

2023

**THE LEGISLATIVE ASSEMBLY FOR THE
AUSTRALIAN CAPITAL TERRITORY**

TENTH ASSEMBLY

**Auditor-General Report No.5 of 2023
Activities of the Government Procurement Board
Government Response**

**Presented by
Chris Steel MLA
Special Minister of State**

ACT Government Response to Auditor-General's Report: Activities of the Government Procurement Board

Introduction

The ACT Government welcomes the Auditor-General's performance audit report No. 5 of 2023 on the activities of the Government Procurement Board (the Report). The Report was presented to the Speaker on 20 July 2023, for out-of-session circulation to members of the Legislative Assembly.

The Report focusses on the activities of the Government Procurement Board (the Board) which forms a part of the Territory's overall procurement framework and considers the processes for the referral of procurement proposals to the Board by Territory entities, and the Board's review of procurement proposals and their advice.

The report concludes that:

- Territory Entities generally comply with the necessary referral requirements, though in many cases proponents do not provide adequate documentation and advice to enable the Board to thoroughly consider proposals.
- The Board's role in clearly establishing whether a proposal has met the requirements of the relevant legislation, whether best practice policies are adhered to, and ultimately whether its advice has been actioned in relation to a procurement is unclear.
- That the Board's role in and recommending best-practice policy in relation to Territory-wide procurement could be more clearly established and the Board's responsibilities and powers could be more clearly articulated.

It is important to note that the Report is confined largely to the operations of the Board itself and does not substantially address the ACT Government's broader procurement reform program. The Board, in discharging its functions and in considering Territory-wide advice on procurement matters is appropriately and substantially supported by the ACT public service, through Procurement ACT. Correspondingly, ongoing reform efforts in this space will support the Governments' response to this Report.

Similarly, the Report also does not substantively consider the role of authorising legislation, including the *Government Procurement Act 2001*, *Government Procurement Regulation 2007* and the *Financial Management Act 1996* in regard to the responsibilities placed on various parties to procurement therein. The Report's findings in relation to authorising legislation focus instead on the lack of clarity it provides to the functions, powers and obligations of the Board. The ACT Government proposes to further strengthen and clarify relevant legislation and is supporting the broader capability uplift across Territory entities to ensure that the Board discharges its role in an environment of strict adherence to best practice procurement values.

The Report has made 16 recommendations in relation to the activities of the Board, all of which the Government agrees.

Government Position on Recommendations

Recommendation 1 – Thresholds for referral

The Government should review:

- a) the value thresholds established in the Regulation, and if deemed appropriate, propose revisions; and*
- b) the referral 'classes' and how referral rules are established and implemented.*

Government Position

AGREE

Section 11 of the *Government Procurement Regulation 2007* (the Regulation) currently sets value thresholds for the review of procurement proposals by the Board. The thresholds are mainly linked to the total estimated value of a procurement: \$5 million for Directorates and \$1 million for all other Territory entities subject to the *Government Procurement Act 2001* (Act). The thresholds for ICT procurement with an element of system design or development, and for disposals are set at \$1 million for all Territory entities.

Likewise, where the Board has endorsed a strategic procurement plan for a procurement, there is no requirement to have a related procurement proposal reviewed by the Board. Territory entities have instead used this function to present a range of different unrelated procurements at one time.

No other basis for referral has been established. The dollar value-based thresholds have not been revised since 2007. The passage of time and the changing nature of Government procurements and the marketplace, including the increasing use of whole of Government standing arrangements and panels, means these thresholds may no longer be appropriate. The ACT Government is supportive of increasing these values, where doing so remains complementary to the Government's commitments to strengthening the procurement process and maintaining transparency. To this end, the Government will establish new thresholds of \$7 million for all Territory entities subject to the Act, as well as for disposals and ICT procurements with an element of system design or development.

As identified by the Auditor-General's report '*...a value threshold alone is not a sufficient indicator of procurement risk. Recommendation 15 refers to a risk-based referral process.*'

To support the Government's response to this Report, the Government Procurement Regulation 2007 will be updated to provide the following threshold and risk-based approach to identifying procurements requiring review by the Board.

