

Managing Consultants

A Practical Guide for Busy Public Sector Managers

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Leo Dobes



E P R E S S



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About the Author



After gaining his BA (Hons) and MA in Economics at the University of Melbourne, Leo Dobes completed a DPhil in East European Economics at the University of Oxford in 1980. Since then, he has been an Australian diplomat, worked as an intelligence analyst in the Office of National Assessments, been a policy adviser in the Commonwealth departments of Defence and The Treasury, and played a key role in developing and implementing the reform of the telecommunications sector in 1990-91.

More recently, Dr Dobes has worked in the Bureau of Transport Economics, spent a year at Ernst & Young, market tested corporate services in the Department of Transport and Regional Services, and headed the Analysis and Performance Branch in the Regional Services Division. He currently works in the Department's Strategic Projects unit.

Foreword

In this monograph, Leo Dobes has produced something unusual in the annals of the literature on government and public administration: namely, a practical, user-friendly guide to the benefits, perils and pitfalls of managing outside consultants.

He writes from years of experience in managing consultants in government. Dr Dobes has not only produced a guide to best practice, but has also included advice on what not to do, and how to rectify shortcomings in the process of using consultants effectively.

The use of consultants by public sector organisations has grown immensely over the past 10 to 15 years. In many respects, public sector organisations are now dependent upon external consultants for services ranging from facilities management to internal auditing and human resource management to the provision of policy advice (and much in between).

In part, the shift towards dependency has been driven by the implementation of market testing and outsourcing regimes. In part, too, it marks a recognition of gaps in the skill sets existing within the traditional public service and public sector operations that increasingly emulate commercial business practices. Critically, it has been argued in some quarters that the present reliance on external providers of consultancy services has led to a commensurate loss of corporate knowledge about public sector organisations' operations.

In this publication, Dr Dobes warns that despite considerable investment in skills development, managers in public sector organisations may still exhibit significant deficiencies in contract and relationship management skills and knowledge. This monograph is written to redress these deficiencies.

Professor John Wanna
Sir John Bunting Chair of Public Administration
Director of Research
Australia and New Zealand School of Government

Preface

Although this publication was commissioned by the Australia and New Zealand School of Government (ANZSOG), the first draft was completed in early 2000, just after I completed a one-year secondment in the Canberra office of Ernst & Young (E&Y).

It became clear during my secondment to E&Y that there was no practical guide on the engagement of consultants available to Australian Public Service managers. It was also clear that many public servants in Canberra simply did not understand how consultants work, and therefore did not obtain as much value for money as they might otherwise have done.

The main perspective was necessarily that of an Australian Government public servant. But because most ANZSOG participating governments subscribe to similar principles and policies in their procurement policies, the material differences between them are not substantial. Nevertheless, any significant differences in approach have been noted as far as practicable throughout.

To ensure the capture of as much practical experience as possible, I interviewed 31 practitioners from Australian Government agencies (including the then OASITO, AusAID, ANAO, FACS, DEWR, DOTARS, Defence, and Finance), medium and large consulting firms (ACIL, KPMG, Ernst & Young, SMS Consulting, the then Arthur Anderson, the Centre for International Economics, PriceWaterhouse, and Eltom Consulting), relevant secretariats of Parliamentary Committees, and the Institution of Engineers Australia. Many of those who were generous enough to share their insights, or to comment on early drafts have since moved on, and some did not wish to be identified. I am nevertheless grateful to all of them.

The publication has also benefited from 18 months during which I led a team that market tested a range of corporate services within the Department of Transport and Regional Services. However, the views expressed below are entirely my own.

Finally, my thanks to Professor Allan Fels for facilitating my participation in ANZSOG teaching activities, to Professor Glenn Withers for encouraging finalisation of the publication, and to Professor John Wanna for some very useful pre-publication comments that helped improve both style and content.

Leo Dobes

Abbreviations used in the text and references

AGIMO	Australian Government Information Management Office
AGPS	Australian Government Publishing Service
AGS	Australian Government Solicitor
ANAO	Australian National Audit Office
APP	Annual Procurement Plan
APS	Australian Public Service
APSC	Australian Public Service Commission
CAC	<i>Commonwealth Authorities and Companies Act 1997</i>
CEI	Chief Executive's Instructions
CPC	Commonwealth Procurement Circular
CPGs	Commonwealth Procurement Guidelines
DAS	(Former) Department of Administrative Services
DEWR	Department of Employment and Workplace Relations
DCITA	Department of Communications, Information Technology and the Arts
DOTARS	Department of Transport and Regional Services
DOF	Department of Finance (later DOFA)
DOFA	Department of Finance and Administration (now Finance)
EOI	Expression of Interest
FACS	Department of Family and Community Services
Finance	Department of Finance and Administration (previously DOFA)
FMA	<i>Financial Management and Accountability (FMA) Act 1997</i>
FMAR	<i>Financial Management and Accountability Regulations 1997</i>
FOI	Freedom of Information
FTA	Free Trade Agreement
GST	Goods and Services Tax
MAB/MIAC	Management Advisory Board/Management Improvement Advisory Committee
NOIE	National Office for the Information Economy (now incorporated within DOFA as the Australian Government Information Management Office)
OASITO	Office of Asset Sales and Information Technology Outsourcing (now defunct)
OLD	Office of Legislative Drafting, Attorney General's Department
PM&C	Department of the Prime Minister and Cabinet
PSMPC	Public Service and Merit Protection Commission (now the Australian Public Service Commission)
PSP	Professional Service Provider (Defence usage)

Managing Consultants

RFT Request for Tender
SME Small and Medium Enterprise

Using this Guide

The chapters in this monograph are generally divided into 4 sections as set out below and illustrated in Figure 1:

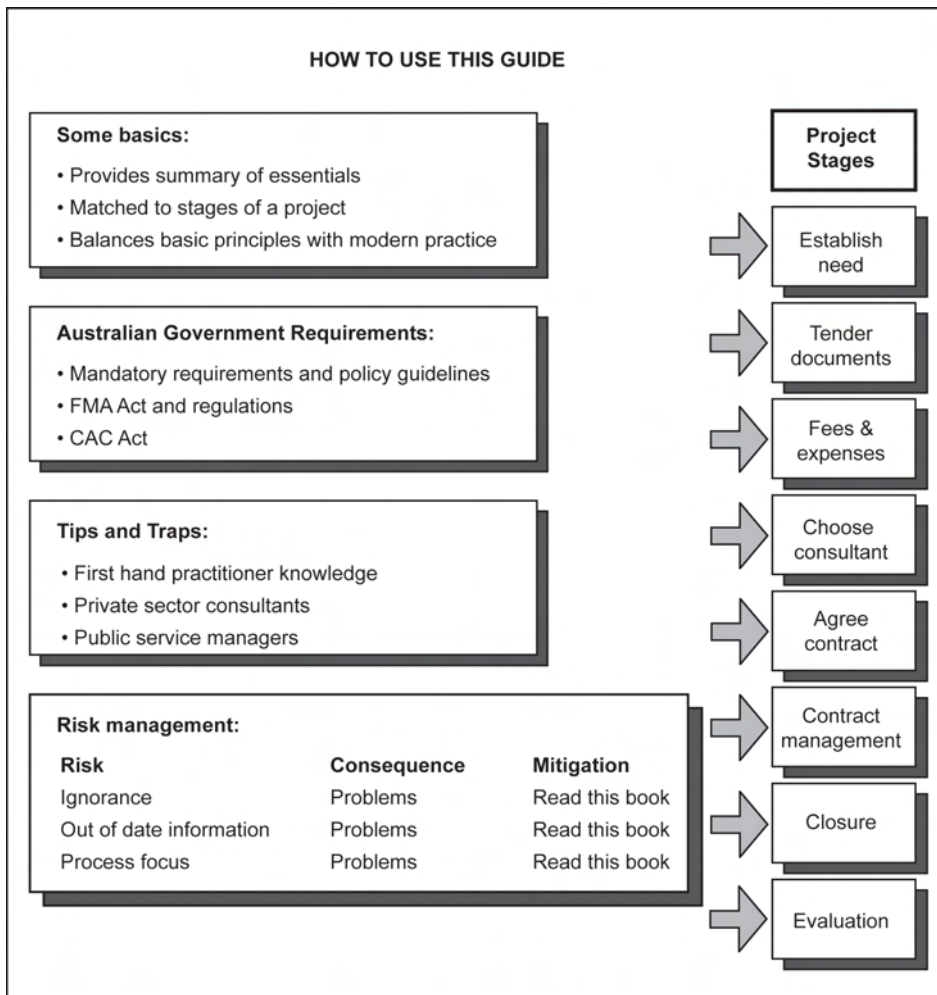
Some basics: a general guide for those who do not regularly let contracts.

Australian Government requirements: a summary of compulsory provisions, as well as policy and best practice ‘should do’ items.

Tips and Traps: a compendium of experiences in the public and private sectors.

Risk management: generic information to save reinventing the wheel.

Figure 1



1. Understanding how consultants work

Some basics

Consultants are people with skills or expertise who provide advice that assists managers to make decisions. Contracts with consultants generally specify the purpose of the task, but not details or the manner in which it is to be performed.

Contractors, on the other hand, are usually engaged by the hour to deliver defined goods or services or prescribed tasks as a result of decisions already taken by an agency. The Department of Defence also distinguishes Professional Service Providers (PSP) as individuals with specialist skills contracted to fill a line position, virtually in the sense of ongoing employees.

Unlike Public Service employees, consultants are engaged on a temporary basis to carry out specific projects. Establishing a collaborative relationship with consultants, therefore, requires some understanding of their working methods and environment.

Consultants and contractors

Sometimes the distinction between a consultant and an operational contractor can be difficult to make. It is extremely important to work out this distinction and decide what type of labour to engage because this decision affects the type of engagement to be used, the nature and extent of taxation obligations that apply and the rates payable for services. Generally, a consultant should be used to develop a new concept or process which has no precedent, and where the department/agency requires critical judgement, whereas a contractor implements or assists with an existing process under supervision to deliver a known outcome. Queensland Department of Public Works, January 2001, *Engaging and Managing Consultants: Better Purchasing Guide*
http://www.qgm.qld.gov.au/00_downloads/bpg_engaging1.pdf

Public Service characterisations of consultants sometimes portray them as grossly overpaid, willing to take on any job, even at short notice, and being happy to work through the night or weekend to complete it, invariably late with reports, requiring a lot of teaching to be able to do the job, and seldom capable of producing the quality of work that could have been achieved in-house by a Public Servant.

Consultants are more circumspect about their Public Servant clients. Pressed, they often express concern about clients who have not entirely thought through

their requirements for a job, or who leave things until the last minute and then expect a high quality proposal or solution to a problem overnight. However, most are also anxious that their reports not be left to simply gather dust on a bookshelf. Like Public Servants, they have a professional interest and pride in seeing their advice being implemented.

There is often some element of truth to stereotypes and popular images, even if they are exaggerated. But a productive relationship needs to be based on knowledge. If you are unsure about some aspect of a consultant's behaviour, then ask them. Consultants are human, despite some of the myths.

A number of points may also help clarify some of the more frequent misconceptions:

- Don't be too surprised by consultants' apparent rates of remuneration. Their firm usually charges clients some multiple of their salary to cover administrative overheads, or to allow for expertise drawn upon elsewhere in the firm. Some independent consultants may earn seemingly large daily amounts, but unlike wage and salary earners they do not always have a steady income.
- The atmosphere in a consulting firm is usually more intense than in a Public Service office. Consultants' days are fairly focused; they must fill in time sheets that distinguish between chargeable and non-chargeable use of their time. Meetings tend to be shorter and involve fewer people than those in the Public Service. The 'time is money' philosophy applies. On the other hand, a good consultancy office has a supportive culture that encourages the sharing of information and celebration of employees' successes.
- Consultants often have families. And they like to catch up on some relaxation over the weekend, even if (like many Public Servants) they also devote some of their leisure time to work.
- Because of the need to compensate for lack of steady income, most consultants need to work on at least three or four projects at any one time. Only in the case of very large projects are they dedicated solely to one client, although they may still be expected to help colleagues in other areas. While you should always expect that a consultant will be responsive to your needs, you need to recognise that their time is not devoted entirely to you unless they are contractually obligated to do so. But that should not matter, provided that the work is done on time and to an acceptable standard.
- Because of the uncertainty of obtaining work, consultants will often put forward bids for more work than they can actually handle. If too many bids are successful, 'bunching' of workloads can cause problems for them and their clients. As a result, a consultant may sometimes seek to delay work or to redefine the scope of the project.

- Experienced consultants may choose not to bid for work. Clients with reputations for bad project management (particularly lack of clarity in objectives) tend to be avoided. Even existing clients who offer additional work on a 'messy' project may find that they are politely refused, often with the excuse that the consultant is already committed elsewhere. However, it is more likely that a consultant will not put forward a bid because:
 - the client is not a major user of consultancy services and repeat work is unlikely;
 - the return calculated within the consulting firm's internal budgetary processes is too low; or,
 - the potential client is not among the consulting firm's strategic targets. For example, the firm may be targeting clients who are likely to need the existing skills of its consultants for some time and servicing a new client would require investment of time to develop new capabilities.
- An occasional complaint is that it is often necessary to teach a consultant about an issue. True, but it also masks a misunderstanding about the role of a consultant. A consultant is hired for specific skills such as being able to manage organisational change, or ability to analyse data. Unless the consultant is used regularly by the client, he or she will initially need to rely on the client for information on the agency's business processes, legislation, or political considerations. If used in complementary ways, the respective skills of the consultant and the client will produce a better output.
- You may have noticed that some of your consultant contacts spend a lot of time in coffee shops. This is not an indication of attempts to overdose on caffeine, nor does it indicate an easy life. On the contrary, the pressure of 'billable' time may mean that it is more efficient to work in a coffee shop in between appointments with clients, rather than going back and forth to an office (if indeed the consultant has an office). And besides, one meets more business contacts in a coffee shop; something that has been well known for several hundred years.
- Consultancy firms tend to have flatter management structures than those in the Public Service. (The title on a business card may not be a good indicator of relative position in the firm because it may simply be used to impress clients.) Most large firms have structures something similar to that set out in Figure 2:

Figure 2

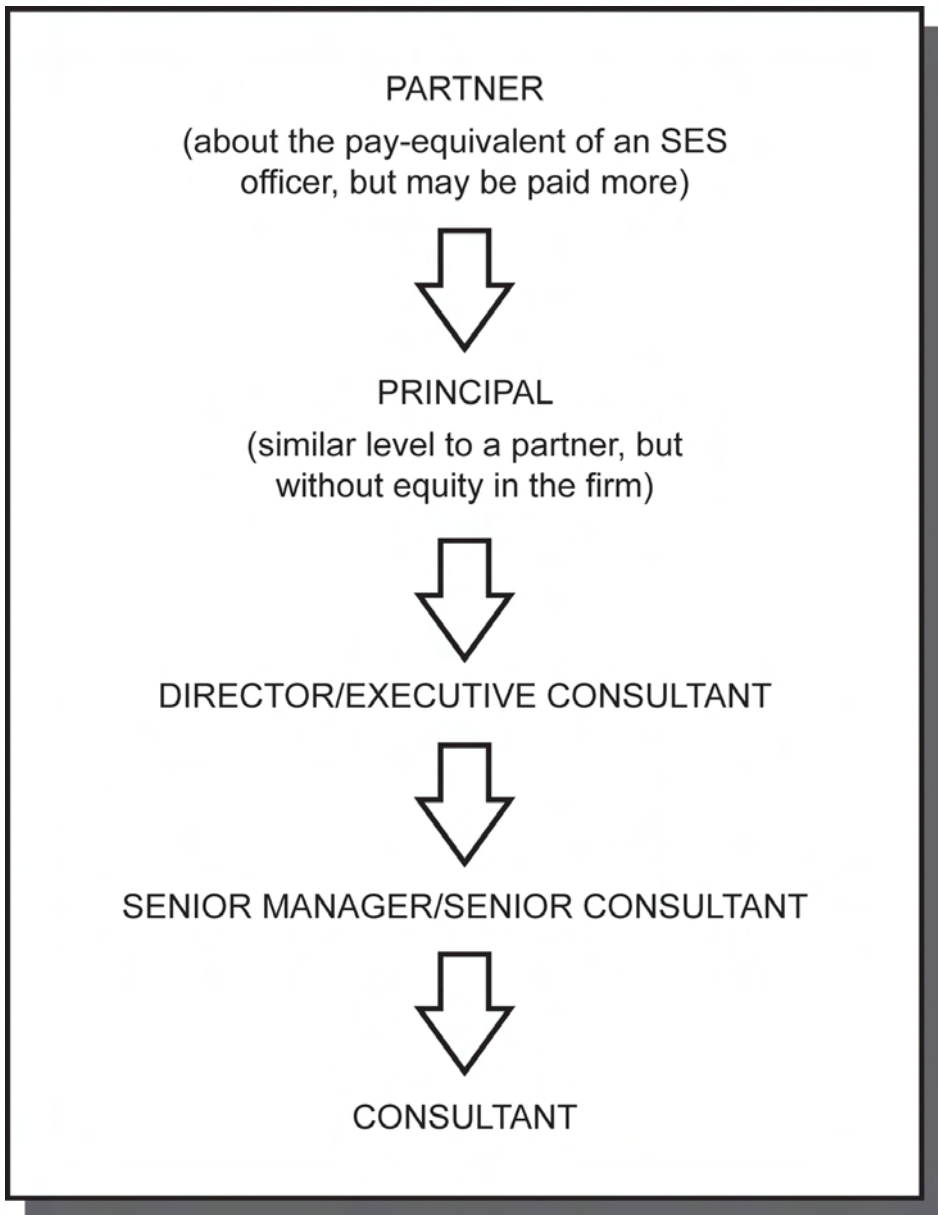


Exhibit 1.1 – A Day in the Life of Mike, a Senior Consultant at a large firm

8:00am Mike logs into the firm’s network remotely at home, checking for emails received since last night. He responds to the urgent ones, as well as replying to a few from clients and colleagues. The main message is from a Department A client who wants to meet at 1.30pm, prior to a Steering Committee meeting. The same message has been left on his mobile phone. Mike emails a confirmation.

