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Performance Audit

2022–23 Aids to Navigation Maintenance Procurement

Australian Maritime Safety Authority

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Canberra ACT

3 June 2024

Dear President
Dear Mr Speaker

In accordance with the authority contained in the *Auditor-General Act 1997*, I have undertaken an independent performance audit in the Australian Maritime Safety Authority. The report is titled *2022–23 Aids to Navigation Maintenance Procurement*. I present the report of this audit to the Parliament.

Following its presentation and receipt, the report will be placed on the Australian National Audit Office's website — <http://www.anao.gov.au>.

Yours sincerely

A handwritten signature in black ink, reading 'Rona Mellor'.

Rona Mellor PSM
Acting Auditor-General

The Honourable the President of the Senate
The Honourable the Speaker of the House of Representatives
Parliament House
Canberra ACT

AUDITING FOR AUSTRALIA

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Audit snapshot

Auditor-General Report No.34 2023–24

2022–23 Aids to Navigation Maintenance Procurement



Why did we do this audit?

- ▶ Aids to Navigation (AtoN) are navigational tools which support coastal navigation safety. Types of AtoN include: traditional lighthouses, beacons and buoys. Since 2001, the Australian Maritime Safety Authority (AMSA) has contracted for the maintenance of the network of AtoN.
- ▶ The audit was undertaken in response to a request from the Minister for Infrastructure, Transport, Regional Development and Local Government.



Key facts

- ▶ A procurement through a Request for Tender was undertaken between August 2022 and July 2023.
- ▶ One tender for AtoN maintenance was received, from the incumbent contractor. Tender evaluation concluded that a value for money outcome had not been achieved and AMSA decided not to enter into a contract.
- ▶ In August 2023, the unsuccessful tenderer made a procurement complaint to AMSA. AMSA's investigation concluded that the alleged breaches of the Commonwealth Procurement Rules had not occurred.



What did we find?

- ▶ AMSA's management of the procurement was largely effective.
- ▶ AMSA took largely appropriate steps to encourage open and effective competition.
- ▶ Tender evaluation was planned and undertaken consistently with the approach to market and the Commonwealth Procurement Rules. On the basis of the evaluation results, it was appropriate that AMSA not award a contract. AMSA has not provided clear and accurate reasons for why it did not award a contract.
- ▶ Important elements of a framework for conducting the procurement ethically were in place including a probity plan and the engagement of a probity advisor. There were some shortcomings with implementation of the framework.



What did we recommend?

- ▶ There were four recommendations related to: improving procurement processes; ensuring communication aligns with tender evaluation results; and better planning for and managing of probity risk.
- ▶ AMSA agreed to all 4 recommendations.

485

number of Australian Government AtoN.

1

compliant tender.

\$225m

contracted cost of AtoN maintenance between 2006 and 2024.

Summary and recommendations

Background

1. The Australian Maritime Safety Authority (AMSA) is responsible for providing the Australian Government's network of marine Aids to Navigation (AtoN) to the commercial shipping industry that meets international standards. Since 2001, AMSA's AtoN maintenance program has been implemented continuously through one external contractor, with the current contract due to end on 30 June 2024.
2. Between August 2022 and July 2023 AMSA undertook an open procurement process for the provision of AtoN maintenance services. One tender was received, which was from the incumbent contractor. After completing a full evaluation of the tender that was received, including a value for money assessment, a contract for the maintenance of the AtoN was not awarded.

Rationale for undertaking the audit

3. This performance audit of the AtoN maintenance procurement was undertaken in response to a request from the Minister for Infrastructure, Transport, Regional Development and Local Government (the minister).¹ The request from the minister referenced concerns about the conduct of the procurement from the unsuccessful tenderer. This performance audit provides assurance to Parliament on the effectiveness of AMSA's management of the 2022–23 AtoN maintenance procurement.

Audit objective and criteria

4. The audit objective was to assess the effectiveness of AMSA's management of the 2022–23 AtoN maintenance procurement.
5. To form a conclusion against the objective, the following high-level criteria were adopted.
 - Did AMSA take appropriate steps to encourage open and effective competition?
 - Was the tender evaluation planned and undertaken consistently with the Request for Tender?
 - In its management of the procurement process and when dealing with complaints from the unsuccessful tenderer, did AMSA act ethically and has it been accountable and transparent?

Conclusion

6. AMSA's management of the 2022–23 AtoN maintenance procurement was largely effective. Achieving value for money is the core rule of the Commonwealth Procurement Rules (CPRs) and the result of the open tender conducted by AMSA identified that the tender received for AtoN maintenance services did not demonstrably represent value for money. Accordingly, and

¹ Australian National Audit Office *Assurance review of the AMSA AtoN procurement*, [Internet] ANAO, Australia 2024, available from <https://www.anao.gov.au/work/request/assurance-review-the-australian-maritime-safety-authoritys-amsa-aids-to-navigation-aton-procurement> [accessed 2 May 2024].

consistent with the CPRs, it was not in the public interest for AMSA to award a contract for AtoN maintenance services. In its debriefing of the unsuccessful tenderer for the AtoN maintenance services contract, and its public statements about the tender outcome, AMSA did not clearly communicate the reasons for not awarding the AtoN contract.

7. AMSA took appropriate steps to design and conduct the procurement in a way that would deliver open and effective competition. This included taking on board information obtained through a market sounding exercise. The tender closing date was also extended twice, at the request of potential tenderers. Some additional steps could have been taken in pursuit of the goal of open and effective competition, in recognition that there was an incumbent contractor, as follows:

- disclosing the weighting of the evaluation criteria, as this would have communicated to potential tenderers that their capability and capacity was more important than whether they had experience in providing the services being tendered. Identifying the weightings would also have allowed AMSA to meet the requirement under the CPRs that request documentation disclose the relative importance of the criteria; and
- clearly communicating to potential tenderers that the draft AtoN contract included with the Request for Tender (RFT) involved changes from the existing contract. This would not detract from tenderer's responsibility to inform themselves about the services they were tendering to provide.

8. In response to the RFT, AMSA received one tender (from the incumbent contractor) for the AtoN contract. An absence of competition makes it more difficult for the procuring entity to be satisfied that that it has obtained value for money.