Under the new arrangement a Delegate or Chief Executive Officer will refer a procurement that meets value and risk thresholds to the Board for review. To ensure the Board is engaged at the most impactful stages of proposal formulation, a procurement must be referred to the Board at least six weeks before the anticipated approach to market or Anticipated Procurement Activity reports, where:

- 1) a procurement that has a total estimated value of \$7 million or more (for acquisitions and disposals); or

- 2) a procurement that, irrespective of its total estimated value, is in the plan phase (before an approach to market), and meets at least one of the following thresholds:
- a) has been assessed by the procuring Territory entity as having a high or extreme risk rating;
 - b) is for an ICT enterprise system or solution;
 - c) is for a cooperative or collaborative arrangement across Directorates or Territory entities, including panel arrangements;
 - d) proposes a substantial change (variation) that would change the scope or nature of the goods, services, works or property procured under a contract. Examples of substantial change include:
 - i) extending a contract where this was not considered by the procurement and not built into the contract (noting that drafting a contract so that it has no end date (ever-green contracts) is never appropriate);
 - ii) changing the nature or volume of goods or services, property or works, delivery schedule or completion date where this was not considered by the original procurement and not reflected in the contract;
 - iii) changing the contract price where this was not considered by the original procurement and not included in the contract;
 - iv) multiple smaller changes in scope, nature or price may together be considered a substantial change; or
 - v) any other change that materially increases the overall allocation of risk or transfer risks to the ACT Government.

Note: The adoption of a commissioning methodology, where the scope or outcomes have not substantially varied, would not be considered a change to the scope of the procurement or nature of the goods, services, works or property.

- 3) a procurement that, irrespective of its total estimated value, is in the source phase (before entering into contract), where a delegate is considering overturning the recommendations of the Evaluation Team (in accordance with the ACT Government Probity in Procurement Guide probity advice is required in these circumstances, where probity advice has not been sought the matter must be referred to the Board);
- 4) a procurement that, irrespective of its total estimated value, or phase in the lifecycle of the procurement, is referred to the Board by at least one of the below parties:
- a) the Minister;
 - b) the Chief Executive or the delegate in the relevant procuring entity;
 - c) by Procurement ACT or Major Projects Canberra, including in circumstances where there is a market for the goods, services or works and one or more of the proposed suppliers that are currently providing the goods, services or works are proposed to be re-engaged for the same activity through a limited or selective tender; or
 - d) by a Probity Advisor or probity auditor, and
 - (i) A procurement that the Board has identified for review from the Anticipated Procurement Activity report, where the procurement is not otherwise expected to be referred to the Board.

This will ensure the Board has increased visibility of both high value procurements, but also procurements that pose a high risk to the Territory. A Risk Assessment Matrix will assist Territory entities in determining if the procurement is high risk. A risk assessment tool will be agreed by the Government Procurement Board and will include consideration of the following factors:

- a) whether the requirements of the procurement are standard and commonly purchased, or one off and unique;
- b) whether the requirements of the procurement include the provision of sensitive or confidential information to the supplier;
- c) market concentration or risks of anti-competitive behaviour;
- d) the likelihood of public interest in the procurement or reputational risk for the entity or the Government; and
- e) the complexity of the approach to market and request type (refer [PLN02-Approach-to-Market-and-Request-Types.pdf \(act.gov.au\)](#))

The delegate responsible for the procurement must approve the risk assessment. The ability to avoid the procurement proposal review by having an endorsed strategic procurement plan is also proposed to be removed, in line with the ACT Government response to Recommendation 7.

These provisions will be further strengthened by the ACT Government's response to Recommendations 4-10.

Recommendation 2 – Board purpose and functions

The Government should clearly articulate the Board's purpose taking into account the context in which Territory procurement is undertaken in 2023. In doing so:

- a) consideration should be given to whether the Board's primary function is to guide system level policy and practice or individual proposal level practice;*
- b) a statement of purpose should be made, which includes primary and subordinate purposes and functions; and*
- c) the Act and Regulation should be amended as necessary.*

Government Position

AGREE

To support the changes to the Board's functions, remit, or governance in accordance with contemporary needs, the Government will table updated legislation that will articulate the objectives of the Board at a high-level. Proposed amendments to the Government Procurement Act 2001 to replace the current functions of the Board in section 6 of the Act with a statement, which will establish the overarching purpose of the Board as providing the Territory with strategic direction in relation to procurement through several functions. The Board's purpose will be set in legislation as a clear articulation from which the functions are derived and articulated in the Board's Terms of Reference. The terms of reference will be re-affirmed annually.

