

PURCHASING POWER: COORDINATED AND COOPERATIVE PROCUREMENT

THE PRESENTER

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Sean is a highly regarded lawyer with significant experience acting for Australian Government clients. He has wide ranging commercial and contracting expertise including in respect of procurement, outsourcing, funding agreements, MOUs and licensing. Sean assists clients to achieve good procurement results through effective and efficient management of the procurement process from deal structuring to tender evaluation to negotiation support.

Sean has assisted numerous Australian Government departments and agencies to establish and use coordinated and cooperative procurements.

INTRODUCTION

The last couple of years have seen a dramatic shift in the landscape for the Australian Government's purchasing of goods and services, particularly information technology and communication services.

Fundamental changes to the purchasing environment have occurred - primarily as a result of the introduction of whole-of-government ICT panels and the implementation of other recommendations from the Gershon review.

Proximity Legal has been involved in a number of engagements recently to assist agencies to both establish and use coordinated and cooperative procurement arrangements. My presentation is about sharing some of the lessons learned through those projects, and also pointing out some of the guidance available from the Department of Finance.

While the presentation has a particular focus on ICT procurements, I will cover whole-of-government arrangements more generally so that the principles are relevant to a broader audience.

The topics that I will cover are:

- › Cooperative procurement
- › Coordinated procurement
- › Whole-of-government arrangements
- › Using multi-agency arrangements
- › Establishing multi-agency arrangements
- › Lessons learned
- › The future
- › Questions

THE BASICS

COOPERATIVE PROCUREMENT

What is Cooperative Procurement?

Cooperative procurement enables the use of a procurement contract by more than one agency. This can be achieved through either:

- › **Clustering** – a joint approach to the market
- › **Piggybacking** – an agency establishing a contract or standing offer arrangement that allows other agencies access.

Why?

Cooperative procurement aims to make better use of agencies' resources by:

- › reducing procurement costs – by reducing the number of tenders
- › reducing administration costs – by reducing the number of contracts
- › reducing unit prices and improving service arrangements – by aggregating demand / bulk purchasing.

How?

Cooperative procurement arrangements are established by the participating agencies, there's no central agency coordinating the arrangement.

Cooperative procurements often come out of:

- › cross-agency governance boards
- › one agency establishing its own arrangement, but assuming that other agencies may wish to access the same services and so making provision for multi-agency access
- › executive decision making, particular in application to portfolio agencies
- › very informal channels, such as a person working at an agency knowing someone at another agency that has a similar need.

There is no central community for agencies to arrange cooperative procurements. Only the standard channels such as agency Annual Procurement Plans on AusTender and GovDex.

Features

- › Multiagency approach to the market
- › Agency piggybacking clauses
- › Non-mandatory
- › Agencies initiate
- › Any newly established IT Services panels must include a multi-agency access clause.

Examples of cooperative procurement

The DHS print services arrangement is an example of cooperative procurement that originated in the DHS portfolio but, sought other interested agencies input before agreeing the print services business requirements and subsequent approach to the market.

The DMO Support Services panel is an example of a panel that provides for multi-agency access, but the services were established with the primary intention of meeting DMO's requirements.

Other examples include:

- › APSC Capability and Development Panel, Learning and Development Panel, etc (currently 54 participating agencies)

- › DHS Print Management Services Panel
- › DHS ICT Contractors Panel
- › DMO Support Services Panel

COORDINATED PROCUREMENT

What is coordinated procurement?

Coordinated procurement is an initiative to establish whole-of-government arrangements for goods and services in common use to maximise market benefits and deliver efficiencies and savings.

A central agency establishes an arrangement that other agencies can access. Often the use is mandatory for FMA Act agencies.

Why?

Whole-of-government arrangements are established for a number of reasons, including:

- › to give effect to government policy decisions
- › to improve consistency and control
- › to deliver savings and efficiencies (in the same manner as for cooperative procurement):
 - a. reducing procurement costs
 - b. reducing administration costs
 - c. reducing unit prices and improving service arrangements.

Price reduction is assessed at the whole-of-government level, and among agencies there may be some winners and some losers with respect to price, but from a pricing perspective the arrangement will be considered a success if there is an overall saving.

How?

To decide which goods or services are suitable for a coordinated procurement arrangement Finance conducts a scoping study to examine agencies' needs, the industry and market, administrative arrangements, volumes and values as well as consulting with industry and agencies.

