



LEGISLATIVE ASSEMBLY
FOR THE AUSTRALIAN CAPITAL TERRITORY

STANDING COMMITTEE ON PUBLIC ACCOUNTS

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Submission Cover Sheet

Inquiry into Auditor-General's Performance Audit Reports July - December 2023

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Government

ACT Government Submission

Standing Committee on Public Accounts

Inquiry into the Auditor-General's

Performance Audit Reports July-December

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Introduction

The ACT Government is pleased to make a submission to the Standing Committee on Public Accounts Inquiry into the Auditor-General's Performance Audit Reports July-December 2023. This submission relates to Report No. 5 of 2023 into the Activities of the Government Procurement Board (the Report).

On 21 September 2023, the ACT Government tabled a response to the Report which agreed to all recommendations and provided a substantive response which outlined the steps the ACT Government would take to implement each of the Auditor-General's recommendations. These steps included prospective amendments to the *Government Procurement Act 2001*, the *Government Procurement Regulation 2007*, other legislative instruments under the Act and the continued work of the Procurement Reform Program (Reform Program).

The ACT Government's procurement ecosystem is made up several composite parts, including the *Government Procurement Act 2001* (the Act), the *Government Procurement Regulation 2007* (the Regulation), a range of policies, procedures and governance arrangements and the Government Procurement Board (the Board). The Report focuses on the Board which is established under the Act. In discharging its functions and in considering Territory-wide advice on procurement matters, the Board is supported by the ACT Public Service.

Since the tabling of the Government Response, the ACT Government has been undertaking several actions to deliver the steps outlined within it. This has included the introduction and passage of the *Government Procurement Amendment Act 2024* (the Amendment Act) through the ACT Legislative Assembly. There are ongoing steps being taken by Government to issue new directions and instruments to support the commencement of the Amendment Act, alongside 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.

This submission, which should be considered alongside the Government Response, provides a progress update on the steps that have already been taken to enhance the Government Procurement Board's function and operation, and future steps associated with the longstanding Procurement Reform Program.

Government Response to Audit Report No. 5/2023 – Recommendations and Government actions

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.*

Progress of government response

DELIVERED-IN-PART

Section 81 of the Amendment Act establishes that procurements, including an acquisition or disposal, that is in the planning period and has an estimated total consideration of \$7 million or more, and any procurement that has been referred to the Board by the administrative unit responsible for administering the Act, must be reviewed by the Board. A forthcoming ministerial

direction establishing the government procurement rules will specify that procurements for non-directorate territory entities must be reviewed by the Board if they have a value of \$1 million or more.

Additionally, a forthcoming ministerial direction will establish terms of reference for the Board that strengthen the risk-based referrals process to ensure that any high-risk procurements are referred to the Board regardless of value. Increasing the financial thresholds will help offset the burden on the Board for having to consider lower-value procurements, where substantial risk does not otherwise exist.

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.*

Progress of government response

DELIVERED-IN-PART

Section 43 of the Amendment Act establishes the objectives of the Board at a high-level. The Amendment Act establishes that the overarching purpose of the Board is to provide the Territory with strategic direction in relation to procurement. This amendment also reflects and updates the key functions of the Board to address the Auditor-General’s key findings and recommendations.

These key amendments establish the function to review and make recommendations about procurements in accordance with criteria set in the Regulation; review and endorse procurement practices and make recommendations to the Minister about any endorsed procurement practices made under the Act.

Additionally, the forthcoming ministerial direction with updated terms of reference for the Board will further articulate the role and objectives of the Board including the strategic direction referred identified in the Government Response. The Terms of Reference will be re-affirmed annually.

The Amendment Act also establishes the requirement for the Board to issue an annual report to the Minister within 30 days of the start of each financial year which must outline the Board’s performance in accordance with the Strategic Direction issued by the Minister, details about each procurement or procurement practice reviewed by the Board, and any advice provided about procurement policies or procedures.