8:30am Like many people, Mike delivers the kids to school. Having dropped them off, he checks for messages on his (hands-free) mobile phone as he drives to work.

His first appointment for the day is at a coffee shop near a client’s office: a fairly central site where he and some of his colleagues tend to meet. He especially needs to catch up with Jane, who has been working at a client’s premises for a couple of weeks.

Following some quick pleasantries, Mike and his colleagues agree on responsibilities for putting together a major project proposal, which is due in five days (the tender documents were only obtained yesterday). Their biggest problem is in working out exactly what the client wants done. Katrina volunteers to call the contact officer to seek clarification.

9:30am Mike drives to his office, checks for phone messages (he has only one) and logs on to check his emails again. He makes a call to a colleague to chase up a performance report he needs for a staff member’s performance review and another to confirm attendance and arrangements for a presentation he will be giving in Melbourne on Thursday.

One of his emails is a bit worrying because he can’t meet a request from client X for a meeting on Thursday. He calls to discuss this with the client and explains that he has another appointment (the presentation in Melbourne), but should be able to get back for an afternoon meeting. But client X is still unhappy.

Seeking out a colleague, Mike blows off a bit of steam, but the two agree that it is best to keep client X happy: there is good potential for follow-on work. They agree that if an afternoon meeting is not possible, Leonie will go instead of Mike.

10:30am Mike finds a 'quiet room'. His firm switched recently to an open plan, 'hot desking' layout and there are no workstations available at the moment. He begins editing a report due by the end of the day. He switches off his mobile and asks the Personal Assistant, whose services he shares with 12 colleagues, to tell callers on his direct line that he is in a meeting and will call back soon.

12:15pm Sandwiches with David, one of the firm's Partners, in the ground floor shop, partly to review progress on a number of jobs, partly to discuss forthcoming staff performance reviews and partly to just stay in touch. Mike is interrupted during lunch by a call on his mobile. As is often the case, David fields at least two calls in the same time.

1:00pm After responding to several new emails, Mike heads off to a Steering Committee meeting for one of the two projects he is currently working on at Department A. He starts to mentally prioritise next week's commitments when David calls. Mike is asked to drop in on another client to review a colleague's report with which the client is not happy.

1:30pm A brief 'heads up' meeting with the Department A Project Director to discuss tactics before the Steering Committee meeting. The project is already falling behind schedule. If it is to be finished on time, they need to convince one of the more influential committee members to stop insisting on more work in an interesting, but essentially peripheral area. The extra work is not specified in the terms of reference for the project or in the contract.

2:00pm The adrenaline flows as Mike presents a detailed progress report. He manages to have the additional work deferred until after the conclusion of this project, but time-lines can't move: the draft Report is due next Friday.

3:15pm Mike and the Project Director hold a 'wash-up meeting' after the Steering Committee meeting and discuss a first draft of the Report. Mike seeks the Project Director's feedback on the meeting as well as input on the suggested format, content and structure of the Report.

There is some pressure now from the Project Director to undertake at least some of the extra work before Friday to keep the Steering Committee happy. However, he understands that this is additional work and offers to draw up a variation to the contract for an extra three days work at a slightly higher fee in acknowledgment of the difficulties involved.

4:00pm	On his way back to the office, Mike assesses his commitments and begins a series of calls to try to push out other work by a few days to give himself the time he needs. Other clients are reluctant to change their expectations, but he does manage to gain some additional time into next week.
4:30pm	Checking his email and phone messages again in the office, Mike resolves a diary clash. He also adds the finishing touches to a draft report due this afternoon and emails it to Client B with a covering note. He then calls the client to let him know that it has been sent and to arrange a meeting for next week to discuss it.
5:15pm	<p>After catching up briefly with some of his colleagues who have also just returned, Mike updates his timesheet for the last few days (this is supposed to be done daily but he has been too busy). The end of the month is approaching, so he also starts going through the timesheet printouts to prepare client invoices for the month. He doesn't want the Managing Partner on his back again.</p> <p><i>Mike realises that today was not a good billable day. His 'utilisation' rate was only about 60 per cent, well below his budget target. Although yesterday was a high utilisation day, any surplus has been brought down by today's performance.</i></p>
6.10pm	<p>Just before going home, Mike receives a call from Peter, a consultant with another firm. Peter has been thinking of going into consulting on his own and asks Mike, who used to run his own consulting business a few years ago, for advice.</p> <p><i>Peter worries about whether he could support his current level of income, how he would get work and whether he has a good enough network of contacts to support himself as a single consultant on his own. He has heard of a colleague who struggled for the first 12 months because some clients took so long to pay their bills.</i></p>
6:40pm	Driving home, Mike makes a mental note to check his travel arrangements for Thursday.
9.15pm	With dinner over, and the kids in bed, Mike settles in at the computer for an hour's work on the draft report, and to check and send some emails. He also needs to review the performance reports emailed to him for the performance review that he has to conduct first thing tomorrow morning.

2. Establishing the need for a consultant

Some basics

Busy managers often have little patience with advice that suggests careful planning and consideration at the outset. Their impatience is understandable. Experience, however, has shown that much time and effort can be saved over the course of a project if a few extra hours are invested at the beginning. Defining the problem, considering alternatives and drafting a clear statement of requirement are key factors in minimising potential problems.

Recourse to external consultancy services should, in normal circumstances, occur only after carrying out and documenting for file, a Business Case which addresses the following:

- a clear exposition of the problem or issue being solved: both consultants and experienced public sector users of consultancy services stress that clarity of purpose is the key factor in a successful tender process;
- relevance to Government policy or programs, including stakeholders;
- scope and quality of outputs required;
- the timeframe for completion;
- whether the proposal was included in the agency's Annual Procurement Plan;
- likely GST-inclusive cost (fees *and* expenses) and availability of funding, including a 10 to 15 per cent contingency allowance, compared to benefits gained;
- degree of any required skill transfer to the agency;
- security considerations, including access to classified information;
- the alternative of carrying out the work in-house; and,
- how value for money will be achieved.

The Business Case should be approved by an appropriate official or delegate in the context of FMA Regulations 9, 10 and 12 which require documented approval on the basis that the proposed expenditure is in accordance with the policies of the Commonwealth and will make efficient and effective use of public money.

Whether an agency should engage external consultants will often depend on factors such as the following:

- a temporary lack of in-house people resources;
- the need for specialised skills or experience;
- provision of independent advice, either to the agency itself, or to enhance public credibility;

- diagnostic management advice to the agency, including facilitation or management of change;
- a need for advice on how best to meet a new Government requirement; and,
- assistance with a review of an agency's service delivery as part of a Performance Improvement Cycle approach.

If unsure of your justification for proceeding with a consultancy, it is worth testing your reasoning with your agency's procurement adviser or Legal Office.

Although the justification for hiring external consultancy services will differ according to individual circumstances, the golden rule is that the engagement should provide value for money. The concept of 'value for money' is presented in Chapter 4.

Australian Government requirements

The fundamental objective of procurement by Australian Government agencies subject to the FMA Act is to achieve value for money by delivering the Government's programs efficiently, effectively and ethically.

Part 7 of the Financial Management and Accountability Act 1997 (the FMA Act) places the onus for promoting the 'proper use of ... Commonwealth resources' on the Chief Executive of each agency. The Financial Management and Accountability Regulations (FMAR) made under the Act stipulate in more detail the Government's requirements. FMAR can be found at www.finance.gov.au.

In recent years, agencies had considerable latitude in the conduct of procurement processes because the Government emphasised achievement of outcomes, rather than the observance of detailed procedures. From January 2005, however, the CPGs are far more directive in their approach. For example, it is now virtually mandatory (with some exceptions) to begin with an open tender process in the case of so-called 'covered' procurements; the previous option of moving immediately to a select tender no longer exists.

Commonwealth Procurement Guidelines (CPGs)

FMAR 7 provides for the issue by the Finance Minister of Commonwealth Procurement Guidelines (CPGs) about procurement matters and FMAR 8(1) requires that officials who procure property or services must have regard to the CPGs.

The CPGs (DOFA 2004d) are available on the Finance website. Note that the publication is divided into three separate parts. The first outlines the procurement policy framework, including the concept of value for money. Mandatory requirements are specified in the second part, and other government policies relevant to procurement are addressed in the third. More detailed guidance on the mandatory procurement procedures is published by Finance as DOFA 2005a.

It is possible to depart from the provisions of the CPGs, but FMAR 8(2) requires that 'an official who takes action that is not consistent with the Guidelines must make a written record of his or her reasons for doing so'.

Most of the content of the CPGs is reflected throughout this Best Practice guide. But officials considering the engagement of consultants should always consult the CPGs, Chief Executive's Instructions (CEIs) and DOFA (2005) directly.

Chief Executive's Instructions (CEIs)

A key provision is FMAR 6, which authorises Chief Executives to give instructions (called the Chief Executive's Instructions) to officials in their agency on matters such as 'making commitments to spend public money', and ensuring or promoting the 'proper use and management of public money', property and other Commonwealth resources.

While this publication provides a summary of the key considerations in using a consultant, Government agencies may differ in their approach to procuring goods and services. A first step in considering the use of a consultant should therefore be to consult the Chief Executive's Instructions (CEIs) for the agency concerned.

Prior approval of spending proposals

Except in the special case of an intelligence or security agency, FMAR 9 requires that a person approving the spending of public money must be satisfied that the proposed expenditure satisfies all of the following conditions:

- a. is in accordance with the policies of the Commonwealth;
- b. will make efficient and effective use of the public money; and,
- c. if the proposal is one to spend special public money, is consistent with the terms under which the money is held by the Commonwealth.

Written authorisation is required from the Minister for Finance where expenditure under a spending proposal is not covered by an appropriation under 'the provisions of an existing law or a proposed law that is before the Parliament' (FMAR 10). Finance (DOFA 2005, 4.11) recommends the preparation of a Business Case for formal approval by an appropriate official.

Ethics, fair dealing and non-discrimination

Ethical behaviour and fair dealing make good business sense by engendering trust and allow the parties to a transaction to minimise conflict and uncertainty.

Australian Government Public Servants are also bound by the Australian Public Service (APS) Values and Code of Conduct under sections 10 and 13 of the Public Service Act 1999. Relevant behaviours include accountability to the Parliament through the Government, the need to behave with honesty and integrity,

avoidance of conflict of interest, prohibition of the improper use of inside information or the employee's position to gain (or seek to gain) benefit or advantage for the employee or others, and the need to act with care and diligence. Section 6.25 of the CPGs also points out that procurement activity 'ought to be conducted in a way that imposes as far as practicable the same level of accountability and responsibility on a service provider as would exist if the agency carried out the services itself'.

Partly as a result of Australia's signature of bilateral free trade arrangements with New Zealand, Singapore, the USA and Thailand, the CPGs stipulate that potential suppliers must be treated equitably, 'and not on their degree of foreign affiliation or ownership, location or size'.

Accountability and Transparency

Agencies are expected under the CPGs (7.16) to 'publish on AusTender, by 1 July each year, an Annual Procurement Plan (APP) to draw business' early attention to potential procurement opportunities'. Agencies are also required to comply with a range of reporting obligations (detailed in the CPGs) to provide broader visibility of their procurement activity.

Specific requirements for reporting on consultancies in Annual Reports are set out in PM&C (2004) at www.pmc.gov.au, and DOFA (2004a.)

Tips and Traps

- Users of consultancy services sometimes complain that consultants simply pump them for information and then sell it back to them. (The old joke is that a consultant is someone who borrows your watch, then charges you to tell you the time.) In some areas of Government, it will be inevitable that consultants will need to learn enough about your business to be able to provide informed output. But a consultant may also take an inordinately long time to learn about your business. If this is the case, then review your perceived needs for consultancy services. Alternatively, review your selection processes.
- It would be difficult to over-emphasise the point that clarity of purpose is essential to a successful consultancy project. If you are not sure what is really needed or how you will use the output, then it may be useful to first engage a consultant on a short-term basis to help you think through the issues. A good test is to ask whether you would be comfortable defending your justification for having hired a consultant in front of a Senate Committee or an auditor.
- There is an enduring myth in the Public Service that consultants will take any job thrown at them by any client. It may be true that a consultant will eventually be found to take on a badly defined or 'messy' task. But good

consultants (who usually have more work than they can handle) will be highly unlikely to accept work that they suspect will involve unnecessary problems and conflicts. Failure by clients to clarify their needs and requirements can therefore limit the choice of consultants available to them, and may result in lower quality output.