9. AMSA's evaluation of the tender received for AtoN maintenance was planned and undertaken consistent with the RFT. The tender that was received was assessed as compliant. It was scored at 65.3 per cent against the four evaluation criteria included in the RFT, with AMSA identifying the scores as 'marginal' in a number of areas. As required by the CPRs and the RFT, tender evaluation was completed by AMSA undertaking a value for money assessment. That assessment concluded that a value for money outcome had not been achieved. On the basis of the evaluation results, AMSA's conclusion that it was not in the public interest to award a contract was appropriate and complied with the CPRs. AMSA has not provided clear and accurate reasons for why it did not award a contract in its debrief of the unsuccessful tenderer or publicly.²

10. Important elements of a framework for conducting the procurement ethically were in place including a probity plan and the engagement of a probity advisor. There was no probity plan in place for the industry engagement activities that informed the design of the RFT. There were also a number of shortcomings in the implementation of the probity framework for the RFT, including insufficient risk management and a lack of evidence that all procurement personnel received probity briefings and completion of conflict of interest declarations. AMSA's investigation of the procurement complaint made by the unsuccessful tenderer under the

2 Parliament of Australia, *Rural and Regional Affairs and Transport Legislation Committee - 25/03/2024 – Estimates*, [Internet] Parliament of Australia, Australia 2024, available from https://www.aph.gov.au/Parliamentary_Business/Hansard/Hansard_Display?bid=committees/estimate/27848/&sid=0000 [accessed 30 April 2024].

Government Procurement (Judicial Review) Act 2018 was timely and scoped appropriately. There were errors in the investigation report although those errors did not affect the findings that the alleged breaches of the CPRs had not occurred.

Supporting findings

The approach to market

11. Prior to, and separate from the RFT, AMSA conducted a market sounding exercise. This was conducted by AMSA issuing an open Request for Information (RFI). The 14 submissions received by AMSA:

- provided information about the likely level of market interest in the AtoN maintenance and level 1 Emergency Towage Capability (ETC) services contracts. There was no market interest in the AtoN contract separate to the ETC contract, seven respondents indicated interest in both contracts and seven respondents were interested solely in the ETC contract; and
- provided information that AMSA used to confirm the design of the contracts included in the subsequent approach to the market. AMSA decided to offer separate contracts for AtoN maintenance and ETC, as well as the opportunity to lodge a tender for both, and lengthened the proposed duration of the contracts (to ten years, with extension options for up to a further five years). (See paragraphs 2.1 to 2.9)

12. With the objective of having competition for the contracts, the procurement was conducted by way of an open RFT with the tender closing date extended twice. In addition to designing the RFT in a way intended to encourage competition, AMSA extended the tender closing date twice at the request of potential tenderers. To encourage competition, there would have been benefits in AMSA informing potential tenderers of the criteria weightings and also highlighting that some changes were proposed to the contract for AtoN maintenance compared with the existing contract.

13. The RFT did not result in competing tenders being received for the AtoN maintenance contract. Most of the respondents to the RFI did not proceed to lodge a tender. Seven RFI respondents indicated they were likely to tender for both contracts with six of those not proceeding to tender for both contracts (although one of those six did tender for the ETC contract). No RFI respondents indicated they were likely to tender for the AtoN contract alone. One tender for the AtoN contract was received, from the incumbent contractor. The incumbent contractor also tendered for the ETC contract. This was the only respondent that tendered to provide both services. (See paragraphs 2.10 to 2.22)

Tender evaluation

14. AMSA implemented appropriate arrangements to govern the evaluation of tenders. (See paragraphs 3.1 to 3.10)

15. An evaluation plan was documented and approved prior to tenders closing. The evaluation plan was consistent with the RFT, with the exception of including criteria weightings that had not been disclosed in the RFT. (See paragraphs 3.11 to 3.13)

16. The tender received for AtoN maintenance services was evaluated in the manner required by the RFT. At the conclusion of tender evaluation, AMSA was unable to conclude that the tender offered value for money. This conclusion drew upon evaluation results against the four weighted criteria, as well as analysis of the price tendered. AMSA also took into account the nature and extent of contractual non-compliance identified, and the related risks, in identifying that tender clarification would, in effect, amount to bid repair. (See paragraphs 3.14 to 3.32)

17. AMSA has not clearly communicated the reasons for not awarding the AtoN contract. The result of the tender evaluation was that the tender received for the AtoN maintenance services had been assessed to not represent value for money. Statements by AMSA that a value for money assessment was not completed, or that the tendered price for AtoN maintenance services was not evaluated, are inconsistent with AMSA's tender evaluation records:

- A Value for Money Assessment Report was prepared, and signed in June 2023 by each member of the two Procurement Evaluation Committees. It applied the methodology set out in the RFT to assess the value for money offered by the tenders received for the two contracts. This included comparing tendered prices to the pre-tender estimate, other ETC tenders (where there was competition) and to the cost of the existing AtoN maintenance contract (where there was no competition).
- The final Tender Evaluation Report, signed in June 2023 by each member of the Consolidation Evaluation Panel, recorded the Panel's assessment of whether the tender received for AtoN maintenance services, as well as the tenders received for ETC services, represented value for money.

18. The value for money assessment, documented in these two evaluation reports, was relied upon by AMSA to support it awarding a contract for ETC services to the tender assessed as offering the best value for money. The same documents set out the evaluation conclusion that the one tender received for the AtoN maintenance services did not represent a value for money outcome and a contract should not be awarded.

19. If AMSA had not completed a value for money assessment, as AMSA has stated was the case, it would have been inconsistent with the RFT, as well as a breach of the CPRs. (See paragraphs 3.33 to 3.38)

Ethics, accountability and transparency

20. A probity plan was not in place to govern the industry engagement activities that informed the design of the procurement process. A probity plan was in place for the RFT process, and an external probity advisor was engaged. AMSA did not specifically assess probity risk and did not fully adhere to the probity plan requirements for procurement personnel to receive probity briefings and make conflict of interest declarations. The probity advisor provided an interim report at the completion of tender evaluation, and a final report following completion of the procurement process. (See paragraphs 4.1 to 4.26)

21. AMSA engaged a probity advisor for the RFT process and an internal audit of the procurement was undertaken. The commissioning of the internal audit did not follow AMSA's internal processes and AMSA's Board Audit and Risk Committee was not informed of the limitations regarding the assurance level of the work that was undertaken. The format of the report, a brief email, was not fit for its purpose. (See paragraphs 4.27 to 4.37)

22. There have been three complaints by the unsuccessful tenderer in relation to the AtoN tender.

- An August 2023 complaint under the *Government Procurement (Judicial Review) Act 2018* alleging breaches of the CPRs was handled appropriately by AMSA. The investigation was appropriately scoped and completed in a timely fashion. There were two errors of fact³ in the investigation report. Those errors did not affect the investigation's conclusion that the alleged contraventions of the CPRs had not occurred.
- In November 2023 the unsuccessful tenderer alleged that the Chair of the AMSA Board had a conflict of interest. AMSA advised the Department of Infrastructure, Transport, Regional Development, Communications and the Arts that the results of the evaluation process, and the decision that a contract should not be awarded, was not influenced by the Chair or any other member of the Board.
- Also in November 2023, the unsuccessful tenderer made allegations about the conduct of the chair of the Consolidation Evaluation Panel. Once it became aware of those allegations in January 2024, AMSA took timely and appropriate action to investigate, finding that there was no evidence to support the allegations. (See paragraphs 4.38 to 4.69)

Recommendations

Recommendation no. 1 The Australian Maritime Safety Authority strengthen its procurement controls and better inform the market by setting out in its request documentation the relative importance of the evaluation criteria that will be applied.

