the reporting threshold of \$10,000;
- that decrease the value of a contract; or
- to the contract term.⁴²

39 Six of these contracts were issued under the NCA's Estate Services Panel/standing offer arrangement which had been established in mid-2015. For the contracts examined by the ANAO, the NCA had not reported the panel/standing offer arrangements in accordance with paragraph 7.20 of the CPRs (as detailed in footnote 37).

40 In some instances, the difference in contract value was due to the collective reporting of the original contract and subsequent amendments.

41 Relevant entities should report the start date identified in the contract. If there is no start date identified, relevant entities should report the date that the contract was signed. If there is no written contract, the date of the first provision of goods or services under the contract should be reported.

42 This includes instances where the term of a contract is amended with no impact to contract value.

3.37 As at 30 June 2021, 23 (55 per cent) of the 42 contracts examined by the ANAO had been varied at least once. Three of the 23 contracts had insufficient information maintained on file in relation to the variations to enable reliable examination as to whether the associated amendments had been reported in accordance with the CPRs. For the remaining 20 contracts, the individual variations totalled 62 in number and \$8.1 million in value. The NCA was obligated to report 45 of those 62 individual variations to AusTender (the other 17 fell into one of the categories listed in paragraph 3.36). Of those required to be reported, only 11 (24 per cent) were accurately reported within the required timeframe.⁴³

Reliability of records

3.38 The ANAO observed the following deficiencies in the NCA's records:

- contracts being executed long after works commenced;
- the combined reporting of parent contracts and amendments;
- duplications in reporting due to inconsistencies in the treatment of variations (sometimes variations were reported both as standalone contracts and as a variation to an existing contract);
- human error when entering information into AusTender;
- insufficient understanding of AusTender reporting obligations as they relate to amendments/variations;
- poor contract management; and/or
- insufficient information being maintained on file.

Recommendation no. 8

3.39 The National Capital Authority place greater emphasis on timely and accurate reporting of its procurement activities, and making and retaining appropriate records of those activities.

National Capital Authority response: *Agreed.*

3.40 *The NCA is progressively implementing a number of new administrative arrangements to further guide staff undertaking procurement, including guidance on AusTender reporting and appropriate record keeping.*



Grant Hehir
Auditor-General

Canberra ACT
2 June 2022

⁴³ For the purposes of this analysis, the ANAO considered contract amendments to be accurately reported where each applicable variation was reported separately for an identical value as that approved by the delegate.

Appendices

Appendix 1 Entity responses



Australian Government
National Capital Authority

Ref: 496027

Office of the Auditor General
Australian National Audit Office
GPO Box 707
CANBERRA ACT 2601

Dear Auditor General

Section 19 Proposed Report—Procurement by the National Capital Authority

Thank you for providing the proposed report under section 19 of the *Auditor-General Act 1997*. The National Capital Authority (NCA) welcomes the Australian National Audit Office (ANAO) Audit. The recommendations made are very helpful in continuing to improve the NCA's procurement framework and processes.

I attach the NCA's response to the report, outlining actions taken to date and future measures NCA will take to address the recommendations of the report. The NCA also welcomes any guidance provided by the Department of Finance which supports the NCA continuing to meet the requirements of the Commonwealth Procurement Rules.

I would like to thank the effort of your team and collaborative approach in undertaking this audit. NCA looks forward a continued working relationship with the ANAO.

Yours sincerely

Terry Weber
Chair

18 May 2022

Enc.

Building the National Capital in the hearts of all Australians
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ABN 75 149 374 427



Australian Government
Department of Finance

Rosemary Huxtable PSM
Secretary

Our Ref: EC22-000196

Mr Grant Hehir
Auditor-General
Australian National Audit Office
GPO Box 707
Canberra ACT 2601

Dear Mr ~~Hehir~~ ^{Grant}

Thank you for your correspondence of 20 April 2022 providing an extract of the proposed Audit Report *Procurement by the National Capital Authority*, pursuant to section 19 of the *Auditor-General Act 1997*, and the opportunity for the Department of Finance (Finance) to respond. This letter of reply contains Finance's summary response ([Attachment A](#)) and response to Recommendation no. 1 ([Attachment B](#)).