- Open tendering processes can be very useful in an unknown market where it is necessary to 'test the water'. However, they can involve significant cost to a client (selection processes) and consultants (preparation of bids). Because of the time and money required, many consultants try to avoid open tendering processes unless they believe that there is a good chance of winning.
- For a fixed price \$100,000 tender, for example, a consultant might assume that there will be five or so serious bidders, including themselves. The chance of winning is only 0.2, so the expected value of the job is only \$20,000. Taking into account time spent obtaining a briefing, thinking through the approach, doing some background research, writing the proposal, and the use of support staff to prepare it for submission, about three consulting days may be involved. The opportunity cost to a consultant with a daily charge-out rate of \$1200 would be about \$3600: a substantial reduction in profit if the bid were successful and a straight loss if it were not. The net expected value is thus \$16,400. At the charge-out rate of \$1200 per day, this represents 13.6 days of work. If consultants feel unable to complete the job within this time (including time spent on project management, travel, administration, etc.) they will probably not bid. (In some firms any loss would be deducted from the consultant's remuneration, or the consultant would need to make up any shortfall in hours spent on the project in their own time.)
- If you expect to hire consultants reasonably frequently, panel arrangements may be worth considering, if they can better achieve value for money. Pre-selection of a number of good consultants with a broad range of skills saves time later because there is no need to repeat the tender and selection processes. You can then choose the best one to engage for a specific project, as required. Panel arrangements may also involve a fixed fee (often lower than normal if there is an expectation of continuing work) for the period of the panel. Multi-use lists are another possibility.
- In the case of outsourcing of services, or large-scale consultancies, it may be worth considering at the outset the benefits of a longer-term 'partnering' relationship with one or more consultants. Because they have the potential to minimise conflict during a project, 'partnering arrangements' are also a form of overall risk management. Partnering usually involves a number of key features which should ideally be specified in a 'protocol' at the commencement of the project:

- Both sides need to commit to a common 'culture' or 'values'. Examples include a commitment to excellence, absolute 'integrity', or providing feedback on issues as they arise (rather than letting problems or disagreements fester).
- Transparency in arrangements, including 'open book' determination of costs and fees. An open book approach means that the consultant's accounts are made fully available to the client, so that the risk of potential conflict over costs and fees is minimised.
- An open book approach may imply that the two sides will share the gains from the project. For example, if the project identifies cost savings in the client's operations, then a pre-agreed proportion of the savings may be given to the consultant. Some sharing schemes provide for the reimbursement of direct costs to the consultant plus a share of the gains, but no fees.
- Agreement to resolve all issues in a non-adversarial manner.
- A partnering charter or framework that defines roles and responsibilities and the intent of the relationship.
- Risk sharing: Government policy is that liability should rest with the party best placed to minimise the occurrence of an identified risk, and that any limitation of a contractor's liability in government contracts must be supported by comprehensive risk management. See CPGs for detail.
- Where guaranteed access to a consultant is required, consider the possibility of a retainer fee. A retainer ensures that a consultant will make themselves available if required at no extra cost, although they may not be used at all if a need does not arise. A retainer fee has the advantage of being lower than normal rates because it provides the consultant with a definite stream of income, and the consultant is bound contractually to provide a specified amount of time (for example, three days per week) to the client, if required. On the other hand, if the consultant is not used very often, the total cost in terms of output may become unjustifiably high.
- Where the objectives or likely scope of a project are difficult to determine with any certainty at the outset, a decision-tree approach may be appropriate. For example, the project could begin with a short feasibility and scoping study at a fixed price of \$5,000. The study would provide information to the client on likely cost (at least for the next stage), relevant analytical methodologies, and perhaps a refinement of the objectives. On this basis, the client might proceed to the next stage of data collection at a fixed price of, for example, \$50,000. Further stages (such as data collation and interpretation, interviews with stakeholders, production of a report, and implementation of recommendations) could then be considered sequentially. The client retains the option at each stage to abort the project or to continue

to the next stage. The advantage is that not all the resources need to be committed at the beginning, when uncertainty is still high. It also offers the potential advantage of being able to bring in different consultants for various stages, particularly where specialist skills are required. In effect, milestones become decision points. Note, however, that where the total value of the procurement cannot be readily estimated, it will qualify as a covered procurement under the CPGs.

- An issue that may need to be addressed is the distinction between consultants and employees. If consultants are required to work closely with other staff on site for lengthy periods, care will be needed to ensure that they do not, as a result, lose their status as independent contractors to the extent that they could be regarded as employees. Section 6 of the Public Service Act 1999 specifies the way in which employees are to be engaged. However, there is no single objective test that will give the answer; the courts look at the whole of the relationship (but only individuals, not companies or other corporate bodies, can be employees). Taxation and the Superannuation Guarantee legislation also requires interpretation of this relationship.
- If a consultant is engaged because specialist skills are not available in-house, a key consideration to address at the outset is the ability of the agency to select the most appropriate expert and how to manage the contract. One solution to the lack of in-house expertise is to obtain separate advice from a consultant in the field; a specialist economist or engineer could be hired to sit on the selection panel, or to provide advice on outputs during the course of the consultancy. The need for such external expertise should be determined on the basis of risk. If specialist knowledge is important in ensuring successful outputs, or if the consequences of unsuccessful outputs are significant, then the case for external advice is likely to be strong. Even if external advice is obtained, care is still required to ensure that the 'expert' selected is competent in the relevant area. Simply choosing a generalist economist or engineer may not be sufficient if highly specialised knowledge is required for a high-risk part of a project.
- If transfer of knowledge to your agency is a priority, ensure that you have sufficient staff to work with the consultant. Your staff need to have adequate skills and will need to be readily available throughout the consultancy.

Risk management

Managing risk is an essential aspect of project management. Overall risks of using a consultant should be considered as early as possible in the procurement process to maximise the opportunity for adopting mitigation strategies, if required. In the case of complex projects, it is worth seeking professional advice, or consulting older publications such as *Purchasing Australia* (1997), AGS 1997a, and AGS 1997b. Although some aspects of these publications are now outdated

(for example the procurement framework and policy) they still offer a range of practical advice.

As well as the risk of hiring a consultant, the project itself will involve risk. Good consultants will automatically assess the risks associated with a project, either as part of their proposal or once the contract has been signed. Clients should always ask for a risk assessment and the consultant's proposed method of dealing with risks. In the case of large or complex projects, it is a good idea to ask the consultant to produce a Project Charter or Plan, to ensure that both sides have an agreed understanding of both the content of the project, as well as who bears likely risks and implements appropriate mitigation strategies.

Not all risk is borne by the client. When considering how to bid for a project, a consultant will typically take into account a wide range of issues, including dependence on the client for the provision of data, the clarity of purpose demonstrated by the client (and hence risk of goalposts changing during the project), the continued availability of key staff (consultant's and client's), conflict of interest with other clients, the client's 'culture' (and hence the willingness to accept unconventional or 'creative' results), the realism of the client's estimate of the time required to complete the project, political factors beyond the consultant's control, profit levels, and whether the client will pay on time.

Both client and consultant risks are relevant to the success or failure of a project. As the client, you should endeavour to be aware of all of them.

Table 1 — Establishing the Need for a Consultant: Risks and Mitigation

Type of risk	Likely consequence	Mitigation strategy
<ul style="list-style-type: none"> • Overlook or breach key provisions of CEIs, CPGs or FMARs 	<ul style="list-style-type: none"> • Decision to engage consultant is not defensible • Possible legal action, media interest, or probing by Senate Committees 	<ul style="list-style-type: none"> • Read key documents, particularly CEIs for your agency • Check with contracts officer or legal adviser
<ul style="list-style-type: none"> • Insufficient funding 	<ul style="list-style-type: none"> • Purchase or availability of services delayed • Premature termination of contract • Reduced quality of output 	<ul style="list-style-type: none"> • Ensure funds available at outset • Allow for contingencies and risk in contract • Provide for about 10 to 15 per cent expenditure contingency • Check that there are no follow-on costs after completion of the consultancy
<ul style="list-style-type: none"> • Unrealistic timeframe for completion of task by consultant 	<ul style="list-style-type: none"> • Delivery schedule not met • Lower quality product delivered • Bad reputation among consultants (and possibly higher quotes for next tender) 	<ul style="list-style-type: none"> • Plan ahead • Where timeframe is unavoidable, select high quality consultant with large resource base
<ul style="list-style-type: none"> • Realistic solution not feasible 	<ul style="list-style-type: none"> • Unnecessary expenditure • On the other hand, external confirmation of the absence of a solution may be an advantage • Finalisation of the project may be difficult 	<ul style="list-style-type: none"> • Perform detailed needs analysis before decision to hire a consultant • If it seems likely that a solution may not be found, provide in the contract for flexibility to terminate the contract
<ul style="list-style-type: none"> • Misinterpretation of needs, or inability to use results 	<ul style="list-style-type: none"> • Unnecessary expenditure • Failure to implement optimal policy outputs 	<ul style="list-style-type: none"> • Specify clear deliverables • Check 'needs analysis' with stakeholders • Carry out a 'dry run' using dummy results to check how they will be used in practice (eg., for policy advice, statistical testing) • Perform a 'gap analysis' to compare expected outputs of consultancy against what is needed for policy advice, etc.

3. Preparing tender documentation

Some basics

Drafting tender documents is much easier if you are clear about what you need. Talking to someone who regularly engages consultants can help you understand the process and avoid pitfalls. Finance (DOFA 2005) Guidance recommends completion of the following internal procedures before approaching the market:

- a Procurement Plan that describes the procurement, specifies evaluation criteria, identifies the procurement process to be used, a risk assessment, timelines, governance arrangements, and a probity plan if appropriate. The Procurement Plan explains *how* the process will proceed, in contrast to the Business Case (which explains *why*) that is used first to gain formal approval for the procurement (Chapter 2 above);
- a Submission Evaluation Plan that maps processes to be followed when submissions (responses from potential suppliers) are being evaluated. For example, role of staff in receiving and opening tender documents, evaluation methodology, indicative timetable, etc.; and,
- formation of the Submission Evaluation Committee, which should agree on the substance of the Request Document and Evaluation Plan before the market is approached.

The CPGs require the mandatory issue (electronically, where practicable) to potential suppliers of Request Documentation that must include a complete description of:

- the nature and scope of the procurement, including technical details;
- any conditions for participation, such as financial guarantees or documents that must be provided by potential suppliers;
- evaluation criteria to be used in assessing submissions; and,
- any other terms or conditions relevant to evaluation.

Request Documentation is intended to provide potential suppliers with sufficient information to permit them to lodge responsive submissions. To this end, inclusion of the following could help ensure a smoother procurement process:

- a copy of the draft contract;
- a website such as Austender for potential suppliers to check for any variations to the Request Document, or for responses to queries by any of the potential suppliers; and,
- details of arrangements to debrief unsuccessful tenderers.

Check draft documentation with legal and probity advisers, or subject experts. A word of caution is warranted, however: no set of summary points can cover the full gamut of considerations involved in arranging a specific tender process. The need to ensure fair and ethical dealing, for example, can involve various unforeseen issues.

Release of a Request Document may in itself generate an obligation on the client, in the form of a so-called Process Contract. The client may be bound to observe the procedures (eg., selection criteria) specified in the documentation. Legal advice should be sought before public issue of any documents.

Australian Government requirements

The 2005 Commonwealth Procurement Guidelines (CPGs)

The CPGs issued in January 2005 reflect quite significant changes to the Government procurement environment. They apply to all FMA agencies, and, where directed by the Minister for Finance, to bodies that are subject to the Commonwealth Authorities and Companies Act 1997.

For all 'covered' procurements of consultancy services (those over \$80,000 including GST) an open tender process or some derivative is virtually mandatory under the CPGs. Where the maximum value of a contract cannot be estimated, it is to be regarded as a covered procurement. And contracts with multiple parts are valued as a single contract. Non-covered procurements allow greater discretion, but agencies are still expected to comply with the overall procurement policy framework.

Where an open tender process has first been used to gain Expressions of Interest (and the AusTender notice made this clear), responses can be used to seek tender submissions from a shortlist of those expressing interest. Another form of select tender involves use of a list of all qualified suppliers from an independent accrediting or regulatory authority, but all those on the list must be invited to tender. A third form of select tendering that is of less relevance to choosing consultants, involves 'multi-use lists' of pre-qualified suppliers of frequently used services (for example, in IT procurement).

Panels of potential suppliers of identified services can be established by agencies, but only through an open approach to the market, under the significantly more prescriptive conditions of the new CPGs. Once a panel has been established, however, the procurement process does not attract the operation of the mandatory procurement procedures of the CPGs. However, other elements of the CPGs, such as achieving value for money, continue to apply. Direct source tendering can only be used under quite restrictive and specific conditions, as set out in section eight of the CPGs.

The CPGs also specify that request documentation (documents provided to potential suppliers; electronically as far as practicable) must include a complete description of:

- the procurement, including the nature, scope and, where known, quantity of the property or services to be procured, as well as other technical requirements to be fulfilled;
- conditions for participation such as financial guarantees or supporting documents;
- all evaluation criteria to be considered in assessing submissions; and,
- any other terms or conditions relevant to evaluation of submissions.

Potential suppliers must generally be given at least 25 days to lodge a submission from the date that an agency publishes an invitation to the market. Once begun, however, a procurement process cannot be terminated if satisfactory submissions have been received, unless the agency determines that it is not in the public interest to continue. A contract must be awarded, provided that at least one of the tenderers meets the requirements of the RFT, including the provision of value for money.

Chief Executive's Instructions

An agency's Chief Executive's Instructions (CEIs) are an essential starting point in preparing request documentation. According to clause 1.7 of the CPGs, 'the CPGs provide the framework within which Chief Executives may prepare CEIs and associated operational guidance related to procurement in a specific agency'.

Advising potential suppliers

All open approaches to the market (open tenders) must be advertised on AusTender (www.tenders.gov.au). Agencies may also advertise opportunities in other media, at their own discretion, but the wording must be identical to that published on AusTender.

For select tenders, agencies are required to issue all invitations to tender electronically (where practicable), and, to the extent practicable, make tender documentation available electronically to all potential suppliers invited.

Debriefing unsuccessful bidders

The Accountability and Transparency section of the CPGs stipulates that procurement officials 'must offer unsuccessful bidders a written or oral debriefing as to why their offers were not successful'. Rather than making the offer separately after the selection process has been completed, time and effort can be saved by inserting debriefing offers in tender documentation, including relevant contact details.

Competitive neutrality

Competitive neutrality requires that government business activities do not accrue net competitive advantages over their private sector competitors simply as a result of their public ownership. Observance of competitive neutrality helps ensure efficient use of public resources, promotes transparency and accountability, and fosters ethical behaviour and fair dealing where a government agency is competing with the private sector in the provision of goods or services. Further detail and practical guidance is provided in DOFA and Treasury (2004).

Industry development policy

Section 5.6 of the CPGs states that the Government 'is committed to FMA agencies sourcing at least 10 per cent of their purchases by value from SMEs [small and medium enterprises]'. The CPGs also require that officials ensure that procurement methods do not unfairly discriminate against SMEs, and outline a number of factors that should be taken into account to ensure that SMEs have appropriate opportunities to compete for business.

International obligations

Australia is a signatory to bilateral free trade arrangements with New Zealand, Singapore, the USA and Thailand. These arrangements are implemented domestically as Government policy and/or legislation, and all relevant international obligations have been incorporated into the CPGs.

Limitation of contractual liability

High insurance costs in recent years have increased pressure from consultants for caps on their contractual liability, or caps on insurance required by them. Reducing insurance costs can help keep down the cost of services supplied to government agencies. However, caps on liabilities borne by suppliers are reflected in commensurate increases in risk and contingent liabilities borne by the Australian Government.

The CPGs require (sections 6.12 to 6.19) agencies to undertake a risk management process, and to seek legal advice appropriate to the complexity of the purchase and the level of risk. Contractual arrangements must be considered against the 'value for money' paradigm, and the CPGs note that 'better practice request documentation will include a draft contract with clear liability provisions, with potential suppliers required to indicate compliance against each clause of the draft contract, including liability provisions, and to clearly state and cost any alternative clauses'.

Intellectual property

In determining the treatment of intellectual property, it is the agency's responsibility to identify, at an early stage, the intellectual property likely to

be developed during a project. It should also consider its own requirements regarding the ownership of intellectual property.

Whatever approach an agency adopts, it is essential that the contract clearly reflect the arrangements. Contract managers should actively track and report intellectual property outcomes if value for money is to be achieved for the Commonwealth. See www.dcita.gov.au.

Other Australian Government policies and legislation

As a consequence of FMA Regulation 9, Australian Government officials are expected to 'comply with legislation and relevant policies that interact with a procurement activity, irrespective of whether an action is consistent with the CPGs'.

Government policies are continually subject to change, so it is prudent to check with the responsible administering agency about specific policy requirements. However, DOFA (2005d) contains a table compiled in November 2004 that provides an initial guide to the range of policies and legislation relevant to procurement activity.

Some examples relevant to consultancies include:

- For consultancy projects involving expenditure over \$5 million in locations where there are significant indigenous populations with limited employment and training opportunities, consideration should be given to employing and training indigenous communities and documenting the outcomes.
- Officials must not enter into contracts with organisations that have been named in Parliament for non-compliance with the Equal Opportunity for Women in the Workplace Act 1999.
- The Occupational Health and Safety (Commonwealth Employees) Act 1991 requires that an employer must take all reasonable practicable steps to protect the health and safety of employees and other persons within the workplace.
- Agencies are required to ensure that the Workplace Relations Act 1996 be fully recognised and complied with by those who seek to do business with the Australian Government.
- The Disability Discrimination Act 1992 makes discrimination on the basis of disability illegal. Procurement processes must have regard to the Australian Government's Disability Strategy (www.facs.gov.au).
- Where appropriate, adequate provision should be made in contracts for insurance, security, privacy and access to records by the Australian National Audit Office.
- Agencies should consult the Government Communications Unit (GCU) in the Department of the Prime Minister and Cabinet (www.gcu.gov.au) before letting contracts for communications research; that is, research on public awareness or attitudes to issues, or concept testing of advertisements, etc.