Paragraph 2.19

Australian Maritime Safety Authority response: *Agreed.*

Recommendation no. 2 When re-tendering contracts, the Australian Maritime Safety Authority consider the benefits to encouraging competition by identifying any major changes proposed to the contractual arrangements in the request documentation.

Paragraph 2.22

Australian Maritime Safety Authority response: *Agreed.*

Recommendation no. 3 When debriefing tenderers and in any public statements on the results of procurement processes, the Australian Maritime Safety Authority promote transparency by ensuring the reasons it provides are consistent with the tender evaluation reports.

Paragraph 3.37

Australian Maritime Safety Authority response: *Agreed.*

3 The investigation report did not reflect that tender evaluation had assessed the:

- value for money offered by tenderer and concluded that value for money had not been demonstrated; or
- tenderer's performance history, drawing on the referees nominated by the tenderer in the tender as well as AMSA's assessment of recent performance of the existing contract. The report incorrectly stated that the CPRs did not permit AMSA to consider its relationship with the incumbent contractor and did not identify that the RFT provided for tenderer experience and expertise to be evaluated.

Recommendation no. 4 Paragraph 4.16 To effectively manage probity risks in procurement activities, the Australian Maritime Safety Authority:

- (a) include an assessment of probity risks and identify how they should be managed within the risk register for large and/or complex procurements; and
- (b) have in place a probity plan that governs any pre-procurement activities including industry engagement and addresses the way it will engage with any incumbent contractor(s) during the planning for, and conduct of, the procurement process.

Australian Maritime Safety Authority response: *Agreed.*

Summary of entity response

23. The proposed final report was provided to the Australian Maritime Safety Authority and extracts were provided to the Department of Infrastructure, Transport, Regional Development, Communications and the Arts. The summary response from AMSA to the report is provided below (the department did not provide a summary response). The full response from each entity is at Appendix 1.

Australian Maritime Safety Authority

AMSA takes seriously its obligations to comply with the *Public Governance, Performance and Accountability Act 2013*, the Commonwealth Procurement Rules and conducting procurements ethically under its own internal procurement requirements. AMSA appreciates the ANAO's conclusion that AMSA's management of the AtoN maintenance procurement was largely effective and that consistent with the Commonwealth Procurement Rules it was not in the public interest for AMSA to award a contract for AtoN maintenance services. AMSA also accepts the identified recommendations and the suggested opportunity for improvement and will amend its practices accordingly.

Key messages from this audit for all Australian Government entities

24. Below is a summary of key messages, including instances of good practice, which have been identified in this audit and may be relevant for the operations of other Australian Government entities.

Procurement

- Entities should seek appropriate advice prior to making public announcements about procurements.
- Debriefings of tenderers, and public statements about tender outcomes, should accurately reflect the results of the evaluation work that was undertaken.
- The extent and nature of probity advice obtained as part of procurement processes should be commensurate with the scale and risks of the procurement.

- When entities identify that no tender demonstrably provides value for money, decision-making should explicitly recognise that this enlivens the Commonwealth Procurement Rules provision permitting that a contract not be entered into.

Audit findings

1. Background

Introduction

1.1 The Australian Maritime Safety Authority (AMSA) is a regulatory safety authority responsible for delivering services in relation to maritime safety, aviation and marine search and rescue and protection of the Australian marine environment.

1.2 AMSA was established under the *Australian Maritime Safety Authority Act 1990*. It is a corporate Commonwealth Entity subject to the *Public Governance, Performance and Accountability Act 2013*. The accountable authority is an Australian Government appointed Board.

Background

1.3 As part of its purpose, AMSA is responsible for providing the Australian Government's network of marine Aids to Navigation (AtoN). The network administered by AMSA consists of 485 visual and electronic AtoN⁴ located at 380 sites around Australia's coastline (see Figure 1.1). It includes: conventional lighthouses;⁵ radar transponder beacons; Automatic Identification System stations; unlit beacons; metocean equipment and supporting communication infrastructure.

4 There are 11,310 AtoN in Australia, the majority of which are maintained by the States and the Northern Territory.

5 For example: Cape Byron Lighthouse; Albany Rock Lighthouse; East Strait Main Lighthouse; Cape Leeuwin and Eddystone Point.

Figure 1.1: Aids to Navigation network map



Source: AMSA.

1.4 The AtoN are used as tools by seafarers to support safe coastal navigation, prevent loss of life and marine pollution that could result from wrecked or stranded vessels. The AtoN supplement other navigation and safety systems on board vessels such as: onboard navigational lighting; radar systems; global positioning systems; and charts. Other external measures that contribute to navigation safety include: compulsory pilotage in specific areas; designated shipping routes; and broadcast of maritime safety information to alert mariners of AtoN outages and other hazards.

1.5 AMSA conducts maintenance and a program of capital works on its AtoN network to support reliable operation, including its target⁶ to ensure operation to meet international standards.

⁶ The target is 99.8 per cent availability for AtoN considered to be of vital national significance, which are classified as Category 1 AtoN.

Contracting for AtoN maintenance

1.6 Since 2001,⁷ a significant part of the AtoN maintenance program has been implemented through an external contractor (Australian Maritime Systems Group Pty Ltd). According to AusTender reporting, the two most recent contracts ran from January 2006 to February 2014 at a cost of \$118 million and then from February 2014 to June 2024 at a cost of \$137 million for both the AtoN maintenance and the level 1 Emergency Towage Capability (ETC).⁸

1.7 In August 2022, AMSA issued an open Request for Tender (RFT) to identify suitably qualified contractors to deliver either, or both, AtoN maintenance and ETC Services. The one RFT⁹ covered two contracts: the first for maintenance of the AtoN network that AMSA is responsible for, and the second for ETC. The latter was to be delivered by a dedicated 'emergency towage vessel' for emergency towage and first response capability in the northern Great Barrier Reef (north of Mourilyan) and Torres Strait.¹⁰ The ETC contract requires that when not required for emergency response, drills or training, the 'emergency towage vessel' be made available to support AtoN maintenance within its area of operation.