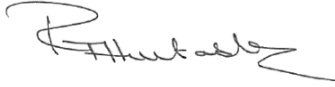
Value for money and competition are the core of the Commonwealth Procurement Rules (CPRs). The CPRs require non-discriminatory and competitive procurement processes to ensure that all suppliers compete on a level playing field when selling to the Government. Open and competitive processes, transparent decision making, and the efficient, effective, economical and ethical use of public resources support the achievement of value for money outcomes for the Commonwealth.

Finance has reviewed the matters raised in the proposed report and agrees with your recommendation. To support this recommendation, procurement guidance will be reviewed and updated to support procuring officials' application of the definition of 'construction services'. Finance will consult with small and large entities which procure construction services, to ensure the guidance is clear, accurate and fit for purpose.

One Canberra Avenue, Forrest ACT 2603 • Telephone 02 6215 3445
Internet www.finance.gov.au

The update will form part of a broader project to develop and expand guidance materials on the Buying for the Australian Government website. Such updates will better support Commonwealth officials to navigate the procurement process with ease and in a sequential manner, and access best practice procurement guidance.

Yours sincerely

A handwritten signature in black ink, appearing to read 'R. Huxtable', with a stylized flourish at the end.

Rosemary Huxtable
Secretary

16 May 2022



17 May 2022

Brian Boyd
Executive Director
Australian National Audit Office

By email: brian.boyd@anao.gov.au; tiffany.tang@anao.gov.au

Dear Mr Boyd

AUDITOR-GENERAL REPORT ON PROCUREMENT BY THE NATIONAL CAPITAL AUTHORITY

Thank you for the opportunity to submit a response to the Auditor-General's report regarding the National Capital Authority's procurement for chillers and boilers replacement (**the Procurement**).

We have received a very short extract from the ANAO's proposed report regarding our involvement in the Procurement.

The bold italicised text reflects the ANAO's finding, and our response follows:

An external probity adviser was appointed (Griffin Legal) but no report or signoff was on file confirming that all probity aspects of the procurement had been satisfactorily followed

We did not provide a report or probity signoff in relation to the Procurement. Ultimately, despite our various attempts to obtain further details, we held insufficient information to prepare a Probity Report. We recommended a Probity Report be prepared however, after numerous requests did not receive instructions to complete the same.

Please do not hesitate to contact our office if you have any further questions.

Yours faithfully
GRIFFIN LEGAL

NICOLE PLATT
Partner

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Canberra City ACT 2601

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Appendix 2 Improvements observed by the ANAO

1. The existence of independent external audit, and the accompanying potential for scrutiny improves performance. Improvements in administrative and management practices usually occur: in anticipation of ANAO audit activity; during an audit engagement; as interim findings are made; and/or after the audit has been completed and formal findings are communicated.

2. The Joint Committee of Public Accounts and Audit (JCPAA) has encouraged the ANAO to consider ways in which the ANAO could capture and describe some of these impacts. The ANAO's 2021–22 Corporate Plan states that the ANAO's annual performance statements will provide a narrative that will consider, amongst other matters, analysis of key improvements made by entities during a performance audit process based on information included in tabled performance audit reports.

3. Performance audits involve close engagement between the ANAO and the audited entity as well as other stakeholders involved in the program or activity being audited. Throughout the audit engagement, the ANAO outlines to the entity the preliminary audit findings, conclusions and potential audit recommendations. This ensures that final recommendations are appropriately targeted and encourages entities to take early remedial action on any identified matters during the course of an audit. Remedial actions entities may take during the audit include:

- strengthening governance arrangements;
- introducing or revising policies, strategies, guidelines or administrative processes; and
- initiating reviews or investigations.

4. In this context, the below actions were observed by the ANAO during the course of the audit. It is not clear whether these actions and/or the timing of these actions were planned in response to proposed or actual audit activity. The ANAO has not sought to obtain assurance over the source of these actions or whether they have been appropriately implemented.

- Development of intranet guidance on procurement.
- Update of the Accountable Authority Instructions.