- Subject to certain restrictions in the Legal Services Directions issued by the Attorney-General under the Judiciary Act 1903, agencies are able to choose their own legal services providers. The Office of Legal Services Coordination in the Attorney-General's Department also assists agencies to manage their legal purchasing decisions, including advising on the use of competitive tendering and contracting principles and on the development of mechanisms to manage the risks involved in purchasing legal services. See www.ag.gov.au.
- The Australian Government is committed to ensuring that FMA agencies pay their suppliers in a timely manner. In general, small businesses should be paid within 30 days of receipt of a correctly rendered invoice of up to \$5 million.

Accountability to Parliament

In recent years, Parliamentary committees have expressed concern about the proliferation of 'commercial in confidence' clauses in contracts, as well as apparent attempts to use them to shield Public Servants from accountability to Parliament.

Chapters 6 and 7 of the CPGs that were issued in January 2005 have now consolidated and made explicit the accountability and transparency requirements associated with the procurement policy framework.

A key feature of the new CPGs is the emphasis on maintaining appropriate documentation during each phase of a procurement process. Examples include the Annual Procurement Plan that must be published on AusTender by 1 July each year, through to various reporting obligations. Documentation relating to a procurement must be retained for three years, or longer if required by legislation or other reasons. The Archives Act 1983 and the Freedom of Information Act 1982 are also relevant.

A smooth procurement process can be assisted if request documentation (preferably including an attached draft contract):

- warns potential suppliers of the public accountability requirements of the Australian Government, including disclosure to the Parliament and its committees;
- includes contractual provision for access to suppliers' records and premises to carry out audits. Model contract clauses are available on www.finance.gov.au; and,
- avoids agreeing to consultants' requests for material to be treated confidentially except where the information meets all the following four criteria: the material must be identified in specific terms; it must in fact be sensitive; disclosure would be detrimental to the consultant or a third party;

and the information was provided on the understanding that it would remain confidential.

Transparency of agencies' use of confidential contract provisions is achieved in chapter 7 of the CPGs by requiring FMA agencies to:

- publish details of all contracts and interagency agreements above \$10,000 on AusTender within six weeks of signature. Variations of \$10,000 or more must also be published;
- place lists of contracts with a consideration of \$100,000 or more, which have not been fully performed or which have been entered into during the previous 12 months, on the Internet with access through their home page (the so-called Murray Motion). Contracts with confidentiality clauses must be identified, and DOFA 2004b provides a template for doing so; and,
- publish in their Annual Report as assessment of performance against core purchasing policies and principles. Reports must separately identify details of contracts with consultants. See PM&C 2004 (www.pmc.gov.au).

Tips and Traps

- Lack of clarity may lead the successful tenderer to seek profitable variations once the contract has been signed and the client begins to specify 'additional' needs. Such **variations can be expensive**, so don't begrudge time spent on preparing the request documentation.
- There are no hard and fast rules, but a **statement of requirements of about three pages** of information may be suitable for simple, low value consultancies. Background material will enable consultants to see the bigger picture and help them prepare proposals that are ultimately of more benefit to the client.
- A long list of **evaluation criteria** can complicate the selection process unnecessarily. Consultants will need to provide lengthier bids, so that more time is spent by the potential client in reading and understanding their claims. The effort involved in documenting the evaluation committee's assessments against the criteria also increases.
- Too many evaluation criteria can also dissuade consultants from bidding. In one case, an agency listed over 30 selection criteria, many of them repetitive. Although the job was a six-figure one, a large firm decided not to bid because it would not have been able to recover the estimated four weeks of work involved in preparing a proposal. **Framing an appropriate number of evaluation criteria** in a logical order, with minimum duplication, assists tenderers to present better submissions. It also makes it easier for you in the selection process stage. So don't skimp on time spent drawing up the evaluation criteria.

- Selection committees can save time and effort by signalling their needs with respect to the **length of bids**. For example: 'We expect proposals to be no longer than about five to seven pages ... (excluding attachments such as CVs)'. Agencies that are significantly more prescriptive than this (for example, by specifying the exact number of pages, font size, etc) are likely to reduce the field of bidders. Like most people, consultants prefer to work in an environment that is not overly restrictive. Except for the marginal operators, many consultants are not so desperate for work that they will bid for jobs if they think that working with a particular agency will be a frustrating experience. So don't send the wrong signals about your agency in your tender documents.
- Preparing a bid costs money. Most consultants won't mind responding to a tender if they know that there is a **genuine intention to proceed** with the project and a fair chance of winning the job. Apart from the fact that tenders should always be genuine, agencies that frustrate bidders are likely to receive fewer bids in the longer term. This is not an academic point: some top tier firms have in the past avoided bidding for jobs tendered by certain Government agencies. It is also likely that a frustrated bidder will, sooner or later, take legal action, because the CPGs now make it mandatory to proceed to completion by awarding a contract once the process has begun, provided that at least one submission satisfies the tender requirements, including value for money.
- Many experienced consultants are less keen to respond to open tenders because of the low expected value (probability of winning, multiplied by contract value) to them. However, most will respond more positively if they are invited to participate in a select tender process. An option in complex procurement processes is to first seek **Expressions of Interest** as part of an open tender process. A response to an Expression of Interest requires less work than a tender bid, so that a larger field of consultants can be attracted. Only the shortlisted ones will subsequently face the cost of submitting a final proposal.
- Many consultants will not bid if they have tendered unsuccessfully several times with specific agencies. If your aim is to maintain a **pool of interested consultants** who have a knowledge of your area (to avoid becoming overly dependent on one supplier), then each must have a reasonable probability, but no certainty, of winning any specific tender. One consultant's rule of thumb is that, unless his firm wins at least one out of three invitations to tender, it refuses to incur further tendering costs in the future. In other words, a longer-term perspective of obtaining value for money by fostering competition may require deliberate allocation of work on a rotational basis, rather than on purely (short-term) competitive grounds.

- It is possible to **signal an agency's requirements** without necessarily restricting the field of bidders. For example, if an agency places a premium on minimising the risk of disruption to a project due to departure or illness of consulting staff, then tender documentation should mention this, and use a formulation something like: 'We expect that the successful tenderer will have satisfactory back-up arrangements to cover any loss of project staff'. This approach does not exclude small or specialist firms (which can form a contingency partnership with other consultants), but does signal a preference for a consultant with readily available back-up staff or ready access to expertise.
- Considerable leverage is available to a Government agency at the stage of issuing a Request Document, and prior to acceptance of a bid. Good use can be made of this in areas which do not directly affect the bidding process. For example, attaching the **draft contract** to the request documentation and requesting confirmation that it is acceptable to bidders, can identify any problems before the evaluation process begins. At the pre-selection stage, bidders are more likely to be amenable to negotiating positively on contract terms, so that a better outcome can be obtained for the client. Ascertaining the acceptability of the contract prior to the selection process can also eliminate tenderers who will refuse to negotiate later and hence save time.
- Should the **likely** budget for the consultancy be revealed in the Request Document?
 - Despite the additional work imposed on the Public Service manager, it is probably preferable in most cases to devote resources to better specifying the agency's requirement. (A consultant can be hired to assist with this, if necessary.) Clearly specified requirements will allow competent consultants to better gauge the extent of work required.
 - Consultants argue that, because their bids are based primarily on expected cost, a budget provides an indication of the scope of the job (in terms of consulting days allocated to it). A more realistic proposal — better suited to the client's needs — can be prepared if the budget is known. Without any knowledge of the likely value of the project, it is argued, consultants may make very different assumptions about the extent and quality of the work required; valid comparisons between those bidding then become all but impossible. For example, it would be difficult to compare bids from two consultants, one of whom assumed that a project would be worth \$500,000, and the other assumed a smaller job of about \$40,000 in value. At least an order of magnitude 'ballpark figure' is required.
 - Some Public Service managers, however, point out that making the likely budget known beforehand invariably results in virtually all the tenderers quoting much the same price. It is always possible that a highly suitable bidder would have bid much lower because of existing knowledge or

skills. On the other hand, most experienced consultants will have similar views about the cost of a job, as long as a detailed specification is provided in the request documentation.

- Further, Public Servants, particularly when they do not have a good knowledge of the market, can seriously under- or over-estimate the value of a project or the extent of work required. One apocryphal recounts an instance where the value of a project was grossly underestimated: after the project had been expanded to many times its original value, the client became suspicious that the consultant (who was relatively far more experienced in the field) had known all along what the value would eventually be, but had put in a very low initial bid to win the contract because of his expectation of an increase in scope after commencement.
- A possible compromise is to make known a fairly broad range (say \$50,000 to \$80,000) to signal the expected order of magnitude of the contract, without diminishing too much the scope for price competition. However, even this approach may be flawed, unless the client is reasonably knowledgeable about consulting in the subject area or has access to some prior industry advice.
- Apart from probing to gain an insight into the likely budget, consultants will normally be interested in finding out about issues like the underlying or background reasons for the consultancy, the nature and strength of the business case for letting the consultancy, the likely overall scope of work, the amount of support or assistance that the agency envisages as its contribution to the project, the extent to which innovative methodologies or ideas are expected (they cost more than ‘vanilla solutions’), the formal and informal decision-making processes within the organisation, and the likelihood that a Report or other output will actually be implemented. As well as clear tender specifications, **face to face meetings** are usually the best means for presenting such information, because discussion is possible. But don’t forget to record the outcomes and to circulate them formally to attendees.
- Don’t forget about the **implications of the GST** . Unless the bidder is registered for GST, your agency will not be able to claim a GST input tax credit for the consultancy fee paid. To maximise cash-flow benefits to your agency, the contract should specify that GST tax invoices are to be issued by the consultant as soon as any payment is due. You also need to ascertain whether any services that you provide to the consultant will be subject to GST; for example, use of computers, electricity, or accommodation, particularly if the consultant is working on-site.
- Ownership of **intellectual property** (if any) that is developed during a project should be addressed in the contract.

- Before issuing the tender, undertake a **sanity check** : would you bid for this work if *you* were a good consultant who was not desperate for work.

Exhibit 3.1 – Consider the following *before* issuing the request documentation

- The clarity of the requirement; it sometimes helps to specify what is *not* required.
- Does the request documentation allow for (or discourage) innovative solutions or approaches? Where possible, avoid specifying inputs or analytical approaches; focus on the output or outcome required.
- Is it written around the capabilities of an identifiably specific consultant?
- Does the draft contract contain clauses that provide sufficient flexibility to alter specified outputs (but without changing the nature of the tender process)?
- Will you be able to judge quality of output? You may need to specify existing technical standards (such as the Commonwealth Style Guide) in the contract.
- The timeframe specified; clients often underestimate the time required to complete work, and consultants may take more time than either party expected.
- Are your specified outputs really important? It can add to costs if you over-specify your needs.
- Have you given your agency's legal and probity advisers or procurement manager enough time to check the documentation?
- Consistency of the project with relevant Australian Government policies.
- Would it help later evaluation processes to include a checklist for potential suppliers to certify completion of required tasks of the submission and agreement to draft contract?
- Have you provided a web address or other means of disseminating information (for example, responses to questions by potential suppliers) so that all potential suppliers have equal access to new information after the request documentation has been issued?
- Under the CPGs there is no discretion to accept late tenders, unless the tender is late solely because of the agency's own mishandling. Make sure your tender box is emptied exactly at the time specified.

Table 2 — Preparing Tender Documentation: Risks and Mitigation

Type of risk	Likely consequence	Mitigation strategy
Failure to specify all relevant contract requirements in request documentation	<ul style="list-style-type: none"> Possible need to re-seek tenders or negotiate with winning tenderer 	<ul style="list-style-type: none"> Consult legal and probity advisers at an early stage before issuing documentation Possibly allow industry expert to preview requirements Draft documents to provide ability to vary conditions Draft documents to provide ability to abort process at any time
Failure to conform to <i>Commonwealth Procurement Guidelines</i>	<ul style="list-style-type: none"> Project attracts interest from Parliamentary committees or ANAO 	<ul style="list-style-type: none"> Consult legal and probity advisers early in the process, particularly for complex procurements Check with legal and probity advisers before any non-standard action such as acceptance of late submissions
Biased or unclear specification of requirements	<ul style="list-style-type: none"> Claims of unethical or unfair dealing Possible legal action Limited response from potential tenderers Loss of time in the long term 	<ul style="list-style-type: none"> Use functional and performance specifications and criteria Check with legal and probity advisers Establish submission evaluation committee to check request documentation, including evaluation criteria, prior to issue In complex cases, engage a consultant to help define or refine request documentation
Terms and conditions which are unattractive to suppliers	<ul style="list-style-type: none"> Loading of costs on offers Refusal to tender Highly qualified offers Legal action after commencement of contract Costly disputes 	<ul style="list-style-type: none"> Check with the market before formal tender process Investigate possibilities for sharing risk Require tenderers to warrant in their submissions that they have assessed risks and allowed for them in tender price
Inadequate information provided or failure to answer suppliers' queries	<ul style="list-style-type: none"> Claims of unethical behaviour, favouritism or unfair practices Refusal to tender Higher quoted costs or qualified offers Loss of time in long term 	<ul style="list-style-type: none"> Develop a probity plan that includes quality control measures for dissemination of information and for ensuring its accuracy Pre-prepare standardised correspondence and information packs Additional information provided to any tenderer should be distributed as soon as possible to others Advise <i>all</i> potential tenderers of <i>all</i> responses to <i>all</i> queries received (but respect confidentiality: use Blind Copy facility if using email) Specify in request documentation the agency's designated staff for all contact with bidders For separate briefings, ensure that someone else is present (even for telephone conversations: use the loudspeaker facility) Document on file all separate briefings provided, including all telephone conversations Include in request documentation a clause that tenderers are to rely on their own information and investigations

Type of risk	Likely consequence	Mitigation strategy
Premature contractual commitment	<ul style="list-style-type: none"> • Tenderer(s) claim existence of a preliminary or implied contract • Legal action to recover costs from agency 	<ul style="list-style-type: none"> • Establish in request documentation that the agency is not legally bound until a written agreement has been signed • Stipulate in request documentation that tenderers must bear all costs of their submissions • Avoid encouraging tenderer to begin work in anticipation of award of contract • In staged contracts, avoid giving the consultant working on the current stage any impression or promise of follow-on to the next stage
Breach of commercial confidentiality	<ul style="list-style-type: none"> • Claims of unethical behaviour, favouritism or unfair practices • Possible legal action 	<ul style="list-style-type: none"> • Develop clear agency procedures for receipt, registration, storage, opening, filing, and handling of offers • All offers kept sealed and secure until designated opening time • Staff access to documents on a 'need to know basis' • Request documentation makes clear what is considered to be confidential, including contract conditions
Breach of s. 52 of Trade Practices Act 1974 by agencies which provide services for remuneration or as a business	<ul style="list-style-type: none"> • Ministerial representations • Possible legal action, as in the Hughes case against the Civil Aviation Authority: see AGS (1997a), and Ross (2004) 	<ul style="list-style-type: none"> • Avoid engaging in 'misleading or deceptive' conduct regarding the tender process • Ensure full disclosure to all parties of all changes in the tender process • Ensure adequate debriefing at end of procurement process (see ch. 5). • Disclaimer in request documentation regarding process contracts
Consultant technically becomes an employee	<ul style="list-style-type: none"> • Increased legal responsibility • Increased cost 	<ul style="list-style-type: none"> • Check with legal adviser where contract is being extended, on-site facilities are made available, consultant carries out investigation on behalf of Australian Government, leave periods are approved by the agency, etc.
Change to procedures or conditions specified in Request for Tender	<ul style="list-style-type: none"> • Breach of Process Contract • Legal action against agency or Ministerial representations 	<ul style="list-style-type: none"> • Consider contents of request documentation carefully prior to issue • Check request documentation with legal adviser • If change is required after issue, consult probity adviser and ensure fair and equal treatment of all tenderers

4. Fees and expenses

Some basics

There is no magic formula for determining the level of fees that will provide 'value for money'. Hence the need for competitive bidding as an indicator of 'market price'.