Recommendation 3 – Accountability and Transparency

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

Progress of government response

ONGOING

A forthcoming ministerial direction establishing 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.

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.

Progress of government response

DELIVERED

Through the Amendment Act, the Government has reformed the two-pass process and established that all procurements presented to the Board proceed through this process. The process itself is modified and operates in a model that ensures proponents receive advice at an earlier time in the procurement process so that it can be practically implemented and ensures that proponents have adequate time to implement the Board's advice.

Through this modified process, the Government has established a process which formalises the advice the Board provides to the procuring entity through written recommendations. Section 43 of the Amendment Act establishes the process a Territory entity must pursue when issued a written recommendation and establishes an escalation schema if this advice has not been addressed or adequately addressed, including escalation to the responsible Minister for the Territory entity undertaking the procurement.

Procedures will be developed to ensure that the Board's advice can be considered well in time to provide appropriate guidance, such that proponents can benefit from the Board's guidance during the procurement lifecycle, and a process for the evaluation and management of risk will be explicitly enshrined within this process.

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.*

Progress of government response

ONGOING

The Amendment Act ensures that the Board is operating with optimal efficiency and effectiveness, reducing the duplication of work by focusing on fewer, higher-risk procurements. The Amendment Act and the forthcoming ministerial direction will establish that matters referred to the Board are threshold and risk based, as outlined previously. Additionally, procurements may also be referred to the Board during the planning and sourcing stage of the procurement lifecycle. This will bring forward the Board’s review within the procurement lifecycle and allows the Board to undertake deeper reviews on higher risk proposals, irrespective of monetary thresholds.

The Government’s agreement to this recommendation is also supported by measures giving effect to its agreement to recommendations 3 and 4.

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.

Progress of government response

DELIVERED-IN-PART

Through the Amendment Act, the Government has strengthened the ability for the Board to make recommendations based on monetary and non-monetary risk-based thresholds (as per Recommendation 1). This captures issues relating to variations where there is a substantial change to the scope or nature of an existing procurement contract.

The terms of reference will clearly articulate these thresholds which include, but is not limited to, substantial change (variation) that would change the scope or nature of the goods/services/property procured under a contract. This will ensure that Territory entities are undergoing the procurement process where appropriate.

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.

Progress of government response

DELIVERED

The Amendment Act clarifies the purpose and functions of the Board, including endorsing government procurement practices, if appropriate (procedures, practises and policies used by Territory entities undertaking procurements).

The Board will also provide strategic direction in relation to procurements, review procurements and government procurement practises, make recommendations and give direction.

The Board must also submit an annual report to the Minister that lists the endorsed procurement practises or recommendations that will be subject to endorsed practices in the next reporting period.

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.

Progress of government response

DELIVERED

As per recommendation 7, the Amendment Act also establishes that the Board will provide strategic direction in relation to procurements, review procurements and government procurement practices, make recommendations and give direction. The Board must submit an annual report to the Minister that lists the endorsed procurement practises or recommendations that will be subject to endorsed practises in the next reporting period.

Recommendation 9 – Annual Procurement Plans

The Government should review the use of 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.

Progress of government response

DELIVERED

As per recommendations 7 and 8, the Amendment Act also establishes that the Board will provide strategic direction in relation to procurements, review procurements and government procurement practises, make recommendations and give direction. This includes a role for the Board to consider any anticipated procurement practices. The Board will report annually to the Minister on any recommendations it makes to territory entities in this respect.

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.

Progress of government response

DELIVERED

Consistent with the Government’s agreement to recommendation 4, the Amendment Act establishes a modified second pass process that will provide avenues to mitigate risks associated with procurement proposals which 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 and the 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.

The changes made in this reform also strengthen and reconfirm that the delegates for individual procurements are responsible for complying with the *Financial Management Act 1996*, the *Public Sector Management Act 1994*, the *Government Procurement Amendment Act 2024*, the *Government Procurement Regulation 2007* and all supporting Ministerial Directions and other guidance.