Where a good or service is considered suitable, Government agreement is sought to conduct a tender process to establish a whole-of-government arrangement.

Whole-of-government arrangements vs coordinated procurement

The term 'whole-of-government arrangements' is broader than just panels established through coordinated procurement. For example whole-of-government arrangements might describe panels, contracts and template documentation such as SourceIT. SourceIT is not coordinated procurement, but it is a whole-of-government arrangement, namely a whole-of-government ICT contract template.

Features

- › All agencies
- › Often mandatory
- › Generally initiated by government
- › Managed by a central agency, typically finance (but not exclusively, eg Microsoft VSA was initiated by Defence)

Examples of coordinated procurement

- › Motor Vehicle Leasing
- › Government Advertising
- › Travel
- › Stationery and Office Supplies

- › Information and Communications Technology
 - a. Australian Government Telecommunications Arrangements
 - b. Telecommunications Commodities, Carriage and Associated Services Panel
 - c. Telecommunications Invoice Reconciliation Services Panel
 - d. Telecommunications Management Panel
 - e. Internet Based Network Connection Services Panel
 - f. Data Centre Migration Services Panel
 - g. Data Centre Facilities Panel
 - h. Microsoft Volume Sourcing Arrangement
 - i. Major Office Machines Equipment and Support
 - j. Desktop Hardware Panel
 - k. Secure Internet Gateway Services

ICT and whole-of-government

Many of the coordinated procurements relate to ICT. This is for two reasons:

- › ICT often lends itself to coordinated procurement, eg desktops are high volume, commoditised, and not subject to many agency specific requirements
- › The Gershon Review promoted a whole-of-government approach (although Gershon focused on alignment of architecture, security, etc as much as procurement method)

SUMMARY

Cooperative: Individual agency arranged, Opt-In

Coordinated: Central agency arranged, Opt-Out

Further information for government procurement officials is available through the Coordinated Procurement Community at GovDex.gov.au. The Department of Finance website also has very guidance at <http://www.finance.gov.au/procurement/wog-procurement/index.html>.

THE CYCLES OF PROCUREMENT

The pendulum

The Commonwealth is one of the largest purchasers in Australia. Consequently, substantial analysis and review is undertaken regarding Commonwealth procurement.

There have been a number of cycles – from centrally coordinated procurement to agency autonomous procurement.

Some commentators have likened this swing back and forwards to a pendulum, with it only being a matter of time before the preferred procurement method swings from central control to agency autonomy or vice-versa.

In my view, it is not actually a pendulum because refinements are made in each cycle. Unlike some people, I am not critical of these changes in approach (provided it's no change for change sake). Markets change, government services change, the world moves on and procurement approaches must move with it. There's a management approach – disruptive theory – that says that change is necessary for innovation, and the same might be said for procurement methods.

The current cycle

Each Agency has direct responsibilities under the Financial Management and Accountability Act 1997 for its own administration. Section 44 of the FMA Act requires each Chief Executive to manage the affairs of the agency in a way that promotes proper use of Commonwealth resources

In June 2008, the Department of Finance and Deregulation issued Finance Circular No.2008/06 dealing with commitments to spend public money and in particular FMA Regulations 7 to 13. This Circular clarified that under section 44(2) of the FMA Act the Agency Chief Executives must promote proper use of resources within the framework of procurement and other government policies, including policies related to coordinated procurement.

ANAO analysis of AusTender data identified that as at 31 December 2008, there were 588 panel arrangements in place, 21 per cent of which allowed multi-agency access.

At 31 December 2011, there were 602 standing offer arrangements recorded on AusTender with 44 per cent reported as allowing multi-agency access. Certain panels that have been accessed and used by a large number of agencies (for example, panels run by DBCDE, DHS and APSC).

Arguable, there is still much duplication despite these arrangements. For example, as at 31 December 2011, there were:

- › 47 panels for management advisory services
- › 34 relating to education and training services
- › 17 for human resource services.

The next cycle

The pendulum may be starting to swing again. Many will have noticed that legal services, historically one of the major panel services, are now subject to a whole-of-government multi-use list. The NSW government is also abolishing a number of major panels in favour of prequalification schemes. Later in the presentation I will discuss possible future developments.