Large, established firms are likely to charge more. But the trade-off is that they may be able to respond better to any problems that arise during the project, so that overall risk to the Government agency is reduced (although they may charge extra for solutions). This may not be apparent from the bid (submission) itself, but should be taken into account in gauging value for money.

Small consulting firms may be more responsive to client needs than large ones. Assuming the same level of skill as larger firms, they may therefore provide better value for money. However, they may represent a greater risk in terms of availability of personnel and ability to meet unforeseen needs and problems.

Fees can provide a lever for influencing a consultant's performance. A graduated, incentive-based scale that reflects differing degrees of performance is better than an 'all or nothing' penalty approach.

Payment schedules should be based on carefully defined and specific milestones. Of particular importance is that the milestones are easily measurable. Smaller firms may need more frequent milestones to ensure adequate cash flow for them.

If consultants are not registered for GST, then the agency that hires them will not be able to claim an input tax credit for the fee paid. To maximise cash-flow benefits to the agency, the contract should specify that tax invoices will be required for any payment to the consultant.

In some cases, it may be difficult to specify clearly the extent or quality of work required. Providing a ballpark figure (maximum, or a range) for the value of a job in tender documentation can 'signal' bidders to compete primarily on quality, with less emphasis on cost. Value for money is encouraged because excessively expensive bids, as well as superficial proposals are avoided without eliminating price competition entirely.

Travel and accommodation expenses are usually charged at cost at non-SES rates. Consultants do not normally receive a travelling allowance, so the contract should specify that expenses are to be acquitted on the basis of receipts. A further option is to place a contractual cap on total expenses, in order to minimise costs.

Various payment arrangements are possible. Shenson (1990, ch. 9) identifies a number, including the following:

- *Daily or hourly fee*: there is little incentive for the consultant to minimise the time spent on the job and the client bears all the risk.
- *Fixed-price fee*: the consultant bears the risk and is likely to have allowed a contingency margin in the bid, although it is unlikely to be apparent to the client. In an arrangement of this kind, it is important to have well-defined outputs.
- *Fixed fee plus expenses*: the most common form of contract used in the Australian Public Service. While the consultant bears the risk for the fixed fee, the client bears the risk of expenses unless the contract specifies that expenditure for expenses is subject to prior approval.
- *Fixed-price plus incentive*: if a special condition is met (for example, early delivery) an additional pre-specified fee may be paid to the consultant. An alternative form is to base the fee on an estimate by the consultant (for example, \$50,000) with a capped fixed price of \$70,000. It can be agreed that any costs above the \$50,000 threshold (but not exceeding \$20,000) will be borne by the client at a rate such as 75 per cent, and the remainder by the consultant. This approach provides an incentive to the consultant to minimise costs above \$50,000, but without necessarily compromising the quality or extent of the contract outputs.
- *Graduated incentive fee*: if the consultant estimates that the contract will require \$50,000 of work, a range of \$20,000 can be set on either side. The consultant may be required, for example, to bear 25 per cent of costs above \$50,000 up to a maximum of \$70,000. Similarly, the consultant may receive 50 per cent of any savings below the estimated project cost of \$50,000.
- *Fixed-price with re-determination*: Where the scope and nature of the work is very vague, the parties may agree to proceed for a fixed fee to a defined milestone, by when the requirements will have been better defined and a fixed fee for the remainder of the work can be agreed.
- *Cost contract*: where the consultant will acquire technology or knowledge which can be used to earn profits elsewhere, it may be possible for the client to agree to pay some portion of the consultant's costs, but no fee (to reflect the revenue potential of the technology). This approach may be suitable for dealing with intellectual property.

Australian Government requirements

Apart from the broad provisions of the FMA Act regarding the 'proper use' of Commonwealth resources (see Chapter 2), obtaining 'value for money' is the primary guidance provided to Government agencies of relevance to consulting services.

Contract fees may be affected by the extent of liability accepted by, or imposed on, the contractor. In general, liability should generally rest with the party best

placed to minimise the occurrence of an identified risk, and any limitation of a contractor's liability should be based on comprehensive risk management.

When people ask me whether the [Defence Materiel Organisation] is going to revert to using fixed price contracts, or increase the use of innovative contracting techniques like pain-share, gain-share, my answer is 'it depends'. To be more business like is to be more willing to adapt one's approach to the market, the risks, and the circumstances.

Steve Gumley, *Reforming Australia's Defence Acquisitions*, 3 March 2005

Tips and Traps

- Public servants are sometimes not aware of the fact that consultants normally consider time spent in **meetings with the client** to be **billable**. If the contract specifies that a certain number of consulting days (usually taken as 7.5 hours per day) will be spent on the project, then any anticipated meeting time should be taken into account in setting the budget for the project. Top tier firms will not normally bill for time spent travelling to a meeting unless **travel** occurs during business hours and precludes the consultant from undertaking other work, although air and taxi fares and accommodation are considered to be legitimate expenses to be reimbursed by the client. (Consultants are generally reimbursed at non-SES rates. Unlike some Public Servants, they do not normally receive a daily Travelling Allowance.) Items such as **faxes** sent to clients, **telephone calls**, use of **couriers** and other out-of-pocket expenses are also considered to be expenses that are recoverable from the client. And don't forget to allow for time spent on project **management** tasks or the use of **materials** (printing multiple copies of reports can be expensive). Because practice differs widely between consultants, it is worth checking on each bidder's charging policy for all of these items. Bidders are likely to be more accommodating if you do so before the selection process begins.
- Whether you should **expect to pay a fee** each time that you deal with a consultant depends to a large extent on your relationship. There are no hard and fast rules, but the following provides some general guidance:
 - If you want to test the feasibility of a project and phone a consultant to 'pick their brains' in a general way, they will normally treat the enquiry as part of their marketing activity. But the consultant is likely to follow up in a few days to see if you want some work done. So be careful not to raise undue expectations during the first query.
 - Frequent calls for (free) opinions to a tax consultant, on the other hand, would probably come to be seen as unwelcome if no work flowed from the queries.

- Asking a consultant for a 'one page outline' on how to deal with an issue is likely to be seen in the context of a proposal. A 'proposal' comes closer to generating an expectation that work is available. It is worth making clear that you are still only in the stage of considering the possibilities. Except in very large projects, proposals are provided free, although consultants themselves will consider whether it is worth their while preparing them for a specific enquirer. Unless you offer definite work, however, do not expect a full analysis that solves your problem.
- Once you ask a consultant to put together a proper plan (even 3 or 4 pages), you start to cross the line into making serious use of a consultant's expertise and time and a fee should be expected. Caution is therefore required to avoid entering into a contract (including an implicit, unwritten one) without considering fully the need for a consultant and the need for a tender process.
- Some agencies appear to select consultants purely on the basis of quoted cost, apparently avoiding larger firms. Unless all factors, including quality of output, are taken into account, the chance of obtaining **value for money, the primary consideration**, will be diminished.
- Where project outcomes are not entirely certain, or there is some likelihood that the analysis may point to further work, consider allowing for a **contingency amount** of about 10 to 15 per cent of total project budget. Under the January 2005 CPGs, any expectation of higher cost needs to be acknowledged at the outset in deciding whether a proposal exceeds the \$80,000 GST inclusive threshold for covered procurement. Any proposed change in scope of the work involved should be discussed with the probity adviser.
- Most consultants try to remain **competitive**. If consultants refuse to lower their fee in a competitive situation, their **quote** is likely to be fairly realistic for the proposed level of quality and time spent. If you are still not happy with it, ask an experienced colleague for advice, or even ask another firm (but being careful about commercial confidentiality). (Alternatively, explore the possibility of reducing the scope of the work if budgetary considerations are of concern.) A refusal to accept a lower fee may be an indication of a good consultant who is in demand and can earn that fee elsewhere. And if a consultant does accept a fee that is lower than they wish, they may later cut corners to ensure they do not make a loss.
- Government agencies often seek to reduce risk to themselves by seeking a **fixed-price contract**. However, establishing the price in a reasonably competitive market means that the consultant is likely to insist on keeping strictly to the scope of the work defined in the contract, because there is little margin to adjust without incurring a loss. A client may therefore gain more certainty regarding the final amount to be paid to the consultant, but

may bear a commensurately higher risk in terms of output if changes to the scope of the work are found to be required during the project. Because most projects require some adjustment as they proceed, neither side is likely to end up being entirely happy with the final outcome. Potential problems can be reduced, however, by ensuring clarity of requirement in the Request for Tender. Alternatively, provide in the contract for the ability to agree easily on variations (at the same fee) to work specified.

- A major area of frustration to consultants is the **unavailability of data or personnel promised by clients**. The assumption that data are available is likely to be a significant factor in the framing of a bid: collection of original data is usually expensive. If there is any uncertainty about the quality or availability of data, bidders should be invited to inspect it for themselves as part of the tendering process, rather than specifying in request (tender) documentation that data will be made available. Similarly, if bidders were promised a contribution of personnel to help with the project, you need to make sure that they are available at the times when they are needed. If you do not make available data, staff, or other resources promised during the tender process, you should expect to meet any expenses incurred by the consultant in making up the shortfall. Delays are also likely.

Table 3 — Fees and Expenses: Risks and Mitigation

Type of risk	Likely consequence	Mitigation strategy
Fee is too low	<ul style="list-style-type: none"> • Consultant loses incentive to produce quality or timely output • Possible request for renegotiation during contract 	<ul style="list-style-type: none"> • Fair negotiation of fees, possibly 'fixed price plus incentives' version (see above). • Request confirmation of fees during briefing sessions after bids are received • Agree on method for agreeing variations to contract • Periodic review during contract • Build 10 to 15 per cent contingency allowance into agency's budget for the contract
Insufficient provision for expenses	<ul style="list-style-type: none"> • Budget overrun for agency • Lower quality output 	<ul style="list-style-type: none"> • Request estimate of expenses over life of project as part of the bid • Agree that only written variations to contract can result in extra expense • Periodic review during contract • Build 10 to 15 per cent contingency allowance into agency's budget for the contract
Fees or expenses too high	<ul style="list-style-type: none"> • Reduced value for money 	<ul style="list-style-type: none"> • Encourage competitive bidding • Develop strong working relationship with consultant from the outset to encourage fair dealing (and possible refund) • Request cost breakdown with all invoices (including record of hours worked)
Blow-out in project expenses	<ul style="list-style-type: none"> • Reduced value for money • Budget overrun for agency 	<ul style="list-style-type: none"> • Contract should specify that expenses will be acquitted on the basis of receipts • An overall cap on expenses is an option to reduce administrative costs

5. Choosing the consultant

Some basics

Choosing consultants is analogous to a staff selection process:

- Interview the short-listed bidders to provide an opportunity to probe claims and methodology. But make sure that it is the nominated team that is interviewed as part of a consultant's presentation, not just one of the firm's 'professional presenters'. The box below ('Quick-check questions') provides a useful basis for discussion during the consultant's presentation.
- For large contracts, consider having an outsider sit on the selection panel both for probity and to gain an external perspective; preferably someone from an agency with relevant expertise. Even an industry person not connected with the bidder can be used, but first seek agreement from all bidders, in case of a potential breach of any confidentiality provisions in their bids. For probity, external advisers need to sign confidentiality and conflict of interest declarations;
- Compare candidates only against the evaluation criteria set out in the RFT.
- Interview referees, consulting peers, or others who may have worked with the consultant. And don't just ask if everything was OK. Ask for examples of things that went well, and things that did not. Are the same personnel still involved?
- Don't promise the job to anyone before a final decision has been made.
- Provide debriefing for unsuccessful candidates.

Some degree of subjective or professional judgement will inevitably be required, but the primary evaluation should be carried out as objectively as possible against the selection criteria set out in the tender documentation. One of the reasons for the successful action against Airservices Australia by Hughes Aircraft Systems International was the failure by its predecessor organisation (the Civil Aviation Authority) to evaluate tenders in accordance with the priorities and methodology specified in the Request for Tender (AGS 1997a, 1997b).

If considered desirable, clarification of terms or outputs can be achieved through discussion after the receipt of bids. The best results can be achieved before selection of a preferred bidder, but ethics demand that discussions should not merely be a means of playing bidders off against each other. In complex cases, use of trained negotiators is advisable. Prior legal and probity advice should be sought in any case, to avoid inadvertent breaches of contract law. Where none of the submissions received is considered to be satisfactory, an option is to relet the tender.

Exhibit 5.1 — Questions to ask during a consultant’s bid presentation

- What do you regard as our principal need or problem?
- Can you please analyse for us the principal strengths and weaknesses of your proposed approach/methodology?
- What alternative methodologies could be used? (As a check on whether the consultant will only apply preconceived ideas or methodologies.)
- What specifically can you offer us that others cannot?
- How will we measure or evaluate your success in meeting our needs?
- Are you willing to work on a performance basis: that is, to be compensated on the basis of results produced?
- What related experience have you (the actual personnel nominated, not the firm as a whole) had in working with similar organisations, or with other organisations in this industry or field?
- What guarantees do you offer on the availability of nominated personnel?
- How do you plan to maintain communication with our contact officer?
- What related experience have you had in working on similar issues?
- If you plan to use sub-contractors, what are the arrangements?
- From your (consultant’s) point of view, what are the major risks in the project, and what strategies do you intend to adopt to mitigate them? What risks do you see facing us (the client)?
- Can you confirm that your stated fees (*and* expenses) are likely to represent all costs to be incurred? If expenses are based on cost recovery, then what is the likely overall expense to be incurred? How do you propose to charge for meetings, time spent travelling, telephone calls, taxis, etc?
- Do all quoted costs and fees include GST?
- What penalties should be imposed on you for under-performance?
- Do you have the capacity to meet the timeframe specified?
- How do you propose to work with our nominated resources (where some of the client’s staff will be working on the project alongside the consultant)?
- What quality assurance procedures do you have? What procedures do you have in place to ensure that files are maintained adequately?
- Do you have any conflict of interest (name a few obvious parties to provide a prompt), and how will you handle this situation?

Source: adaptation and expansion of list in Shenson (1990, p. 47).

Australian Government requirements

Evaluation of value for money offered by submissions should be on a whole-of-life basis, taking into account factors relevant to the project under consideration. Costs and benefits should be compared on a common basis over time, including through the calculation of net present values, where appropriate.

Agencies can claim GST input tax credits for services provided, but only if the consultant is registered for GST purposes. This may be a relevant consideration in the case of individual consultants or community groups.

Section 4.4 of the CPGs lists factors other than cost that should be taken into account in assessing value for money.

Australia's international free trade arrangements

As a result of free trade arrangements with a number of countries, the CPGs now require explicitly that there be no discrimination regarding the degree of foreign affiliation or ownership, location or size. Submissions must be considered on the basis of their suitability for their intended purpose, and not on the basis of their origin.

Confidentiality during the tendering process

In the Hughes Aircraft case ... one of the breaches of the tender process identified by Finn J was breach of confidentiality. Information about the bidders' prices was provided by the Civil Aviation Authority Board to the portfolio minister and to personnel from another department, including the permanent head and minister of that department. Finn J had no doubt that passing on this information to personnel (including the minister) from the other department was a breach of the strict confidentiality which was part of the package of terms of the request for tender. The department's role was to assess the Australian Industry Involvement commitments of the two bids and providing the prices to that department was irrelevant to that task.

Providing that information to the portfolio minister also constituted a breach of confidentiality in the circumstances. This was because the information was, as it were, volunteered by the Board rather than requested by the minister. Finn J was in no doubt that the minister ... could have made a direction to the Board to provide the information ... But this [legislative] power had not been used.

Source: Seddon, 2004, p. 320.

Debriefing

The CPGs (7.25) require that agencies 'must promptly inform all tenderers of the tender decision and, on request, provide an unsuccessful tenderer with the reasons its submission was not successful. On request, debriefings should also be provided to successful tenderers'.