The Act will be amended to outline the objectives of Board which are currently to:

- (i) Review and make recommendations or directions on procurements in accordance with the thresholds set in the Regulation.

- (ii) Review and endorse Whole of Government procurement practices.
- (iii) Make recommendations to the Minister in relation to making any endorsed Whole of Government procurement practices through subordinate legislation.
- (iv) Anything else directed by the Minister.

In addition, the powers to direct the Board under the Act, the Minister will issue an annual Direction to the Government Procurement Board to provide the Board's Strategic Direction for that financial year. The Direction will be developed in consultation with the Board and will support the Board in meeting its objectives under the Act.

The Direction will also outline how the Minister wishes the Board to pursue its objectives in accordance with the Act, including any areas of focus such as a specific procurement category, as well as outlining any variation to the reporting requirements of the Board. The Direction will be updated annually, or as required, by the Minister, to respond to emerging issues. The Board will provide annual reports to the Minister on the Strategic Directions. The reports will outline, at minimum:

- any Territory entity specific or systemic procurement risks identified by the Board, along with recommendations to address any identified issue;
- any instances where the Board has concerns about the implementation of its advice by a Territory entity including the process by which these concerns were escalated in accordance with the escalation process identified in the Board's Terms of Reference;
- any procurement policy or process matter that the Minister advises the Board they wish to receive an update on; and
- any other matter the Minister directs the Board to report on.

The above reporting does not prevent the Board from referring any matter to the Minister, as required.

Recommendation 3 – Accountability and Transparency

Territory Entities should clearly authorise all documentation presented to the Board.

Government Position

AGREE

The Board's Terms of Reference will require that all documentation presented to the Board must be authorised by the relevant Delegate or Chief Executive Officer.

To support the Board's oversight of this requirement, templates will be updated by Procurement ACT to ensure that the relevant Delegate or Chief Executive Officer needs to sign to authorise documents proceeding to the Board. The Board Secretariat will not accept the documents unless they have been signed by an appropriately authorised official.

Recommendation 4 – Two-pass review process

The Government should consider the merits of continuing with the two-pass review process in the light of wider consideration of the Board's purpose and functions.

Government Position

AGREE

Currently, a two-pass process applies to goods and services procurements only. The first is a strategic review which focuses on the procurement strategy such as options, strategic objectives and risks and the second pass focuses on the details of the procurement captured in the full procurement documentation suite. Due to a range of factors including the timeliness of presentation to the Board, the process is ineffective. The process is mainly ineffective as there are no accountability mechanisms in place to ensure proponents are implementing Board advice.

It is proposed that the two-pass process be modified and applied to all procurements presented to the Board and not just goods and services. This is to ensure proponents receive advice at a time that it can be practically implemented and also to mitigate the risk of proponents disregarding the Board's advice. Broadly, the process will operate as follows:

- 1) The Proponent presents procurement proposal to the Board.
- 2) The Board provides advice to the proponent on their proposal and establishes whether the advice is of a risk profile that requires a return for a second pass.
- 3) The proponent implements the Board advice and returns to the Board for a second pass if identified.
- 4) If the proponent has not implemented the Board's advice when they return for the second pass, escalation post the review will occur as discussed below.

Separately, a procurement proposal brought to the Board for review will be unable to progress unless any procurement risks have been mitigated. Where the Board does not discharge its function or does not otherwise consider that the risks are mitigated, the Territory entity cannot proceed with this proposal without breaching legislation.

Depending on the issues and the structure of the entity, the process provides visibility of the Board's views to the Delegate/the Chief Executive of the Territory entity/a relevant board, and the relevant Minister for the portfolio.

Proposed changes to the Government Procurement Regulation 2007 will ensure that a procurement proposal must be provided for the Board's review at least six weeks before the anticipated approach to market date.

- The Board will discharge its review functions only where a procurement proposal meets the minimum requirements in section 12 of the Government Procurement Regulation 2007, with further details of those minimum requirements set out in the Board's Terms of Reference, which will include a review schema.