USING MULTI-AGENCY ARRANGEMENTS

Using whole-of-government panels

Mandated use

- › The use of coordinated procurement arrangements is mandatory for FMA Act agencies and also those CAC Act agencies bound by the CPRs.
- › The Commonwealth Procurement Rules, paragraph 4.9 state:

Agencies must use coordinated procurement. Exemptions from coordinated procurement can only be granted jointly by the requesting agency's Portfolio Minister and the Finance Minister where and agency can demonstrate a special need for an alternative arrangement.
- › This rule is in Division 1, and therefore it applies even if procurement is under the \$80k threshold
 - a. Appendix A exemptions relate only to Division 2
 - b. Only CPR 2.6 is relevant as an exemption (because it is in Division 1). CPR 2.6 says:

Nothing in any part of these CPRs prevents an official from applying measures determined by their chief executive to be necessary for the maintenance or restoration of international peace and security, to protect human health, for the protection of essential security interests, or to protect national treasures of artistic, historic or archaeological value.

Opting out

Slightly different rules apply to opting-out of whole-of-government ICT arrangements, due to recommendations from Gershon.

- › Agency must seek approval from the Expenditure Review Committee (ERC).
- › The ERC's consideration of opt-out requests is to be informed by the Secretaries' ICT Governance Board
- › Agency must prepare a short business case based on a genuine business need, irrespective of how the driver for the opt-out is funded
- › Agency must apply the criteria for the assessment of opt-outs as developed and agreed by the Secretaries' ICT Governance Board.

Understanding the head agreement

- › It is essential to understand the terms of the head agreement.
- › Most whole-of-government panels are built around flexibility and require getting the official order terms right
- › Agencies need to ensure that their processes align with the panels.
 - a. For example, I was once asked for advice from an agency that had used its standard Purchase Order rather than the template Panel Official Order. The Purchase Order had standard terms attached that did not align with the panel and there was doubt about which terms applied.
- › Understanding the head agreement is also necessary in order to set an appropriate procurement strategy.
 - a. For example:
 - i. under a typical panel, the resulting contract is between the procuring agency and the supplier
 - ii. under the IBNC Panel the resultant contract is between the Department of Finance and the supplier

Importance of the official order

The official order forms part of the contract – so it is necessary to keep the official order somewhere that is easy for a future contract manager or interested agency person to find.

A recent ANAO audit found that one of the three audited departments could not find approximately a quarter of the official orders under the audited panels, and none of the three could find all of the official orders.

The official order should be put in the contracts register and managed in the same way as any other contract.

I have seen many incomplete official orders— and inconsistent official orders, ie with rates above the panel ceiling rates.

Whole-of-government panels do not do away with the need for people with strong procurement expertise. In some instances procurements are actually much more difficult using the panels than a standard RFT process. Particularly where the services required cut across numerous panels. I will give an example later.

Complying with regulation and policy

Once a panel is established, an agency can go directly to the panel even for purchases exceeding the \$80K threshold. If a panel was established through an open approach to market in accordance with Division 2 of the CPRs, purchases of property and services through the panel (even if seeking a quote from only one panelist) is deemed to be an open approach to market in accordance with the CPRs irrespective of the value of the procurement

That said, it is still necessary to achieve value for money. The section 44 delegate must be satisfied that the purchase is an efficient, effective, economic, and ethical use of public money. Each agency in the cluster will require authority from the appropriate agency delegate to participate in the contract.

For example, in some cases agency evaluation criteria include a component related to the value-add a supplier can provide to the agency, with suppliers tailoring their proposals accordingly. In such cases a supplier may represent value for money for the establishing agency, but not for others.

A panel cannot be used to purchase property or services that fall outside the scope of the arrangement.

Entering into the Deed of Standing Offer and utilising the standing offer arrangement are two separate actions for the purposes of the FMA Regulations. Subsequent orders made under the Deed of Standing Offer will be subject to Regulation 9. For example, the Regulation 9 delegate is approving the quantity being ordered as well as ensuring that using the standing offer arrangement in the particular circumstances is a proper use of Commonwealth resources.

Joining an existing arrangement

Considerations that will affect a decision by a participating agency to join an existing arrangement include:

- › Are you confident that the lead agency's process was in accordance with the CPGs?
- › Did the approach to market provide for multi-agency access?
- › Did the resulting contract or deed allow for multi-agency access?
- › Will your agency have any control over the relationship with the supplier?
- › Do your agency's needs match those of the existing arrangement?
- › Are your requirements likely to exceed the scope of the existing arrangement (or change the scope of the arrangement)?
- › Will your agency receive property or services that represent value from money?
- › Has the market changed substantially since the existing arrangement was put in place?
- › What is the likely reaction from the market at not having had an opportunity to tender for your requirements?
- › Are you confident that no probity or process issues arise.