Section 9.4 of DOFA 2005 recommends that complaints by tender participants be managed through communication and conciliation. Senior management independent of the procurement process should be involved. Agencies should put in place a system to deal with complaints.

The Gun Buy-back Scheme

Following the tragic events at Port Arthur in Tasmania in April 1996, the Australasian Police Ministers' Council met and agreed to a 10-point plan for the regulation of firearms on a national basis.

The advertising and public relations contract for the Gun Buy Back campaign was the subject of a tender process. The responsible agency, the Office of Government Information and Advertising (OGIA), in consultation with, among other agencies, the Attorney-General's Department, developed a list of potential tenderers from its register of consultants. However, the name of another advertising firm was added on the basis of 'a facsimile from the then Chief Political Adviser to the Prime Minister, which suggested inclusion of DDB Needham, Adelaide.' (para. 3.142)

'OGIA advised the ANAO that the decision to include DDB Needham on the shortlist ... was made with the agreement of the evaluation committee ... [but] neither OGIA or the Attorney-General's Department were able to provide the ANAO with adequate written evidence documenting the committee decision.' (paras. 3.155, 3.156)

The ANAO concluded that it 'considers that adequate documentation of decisions helps to ensure transparency and accountability. ... A tangible management trail provides protection for all concerned, including those who may have to take decisions later in the process but who ... may not have been involved in the early stages of decision-making or assessment.' (para. 3.159)

Source: ANAO (1997)

Ex-Public Service employees

Under clause 4.4A of the *Public Service Commissioner's Directions*, a person who has received a redundancy benefit, should not generally be engaged as an 'ongoing' APS employee within 12 months of their employment ceasing. The measures restricting the engagement of a person who receives a redundancy benefit from an APS agency or from a non-APS Commonwealth employer do not apply to the engagement of consultants or contractors. However, consultants should not perform tasks, which would be expected to be performed by ongoing employees of the agency. For further information see: *Public Service Commissioner's Directions 1999*, or APSC (2003) at www.apsc.gov.au.

Tips and Traps

- Departmental registers can provide useful information about previous work done for the Department by consultants. However, if use is made of any recorded remarks about a consultant's previous work then the principles of natural justice require that the consultant be given an opportunity to comment on them. If using a '**consultants register**', check whether the same personnel are being proposed again by the consultant, and whether the nature of the job is comparable to previous work carried out for the Department.
- Avoid accepting **hospitality** or favours during a tender selection process, including seemingly innocuous offerings such as a cup of coffee in a coffee shop. Even if there is a long-established relationship with a bidder, or the hospitality is part of another project, probity demands not only impartiality but also the need to avoid being *seen* to be compromised in any way.
- In some agencies, the **preferred bidder** is announced publicly before finalisation of the contract. Where the preferred bidder is made known, it may significantly reduce the agency's scope for further negotiation of terms and conditions with that bidder. If negotiations fall through, the scope for negotiations with alternative bidders is also diminished.
- Some bidders may seek to present their bid at an interview by using specialised presenters who are not part of the consultant's project team. Such **presentations** can be a waste of time, particularly if the presenters are not familiar with the issues or the methodology to be used. Nor is the client afforded the opportunity of meeting the consultants who will actually carry out the work. *Insist on the actual team of nominated personnel making the presentation*. Apart from getting to know them, you will be better able to assess their capabilities.
- Large consulting firms may cite as part of their '**previous history and experience**' work which has been done within the firm, but in other locations (for example, Sydney or Melbourne) by people other than those nominated in the proposal. The implication is that the experience is available

within the firm and can be drawn on if required. Take the time to ask during the presentation about the personal involvement of the team nominated in the proposal in the projects cited. If none of the nominated personnel were personally involved, ask how the firm's experience will be made available for your own project.

- Under the new CPGs, agencies no longer have discretion to accept **late tenders** , unless the tender is late solely because of the agency's own mishandling. All suppliers must meet a common deadline.

Table 4 — Choosing the Consultant: Risks and Mitigation

Type of risk	Likely consequence	Mitigation strategy
Bidders not treated equally	<ul style="list-style-type: none"> Loss of confidence by suppliers in agency processes Ministerial representations Possible legal action 	<ul style="list-style-type: none"> Check before selection process commences that all tenderers received the same request documentation: if necessary, rectify, seek legal and probity advice, and consider need to reopen tenders Check all records of conversation in case of need to correct information provided, or to provide identical information to all bidders
Preliminary contract created	<ul style="list-style-type: none"> Loss of confidence by suppliers in agency processes Ministerial representations Possible legal action 	<ul style="list-style-type: none"> Avoid any statements on awarding of the contract until the process has been finalised Avoid encouraging any bidder to incur costs (over and above the cost of tendering) before the contract is signed Include in tender documentation a statement that a contract will only be created on signature of a written agreement: seek legal advice.
Unsuitable consultant selected	<ul style="list-style-type: none"> Outputs below expectations Output does not represent value for money 	<ul style="list-style-type: none"> Ask referees about any bad experiences with the consultant, as well as good ones Include an informed 'outsider' on the selection panel to increase range of judgements Re-tender if no bidder suitable, even if time is lost
Breach of due process or confidentiality during debriefing	<ul style="list-style-type: none"> Loss of confidence by suppliers in agency processes Ministerial representations Possible legal action 	<ul style="list-style-type: none"> During the debrief, compare tenderer's response only against selection criteria stated in RFT, not to responses from other tenderers Do not disclose any information provided by other tenderers Involve other staff in the debriefing in case corroboration is needed Place on file notes of debriefing session as soon as possible Aim for professional, positive debriefing to foster goodwill
Apparent agreement masks different expectations between client and consultant	<ul style="list-style-type: none"> Disputes during project 	<ul style="list-style-type: none"> Develop a clear specification of requirements Include in tender documentation a draft contract, a list of respective roles and responsibilities, etc. Record all discussions during tendering and selection processes Clarify all outstanding matters before signature of contract

6. Executing the contract

Some basics

The following dot points set out the basic principles and steps to follow when executing the contract:

- Involve legal and probity advisers at an early stage, where appropriate — ideally as far back as the preparation of tender documents (including the draft contract).
- Exercise caution in discussions to avoid creating implied or preliminary contracts.
- Consider the use of trained negotiators in complex or high value cases.
- Ensure that the agency's accountability to Parliament for financial management and administration is not compromised, particularly through inappropriate use of confidentiality clauses.
- Clear up all outstanding issues before signing.
- Use standard or model clauses as far as possible and check that all Australian Government requirements have been included.
- Where an agency's cash flow is a consideration, the contract should provide that the consultant will issue a GST tax invoice, whenever requested.
- Before signature, check the final draft contract with a legal adviser.
- *Always* sign the contract before the commencement of the consultancy.
- Ensure that mandatory Australian Government reporting requirements are fulfilled within six weeks of entering into the agreement.

Australian Government requirements

Payment for services received

The CPGs refer specifically to the Government's 30-day payment policy. In the case of FMA agencies dealing with small businesses (less than 20 full time equivalent employees), maximum payment terms are not to exceed 30 days from the date of receipt of specified property and/or services, and a correctly rendered invoice up to the value of \$5 million.

Accountability and transparency requirements

Transparency of agencies' use of confidential contract provisions is achieved in chapter 7 of the CPGs by requiring FMA agencies to:

- Publish details of all contracts and interagency agreements above \$10,000 on *AusTender* within 6 weeks of signature. Variations of \$10,000 or more must also be published.

- Place lists of contracts with a consideration of \$100,000 or more, which have not been fully performed or which have been entered into during the previous 12 months, on the Internet with access through their home page (the so-called Murray Motion). Contracts with confidentiality clauses must be identified, and DOFA (2004b) provides a template for doing so.
- Publish in their Annual Report as assessment of performance against core purchasing policies and principles. Reports must separately identify details of contracts with consultants. See PM&C (2004) (www.pmc.gov.au) and DOFA 2004a.

Tips and Traps

- Contract termination clauses are necessary, but of limited use in themselves. For example, one agency signed an IT management contract which contained a termination clause that could be activated under a large number of situations and conditions. (The contractor also purchased all of the agency's hardware.) However, termination of the contract would have left the agency with no IT support unless other contractors could be found to immediately take over a system with which they were not familiar, and to provide all the equipment. An alternative approach would have been to also include **graduated incentives and penalties** that could be applied progressively if contract performance fell below expected standards.
- Managing projects as part of a **multi-party arrangement** (such as joint Commonwealth-State government groups) can be difficult unless there is unanimity in objectives and approach. An unscrupulous consultant can exploit differences to extend a project and to increase earnings. As far as possible, contracts on behalf of groups should provide for management by only one party on behalf of the others. Differences can then be more easily resolved without involving the consultant.

There's many a slip 'twixt the cup and the lip

Early in 1993, the Federal Government put up for sale two subscription satellite television (pay-TV) broadcasting licences. There was considerable urgency to finalising the sale process, because of the early likelihood of an impending election. Staff in the Department of Transport and Communications were under considerable pressure, and many had worked through the traditional December-January holiday period.

The sale of the licences was to be by tender, using a 'price-based allocation system', under which licences would be awarded to the highest bidders. The process was a cascading one, with the next highest bidder to be offered the licences if the first (highest) bidder did not subsequently meet trade practices, foreign ownership, and other requirements, or could not pay for the licences within 30 days. Because a cascading process that allows 30 day periods between offers can take a long time to finalise, the Department had previously used a system of deposits in some similar auctions, in order to weed out bidders who were unlikely to be able to meet payments in their own right.

In accordance with relevant legislation, and on the advice of his departmental officers, the Minister (Senator the Hon R.L. Collins) signed a Determination on 19 January 1993, setting out the conditions of the tender process. However, the Determination contained no reference to deposits by tenderers; merely requiring a \$500 fee, ostensibly to cover administrative costs incurred by the Department (Pearce 1993, appendix 2).

At this point, the story becomes a little tangled.

Senior departmental officers who met in December 1992 to discuss the draft Determination, recalled that the question of a deposit had not been discussed. The \$500 application fee was considered to be sufficient to discourage frivolous bidders (Pearce, p. 6). By implication, departmental officers had not considered a deposit to be appropriate, and it had therefore deliberately not been included in the draft Determination given to the Minister.

Senator Collins, while admitting that he had not read the Determination thoroughly ('like a corporate lawyer') before signing it (Matter of Public Importance, Senate Hansard, 5 May 1993, p.153) later clearly considered that the Determination should have contained a requirement for a deposit:

'The cold hard facts are that it is clear that the departmental officers who were involved in preparing these tenders in the way that I assumed they would — in the same successful way as they had for the third mobile licence ... and for television licences and radio licences, all of which required these deposits — did not do so'. (Question without notice, Senate Hansard, 6 May 1993, p. 246)

Although the independent investigator, Professor Dennis Pearce noted (Pearce 1993, p. 9, and appendix 5) that assertions that 'the failure to require a deposit constituted a change in departmental practice, are not sustainable', he nevertheless criticised the Department. Noting that 'there were no discussions with the Minister or his advisers relating to the tendering process' (p. 10), Pearce's view (p. 13) was that 'advice should have referred to the fact not only that there was no deposit required but also that there was no reserve price and no ongoing fee to be paid by the licensee'. One might wonder how Public Servants could brief Ministers on all possible permutations and combinations of tendering processes that have not been used, but this issue is not addressed. Briefing clearly requires an element of luck.

The only clear moral (but acknowledging the logistical problems for the Department, with the Minister away in Darwin at the time) that emerges from this episode is that it is really important to talk at length, preferably face-to-face, with a Minister and his or her advisers when policy-determined tender processes are being applied. The same is true for other processes that are oversights by a Steering Committee or other authority.

Table 5 – Executing the Contract: Risks and Mitigation

Type of risk	Likely consequence	Mitigation strategy
Deadlock on details of agreement	<ul style="list-style-type: none"> • Delays in delivery • Need to re-tender • Increased cost 	<ul style="list-style-type: none"> • Include a draft contract in tender documentation, and specify roles and responsibilities of parties • Distinguish between essential and non-essential requirements • Seek legal advice
Failure to ensure agency accountability to Parliament	<ul style="list-style-type: none"> • Undue political and media attention • Reduced transparency 	<ul style="list-style-type: none"> • Follow advice in DOFA 2004c guidance on <i>Confidentiality of Contractors' Commercial Information</i> .
Contract signed before all issues agreed	<ul style="list-style-type: none"> • Disputes during project • Project delay, or non-completion • Possible legal action 	<ul style="list-style-type: none"> • Resolve all issues before signature, possibly through use of trained mediator • If start time is critical, consult legal advisers about possible two-part contract • Consider long-term benefits of restarting the procurement process instead of continuing
Price and exchange variations	<ul style="list-style-type: none"> • Cost overruns 	<ul style="list-style-type: none"> • Agree pricing schedules • Agree triggers for pricing variations • Hedge exchange rates
Legal meaning of contract wording differs from agency intention	<ul style="list-style-type: none"> • Disputes • Project delay • Legal action 	<ul style="list-style-type: none"> • Check final draft with legal advisers before signature • Ensure from outset the development of a cooperative relationship with the consultant, rather than an adversarial or overly legalistic approach • Include specific evaluation criteria for assessments during and at completion of contract

7. Contract and project management

Some basics

No failsafe methodology or perfect 'cookbook' approach exists for managing consultants, any more than it does for managing other human relationships. The key is to establish a sound, open working relationship. A written contract that includes clauses on termination, arbitration, and graduated incentives and penalties, is an essential foundation for the relationship. Consultants need to be managed, but not supervised or controlled. If you have chosen competent consultants, let them get on with the job. That is why you have employed them. But in managing them:

- Ensure not only that you have a clear understanding of what is needed, but that you communicate your requirements to the consultants.
- Appoint a Project Officer for all formal contact with the consultant.
- Base payment schedules on the milestones specified in the contract.
- Steering committees can be very useful, particularly where there are many stakeholders in the project. But such committees also need to be managed firmly to avoid undue interference in the consultant's main task.
- Insist on regular (weekly) face-to-face meetings. Have the consultant produce an issues log to ensure accountability. But remember, unnecessarily prolonged meetings cost money and send the wrong signal to the consultant about your own professionalism and desire to get the job done on time.
- Keep an 'open door' to ensure that communication is always possible.

In other words, treat a consultant as you would a member of staff who is a self-starter, professionally competent and highly motivated. Good consultants also seek regular feedback from clients to ensure that there are 'no surprises' at the end of the project. Their desire for repeat business from you makes them receptive to suggestions, but positively expressed feedback is always the most effective.

Subcontractors employed by consultants should be managed directly by them, not by you. The consultant should also be held fully responsible for the quality of their subcontractors' outputs. In the case of complex projects, it may be worth contracting another consultant separately to act as project manager. Where there is any variation in the scope of the work, it is in both parties' interests to exchange a written record of the change, as a formal contract variation.

Terminating a contract can turn the tables

The Amann Aviation case is an example where termination of a contract backfired.

In March 1987, Amann Aviation won the contract to provide coastal surveillance services in northern Australia. Although it did not at the time have the scale of operations or the expertise or equipment to meet the contract, it was to acquire resources before commencement of the contract in September. Its tender had indicated that acquisition of resources was feasible, but, in practice, it was apparent that the company was not in a position to begin operations by the start-up date. The Commonwealth therefore terminated the contract. In a subsequent court case, damages of over \$5m were awarded against the Commonwealth.

(Based on Senate Finance and Public Administration References Committee 1998, p. 13)

Using the Amann case as an example, Seddon (2004, 1.18) highlights the legal risks involved in terminating a contract. Wrongfully terminating a contract is itself a serious breach of a contract 'which then provides the other party with the right to terminate and seek damages'. Seddon points out that:

'In the Amann Aviation case the mistake made by the Commonwealth was to by-pass the show cause procedure that was written into the contract. The Commonwealth proceeded straight to termination without giving the contractor an opportunity to show cause [why the contract should not be terminated for breach of contract by Amann].'