The Board provides a Risk Assessment Matrix to assist Territory entities in determining risk in procurement. The risk assessment tool will include consideration of the following factors:

- whether the requirements of the procurement are standard and commonly purchased, or one off and unique;
- whether the requirements of the procurement include the provision of sensitive or confidential information to the supplier;
- market concentration or risks of anti-competitive behaviour;
- the likelihood of public interest in the procurement or reputational risk to the entity or Government;
- the complexity of the approach to market and request type (refer PLN02-Approach-to-Market-and-Request-Types.pdf (act.gov.au)); and

where the Board seeks to evaluate a procurement not otherwise expected to be referred to it, the Board will advise the relevant Chief Executive of the Territory entity of its intention to do so.

In all cases, when considering a procurement, the Board must consider whether the Territory entity has applied the relevant provisions of the Government Procurement Act 2001 (at a minimum, provisions relating to the pursuit of value for money), the Government Procurement Regulation 2007, associated regulations and legislative instruments.

In all cases, when considering a procurement, the Board must issue written recommendations, to the relevant delegate for the procurement, that clearly articulates:

- a) whether in the Board's view the Territory entity has applied the relevant provisions of the Government Procurement Act 2001 (at a minimum, provisions relating to the pursuit of value for money), the Government Procurement Regulation 2007, associated regulations and other legislative instruments;
- b) if the answer to (a) is yes, whether there are any observations that would enhance value for money;
- c) if the answer to (a) is no, what specific unmitigated risks remain and what is the recommended treatment, and whether the treatment must occur before proceeding further with the procurement.

In the case of (c), the Board must require that the Territory entity address the relevant risks and bring the matter back to the Board with an explanation of the treatment.

Where, following Territory entity return to the Board, the Board still considers that there is an unmitigated risk, the Board must bring the matter to the attention of the relevant Chief Executive of the Territory entity, and must advise them not to proceed with the procurement until the relevant risks have been mitigated, including through obtaining independent professional advice.

The Chief Executive of the Territory entity must provide written response to the Board and their responsible Minister of the actions taken to resolve the relevant unmitigated risks, before proceeding with the procurement. Any actions taken by the Territory entity will be considered in the context of the accountability of the relevant Chief Executive to the responsible Minister under the Financial Management Act 1996 for the efficient and effective financial management of the public resources for which the Directorate is responsible. An unmitigated risk will be clearly defined as any factor that in the Board's view presents a high to extreme risk to a Territory Entity's ability to pursue value for money under section 22A of the Act (e.g., risks to open and effective competition, probity and ethics), and which has not been adequately addressed in the documentation presented to the Board.

This approach will provide a clear administrative process in relation to the review of procurement proposals by the Board and allows greater flexibility than changes to legislation alone.

Additionally, only procurement proposals that meet the minimum standards are reviewed by the Board, which will ensure that the Board's time is not devoted to partially complete matters, while at the same time allowing the Territory Entity greater time to consider Board advice.

Lastly, this process also has the advantage of clearly specifying the relevant risk environment, ensuring that the Board considers proposals with an unmitigated risk a second time and provides clearer documentation of process as well as the expectations of proponents – including an escalation process to highlight and resolve unmitigated risks.

Recommendation 5 – Review process improvement

In the light of wider consideration of the Board's purpose and functions, the Government should seek to ensure:

- a) proponents bring forward the Board's review in the procurement timeline;*
- b) the Board undertakes fewer, deeper reviews of the highest risk proposals; and*
- c) the Board has the facility to conduct reviews of the fundamentals of a proposal (as is undertaken under the current strategic review), including sourcing options, where appropriate.*

Government Position

AGREE

The Board's Terms of reference (referred to in the response to Recommendation 3 above), will explicitly require that all documentation presented to the Board at least six weeks prior to the anticipated approach to market. Following initial consideration by the Board proponents will be required to bring forward their response to any recommendations provided by the Board four weeks before the anticipated approach to market.

Where the Board determines the response has not resolved the deficiencies or risks the escalation process will commence and the Territory entity will be explicitly advised not to proceed to market until the matter is resolved.