1.8 One tender was received for the AtoN contract, from the incumbent contractor, Australian Maritime Systems Group Pty Ltd (AMS Group). The incumbent was also the only entity to tender to undertake both AtoN maintenance and provide ETC services. After completing a full evaluation of the AtoN tender that was received, a contract for the maintenance of the AtoN was not awarded. AMSA's completed value for money assessment recorded that:

- in the absence of competition, and with an unclear tender response as evidenced by the low moderated score (of 65.3 per cent), it was not possible to confirm whether value for money had been obtained;
- the benefits from comparing the price to the pre-tender estimate was limited because the estimate was based on 100 per cent conformance to the terms of the draft contract whereas the tender response was not consistent with, or did not address to AMSA's satisfaction, key aspects of the proposed contract. In addition to the pre-tender estimate, AMSA compared the tendered price to the amount it was paying under the existing contract, and identified that there was a significant increase in price; and

7 Prior to 2001, the AtoN maintenance services were delivered by AMSA directly. In December 1999, following on from the government's competitive neutrality and contestability policy, AMSA assessed all of its functions and selected some for market testing. The engineering function associated with the maintenance of the navigation aids network, and the support ship that provided transport to remote navigation aid sites, were outsourced as a result of the review.

8 AMSA advised the ANAO in May 2024 that it could not confirm the contract value between April 2001–December 2005 from its electronic files.

9 AusTender ID: 22AMSA117.

10 AMSA is responsible for this specific area with the purpose of the 'emergency towage vessel' being to stabilise emergency situations and prevent or minimise any risk of pollution from such an incident.

- given the nature and extent of the non-compliances and lack of information within parts of the tender, using the provisions of the RFT that permitted tender clarification would amount to bid repair rather than clarification, including a possible increase in price.¹¹

1.9 The RFT did not allow AMSA to terminate the procurement in part. Rather, the RFT allowed AMSA to award one rather than both contracts.

1.10 For ETC services,¹² eight tenders were received from four entities, including four tenders from the incumbent contractor. Four tenders from three respondents (including two from the incumbent) were shortlisted applying the three criteria for this contract set out in the RFT. Each was evaluated, with the tender submitted by Smit Lamnalco identified as offering the best value for money. A 10-year contract with Smit Lamnalco for the Torres Strait and Great Barrier Reef was announced on 20 December 2023.¹³ The contract includes extension options in AMSA's favour of up to five years.

1.11 Separate procurement processes for AtoN maintenance commenced on 9 February 2024. Rather than one contract covering the whole of Australia as per the unsuccessful tender, the second procurement sought tenderers to fulfil eight separate regional area contracts, along with a contract for a central technical support and logistics contract.

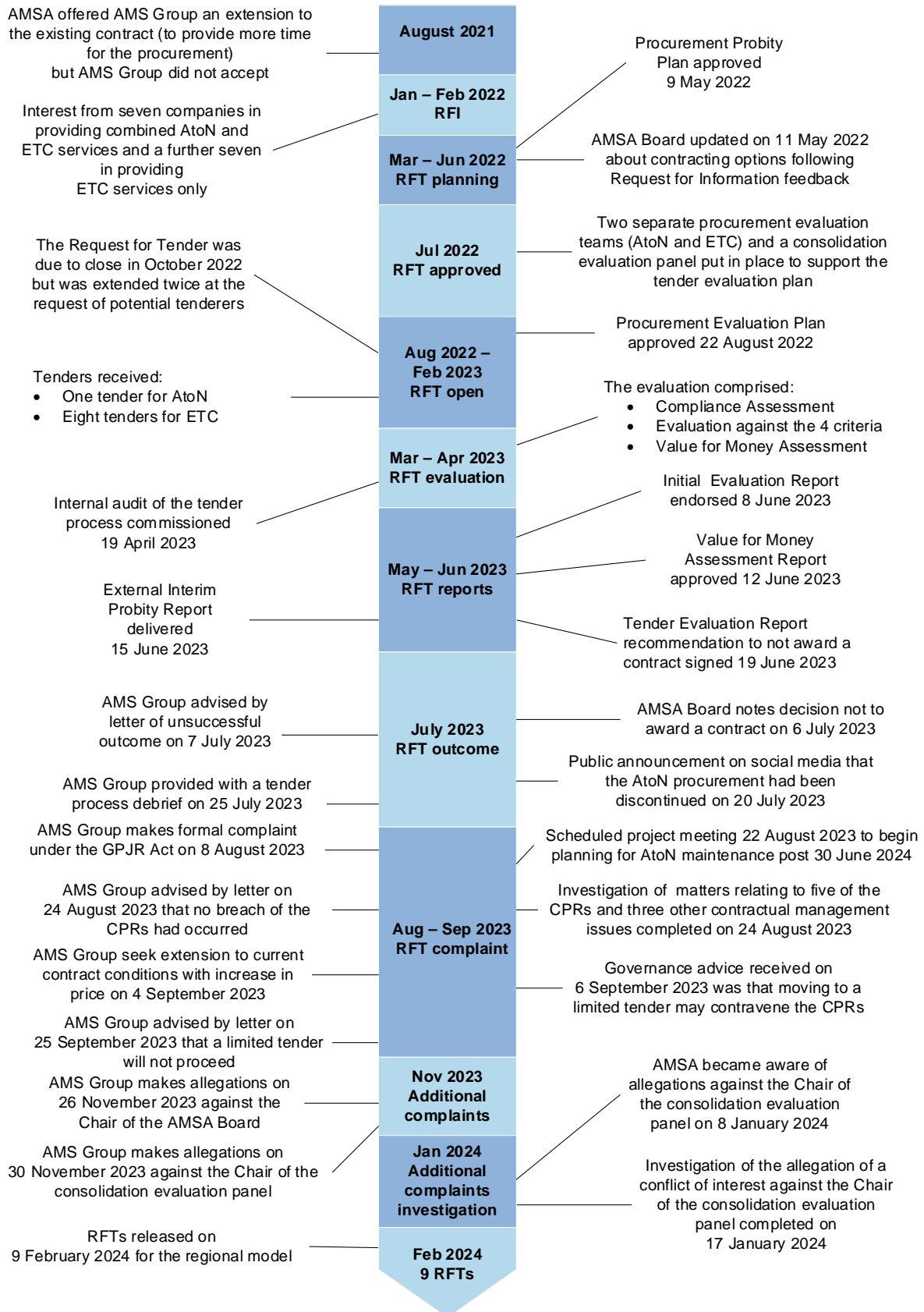
1.12 Figure 1.2 summarises the key stages and key events in the conduct of the 2022–23 AtoN maintenance procurement.

11 Clarification must not be used as an opportunity for respondents or the entity, to revise, modify the scope of, or change a submission (including the submitted price). Any additional information submitted by a respondent must be assessed to determine whether it is truly a clarification of submitted information, or whether it effectively amounts to the submission of late material that seeks to vary the existing submission. If the 'clarifying information' falls into the latter category, it must be considered late and not accepted.

12 The area AMSA is responsible for is the northern Great Barrier Reef (north of Mourilyan) and Torres Strait.

13 The value of the contract is approximately \$196 million over the ten-year term.

Figure 1.2: Timeline of key events of the 2022–23 AtoN maintenance procurement



Source: ANAO analysis of AMSA records.