(Seddon 2004, p. 31, footnote 115)

Seddon (2004, p. 12) also draws attention to judicial authority supporting the principle that 'the government is required to adhere to higher standards of conduct than is expected of private sector entities [Government as a "moral exemplar"]'. The principle may be interpreted in particular cases as posing a dilemma for government (Seddon, p. 15) because it must act both in the interests of the beneficiary (the people it represents), as well as the contractor (a citizen, or a business that could be destroyed if the full force of a contractual remedy were exercised).

Australian Government requirements

There are no specific Australian Government requirements for managing consultants. Managers themselves are expected to manage, to achieve the intent of the contract. However, check your agency's 'Chief Executive's Instructions' and any operational guidelines.

Some Australian Government guidance specific to consultancies is available in publications such as ANAO 2001c, *Contract Management: Better Practice Guide*. The Queensland Government has also issued a *Better Purchasing Guide on Engaging and Managing Consultants* (Queensland Department of Public Works, 2002-03).

Tips and Traps

- The consultant may not be fully informed about your agency or your area's role within it. It is worthwhile allocating a large part of the first meeting to **educating the consultant** about your agency, including the structure, its major objectives, the political landscape, the culture, common abbreviations or acronyms used, and anything else that will assist in enhancing the quality and timeliness of output.
- For larger projects (or even small, complex ones), it is reasonable to expect the consultant to produce a **Project Charter** (Plan) before starting work. Based on discussion with the client, it should include information like the terms of reference for the project, methodologies and a risk analysis for each component of the project, a budget that includes the payments schedule, a schedule of project meetings, timelines and milestones (often in the form of a Gantt Chart), a protocol on 'partnering' behaviour, details of specific client and consultant responsibilities, and any other relevant information about the project. The Charter then becomes the basic reference document for both parties, and should form the basis for managing the project
- Consultants will tend to feel aggrieved if they do additional work, but are then not paid for it. It is therefore important to ensure that a consultant does not undertake more work than is actually required without prior written agreement from the client. The contract itself should contain a clause that precludes the consultant from undertaking additional work without formal agreement. Any changes to the contract should be agreed formally in the form of a **variation to the contract**. A trap for the unwary is an informal discussion or agreement between a client and a consultant which is not treated at the time as a formal variation because of the spirit of cooperation that may exist, or because it does not seem to be important enough. Nevertheless, it always pays to record any agreement that implies a change in scope in the work being undertaken, even if only apparently minor. Such notes (including emails) should be filed as part of the normal Public Service accountability process.

- Where a variation is made to the scope or terms and conditions of a consultancy, care should be taken to ensure that the **change is defensible** against a claim that it did not allow for an appropriate level of competition. Such a claim could be made if the change were to alter the nature or size of the original contract to a significant extent. An alternative supplier could argue that they would have been able to offer a more competitive bid had the original tender requirement included the variation. Where a change is significant, it may be better to let a separate contract for the work involved. If in doubt, seek legal advice.
- The term ‘**sign off**’ to a consultant means final acceptance by the client of an output, in satisfaction of the contract. Once a stage of the project has been ‘signed off’, the consultant is entitled to expect that no further work needs to be done on it unless an extension to the contract is agreed.
- For large or complex projects, it is important to keep an **issues log** to record major issues that arise. The task of keeping a log can be allocated to the consultant, by agreement. The log should form the basis of discussion during project meetings, and can be used for accountability purposes or to resolve disputes. Issues can be divided into ‘open’ (current) issues and ‘closed’ (resolved) issues. As open issues are resolved, they are moved (cut and pasted in electronic form) to the ‘closed’ table to maintain a historical record. The following is an example.

Exhibit 7.1 — Sample issues log A

No.	DATE	OPEN ISSUE	RESOLUTION	DATE
21	12 Jul	Budgetary implications of recommendations need to be assessed before Additional Estimates	13 Jul meeting: keep under review	
28	14 Jul	Consultant requested to attend special meeting with another agency	20 Aug: difficulties in arranging meeting due to interagency policy differences	
51	15 Oct	Agency asked consultant to confirm specifically that project is on track, and that no extra work was being done that would lead to a claim for additional fees.	15 Oct: on track 23 Dec: reconfirmed	

Exhibit 7.2 — Sample ‘issues log’ B

No.	DATE	CLOSED ISSUE	RESOLUTION	DATE
1	15 Jan	Consultant requires clarification of process for claiming expenses	15 Jan: agreed that tax invoices to be submitted to Mr Smith	15 Jan
2	23 Jan	Consultant raised problems regarding data base	23 Jan: agreed that Ms Jones will check data 25 Feb: IT section requested to provide software to enable transfer of revised data to consultant 26 Feb: consultant confirms receipt of data	26 Feb
3	12 Feb	etc	etc	

- Bids and contracts normally specify the personnel to be engaged on a project. But consultants may leave a firm, or they may be engaged on another job by the time the project begins. Should you insist that only the originally **nominated personnel** be used? If you entered into the agreement because you knew the personnel nominated and wanted their particular skills, the answer is probably 'yes', if that is feasible. Where this factor is important, seek a contractual guarantee (perhaps combined with monetary penalties for non-performance) at the time of selection of the consultant.
- Project managers are pivotal to the success of any consultancy. They need to be across all of the key issues, understand the broader political context in which the client operates, possess business skills, and have good people skills. Some large firms have on occasion, however, used **inexperienced personnel** (with little or no supervision) in the role of project manager, because of shortages of experienced staff. However, it is not the client's role to provide a training ground for project managers. If you are concerned about the skills possessed by the project manager, raise the issue as soon as possible with the Partner responsible for the job.
- Consultants measure jobs in terms of '**(consulting) days**': the number of days (7.5 hours per day) required to finish the work. Six days means six days of a consultant's time. It does not mean six days from the time of agreement to proceed with the work (elapsed time). Often there is considerable down time during a job while a consultant waits for information to come in: for example, survey returns, or client-furnished data. Further, most consultants need to be engaged on several projects at the same time to earn sufficient income, unless the projects are large. Agencies that make best use of consultants are usually those that understand that consultants rarely work on a single issue. Consultants should certainly be expected to be responsive to your needs, but don't expect them to be dedicated solely to your project unless you have a prior agreement to this effect.
- A **Steering Committee** is sometimes used to oversee the work of the consultant. The establishment of a Steering Committee may be desirable where several stakeholders wish to be closely involved in the project. However, individual members of such committees can, on occasion, become caught up with unnecessary detail, or may insist on directing the consultant to pursue cherished but possibly irrelevant lines of inquiry. Consultants are often exasperated by Steering Committees whose members do not bother reading (let alone commenting on) drafts or documentation supplied during the project. At other times, Steering Committees may spend their time going through drafts page by page, more concerned with grammar and punctuation than with content. There appears to be no easy solution to such problems, but it helps if the Chair of the committee is experienced. The Chair should possess sufficient authority to maintain members' focus on the main

objectives of the consultancy, and should ensure that necessary decisions are taken, and approval ('sign-off') given, as stages of the project are (successfully) completed by the consultant. It also helps if the client and the consultant work together to caucus members of the Steering Committee out of session: committees often feel more comfortable taking decisions if their members are 'familiar' with issues or solutions because they have already been explained to them beforehand. Meetings of the client, the consultant and the Chair of the Committee immediately before Steering Committee meetings can be very useful in discussing tactics and in briefing the Chair on the key issues.

- Insistence on adherence to Public Service **hierarchies** can be counterproductive. One consultant recalls working for a non-Commonwealth government agency whose CEO barred the project manager from attending meetings of the Steering Committee because he was too junior. Because only the senior manager was allowed to attend, it was difficult to keep in touch with a lot of the Committee's thinking, or to develop a cooperative approach to the project.
- Prior agreement to **settle disputes** in a non-adversarial manner is an integral part of a partnering arrangement. Where relationships have broken down badly, however, it may be worth considering mediation or even arbitration. Provision for such eventualities should be made in the contract.
- One Public Service officer encountered a **recalcitrant consultant** who often promised delivery of a draft in the evening, but would normally deliver it only the next day. Faced with a time-critical deadline, the officer informed the consultant that he would wait in the office that night until the report was delivered. While the tactic was successful, it came at a cost to the officer concerned. An alternative approach might be to ensure that the contract contains sufficient flexibility in terms of imposing monetary penalties (or awarding benefits) in order to manage such situations.
- Despite popular belief in some quarters, consultants get little satisfaction from being **engaged unproductively**, whether they are paid or not. One consultant recalls being instructed by his Partner to stop attending the many general meetings called by the client. The Partner agreed that the consultant was adding little value to the project by attending meetings of marginal relevance, despite recovering in fees the time spent doing so. Equally important in the decision was the fact that the consultant was working unreasonable hours because he was unable otherwise to meet deadlines for deliverables due to the time spent in meetings.
- An important benefit of using skilled consultants is that they can act as a sounding board, or provide new ideas. Despite some misconceptions among Public Servants, there is nothing wrong with **testing ideas** — even differing viewpoints within the agency - with a consultant. But it is important to first

have consensus and clarity of purpose about the final output that is to be achieved by the consultant.

- In the absence of an obvious methodology, or where information is scarce, a first response in the Public Service is often to **conduct a survey** . But surveys are not always necessary, or even the best means of obtaining data. (Sometimes an enthusiastic consultant or client will wish to collect information out of interest, rather than out of necessity.) Before agreeing to incur the costs of a survey (including the time taken), insist on the consultant specifying exactly the issues or hypotheses which are to be tested, the specific statistical tests which will be used to determine confidence in the results, how each of the intended questions to be asked will be used to test a hypothesis, and why existing information cannot be used. Even if a survey is found to be necessary, the process of justifying it will help to sharpen its focus, and avoid inclusion of unnecessary questions. Further, Australian Government agencies proposing to conduct a survey of 50 or more businesses need to seek clearance through the Australian Bureau of Statistics Statistical Clearing House: www.sch.abs.gov.au.
- For good reason, Government agencies sometimes seek to achieve a transfer of knowledge from the consultant to themselves by including their own staff on the project team to work alongside the consultant. Unless such **nominated staff** are actually made available (and have the right skills), however, there is a high risk that the project will be delayed. Further, the consultant may have bid for the job on the basis that the client would contribute a certain amount of staff resources. If these resources are not made available, or are not suitable for the task, consultants may seek a variation to the contract to reflect the fact that they need to commit more of their own resources.
- At least one agency has encountered potential problems with consultants and contractors being employed over **extended periods of time** . In one case, all of the original staff working in the area had left over time, so the consultant effectively became the only repository of corporate knowledge. In other cases, consultants have been provided with necessary training (at agency cost) as projects have progressed, in order to upgrade their skills to requisite standards. Such situations may reflect short-term needs or expediency, but they also raise questions about the employment of consultants rather than use of permanent staff. There is also the risk of the consultant effectively becoming an employee, so that the agency is liable legally for superannuation contributions and income tax payments.
- Consultants' **invoices** are usually presented after delivery of 'milestone' outputs, or at the end of the month in the case of reimbursable expenses. Let the consultant know how you want invoices prepared: detailed accounts show more clearly what you are paying for. Good consultants will automatically provide a fair degree of information as a means of engendering

trust. But unless you have a need for specific detail, don't ask for too much. The purpose is to satisfy accountability requirements. An invoice broken down into broad headings such as project meetings, report preparation, project management, air fares, taxi fares, etc., can generally provide sufficient information.

- There is always the danger that a **risk management** plan, once produced, will be filed away and forgotten due to a misplaced feeling of having accomplished the 'task' merely by considering the issue. This danger can be ameliorated by ensuring that project management meetings include as a regular agenda item the review, and any updating, of the plan. The risk management plan itself should document the specific person responsible for implementing each of the mitigation strategies, what resources are to be utilised, the timetable for implementation, and the review mechanism. Inclusion of the risk management plan in the Project Charter (see above) is a useful way of keeping it in mind.
- Most Public Service guides to using consultants stress the need for **ethical behaviour**. Given the fairly general nature of this advice, it may not always be treated with the sense of immediacy that it deserves. A more pragmatic perspective is to ensure that all action taken during the course of a project is consistent with the Public Service values defined in the Public Service Act 1999. Note that section 6.25 of the CPGs requires that 'procurement of services ought to be conducted in a way that imposes as far as practicable the same level of accountability and responsibility on a service provider as would exist if the agency carried out the services itself'.

Table 6 — Contract and Project Management: Risks and Mitigation

Type of risk	Likely consequence	Mitigation strategy
Consultant begins work before the contract is issued	<ul style="list-style-type: none"> • Claims for unauthorised work • Possible legal action by consultant for perceived breach of contract 	<ul style="list-style-type: none"> • Avoid providing any encouragement to the consultant to start work before contract execution • Seek legal advice if problems are expected • Where time is short, consider a separate formal contract covering preliminary work
Unauthorised increase in scope of work	<ul style="list-style-type: none"> • Unanticipated increase in cost • Contract disputes • Possible legal action 	<ul style="list-style-type: none"> • Maintain an issues log • Insist on regular, documented meetings and/or progress reports • Issue formal contract amendments for all agreed variations to the contract
Inadequate contract administration	<ul style="list-style-type: none"> • Cost increases • Failure of the project • Contract disputes • Possible legal action • Loss of intellectual property 	<ul style="list-style-type: none"> • Maintain an issues log • Use trained staff • For large or complex projects, consider mediation, or use another consultant to manage the project • Track and report intellectual property outcomes
Failure to fulfil contract conditions, including delivery on time	<ul style="list-style-type: none"> • Contract disputes • Possible legal action • Client's needs not met 	<ul style="list-style-type: none"> • Maintain an issues log • Foster cooperative and open working relationship • Insist on regular, documented meetings and/or progress reports • Issue formal contract amendments for all agreed variations to work • Maintain strict control over payments according to observable milestones • Where quantifiable loss occurs, seek liquidated damages
Client fails to take decisions, or to provide nominated staff	<ul style="list-style-type: none"> • Project delay • Possible budget overrun • Possible variation to contract, or legal action 	<ul style="list-style-type: none"> • Ensure that decisions are taken quickly, including 'sign-off' on delivery of outputs • Appoint Chair of Steering Committee with authority and experience • Ensure that staff nominated to work alongside the consultant are available and possess relevant skills.

8. Closure

Some basics

It is likely that payments will have been made against observable milestones during the course of the project. Finalisation of the project will thus generally involve only the completion of the final milestone(s).

Once a client has 'signed off' on a project (or milestone), the consultant is entitled to consider the job (or part thereof) to be complete. It is therefore important that final acceptance ('signing off') does not occur without prior reconciliation of all outputs against those specified in the contract. The reconciliation should obviously take place early enough for remedial action or additional work to be undertaken if necessary.

The main factors to check during a reconciliation include:

- Have all deliverables specified in the contract been provided?
- Is the quality of the deliverables satisfactory?
- Is there a need to take into account any new circumstances to ensure that the deliverables are current and relevant?
- Were all outputs delivered on time, or as part of an agreed variation?
- Have all expenses incurred by the consultant been authorised and approved for payment?
- Overall, have the objectives of the project been met by the deliverables?

Where a cooperative relationship has been maintained with the consultant, and variations to the contract have been documented throughout, there should be little difficulty in agreeing on the final deliverables.

Should difficulties nevertheless arise, consult your agency's legal adviser immediately.

Australian Government requirements

Considerable time can elapse between completion of a consultancy and the need to discharge the reporting obligations outlined in Chapter 7 of the CPGs. It is often easier to complete these reporting requirements as part of closing off the file, while details are still fresh in one's mind. When needed later, the reports can be found more easily on the relevant file.

Clause 7.11 of the CPGs also requires the retention for three years or longer of the documentation relating to a procurement.

Tips and Traps

- One agency let a consultancy with very short timeframes. Material was to be prepared in stages for a manual, prior to printing and presentation of a training course. Asked by the consultant to '**sign off**' on the chapters of the manual as they were completed, the agency's contact officer did so, but subsequently requested substantial revisions after the manual had been sent to the printer. Because of the short timeframes involved, course participants did not gain access to the manual. The agency's own required training outcome was thus compromised, and the consultant was made to look less than competent. Apart from the contract management aspects of this case, it is important to recognise that '**sign off**' to a consultant means final acceptance of the product in satisfaction of the contract.
- Sometimes, consultants request a '**sign-off** meeting'. Their expectation is that, unless any major issues are raised, the meeting itself constitutes sign-off by the client. Make it clear that you reserve your position until all documentation, including any reports, have been properly considered and finalised.