Reporting

- › Establishing agency reports the Deed of Standing Offer
- › Establishing agency reports the addition of new participating agencies
- › Participating agencies report contracts established by placing an official order

ESTABLISHING MULTI AGENCY ARRANGEMENTS

Planning

A **cooperative procurement strategy** may include:

- › research into agencies that may be interested in a cooperative contract
- › business case or other approval documentation to enter into a cooperative procurement contract
- › meeting plan, minutes or report discussing options with potential partner agencies
- › written agreement determining agencies' roles and responsibilities in the cooperative procurement, in particular, what responsibilities the lead agency has in conducting the procurement and managing the ongoing relationship with the provider
- › contribution to cooperative scoping study, tender documents, evaluation of tender, negotiation of contract, and management of contract
- › trade-off decisions between flexibility and simplicity. For example, whether to specify insurance in the head agreement or leave it to the official order.

A **coordinated procurement strategy** will address many of the same issues as for a cooperative procurement strategy. However, it will also consider whether the services appropriate for a whole-of-government arrangement.

The services that are best suited to coordinated procurement are:

- › commoditised goods – motor vehicles, desktops, handsets, office machines and travel
- › goods that are purchased regularly – so that setup and administration costs are offset by savings in pricing and efficiency of placing orders

Other strategy issues:

- › is there sufficient demand
- › are there a sufficient number of suppliers
- › ceiling rates or fixed rates
- › will fees be payable to the lead agency for managing the procurement and contract
- › usage reporting to central agency
- › periodic review of effectiveness
- › consider whether MOUs are required with other agencies participating in the cooperative procurement

Undertaking

- › Establishing a panel is a procurement and therefore needs to be undertaken in accordance with the requirements of the CPRs
- › Negotiation – often by a cross-agency team
- › Need to consult widely with agencies and suppliers
- › Central coordinating agency needs to provide very good support to panel users.

Reporting

Agencies need to ensure that they report details of the standing offer arrangement on AusTender within 42 days of entering the first Deed of Standing Offer.

As there can be considerable time lapses in finalising Deed of Standing Offer s with all the preferred suppliers, this may need to be done progressively as the Standing Offers are finalised. Additional suppliers should be reflected on AusTender when other Deed of Standing Offer s are finalised.

Pros and cons of cooperative and coordinate arrangements

AGENCIES	
Benefits	Potential risks
<p>Reduced duplication of procurement effort:</p> <ul style="list-style-type: none"> › An open tender process only needs to be carried out once. › Terms are set out in the head agreement, so reduced negotiation costs. 	<p>Agencies may not conduct a thorough VFM assessment when placing Official Orders.</p> <p>Need to ensure procurements under a panel represent VFM, particularly if the panel only has ceiling rates. In its audit, the ANAO found that between 41 per cent and 71 per cent of the procurements examined did not show how VFM was achieved.</p>
<p>Aggregated demand may increase competition among suppliers and contribute to improved pricing, terms and conditions.</p>	<p>Does not suit all agencies' needs.</p> <p>A one size fits all approach might not work for smaller or unique agencies.</p>
<p>Familiarity with the terms and conditions.</p>	<p>If the market changes, eg the establishment of new suppliers that are better value for money, agencies will likely have to wait to the expiry of the arrangement to access the benefits.</p>
<p>Ability to readily access suppliers to meet business needs, including where there may be a conflict of interest or volume of work in excess of a single supplier's capability.</p>	<p>Potential suppliers may not submit tenders due to onerous conditions; and narrow definitions or commercial specifications may result in insufficient responses.</p>
<p>Sharing administration and contract management resources.</p>	<p>If the scope of the panel is defined too broadly or narrowly, this may affect suppliers' pricing and the capacity to use the panel to meet business needs.</p>
<p>Aligned services that are familiar across government.</p>	<p>Procuring agencies do not build a strong relationship with suppliers as they're primary client is seen as the central agency.</p>
<p>Lead agency may be able to assist very small agencies with more effective management of their contractual arrangements and provide technical advice.</p>	<p>Often locks out smaller players and innovation, leading to:</p> <ul style="list-style-type: none"> › less tailored services › subcontracting premium › reduced competition.
SUPPLIERS	
Benefits	Risks
<p>Access to a potentially lucrative market for property or services for a set period of time.</p>	<p>Where unsuccessful, there may be limited opportunity to undertake work for an agency for a period of time.</p> <p>This effect is multiplied if the arrangement is a whole-of-government arrangement as may not be able to provide those services to any government agency.</p>
<p>Increased probability of future work (although work is</p>	<p>Small and medium enterprises may be disadvantaged.</p>