Rationale for undertaking the audit

1.13 This performance audit of the AtoN maintenance procurement was undertaken in response to a request from the Minister for Infrastructure, Transport, Regional Development and Local Government (the minister). The request from the minister referenced concerns about the conduct of the procurement from the unsuccessful tenderer (on 8 August 2023 the tenderer had made a complaint to AMSA under the *Government Procurement (Judicial Review) Act 2018*).¹⁴ This performance audit provides assurance to Parliament on the effectiveness of AMSA's management of the 2022–23 AtoN maintenance procurement.

Audit approach

Audit objective, criteria and scope

1.14 The audit objective was to assess the effectiveness of AMSA's management of the 2022–23 AtoN maintenance procurement.

1.15 To form a conclusion against the objective, the ANAO examined:

- Did AMSA take appropriate steps to encourage open and effective competition?
- Was tender evaluation planned and undertaken consistently with the Request for Tender?
- In its management of a procurement process and when dealing with complaints from the unsuccessful tenderer, did AMSA act ethically and has it been accountable and transparent?

1.16 The audit assessed AMSA's management of the procurement against relevant parts of the Commonwealth Procurement Rules (CPRs). The audit scope did not include:

- the contract for ETC services contained in the same procurement;
- an assessment of how the maintenance of AtoN interacts with ETC services;
- the technical component of services provided (or required to be provided) for the AtoN network;
- the services and user satisfaction with the services provided by the AtoN network; or
- the procurements for the provision of AtoN maintenance which commenced on 9 February 2024.

Audit methodology

1.17 The audit team:

- examined relevant records relating to the procurement process;
- conducted meetings with staff involved in the procurement; and
- reviewed one submission from the incumbent contractor.

14 Auditor-General Report No. 19 2022–23 *Procurement Complaints Handling*, provides further information on the handling of complaints under this legislation, [Internet], available from <https://www.anao.gov.au/work/performance-audit/procurement-complaints-handling> [accessed 24 April 2024].

1.18 The audit was conducted in accordance with ANAO Auditing Standards at a cost to the ANAO of approximately \$155,000.

1.19 The team members for this audit were Rowena Thomson, Kai Clark, Renina Boyd and Brian Boyd.

2. The approach to the market

Areas examined

The ANAO examined whether the procurement process involved open and effective competition.

Conclusion

AMSA took appropriate steps to design and conduct the procurement in a way that would deliver open and effective competition. This included taking on board information obtained through a market sounding exercise. The tender closing date was also extended twice, at the request of potential tenderers. Some additional steps could have been taken in pursuit of the goal of open and effective competition, in recognition that there was an incumbent contractor, as follows:

- disclosing the weighting of the evaluation criteria, as this would have communicated to potential tenderers that their capability and capacity was more important than whether they had experience in providing the services being tendered. Identifying the weightings would also have allowed AMSA to meet the requirement under the Commonwealth Procurement Rules (CPRs) that request documentation disclose the relative importance of the criteria; and
- clearly communicating to potential tenderers that the draft Aids to Navigation (AtoN) contract included with the Request for Tender (RFT) involved changes from the existing contract. This would not detract from tenderer's responsibility to inform themselves about the services they were tendering to provide.

In response to the RFT, AMSA received one tender (from the incumbent contractor) for the AtoN contract. An absence of competition makes it more difficult for the procuring entity to be satisfied that that it has obtained value for money.

Areas for improvement

The ANAO made two recommendations to AMSA aimed at encouraging increased competition in procurement processes.

2.1 Competition is a key element of the Australian Government's procurement framework set out in the CPRs.¹⁵ Effective competition requires non-discrimination and the use of competitive procurement processes.

2.2 Generally, the more competitive the procurement process, the better placed an entity is to demonstrate that it has achieved value for money. Competition encourages respondents to submit more efficient, effective and economical proposals. It also ensures that the purchasing entity has access to comparative services and rates, placing it in an informed position when evaluating the responses. Openness in procurement involves giving suppliers fair and equitable access to opportunities to compete for work while maintaining transparency and integrity of process.

15 Department of Finance, *Commonwealth Procurement Rules*, paragraph 5.1, [Internet], Department of Finance, Australia 2022, available from <https://www.finance.gov.au/government/procurement/commonwealth-procurement-rules/encouraging-competition> [accessed 24 April 2024].

Was there adequate engagement with industry in planning the procurement approach?

Prior to, and separate from the RFT, AMSA conducted a market sounding exercise. This was conducted by AMSA issuing an open Request for Information (RFI). The 14 submissions received by AMSA:

- provided information about the likely level of market interest in the AtoN maintenance and level 1 Emergency Towage Capability (ETC) services contracts. There was no market interest in the AtoN contract separate to the ETC contract, seven respondents indicated interest in both contracts and seven respondents were interested solely in the ETC contract; and
- provided information that AMSA used to confirm the design of the contracts included in the subsequent approach to the market. AMSA decided to offer separate contracts for AtoN maintenance and ETC, as well as the opportunity to lodge a tender for both, and lengthened the proposed duration of the contracts (to ten years, with extension options for up to a further five years).

2.3 Under the CPRs when a business requirement arises, officials should consider whether a procurement will deliver the best value for money. The CPRs identify that stakeholder input is an important consideration to this.¹⁶ One area of possible stakeholder input involves the conduct of market sounding involving potential tenderers to inform the design of the procurement process.¹⁷

2.4 On 28 January 2022, a RFI was released by AMSA via AusTender to inform the Statement of Requirements and other procurement documentation. It provided 'background information and preliminary considerations and ideas for discussion with interested parties in relation to performing the Services' and outlined that AMSA was seeking information that:

- provided an understanding of market interest in providing AtoN maintenance and/or ETC services;
- indicated market capacity and capability to provide the services;
- enabled understanding of market initiatives and improvements to AtoN maintenance and ETC services; and
- clarified the risks and potential opportunities associated with delivery of the services.

2.5 There were 71 downloads of the RFI documents and 14 responses were received. None of the 14 submissions expressed interest in the provision of AtoN maintenance only. Seven were interested in providing AtoN maintenance and ETC services, while the other seven were interested in the provision of the ETC services only.

2.6 The findings were documented in the RFI Summary Report and included:

16 Department of Finance, *Commonwealth Procurement Rules*, paragraph 4.2 [Internet], Department of Finance, Australia 2022, available from <https://www.finance.gov.au/government/procurement/commonwealth-procurement-rules/value-money> [accessed 27 February 2024].

17 Auditor-General Report No. 45 2016–17 *Replacement Antarctic Vessel*, p. 42. [Internet], available from <https://www.anao.gov.au/work/performance-audit/replacement-antarctic-vessel> [accessed 24 April 2024].

- increasing the contract term from the proposed 8 years to 10 years (with three extension options of two years, two years and one year);
- that AMSA should approach the market with two separate contracts; and
- there was a 'fair amount' of interested parties looking to provide services for both contracts.