Accordingly, the new provisions provide that where the Government Procurement Board remains dissatisfied with the steps taken by the Chief Executive of the procuring Territory entity and is concerned that there remain unmitigated risks, the matter can be referred to the relevant minister with portfolio responsibility for that entity. Departures from the Board’s advice will also be reported to the Special Minister of State annually for transparency.

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.*

Progress of government response

DELIVERED

From 1 July 2024, the Chair of the Government Procurement Board will be a non-public member. The Deputy Chair will be a public employee. The Government is currently in the process of recruiting a new Chair for the Board. This change establishes that a majority of Board members will be non-public members.

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.

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.*

Progress of government response

ONGOING

The issuing of a forthcoming ministerial direction to establish the Board’s new terms of reference will 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 Amendment Act also requires that conflict of interest disclosures be recorded in the minutes.

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.

Progress of government response

DELIVERED

The Amendment Act establishes that if the Board makes a recommendation, a Territory entity must now explain to the Board, in writing, how they intend to address the recommendation. There is a clear line of escalation.

The forthcoming terms of reference will reiterate that the Board has the authority to issue a recommendation on any matter it has considered to the Head of Service, the Special Minister of State and the relevant Minister relating to instances of non-compliance with the Board's advice or recommendations. However, the Chief Executive Officer/Delegate for the relevant Territory entity remains responsible for giving effect to the Board's recommendations.

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.

Progress of government response

ONGOING

The forthcoming terms of reference for the Board 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. This advice schema will be consistent with the authority of the Board, as established by the Amendment Act.

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.

Progress of government response

DELIVERED

The Government's agreement to recommendation 4 and the mechanisms established therein will 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.*

Progress of government response

ONGOING

As per recommendation 6, the Special Minister of State will issue a ministerial direction with the Board's new terms of reference. As per the Amendment Act, the Board is enabled to make recommendations based on monetary and non-monetary risk-based thresholds (as per Recommendation 1).

The terms of reference will clearly articulate these thresholds which include, but is not limited to, substantial change (variation) that would change the scope or nature of the goods/services/property procured under a contract. This will ensure that Territory entities are undergoing the procurement process where appropriate.

Forthcoming Government Actions

There is considerable overlap in the manner of support that the ACT Government is providing in agreement to these recommendations, which reflects both the Government's intention to address these recommendations substantively, but also the breadth of the longstanding Procurement Reform Program which predated the Auditor-General's Report.

In line with the government response to the Report, the Special Minister of State will issue ministerial directions to the Board that establish:

- Terms of reference that will describe, functions, authority, support, ethics and probity (including conflicts), thresholds, advice schema, membership and diversity, and performance and reporting.
- A strategic direction for the Board, developed in consultation, to support the Board in meeting its purpose and functions under the Act. It will articulate how the Government wishes the Board to exercise its purpose and functions, including any areas of focus such as a specific procurement category, and will also outline any additional reporting requirements that the Special Minister of State wishes the Board to report on.
- An enhanced conflicts of interest process, an advice schema and the Board's role in relation to the Goods and Services Accreditation Program.

From 1 July 2024, the Chair of the Government Procurement Board will be chaired by a non-public member, giving effect to specific observations from the Auditor-General's Report.

Overall, the longstanding Procurement Reform Program will improve procurement capability and awareness of associated obligations and responsibilities across the ACT public service. The reform program will also enhance capability in Procurement ACT to provide a greater value-add in supporting the Board in its deliberations.

Conclusion

The ACT Government welcomes the Auditor-General's report into the Government Procurement Board and the recommendations made by him as to how we can strengthen and improve the Board's purpose and function. The passage of the *Government Procurement Amendment Act 2024*, and its forthcoming subordinate legislation and ministerial directions, have ensured the delivery of a large volume of the recommendations the Auditor-General has given. The ACT Government is confident that the steps taken in the Amendment Act represent a significant step forward in meeting the Auditor-General's recommendations and strengthening the ACT Government's procurement framework.