not guaranteed), which assists forward planning.	For example by overstatement of procurement needs or onerous selection processes.
Familiarity with common process, terms, conditions and performance criteria for multiple requests for property or services which can lead to lower costs.	Suppliers are bound by agreed terms and conditions for the period of the standing offer regardless of external impacts such as higher costs.
Being a supplier in a coordinated or cooperative arrangement may enhance the supplier's reputation in the market.	Further additional submissions or quotations may be required.
Efficiencies in reduce amounts of tendering (which should also reduce prices for government)	Administrative costs. For example, may have to report to the central agency and the participating agencies.

Considering another agencies request to join your existing arrangement

When considering a request from an agency to access a contract or standing, the lead agency should:

- › confirm that both the contact and the RFT documentation provided for multi-agency access
- › assess the anticipated use of the contract by another agency to ensure that the scope of the original procurement will not be exceeded
- › formalise the arrangement with the suppliers. This may be done by the addition of an appendix or schedule to the contract or standing offer
- › formalise the arrangement with the participating agency
- › manage reporting requirements resulting from the change in the contract.

LESSONS LEARNED

Relationships and governance

Lots of governance

- › Secretaries' ICT Governance Board
- › Shared Communications Services Governance Committee
- › Cyber Security Policy and Coordination Committee
- › Finance Coordinated Procurement Committee
- › Gateway Reduction Steering Committee
- › Gateway Reduction Working Group

Plus stakeholder management

- › Central agency
- › Client agencies
- › Internal

Complexity

Multiple parties

- › Degree of centralisation
 - Centralised
 - Decentralised
 - Combination (agency distinction)
 - Combination (issue distinction)
- › winners and losers in terms of agencies
- › liability apportionment between agencies