2.7 AMSA finalised the approach to market documentation to reflect feedback on the length of the contract and splitting the AtoN Maintenance and ETC services into two contracts.

2.8 AMSA advised the ANAO in February 2024 that:

- none of the respondents to the RFI suggested that the contract be changed from covering the whole of Australia to a regional model and, while this had been discussed within AMSA prior to the procurement, this approach was not pursued due to the likely increase in administrative costs of managing multiple contracts (this is the approach AMSA is now adopting via a new approach to the market); and
- AMSA expected multiple submissions to the tender based on the response to the RFI.

Separate engagement with incumbent contractor

2.9 In addition to the RFI process, AMSA representatives met with the incumbent contractor on 19 January 2022 to discuss the existing contracts and identify from the contractor's perspective where there could be improvements for future contracts (see paragraphs 2.20 to 2.21). AMSA recorded that 'the scope of the meeting was to understand the soft, relational aspects of the contracts from the contractor's perspective'.

Did the Request for Tender process result in a sufficient number of competing proposals being received?

With the objective of having competition for the contracts, the procurement was conducted by way of an open RFT with the tender closing date extended twice. In addition to designing the RFT in a way intended to encourage competition, AMSA extended the tender closing date twice at the request of potential tenderers. To encourage competition, there would have been benefits in AMSA informing potential tenderers of the criteria weightings and also highlighting that some changes were proposed to the contract for AtoN maintenance compared with the existing contract.

The RFT did not result in competing tenders being received for the AtoN maintenance contract. Most of the respondents to the RFI did not proceed to lodge a tender. Seven RFI respondents indicated they were likely to tender for both contracts with six of those not proceeding to tender for both contracts (although one of those six did tender for the ETC contract). No RFI respondents indicated they were likely to tender for the AtoN contract alone. One tender for the AtoN contract was received, from the incumbent contractor. The incumbent contractor also tendered for the ETC contract. This was the only respondent that tendered to provide both services.

2.10 AMSA conducted a single procurement seeking the provision of two categories of services, AtoN and ETC. Under this approach, AMSA issued a single Conditions of Tender with separate draft

contracts for each service category and a separate statement of requirements for each service category.

2.11 The procurement approach involved AMSA issuing an open RFT on 23 August 2022. The tender period was set as nine weeks in the RFT, to close on 24 October 2022.

2.12 There were nine addenda to respond to, or clarify, potential respondents' questions. Two of the addenda involved AMSA granting, at the request of potential tenderers, extensions to the tender closing date, initially to 28 November 2022 and then to 27 February 2023 (resulting in a 27 week tender open period, three times longer than the nine weeks originally offered). At the time of the second extension, AMSA also advised potential tenderers that it had extended the cut off time for requests for information under the RFT to 10 February 2023.

2.13 The tender was downloaded by 133 registered users and 15 went on to access the additional information that was available via a Secure File Transfer Protocol (SFTP).

2.14 Tenders closed on 27 February 2023. The RFT process resulted in competition for the ETC contract with eight tenders received from four entities,¹⁸ including four tenders from the incumbent contractor. The RFT did not result in competition for the AtoN contract.

2.15 There was not a high conversion of submissions to the RFI into tenders. Specifically, three of the 14 respondents (21 per cent) that provided a submission to the RFI proceeded to lodge one or more tenders, as set out in Table 2.1.

Table 2.1: Conversions of responses to the Request for Information into tenders

Contract option	AtoN alone	ETC alone	AtoN and ETC
Request for Information	No interest	Responses from seven entities	Responses from seven entities (including the incumbent)

18 AMSA's advice to the Rural and Regional Affairs and Transport Legislation Committee on 25 March 2024 incorrectly stated that five tenders were received for the ETC contract. AMSA correctly advised the Committee that one tender was received for AtoN. [On 24 April 2024, the CEO of AMSA corrected the evidence provided to the committee by clarifying the reference to five tenders was not correct and that there were eight tenders submitted by four different tenderers for the ETC contract.]

Contract option	AtoN alone	ETC alone	AtoN and ETC
Tenders received from companies that responded to the Request for Information	One tender (incumbent)	Three entities submitted seven tenders, comprising: <ul style="list-style-type: none"> the incumbent contractor submitted four tenders (options were presented to allow AMSA to choose between multiple vessels and crewing options); one of the seven entities that expressed for the ETC services contract alone submitted a tender for that contract; and two of the tenders were from one entity whose response to the Request for Information indicated it might tender for both contracts (which it did not do). 	Nil
Tenders received from companies that did not respond to the Request for Information	Nil	One tender	Nil

Source: ANAO analysis of AMSA records.

Criteria weightings

2.16 The CPRs require that request documentation include the evaluation criteria and, if applicable, the relative importance of those criteria (such as any weighting).¹⁹

2.17 AMSA's tender evaluation plan identified the same four evaluation criteria for the AtoN services contract as had been included in the RFT. It also outlined the same staged approach to evaluation as had been set out in the RFT. A key difference between the evaluation plan and the RFT was that the evaluation plan outlined criteria weightings that had not been disclosed in the RFT (see Table 2.2). Not disclosing the relative importance of the criteria was inconsistent with the CPRs.

Table 2.2: AtoN maintenance procurement evaluation criteria

Evaluation criteria	Weighting
Compliance: Environment Health and Safety/Quality Questionnaires	20%
Experience and expertise: the extent to which the Tenderer is assessed as having the experience and demonstrated expertise to meet the requirements set out in the Statement of Requirements and the draft Contract	20%
Capability and capacity: the extent to which the Tenderer is assessed as having the capability and capacity to meet the requirements set out in the Statement of Requirements and the draft Contract	40%

¹⁹ Department of Finance, *Commonwealth Procurement Rules*, paragraph 10.6 [Internet], Department of Finance, Australia 2022, available from <https://www.finance.gov.au/government/procurement/commonwealth-procurement-rules/additional-rules> [accessed 7 April 2024].

Evaluation criteria	Weighting
Technical: the extent to which the Tenderer is assessed as having the technical experience to meet the requirements set out in the Statement of Requirements and the draft Contract	20%

Source: AMSA Procurement Evaluation Plan.

2.18 Informing potential respondents of the evaluation criteria, and any weightings of those criteria, helps to promote competition as well as provide transparency.²⁰ By not identifying to potential tenderers the criteria weightings, AMSA missed the opportunity to communicate that the capability and capacity of tenderers was more important than experience and demonstrated expertise. This is valuable information for potential tenderers in circumstances where there is an incumbent contractor, noting that the earlier RFI process had identified a lack of market interest in the AtoN maintenance contract alone (see paragraph 2.5).

Recommendation no. 1

2.19 The Australian Maritime Safety Authority strengthen its procurement controls and better inform the market by setting out in its request documentation the relative importance of the evaluation criteria that will be applied.

