AUSTRALIAN GOVERNMENT SOLICITOR

Commercial Notes

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New Commonwealth Procurement Guidelines

The Minister for Finance and Administration issued revised Commonwealth Procurement Guidelines (CPGs) in September 2001. The CPGs are accompanied by Best Practice Guidance that offers guidance on specific aspects of procurement and a section on Additional Legislation Policies and Resources that sets out legislation and policies that impact on procurement decisions. The publication is available through the Finance CTC website at www.ctc.gov.au. The CPGs apply to the procurement of all property and services. The core principle is value for money which is underpinned by four supporting principles:

- efficiency and effectiveness
- accountability and transparency
- ethics, and
- industry development.

Value for money is not necessarily indicated by lowest price but must be analysed by taking into account all relevant costs and benefits over the whole of the procurement cycle. It should be noted that the new CPGs no longer refer to open and effective competition. Some clients view this as an acknowledgment that CTC processes are not always called for to establish value for money and that consideration may be given to establishing strategic alliances or other non-competitive methods of procurement provided accountability and transparency requirements can be satisfied. This is supported by comments in the Best Practice Guidance. Procurement officials are also reminded of the cost to suppliers in participating in government procurement. Other changes include:

- the inclusion in the CPGs of the ANAO request that contracts include a provision to enable ANAO access to carry out appropriate audits
- agencies are required to publish a list of their contracts exceeding $100,000 in value including whether confidentiality provisions are in the contracts and the reasons for confidentiality
- changes to the consideration of limitation on liability
- a commitment to electronic payment of suppliers
- model industry development criteria to apply to major procurements of $5m or more
- guidance notes for setting model industry development criteria for projects below $5m.

In relation to limitation on liability the CPGs continue to recommend that liability be assessed on the basis of common law principles and so most contracts should not contain a limitation on liability. If it is necessary to negotiate a limitation, a risk assessment and risk management plan should be sought. The CPGs no longer mandate that there be no limitation on liability for personal injury and death, damage to tangible property and liability under an indemnity, however, they continue to recommend that any limitation be applied only on a per event basis.

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Nature of the Legal Relationship under a Grant

The usual construction of the legal relationship under a grant is primarily that of a conditional gift, rather than a contract or trust, but this will depend on the particular circumstances.

It has been said that a grant is, in theory, a gift from the Crown. Subject to the approval of Parliament, it can be made upon conditions. A grant may therefore be a conditional gift and the conditions may be either *precedent* or *subsequent*. If a condition precedent is not fulfilled, then the gift does not take effect and property does not pass to the grantee. If a condition subsequent is not fulfilled, then the grantee loses the gift and property reverts to the grantor, or, in the case of money, a right of action to recover a similar amount arises. It will be a matter for interpretation in each case as to whether a particular condition is in effect a condition precedent or subsequent.

A grant (in the sense of a gift) and a contract are mutually exclusive legal concepts which have different legal consequences. A grant does not involve an agreement between the parties, whereas a contract does. A grant is a payment of money to a grantee upon conditions unilaterally imposed by the grantor. In some cases (that is, unless conditions are statutory obligations and enforceable as such) the Commonwealth is left with limited rights to enforce the conditions of a grant, which could have been fully enforced if they were conditions under a contract (for example, by specific performance of the contract).

Accordingly, the only cases in which funding by way of grants should be used for projects are cases where such funding is provided to a grantee under conditions imposed by legislation, or in cases where the Commonwealth will only want to recover all or part of the grant money if the grantee does not comply with the conditions on which the grant is given. (For example, a grant to an orchestra to provide a number of performances on the condition that the orchestra repays some or all of the grant money if it does not provide the agreed number of performances.)

Funding of projects by way of grants in cases where the conditions of the grant cannot be enforced under legislation and where the agency wishes to enforce a number of conditions, such as repayment of grant money with interest or provision of reports and audited statements relating to expenditure of grant money, puts the agency in an unsatisfactory position in that the conditions may be unenforceable by remedies, such as specific performance, even if the grant document is in the form of a deed.

In all other cases funding should be provided by way of contract, so that all the obligations imposed on the person receiving the funding can be enforced, including, for example, performance standards. The contract should not be called a 'grant contract' nor 'grant agreement', should not include any reference to a 'grant' or a 'grantee' and should include all the normal provisions of a contract, such as termination and applicable law provisions. This is the nature of the standard 'funding' deed used in most agencies now, as the intention is that all the obligations in the document be enforceable.

AGS is currently working with a number of agencies in the Standardising Information and Online Access Consortium (part of the More Accessible Government initiative) to develop a standard form of funding deed and accompanying guidelines. This work is also assisting the Australian National Audit Office to revise its best practice guide on grants.