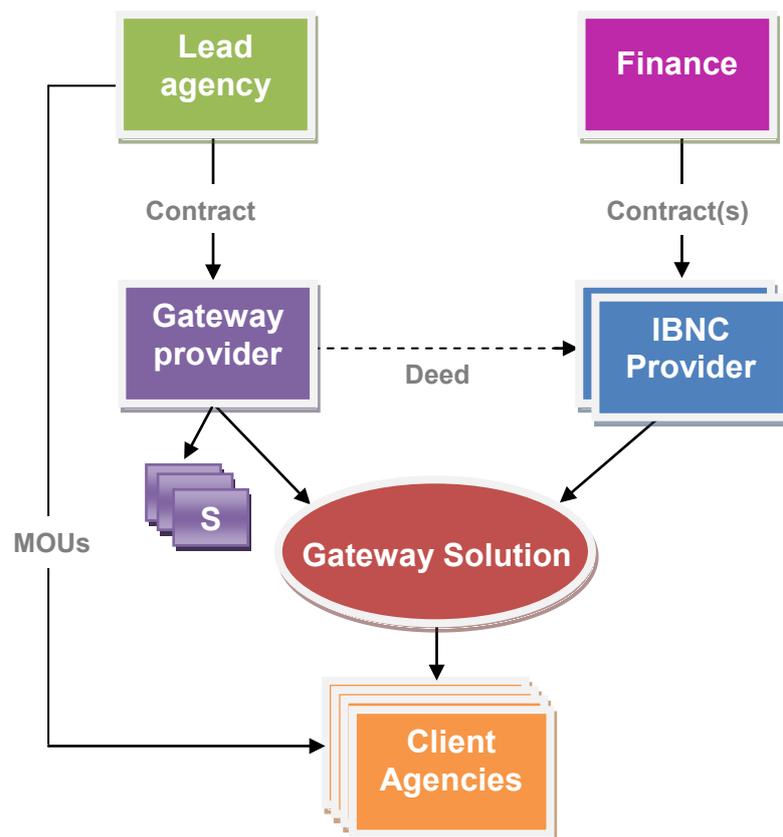
Multiple arrangements

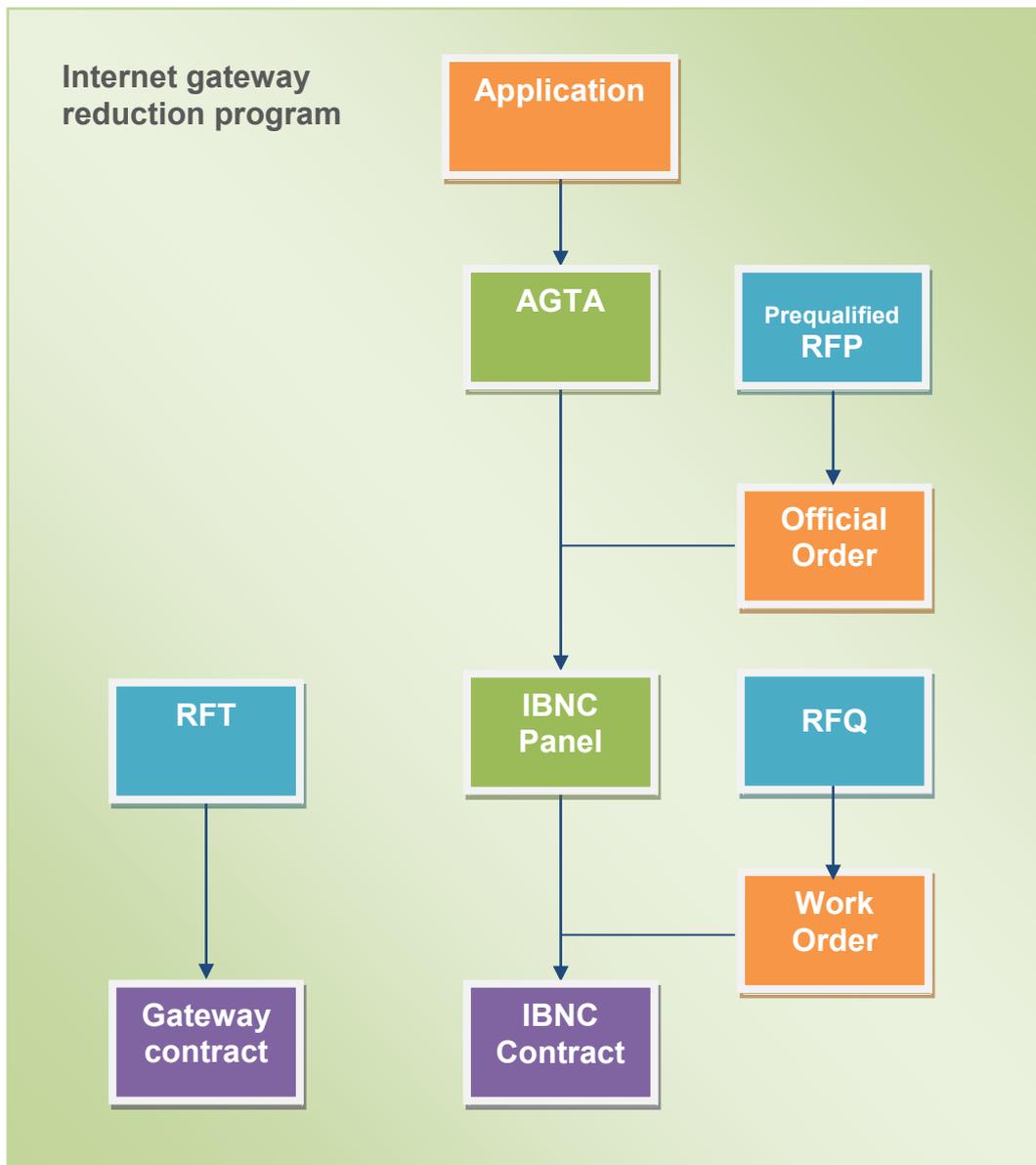
- › Dual Procurement Options
 - Parallel
 - Sequentially (in either order)
- › System Integration Risk
 - Risk mitigation strategies
 - Options for transferring risk
 - Whole-of-government panels may prevent appointing a single prime contractor with solution responsibility
- › cooperation obligations in multi-vendor contracts
- › incomplete service catalogues

for example, procuring services for a whole of agency telecommunications refresh may involve procurements from

- a. Whole-of-government panels
 - i. Telecommunications Commodities, Carriage and Associated Services Panel
 - ii. Telecommunications Management Panel
 - iii. Internet Based Network Connection Services Panel

- b. Non-panels whole-of-government arrangements
 - i. Australian Government Telecommunications Arrangements
- c. Other
 - i. Open approach to market
 - ii. Prequalified tender





THE FUTURE AND ALTERNATIVE MODELS

Portfolio Purchasing Arrangements

Form of cooperative procurement.

