

JUST BECAUSE YOU CAN DOESN'T MEAN YOU SHOULD:

Don't forget the *intent* of the Commonwealth Procurement Rules.

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The Commonwealth Procurement Rules (CPRs) set expectations and requirements for public sector procurement and are designed primarily to ensure value for money. They are made up of requirements that 'must' be followed, as well as requirements that 'should' be followed. The CPRs are designed with a level of flexibility (such as the 'should' elements and exemptions) to ensure they are not prohibitively prescriptive and can be tailored to individual agency circumstances and needs. **However, many public servants appear to be taking advantage of this flexibility and conducting procurements in a manner that is technically compliant with the 'musts', but not in line with the broader intent of the CPRs.**

Why does this matter?

Increasingly, community expectations are higher than the bar set by the mandatory requirements of the CPRs as public trust in government is challenged (along with the associated benefit of the doubt). And can we blame them? The list of criticisms relating to the proper use of public funds continues to grow with the PWC tax advice scandal, dubious lobbying from Synergy 360, "questionable land deals", "carpark rorts", "sports rorts", as well as pork barrelling, over reliance on consultants and contractors, and some fairly scathing Australian National Audit Office (ANAO) and Joint Committee of Public Accounts and Audit (JCPAA) reports. And no, the public doesn't care about the difference between public service decisions and ministerial decisions, state or commonwealth decisions, or the difference between procurements and grants etc. They just care about the efficient, effective, economical and ethical use of public money, and what they're hearing is that this is not being taken seriously in the public sector. If public servants continue to aim for bare minimum compliance and give themselves benefit of the doubt that is not reciprocated in the broader community, further scandals and reputational damage will continue to occur.

Understanding the problem

If all elements of the CPRs (including the 'shoulds') were followed in all government procurements, we would be living in an accountability and transparency utopia – but this utopia would not be characterised by efficiency and optimised value for money. For lower risk procurements or in certain exceptional circumstances, value for money could be diminished by blanket (albeit well-intentioned) red tape, hence the flexibility and exemptions built in to the CPRs. Alternatively, if all mandatory




elements of the CPRs as well as all reasonable 'shoulds' given the specific circumstances were followed, we would probably be closer to a procurement utopia that is both accountable and transparent as well as efficient and economical. However, this is not how the CPRs are always applied in practice.

In practice, the primary concern in many cases is achieving the 'musts'. The 'shoulds' barely get a second glance. This is probably most stark when it comes to sole-supplier approaches, particularly when using panels (where a number of suppliers have a standing offer with the government for the delivery of specific categories of services for which they have been 'pre-vetted' and contracted). Under the CPRs, procurements from an existing standing offer (panel) are not subject to Division 2, meaning they aren't required to approach multiple suppliers (among other things). However, a not insignificant number of procuring officials seem to have stopped reading at that point and missed the part (just 3 lines below) where the CPRs explicitly state that where possible, multiple potential suppliers should still be approached when using a panel arrangement to maximise competition. This is because panels are designed to improve efficiency when there are an overwhelming number of choices, and it is difficult to start from scratch – NOT to remove the need for competitive tenders. A comparison of rates on a panel doesn't actually tell you much from a value-for-money perspective when you don't know how different organisations would scope or conduct the work. A supplier with higher rates may be able to complete the task much more efficiently but you won't know that if you don't get competing quotes for the specific piece of work you are seeking.

Additionally, due to a quirk in the CPRs, these sole-supplier approaches are classified as 'open tenders' when reporting on AusTender if the panel used was originally set up using an open tender. This is objectively ridiculous and needs to be changed (as per the recommendations of the recent JCPAA "Commitment Issues" Commonwealth procurement inquiry report), but in the meantime public servants shouldn't reduce transparency by using this quirk to their advantage when it is not in line with the intent of the CPRs.

Similarly, procurements under the threshold (generally <\$80,000) are not required to seek multiple quotes. But again, the intent here isn't that all procurements under \$80k are just sole-sourced. **Competition should still be a core driver of value-for-money where relevant.** Unless there is a good reason for sole-sourcing (remembering 'convenience' alone is not a good reason), it is always best practice to seek multiple quotes to confirm value-for-money. As individuals in our private lives, we aren't required to seek multiple quotes for anything, yet of course we usually still do because we are spending our own money and we want to ensure we are getting a good deal. This is the mindset that the public service should have around the spending of public funds, but it isn't filtering down to all procurement decisions.

It appears in many cases that every procurement decision is treated as a completely separate decision, without consideration of how decisions are made



across all procurements. By that I mean some people seem inclined to make exceptions for themselves because it's just one procurement. In the scheme of things it's not that high value and it will be easier this way, so it doesn't really matter – except that when every decision is made with this mindset it does add up to a very high value and it does really matter. The CPRs build in exemptions and have 'shoulds' instead of 'musts' to ensure flexibility in exceptional circumstances, but when every circumstance is treated as exceptional it gets a bit ridiculous and integrity is lost.

This blog should not be interpreted as public service bashing, in fact it is quite the opposite. The Australian Public Service is an impressive institution with thousands of intelligent and passionate people working together to deliver incredibly important work for our country and communities. However, there is always room for improvement and procurement in particular does not seem to be getting the attention to detail it deserves at the moment. **In many agencies procurement is decentralized to staff without specific procurement training, knowledge, or experience, who are also often under-resourced and under extreme pressure to deliver their priorities.** It's not hard to see how this approach may not be conducive to those public servants being able to take an ambitious approach to best practice procurement and really embrace and embody their roles as stewards of public funds every time they need to acquire goods and services.

For administrative changes that would support improvement in this space, implementation of the recommendations of the JCPAA's "Commitment Issues" report would go a long way. Further improvements would also come from development of more detailed guidance for procuring officers including agency-specific procedures, tools, and templates to support the interpretation and application of the CPRs, as well as greater consideration of procurement needs early in program/activity planning to reduce the time pressures that so often become the enemy of proper process.

But as always, culture is king, and these changes alone will not be enough. Flexibility must remain in the CPRs, and where there is flexibility there is subjectivity. Where decisions are subjective, a culture that values, supports, and prioritises better practice will be required to enable improvement in procurement decision making in line with APS values and broader community expectations.

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