As described in Recommendation 4 a second-pass process will occur only when identified as necessary by the Board, to ensure the Board can undertake fewer but deeper reviews. This contrasts with the current process where all goods and services procurement proposals require two passes. The response to Recommendation 4 elaborates on modifications to the two-pass review process. Additionally, re-evaluation of relevant financial thresholds and a clear articulation of risk evaluation criteria will establish cases where the Board may elect to undertake a two-pass review process.

The ACT Government does not propose that the Board's facility to review the fundamentals of a procurement proposal be diminished.

Recommendation 6 – Variations

The Government should consider the merits of maintaining or ceasing variation referrals to the Board in the light of wider consideration of the Board's purpose and functions. If the consideration of variations is removed from the Board review process, additional safeguards should be implemented to ensure variations are not used where there is a strong case to return to the market with a new procurement opportunity.

Government Position

AGREE

The Board will continue to review variation proposals that are in the proposed threshold of \$7 million or considered high risk if the following applies:

- The proponent has consulted the advisory function in Procurement ACT through the tiered service offering and Procurement ACT has advised the proponent that the variation needs to be reviewed by the Board. In making this decision, Procurement ACT consider whether:
 - there is a change in scope of the procurement;
 - the proponent seeks to extend a contract that has no further extension options;
 - adequate demonstration of why a decision not to return to market for a new procurement opportunity is not provided; or
 - any other unmitigated risks are identified.

Recommendation 7 – Strategic procurement plans

The Government should consider the merits of the endorsement and use of Strategic Procurement Plans in the light of wider consideration of the Board's purpose and functions. If endorsement of Strategic Procurement Plans is retained as a function in the Regulation, Procurement ACT's draft guidance should be finalised and promulgated.

Government Position

AGREE

Currently, where the Board has endorsed a strategic procurement plan for a procurement, there is no requirement to have the relevant procurement proposal reviewed by the Board. The initial intent of strategic procurement plans was for Territory entities to provide a holistic view of several procurements falling under one need. Over time, Territory entities have instead used this function to present a range of different unrelated procurements at one time.

For this reason, strategic procurement plans are being removed from the Board's function. Where the capability and compliance of Territory entities increases this function can be reinstated by the Minister through the issuing of Strategic Directions.

In removing strategic procurement plans from the Board's functions, consideration will be given to how human services sector commissioning plans can be presented to the Board to enable an understanding of sector needs, challenges and strategic procurement options. This will be particularly important where individual procurements may not reach the \$7 million threshold and/or a variety of procurement options may be used.

Recommendation 8 – Endorsed procurement practices

The Government should consider the merits of the Board’s formal endorsement of procurement practices in the light of wider consideration of the Board’s purpose and functions. This may involve a role for the Board in initiating, formulating and endorsing systemic procurement advice and guidance.

Government Position

AGREE

One of the functions of the Board is to consider, advise on and, if appropriate, endorse procurement practices and methods. To date, the Board has only exercised this function once. An Endorsed Procurement Practice (EPP) is a best practice approach to a specific procurement matter that is supported by the Board through an endorsement, which should be suitably adopted by Territory entities.

Under the proposed updates to the Procurement Framework, Endorsed Procurement Practices (EPPs) will be integral to the Board’s fulfilment of its guidance and policy-shaping function. Subordinate legislation will define and compel best practice procurement behaviours. Attachment A outlines the proposed ACT Government Framework.

This requirement will be enshrined under legislation which will outline the Board’s objectives, requiring the Board to make recommendations to the Minister in relation to making any endorsed Whole of Government procurement practices.

Procurement ACT will support the Board in identifying broad procurement issues that may benefit from clarification and guidance where an EPP is considered as the most suitable way to achieve this objective. Procurement ACT will seek Ministerial endorsement of this approach and, subject to agreement, the Board will be directed to consider the procurement practice for endorsement. If the Board disagrees with the proposed approach, Procurement ACT will reassess its proposed approach for future Board consideration and final Ministerial endorsement.

Territory entities or other third parties may not propose an EPP directly to the Board for its consideration but should work with Procurement ACT if they identify a need for an EPP.