For example Panels for IT Services

In November 2011, the Secretaries' ICT Governance Board (SIGB) endorsed the decision to transition to a smaller number of IT Services panels via this Portfolio Panels for IT Services policy. This policy focuses on IT Services panels and limits portfolios to a maximum of three IT Services panels each. In addition, each of the IT Services panels is required to have a multi-agency-access clause.

This policy aims to reduce, by December 2014, the number of panels by 50%.

Lead agency

Eg Internet Gateway Reduction Program

Multi-Use Lists

- › **Established** - Legal services multi-use list
- › **Not extended** - ICT Management Consultant Multi Use List

NSW procurement reforms

NSW currently has a very centralised system. According to the report that accompanied the announcement of procurement reforms, NSW currently has the largest expenditure under whole-of-government contracts - \$12.7 billion (out of a total of \$14 billion).

Decentralising

- › The NSW Procurement Board has been established, principally to decide what categories of goods and services should be procured centrally versus those devolved to principal department level.
- › Move towards decentralisation, but coming from a highly centralised model currently.
- › Certain agencies (most notably larger agencies) will have new powers to buy goods and services direct. They will need to get accreditation from the central agency.

Greater flexibility

- › realisation that the current standard approach, open tenders to establish panels under 5 year standing offers, is not always the best solution
- › use of pre-qualification schemes

Simplification and accessibility

- › increased industry engagement
- › industry briefings can be streamed online
- › removing the supply management fee (2.5% fee paid by businesses when providing goods and services under NSW government contracts)
- › opening to SMEs (including an SME policy)
- › reduced insurance requirements
- › simpler contracts, as appropriate

Technology use

- › Changing from standard tender process to online applications, which can be submitted at any time during the term of the prequalification scheme
- › Dynamic online reporting
- › Online eCatalogues as a place for marketing
- › Online systems through which suppliers can provide details about the services they offer to government

Smart IT systems (for example, no reason why the whole-of-government panel catalogues couldn't more closely resemble online shopping rather than an excel spread sheet catalogue).

If a particular service is too complicated to order through a web portal based system, then it's probably not suited to coordinated procurement.

Other state reforms

Other states are also currently undertaking procurement reforms. For example Queensland is currently considering a central procurement office.

AGIMO split

The Department of Finance's decision to split the Australian Government Information Management Office (AGIMO) in two:

- › whole of government policy and governance - Australian Government Chief Information Officer
- › whole of government services delivery - Australian Government Chief Technology Officer.

May have an impact on panel extensions.

Lesson:

- › coordinated procurement needs to be run by an agency with lots of influence
- › central agency must not be establishing too many arrangements at a time when it is still building the team, establishing processes, etc

Changing services

In the ICT space, cloud computing may result in less relevance of panels.

Less mandated whole-of-government panels

More cooperative procurement and less mandated whole-of-government panels

If an arrangement is truly value for money, its use should not need to be mandated.

APSC has announced an expansion of its panels, which are a form of cooperative (opt-in) procurement arrangement not a mandatory whole-of-government coordinated procurement arrangement.

Other – the long shots

- › need for a shorter, more flexible tendering process that encourages bids from suppliers and simplification of Government contracts to encourage competition
- › raising the 80K threshold
- › greater emphasis on procurement skills. There's no one size fits all approach and the leading agencies will seek to access the most skilled procurement specialists - whether internally or externally.

Conclusion and Questions

All of us should look for ways to ensure that Government procurement is efficient, effective, economical and ethical. This applies at both the micro level (individual procurements) and the macro level (the procurement model and system).

The money that is used is taxpayer money and those of us involved in public sector procurement need to ensure that we are good stewards of public expenditure. Procurement must be, and be seen to be, a tool to deliver better services more efficiently.

Questions

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