Risk management

The main risk at the end of a project is that a final output will be delivered by the consultant, and payment made, without a proper check that the deliverables specified in the contract have all been provided. An obvious mitigation strategy is therefore to conduct a thorough reconciliation of output received from the consultant against the outputs specified in the contract.

The reconciliation should take place with sufficient time to spare for additional work by the consultant, if required. And don't forget to include any contract variations in the reconciliation process.

9. Evaluation

Some basics

Even if a project has been completed successfully, it is still possible to gain some additional useful knowledge. Good consultants will be prepared to assist in this process, and some also provide evaluation forms to clients (or conduct interviews) in order to gain feedback on their own staff.

Busy managers are unlikely to be able to afford the time to engage in an extensive review process. However, even a *brief* review can:

- provide an opportunity to discuss with the consultant his or her view on how the results can best be used — an external perspective from someone who, at the end of the project, has a good grasp of the subject matter, can be invaluable;
- provide a learning experience for all staff;
- improve your own contract management skills; and,
- identify further value to be gained (for example, in making available to the public or the Minister any useful data collected).

The review should focus on major issues, not the nitty-gritty:

- Could project objectives have been better defined?
- Was there enough (or too much) management of the consultant?
- How could the consultant have performed better?
- Have enough skills been transferred to your staff?
- Which risks were not identified properly before the project started?
- How useful are the results compared to the original objectives?
- How could the agency have performed better?

Australian Government requirements

There are no specific guidelines or requirements for evaluating a consultancy. However, accountability and good practice imply that an evaluation be carried out and documented as a matter of course. An evaluation is also an integral part of overall project or program management along the lines of the Performance Improvement Cycle (DOFA, 1998), although this document is no longer available on the Finance website.

Tips and Traps

- An evaluation should cover more than just the management and output from the consultancy itself. To be useful, it should also include the process of initiating the consultancy (including the justification) and the subsequent

use of outputs for policy formulation, organisational change, or other purpose. In essence, the evaluation should **test whether the initial objectives have been satisfied** and identify lessons learned. It should not be used as an excuse to lay blame for problems encountered on the way.

- Additional value can be extracted from a consultancy if the consultant provides a general debriefing on the project. Consultants often pick up **additional information** that is of use to the client but is not included in a report because it is not directly relevant. Similarly, consultants can brief clients on any avenues investigated that were 'dead ends': such information may not appear in a report, but helps provide a more complete picture of the issues investigated.
- Where consultants are hired regularly, a file containing '**lessons learned**' is often useful, particularly if it includes basic details such as the nature of the project and the agency involved. New staff, or those with less experience in letting contracts can skim the file to gain an impression of pitfalls to avoid, and useful practices to emulate.
- To a certain extent, successful use of consultants requires practical experience. It is therefore a good idea to invite **all of your staff**, not just those who were involved directly, to sit in on evaluations. The knowledge gained will be at least as valuable as anything that can be gleaned from publications, and will contribute to improved use of consultants in the future.
- Evaluations can also be carried out **before the finalisation of a project**. In large projects, it may even pay to seek external evaluation of tender documentation before its release, particularly where subject matter expertise is important.
- It may not be realistic to expect busy Public Service managers to carry out an evaluation of every project. However, agencies seeking to improve their general level of performance in letting consultancies could select a number of projects each year for use as **case studies** in a 'no-blame' atmosphere to allow all staff to learn from them. It would be important, however, to ensure that agency performance (for example, turnaround time for selecting a consultant) were assessed, as well as the performance of the consultant. An alternative is to link performance assessment directly to the outcomes of a consultancy project.
- Where **useful data or information** has been collected and there is a likelihood that they may be of use to researchers or policy makers elsewhere, it is worth reviewing the costs and benefits of making them accessible. Dissemination to academics and State or local governments, reference to its availability in your agency's annual report, or posting on a website, can help make it more generally available. From a national perspective, resources will be saved in future if data or information collection does not need to be duplicated.

Table 7 — Evaluation: Risks and Mitigation

Type of risk	Likely consequence	Mitigation strategy
Consultant resents contract evaluation	<ul style="list-style-type: none"> • Inadequate evaluation • Damage to relationship between client and consultant 	<ul style="list-style-type: none"> • Foster ‘partnering’ relationship with consultant throughout project • Hold regular reviews and evaluations as part of contract management process and progress reports • Make clear from outset (including in tender documentation) that final evaluation is to occur • Include evaluation clause in contract
Failure to identify problems and address them	<ul style="list-style-type: none"> • Missed opportunity to improve future procurement activity 	<ul style="list-style-type: none"> • Develop systematic evaluation methods and techniques • Use clear, relevant evaluation criteria

10. What if things do go wrong?

Some basics

Every project is different. There is no way of predicting the range of things that can go wrong. And things can go wrong at any stage of a project.

Risk can be minimised by implementing risk mitigation measures such as those outlined in each of the chapters above.

However it is important to realise that some of the protective measures that are available can, and should be used:

- Graduated rewards and penalties can be used to advantage where there are early indications of problems developing.
- In some cases, it may be worth approaching a consultant's superiors if performance is below standard.
- In extreme cases, a project can be terminated. Despite the cost, it may be better to simply start again. But seek legal advice first.

Things can go wrong at any stage of a project. Any of the following may (or may not) presage a problem:

- An **exclusive approach** by the consultant, often characterised by the 'just leave it all to us, we'll fix it' attitude. It is often accompanied by an attitude that Public Servants don't really know what they are doing. One symptom noted by an agency that experienced this attitude was persistent late arrival for meetings, a problem that was remedied by protesting to the firm's hierarchy.
- The corollary is a dismissive attitude by Government agencies whose staff treat **consultants with contempt**. Treat consultants as you would your own staff. Good people management practice ultimately generates better results.
- A **breakdown in communication**. Good consultants make a point of regularly (at least once a week, but on a daily basis for some projects) checking with the client that everything is proceeding satisfactorily. Not touching base may be a sign that things are not going too well. Take the initiative to re-establish contact yourself, and find out how things are going.
- The corollary from the consultant's perspective is when the client begins to '**walk away**' from the job. When clients plead too much work to be able to take a direct interest, or suggest that the consultant 'just get on with it yourself', or find some other means of distancing themselves from the project, consultants begin to worry about being able to achieve a successful outcome.

- Excessive '**library research**'. Too much general research may indicate that the consultant does not have sufficient expertise in the area.
- Excessive focus on **producing a report**, rather than dealing with issues or people. This is particularly relevant in choosing consultants to implement programs that involve organisational change. Unless there is a shortage of reports on your bookshelf, look for a consultant who is geared to solving problems rather than just analysing them.
- Use of '**guru language**'. If a consultant suggests 'leveraging off the knowledge base to achieve optimal organisational alignment in a contextual framework', find one who uses plain English.
- Undue focus on the use of software or an analytical package as the primary means of analysing issues or solving problems. An analytical framework is essential in problem solving, but beware the '**package bender**' who only knows one technique and tries to adapt it to every situation. A good check during the selection process is to ask what alternative approaches could be used.
- A too-ready willingness to drop the **bid price** during negotiations may indicate that a consultant has difficulty in finding other work at the bid price. Good, sought-after consulting firms will often refuse to materially alter their bid price without also redefining the scope of the project.
- **Staff nominated by the client** to work alongside the consultant find it difficult to contribute, because of insufficient skills or because of other work priorities. Unless alternative resources are made available to the consultant, delay (or higher cost) is likely.
- The client, or a Steering Committee, focuses on **red herrings**, avoid or postpone taking decisions, or **vacillate** in providing 'sign-off' as the stages of a project are completed.
- **Persistent delays** or regular attempts to redefine the scope of the work. On the other hand, occasional delays, or necessary redefinition of issues may be a good indication of a high quality consultant.
- Once a client or a consultant have started to **refer to the provisions of the contract**, the relationship is probably in serious trouble.

Prevention of problems is invariably preferable to any cures. So it is important to be aware of major warning signals. Because this publication is written from an Australian Public Service perspective, most of the signals presented in the box below assume that the consultant is somehow responsible for the problem. However, consultants may also come to feel aggrieved during the course of a contract. As the use of consultants increases, and the CPGs become more directive, the likelihood of legal action against the Australian Government is also likely to rise.

What if things do go wrong?

Seeking some degree of legal advice at all stages of a project is a useful risk reduction strategy. Advice should also be sought quickly if things do start to go wrong. Management decisions on what to do next are always better if informed by the options available under the contract.

Probably the most effective method of avoiding major problems arising is to insist on formal weekly (at least) meetings with the consultant.

Appendix A: Glossary

Agency: defined in the FMA Act as a Department of State, a Department of the Parliament, or a prescribed Agency.

Annual Purchasing Plan: clause 7.16 of the CPGs states that ‘agencies are to plan their forthcoming annual procurement and must publish on AusTender, by 1 July each year, an Annual Procurement Plan (APP) to draw business’ early attention to potential procurement opportunities ... the APP is to contain a short strategic procurement outlook for the agency supported by details of any planned procurement. The detail should include the subject matter of any planned procurement and the estimated date of the publication of the request for tender’.

Approach to the market: any notice inviting potential suppliers to participate in a procurement including a request for tender, request for expression of interest, or request for application for inclusion on a multi-use list.

AusTender: (www.tenders.gov.au) allows potential suppliers to access Australian Government business opportunities online, download tender documentation and submit tender responses electronically. The CPGs require agencies to publish all open approaches to the market on AusTender. Where other media are also used, the wording must be identical to that in AusTender.

CAC Act: *Commonwealth Authorities and Companies Act 1997*. ‘Relevant CAC Act Bodies’ are listed in CAC Regulation 9.

Commonwealth Procurement Guidelines (CPGs): the CPGs published in January 2005, incorporate the requirements of the free trade arrangements with New Zealand, Singapore, Thailand and the USA, and consequently reflect substantial changes to previous guidelines. Available on www.finance.gov.au, the guidelines are in three parts:

Division 1 — the Procurement Policy Framework, including the core principle of value for money.

Division 2 — mandatory procurement procedures.

Division 3 — other Government policies that affect procurement obligations.

The CPGs apply to all departments and agencies subject to the FMA Act, and to relevant CAC Act bodies that have been directed to comply by the Finance Minister.

Covered procurement: except where exemptions apply (for example, appendix B of CPGs), procurements are considered to be ‘covered’ by the mandatory provisions of the CPGs where the estimated GST inclusive value exceeds \$80,000 (FMA agencies, except for purchase of construction services) and \$400,000 for CAC Act bodies (except for procurement of construction services).

Deliverable: specific output, usually (and preferably) defined in the contract.

Expression of Interest: a response to an open approach to the market that requests submissions from businesses interested in participating in a procurement. The list of potential suppliers who have submitted expressions of interest may be used as the basis for conducting a select tender process.

FMA Act: *Financial Management and Accountability Act 1997*. The Act is supplemented by FMA Regulations (FMAR).

Issues log: a record of issues that arise during the project. (See Chapter 7 above).

Letter of intent: a documentary mechanism for making preliminary commitments in contract negotiations.

Liquidated damages: an agreed pre-estimate of damages for an anticipated breach of contract. Liquidated damages cannot be used as a penalty.

Memorandum of Understanding (MOU): formal agreement between two or more departments of the Australian Government. An enforceable contract is not possible because the departments are part of the same legal entity (the Australian Government), and the Government cannot contract with itself.

Milestone: point specified in contract. Where a milestone represents a point of payment, it is important to ensure that the point is specified in terms of a clearly identifiable and measurable output by the consultant. Some contracts specify milestones as points of formal review of progress on which an extension or continuation of the contract might be based.

Multi-Use List: a list, intended for use in more than one procurement process, of pre-qualified businesses who have satisfied the conditions for participation for inclusion on the list. Multi-use lists are one of the three means of using a select tender process.

Murray Motion: see 'Reporting requirements'.

Nominated personnel: usually those identified in a contract as carrying out the actual work during the project, or as contact officers.

Open book approach: in a partnering arrangement, the risk of disagreement over fees and expenses can be reduced if the consultant permits the client full and open access to information on the consultant's costs throughout the project.

Open tender process: publication on AusTender of a request for tender *and* accepting all submissions received before the deadline for submissions from any potential suppliers who satisfy the conditions for participation.

Panel: Panel arrangements or contracts involve an agency pre-selecting a number of consultants. The selected consultants can be drawn on at any time to provide services at a price agreed when bidding for a place on the panel, without the need to go again to tender. Both the agency and the panel consultants gain from this arrangement because there is no need to go through a tender process each

time that work is required. Because of the cost savings to them, consultants will often quote a lower fee when bidding to be part of a panel arrangement. Under clauses 8.67 and 8.68 of the CPGs, panels can be established under open or select tender processes, and arrangements must contain minimum requirements, including indicative or set prices or rates.

Partnering: a cooperative approach to the employment of consultants. It may involve the use of a 'relationship agreement'.

Period contract: an agreement to provide goods or services on particular terms over a period of time. (See Standing Offer).

Process contract: a statement in the nature of a Request for Tender may itself constitute an offer which, upon acceptance, becomes a binding and enforceable contract (a so-called process contract). In other words, an agency that issues an RFT may be bound to follow the procedures and selection criteria specified in it. The courts may consider that the Process Contract contains an implied term that the agency will conduct its evaluation fairly and in a manner that ensures equal opportunity for all bidders.

Project charter: essentially a plan for managing the project. It should include information like the terms of reference for the project, methodologies and a risk analysis for each component of the project, a budget, a schedule of project meetings, milestones and payments against them, a protocol on 'partnering' behaviour, details of specific client and consultant responsibilities, and any other relevant information about the project. The Charter then becomes the basic reference document for both parties, and should form the basis for managing the contract.

Project management plan: see Project charter.

Relationship agreement: agreement that supplements a contract and is designed to facilitate the development of a cooperative working relationship between parties, rather than the more adversarial approach fostered by some traditional contracts. It is essential that the purpose of a relationship agreement be clearly stated, in order to avoid conflict with existing legal contracts between the parties. Detailed legal advice should always be sought before entering into a relationship agreement.

Reporting requirements for procurements are outlined in chapter 7 of the CPGs.

Request for Tender (RFT): a formal request that may be publicly advertised to obtain offers from potential suppliers of goods and services. An RFT normally contains a Statement of Requirement.

Request for Expression of Interest (REI): see Expression of Interest.

Request for Proposal (RFP): usually sought following evaluation of responses to an REI, as a means of identifying innovative solutions. Parties are asked to provide a preliminary or a full tender proposal.

Request documentation: documentation provided to businesses to enable them to understand and assess the requirements of the procuring agency and to prepare appropriate and responsive submissions. The general term includes documentation for expressions of interest, multi-use lists, open and select tender processes, and direct sourcing.

Select tender process: a procurement procedure in which the procuring agency selects which potential suppliers are invited to submit tenders. For covered procurements, a select tender process may only be conducted in accordance with certain procedures and circumstances set out in mandatory section (Division 2) of the CPGs.

Sign-off: a client's acceptance of an intermediate or final output. Further work requested after formal 'sign-off' should be the subject of a variation or extension to the contract.

Standing offer: (not a contract, but sometimes incorrectly called a 'period contract') is an offer to supply goods or services on certain terms over a period of time. Normally, no obligation exists to purchase a particular quantity of goods or services.

Statement of Requirement (SOR): description of an activity or client needs in terms of outputs and constraints such as timeframes. (See RFT)

Submission: includes any formally submitted response from a potential supplier to an approach to the market. Submissions include tenders, expressions of interest and applications for inclusion on a multi-use list.

Tender specification: document that provides information on the outputs and outcomes required from a consultant, including relevant quality standards.

Value for Money: the core principle underpinning Australian Government procurement (see Chapter 4 of CPGs).

Variation: work additional to the deliverables specified in the original contract, or changes in terms and conditions, should be recorded formally in a variation to the contract, in order to avoid later disputes and to ensure accountability.

Appendix B: Further reading

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