Australian Maritime Safety Authority response: *Agreed.*

Changes in contractual requirements

2.20 AMSA undertook its own analysis of areas for improvement. In addition, as outlined in paragraph 2.9, in January 2022 AMSA met with the incumbent contractor to obtain the contractor's perspective on possible improvements to the contracts as part of AMSA's procurement planning.

2.21 The draft AtoN maintenance contract in the RFT package released in August 2022 included a number of changes from the existing contract. AMSA's Value for Money Assessment Report of June 2023 identified ten 'major²¹ differences' from the current contract that may drive price changes (see Table 2.3). There would have been benefits in AMSA highlighting to potential tenderers that the draft contract included a number of changes from the existing contract, as part of its approach to encouraging competition by highlighting that the procurement was not limited to an exercise in rolling over the existing contractual requirements.²² This would not have been inconsistent with the RFT requirement that the tenderers inform themselves of the requirements and declare that they have not relied on anything else, including any representation made by AMSA.

20 See, for example: Auditor-General Report No.23 2017–18 *Delivery of the Moorebank Intermodal Terminal* and Auditor-General Report No.42 2021–22 *Procurement of Delivery Partners for the Entrepreneurs' Program* and Auditor-General Report No.34 2022–23 *Procurement of Permissions Capability*, [Internet], available from <https://www.anao.gov.au/> [accessed 24 April 2024].

21 AMSA advised in April 2024 that 'major' is 'a relative term' and that 'AMSA maintains the view that in the context of all the services delivered under the existing maintenance contract, the changes were not significant in the overall scope of work'.

22 AMSA's advice to the Rural and Regional Affairs and Transport Legislation Committee on 25 March 2024 was that the contract tendered was not markedly different from those entered into with the incumbent previously.

Table 2.3: Major changes for the AtoN contract with potential cost impacts

Additions	Reductions
Introduction of a new preventative maintenance task to be conducted once within the 10-year contract term that affects approximately 25 sites	Approximately 50 AtoN sites were changed from an annual visit site to a two yearly
Introduction of a new preventative maintenance task to be conducted once within the 10-year contract term that affects approximately 60 sites	Removed the purchase costs of buoys that affects approximately 60 sites within the contract term
Introduction of Lead Risk Works which could be conducted at every visit that affects approximately 40 sites	Removed technical innovations where the contractor pays for upgraded or replaced AtoN equipment
Introduction of more detailed protective coating surface preparation for offshore pile structures which is to be conducted 5 times within the 10-year contract term that affects approximately 25 sites	Introduction of annual fee escalation from agreed indexation factors (this change was introduced to mitigate the current inflation risk from a fixed price offer over a 10-year term)
Introduction of stricter AtoN availability requirements that may affect outage and failure response pricing	Major maintenance threshold/risk remained the same in principle but was made clearer with respect to repair or replace when beyond repair

Source: ANAO analysis of AMSA records.

Recommendation no. 2

2.22 When re-tendering contracts, the Australian Maritime Safety Authority consider the benefits to encouraging competition by identifying any major changes proposed to the contractual arrangements in the request documentation.

Australian Maritime Safety Authority response: *Agreed.*

3. Tender evaluation

Areas examined

The ANAO examined whether the tender evaluation was planned and undertaken consistently with the approach to market and with the objective of identifying a compliant tender that represented value for money.

Conclusion

AMSA's evaluation of the tender received for Aids to Navigation (AtoN) maintenance was planned and undertaken consistent with the Request for Tender (RFT). The tender that was received was assessed as compliant. It was scored at 65.3 per cent against the four evaluation criteria included in the RFT, with AMSA identifying the scores as 'marginal' in a number of areas. As required by the Commonwealth Procurement Rules (CPRs) and the RFT, tender evaluation was completed by AMSA undertaking a value for money assessment. That assessment concluded that a value for money outcome had not been achieved. On the basis of the evaluation results, AMSA's conclusion that it was not in the public interest to award a contract was appropriate and complied with the CPRs. AMSA has not provided clear and accurate reasons for why it did not award a contract in its debrief of the unsuccessful tenderer or publicly.

Areas for improvement

The ANAO made one recommendation aimed at promoting transparency over the reasons for tender outcomes.

3.1 Achieving value for money is the core rule of the CPRs. Officials responsible for a procurement must be satisfied, after reasonable enquiries, that the procurement achieves a value for money outcome.²³ The CPRs state that achieving value for money requires a consideration of the relevant financial and non-financial costs and benefits of each submission.²⁴ Unless it has been determined by the entity not to be in the public interest to award a contract (for example, because tender evaluation has concluded that none of the tenders received represents value for money), a contract must be awarded to the tenderer that the entity has determined:

- satisfies the conditions for participation;
- is fully capable of undertaking the contract; and
- will provide the best value for money, in accordance with the essential requirements and evaluation criteria specified in the approach to market and request documentation.

23 Department of Finance, Commonwealth Procurement Rules [Internet], Department of Finance, Australia 2022, available from <https://www.finance.gov.au/government/procurement/commonwealth-procurement-rules/value-money> [accessed 27 February 2024].

24 The CPRs state (paragraph 4.5) that the factors to be considered include, but are not limited to: the quality of the goods and services; fitness for purpose of the proposal; the potential supplier's relevant experience and performance history; flexibility of the proposal (including innovation and adaptability over the lifecycle of the procurement); environmental sustainability of the proposed goods and services (such as energy efficiency, environmental impact and use of recycled products); and whole-of-life costs.

Were appropriate governance arrangements in place for the evaluation of tenders?

AMSA implemented appropriate arrangements to govern the evaluation of tenders.

3.2 Following receipt and compliance checks, tender submissions progressed to one of two Procurement Evaluation Committees. One committee was responsible for evaluating tenders for AtoN services, the other was responsible for evaluating tenders for level 1 Emergency Towage Capability (ETC) services. The role of the Procurement Evaluation Committees was to undertake individual assessment against the criteria in the RFT (four criteria for AtoN, three criteria for ETC), convene for the moderation process and then draft an 'initial summary and options report'. Each committee had three members and a 'non-scoring chair'. All members were AMSA employees and two officers were on both committees.

3.3 Additional AMSA resources were made available to assist with evaluation of:

- quality, health, safety and environment compliance;
- non-compliance with the contract conditions; and
- commercial assessment of the offered prices.