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Relationship and Alliance Contracting by Government

Alliance contracts are a recent form of relationship contracting. It is sometimes argued that alliance contracting is inconsistent with the obligations of government. This note examines some of those arguments.

Problem Areas

Possible areas where problems could arise are:

- evaluation of alliancing capacity/compatibility
- no fixed price before selection
- participation of principal in alliance board/ alliance teams/Integrated Process Teams (IPTs).

Each of these is a significant topic in itself and we have space here only to raise them as issues and to consider them very briefly.

Evaluation

Since the changes to the Audit Act and Regulations in 1989, Commonwealth agencies have been free to pursue in their procurement 'value for money' by the most effective means. Accordingly, considerations such as quality, fitness for purpose and capacity to deliver can be considered as well as price. Even so, the focus has generally been very much on the item (or service) to be delivered.

Now, with the advent of alliancing, one of the criteria for selection is a bidder's ability to operate successfully within an alliance relationship. If it is considered that the project demands an alliancing process, then it is reasonable that the bidder's ability to deliver through that process should be the subject of assessment. However, besides making it clear that this ability is a selection criterion, the method of making the assessment must be reasonable and conducted fairly.

Alliance workshops are a usual part of the assessment process and, as these will involve more interaction than normal between principals and bidders, particular care must be taken to ensure fairness. To ensure equality of opportunity and consistency of assessments, considerable preparation is required, including rehearsal, planning of the positions to be taken and training of participants. It is inadvisable to include actual output from the workshops in the evaluation as it will be difficult to distinguish the bidder's input from that of the principal.

No Fixed Price

One of the fundamental elements of an alliance project is that contractor participants will be paid on a cost plus basis. Although their fee will be at risk if key performance indicators (including coming in at or below the target costs) are not met, it is true to say that costs are in fact not fixed. There will therefore be no definite price fixed when the preferred tenderer is chosen. Although this has been criticised, in our opinion it is not necessarily contrary to the requirement to seek best value for money.

The Commonwealth Procurement Guidelines (September 2001) set the test of value for money as whether 'the best possible outcome has been achieved taking into account all relevant costs and benefits over the whole of the procurement cycle.' The justification for using a cost plus payment method must be tested exhaustively against this, including an assessment of the real advantage a so called 'fixed price' would have in the context of the variations to price likely to be necessary during the particular project if a fixed price were used.

Alliance Board, Alliance Teams and IPTs

The principal normally will be involved with other alliance participants on the Alliance Board, the Alliance Management Team and Integrated Process Teams (IPTs). A number of important issues arise from this involvement. First, it will be necessary to ensure that each representative has the necessary (actual) authority from their respective organisations to do what is required of them. It will also be necessary to state clearly what the limits of that

authority are, and to make sure that any financial functions allocated to a contractor comply with the requirements of the *Financial Management and Accountability Act 1997*.

Secondly, there is a risk that the close cooperative relationships on the board and those teams could be regarded as giving rise to a 'fiduciary relationship'. This would introduce considerable problems for government representatives as it would raise questions about whether they could use their position or knowledge to the disadvantage of another alliance participant. That is, there could be a conflict between their obligations as representatives (employees) of the Commonwealth and their personal obligations as members of the board or team. While in principle, a fiduciary relationship could be expressly excluded, there is still the danger that a court would see such a relationship as arising in the particular circumstances or from actions of the parties.

Thirdly, IPTs are increasingly widely used in relationship contracts (that is, not only in those considered to be 'alliance projects'). The difficulty here is in establishing precisely where the dividing line between the responsibilities of the principal and contractors lies. The involvement of a principal's representative in the work of an IPT could well result in the principal being unable (that is, 'estopped') from holding the contractor responsible for the consequences of a joint decision. Even in projects governed by traditional contracts, where there is little involvement of the principal in detailed management of the project, it has often been difficult to establish who was properly responsible for defects, because of some action by the principal. Where the principal is involved in everyday decision making through being represented on IPTs, that difficulty will be magnified. At the very least, it will be important to spell out carefully what the respective responsibilities are and to keep a careful record of the deliberations of IPTs. (There will of course be less need to identify clearly who decided what where the contractor is largely relieved of direct liability for breach of contract, as is the case in many alliance contracts.)

In a typical alliance contract, both parties are taking on unusual liabilities – the principal, for cost overruns and lack of precise specifications and the contractors in respect of their profit (and corporate overhead) being at risk, as well as sharing management of the contract with the principal.

Alliancing is neither suitable nor necessary for many projects and involves considerable expense for the principal both in the selection process and ongoing. These matters merit careful consideration before a decision is made to proceed with alliancing.

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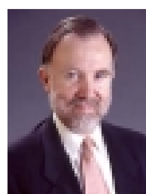

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