Recommendation 9 – Annual Procurement Plans

The Government should review the use Annual Procurement Plans in the light of the wider consideration of the Board’s purpose and functions. In doing so, consideration should be given to the limited impact they have in informing Board activities.

Government Position

AGREE

Territory entities are required to complete Anticipated Procurement Activity reports (APAs – replacing Annual Procurement Plans) each year. The purpose of APAs is to assist Territory entities in planning their future procurement activities and give them the opportunity to advertise advance

tender notices which provides industry with an indication of business opportunities that may be available in the future.

To facilitate the Board's greater oversight of ACT Government procurements, APAs will be made available to the Board within 30 days of the publication of the ACT Budget each year. APAs will be further augmented by proposed Budget process rules, which will explicitly require Directorates and Agencies to indicate where a procurement is required to support a business case. This requirement will also apply to the Budget Review process, where applicable.

APAs may be updated throughout the year. As per usual practice, variations to Directorates' and Agencies' APAs will be brought to the Board's attention by Procurement ACT to facilitate investigation of amendments to APAs.

The Minister may through a Direction give the Board explicit power to select procurements from a Territory entity's APA that would not otherwise be presented to it through the threshold requirements. The Board can select procurements that they see as complex or sensitive in nature, or in circumstances where a variation to an APA itself represents a risk to best practice procurement activity and planning on the part of a Territory entity.

Recommendation 10 – Escalation post review

In the light of wider consideration of the Board's purpose and functions, the Government should consider providing the Board with an express power to provide written advice directly to a director-general (or chief executive) following the Board's consideration of a procurement proposal.

Government Position

AGREE

As articulated in the ACT Government's position on Recommendation 4, a modified second-pass process will provide avenues to mitigate risks associated with procurement proposals that may not be compliant with the Procurement Act or Procurement Rules or may otherwise expose the ACT Government to inappropriate risk.

Where a procurement proposal does not initially satisfy the Board as to these requirements, or does not meet the minimum requirements, including where it presents unmitigated risk(s), the Board will return the procurement proposal to the relevant Delegate (cc Chief Executive of the Territory entity) for correction and resubmission to the Board for review.

In doing so, the Board will provide specific and explicit recommendations to the Delegate as to how the deficiency or risk may be managed and require that the Territory entity return to the Board with a procurement proposal that specifically addresses the matters raised by the Board. This advice will also unequivocally specify that the Board does not endorse the procurement in question.

As described in the response to Recommendation 4, where the Board considers a procurement a second time and the proposal is judged to remain deficient or otherwise contains unmitigated risk(s), the Board will follow an escalation process.

Recommendation 11 – Enhancing board independence

In the light of wider consideration of the Board’s purpose and functions, the Government should consider:

a) revising the constitution of the Board to achieve a majority of non-public employee members; and

b) revising the constitution of the Board to ensure a non-public employee member chairs the Board.

Government Position

AGREE

While the Board currently comprises a diverse group of members in respect of expertise and public sector engagement, the ACT Government accepts the case for enhancing the representation of the Board to the greatest practical extent. Noting the breadth of Recommendations proposed by the Auditor-General, their strong interrelationship with an enhanced function for Procurement ACT and additional protections that the ACT Government proposes to adopt as recommended by the Auditor General, the ACT Government proposes to review the composition and chairing of the Board.

The ACT Government will appoint a non-government member as the Chair of the Government Procurement Board. The Deputy Chair will be a public employee.

We agree that the composition of the Board should have more non-public employees than public employees. It is unlikely that the current size of the Board will change. However, subject to the successful passage of forthcoming legislation, the composition of membership will change.

The focus of the appointment of future Board members will remain skills and merit based with a diversity of experience and ability to meet the Board’s objectives. The Board’s updated Terms of Reference to be established through subordinate legislation will elaborate on specific compositional objectives.

There will be a transition period to the new arrangements with more non-government members including the Chair. This will allow for the broader implementation of recommendations otherwise proposed by the Auditor-General to be adopted.

This compositional change will also be supported by proposed enhancements to the Board’s handling of conflicts of interest in a revised and updated Terms of Reference, particularly as they relate to procurements proposed to the Board where a public Board member may have an association with a proposal before the Board (as per the response to Recommendation 12).

Procurement ACT will also ensure that the Membership selection process will be conducted in accordance with the [Governance Principles, Appointments, Boards and Committees](#), and seek to represent a broad cross section of the community, in particular, Aboriginal and Torres Strait Islander Enterprises and Canberra region small to medium enterprises. Where, at any point in time, female representation on the Board is below 50 per cent, the selection process should take into account the need to improve gender representation.

Recommendation 12 – Interests and voting

In the light of wider consideration of the Board's purpose and functions, the Board should review practices with respect to:

- a) the use of formal voting and the recording of that vote; and*
- b) the management of declared interests and the action taken as a result of the declaration.*

Government Position

AGREE

The Board's terms of reference will be strengthened to require that formal voting records be summarised and explicitly recorded as part of the Board Minutes for each procurement under consideration at a Board meeting, and that as part of quarterly reporting obligations the Board will provide the Minister an update of its decisions in relation to procurements considered in that period.

The Board's updated terms of reference will explicitly require that prior to their commencement with the Board, members must sign a declaration to confirm that they:

1. have completed the probity in procurement e-learning module;
2. have completed the Overview of the ACT Government Procurement Framework e-Learning module;
3. are committed to the ACTPS code of conduct, regardless of their status as a public or non-public member. Board members will also agree throughout their tenure on the Board to:
 - a. act in good faith;
 - b. act in the best interests of the ACT Government and the people of the ACT;
 - c. avoid conflicts between the interests of the ACT Government and their own interests; and
 - d. act honestly, exercise care and diligence to the same standards required by a Company Director.

The above declaration will be required to be reaffirmed annually thereafter at the beginning of each financial year.

Prior to commencement with the Board, and thereafter annually to coincide with a new financial year, or at any time where an interest needs to be declared, Board members must also declare in writing their interests including:

- financial and business and other interest; and
- perceived, potential or actual conflicts of interest.

Board members are also required to declare any potential conflicts of interest relating to any procurement before the Board, prior to the formulation of advice and recommendations.

If a member has a declared interest for a specific procurement proposal, they will absent themselves from the meeting for the duration of the presentation and discussion of that item.

If a public employee member works in the same Directorate as the procurement proposal being presented, they will also absent themselves from the meeting for the duration of the presentation and discussion of that item.

Recommendation 13 – Endorsement

In the light of wider consideration of the Board’s purpose and functions, the Government should clarify and affirm the express power and authority of the Board’s advice.

Government Position

AGREE

A regulation will affirm that Territory entities are required to implement the Board’s advice. Where this does not occur, escalation procedures will apply as per the response to Recommendation 4.

Recommendation 14 – Advice schema

In the light of wider consideration of the Board’s purpose and functions, the Board should review and revise its advice schema.

Government Position

AGREE

The Board terms of reference will establish the Board’s Advice Schema. Procurement ACT will develop a template that the Board will use to issue its advice. The template will provide detail on each piece of advice individually and encompass any discussion for noting between the Board and proponents.

Recommendation 15 – Board follow up

In the light of wider consideration of the Board’s purpose and functions, the Board should develop a risk-based practice for the review of proponents’ consideration and acquittal of Board advice.

Government Position

AGREE

As per the response to Recommendation 4, procedures will be enacted to ensure that the Board’s advice is implemented by proponents, and where procurement actions depart from the Board’s advice that appropriate justification is provided.

Recommendation 16 – Risk-based referrals

In the light of wider consideration of the Board’s purpose and functions, the Government should:

- a) develop a range of automatic and discretionary triggers that can be activated by the Board, such that the Board receives and reviews fewer procurement proposals, but which are higher risk; and*
- b) consider including a Board 'call-in' process, which can be informed by the Board's early oversight of procurement activity being supported by Major Projects Canberra and Procurement ACT.*

Government Position

AGREE

Recommendation 1 outlines the value and risk-based approach to referrals to the Board. In addition, triggers have been identified that would also result in referral to the Board, including on recommendation from Procurement ACT or Major Projects Canberra.

As discussed in the response to Recommendation 9, the Board will have access to Territory Entity APAs. This will inform the Board's early oversight in procurement proposal and will also give it the ability to seek an assessment of any procurements that would not otherwise be reviewed by the Board by referral.

Attachment A