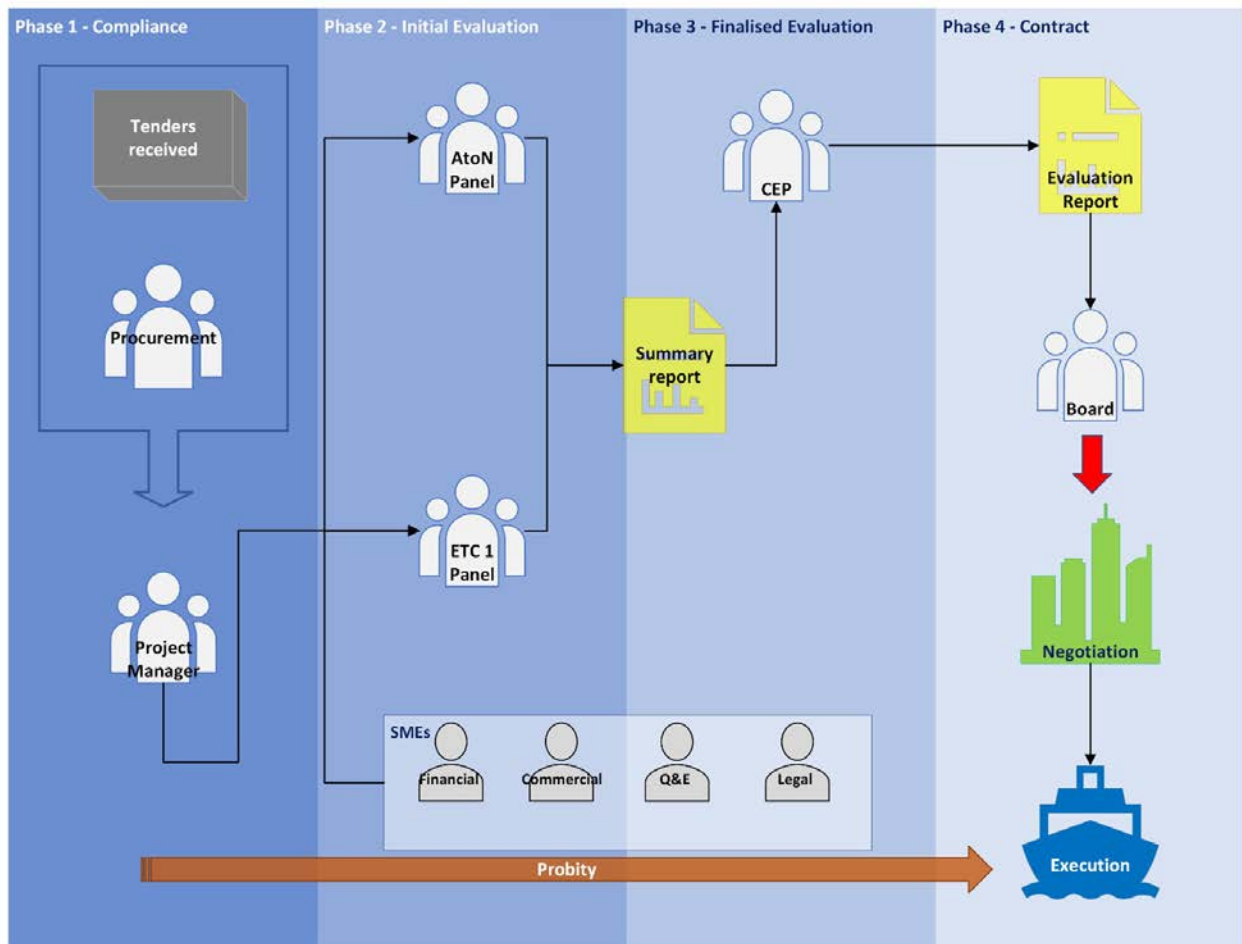
3.4 The Procurement Evaluation Committees were also able to access advice from 'Approach to Market personnel' which comprised 12 internal staff from across AMSA. There were three external contractors that provided advice on probity, financial viability assessment and quantity surveying.

3.5 The evaluation assessments of the separate Procurement Evaluation Committees went to the Consolidation Evaluation Panel for review. The Consolidation Evaluation Panel comprised the chairs of each of the Procurement Evaluation Committees as members and was chaired by AMSA's Executive Director – Response. Its role was to review the value for money options of the individual services, and to consider whether a single service provider for both AtoN and ETC was preferable to separate contracts. The Consolidation Evaluation Panel was not involved in the scoring of tenders.

3.6 In addition to reviewing draft evaluation reports, the external probity advisor Management Options Pty Ltd (see paragraph 4.7) invoiced AMSA for having attended 1.25 hours of the Consolidation Evaluation Panel meeting on 27 April 2023 and 45 minutes of the meeting on 26 May 2023.

3.7 Figure 3.1 summarises the evaluation governance arrangements.

Figure 3.1: Governance arrangements for tender evaluation



Note: 'SME' means subject matter expert.
 'CEP' means Consolidation Evaluation Panel.
 Source: AMSA's approved evaluation plan.

Decision-making arrangements

3.8 As a Commonwealth corporate Entity, AMSA derives its power to enter into arrangements involving the commitment of relevant money from its enabling legislation and its body corporate nature. The accountable authority is the AMSA Board, appointed by the minister. Its role is to decide the objectives, strategies and policies to be followed by AMSA and to ensure AMSA performs its functions in a proper, efficient and effective manner.

3.9 AMSA's Corporate Authorisation Summary documents the Accountable Authority's Instructions²⁵ in relation to approval or commitment of relevant money. The Corporate Authorisation Summary that was in force during the procurement sets out that amounts less than or equal to \$5 million were delegated to the Chief Executive Officer of AMSA. Any two members of the AMSA Board²⁶ could approve amounts less than or equal to \$7.5 million, while amounts above this were to be agreed by the full Board. As the procurement value was above \$7.5 million, this

25 Issued by the AMSA CEO on behalf of the Board.

26 The AMSA Board comprises: Chair, Deputy Chair, AMSA CEO, one departmental ex-officio member and five other members.

required the AMSA Board to agree to a procurement outcome that resulted in the approval of relevant money (as outlined in Figure 3.1). For the AtoN contract, this did not occur as the Consolidation Evaluation Panel concluded at the end of tender evaluation that a contract should not be awarded for the AtoN maintenance service.

3.10 As per its standard processes, the Board 'noted' at its 6 July 2023 meeting that 'the AtoN maintenance component of this tender did not produce a value for money outcome as assessed by the evaluation team' and that 'AMSA intends to end the procurement process'.

Was an evaluation plan documented that was consistent with the Request for Tender?

An evaluation plan was documented and approved prior to tenders closing. The evaluation plan was consistent with the RFT, with the exception of including criteria weightings that had not been disclosed in the RFT.

3.11 An evaluation plan should be established before market responses are sought.²⁷ Drafting the evaluation plan and RFT together helps to avoid any inconsistencies between the evaluation plan and requirements specified in RFT documentation, and to ensure that the evaluation methodology proposed in the plan is consistent with the RFT.

3.12 AMSA planned to finalise the evaluation plan on the same day that the RFT was finalised (both planned for 22 August 2022). The evaluation plan was approved by the CEO of AMSA on 22 August 2022. It was updated and approved again on 12 December 2022 with clarified details relating to process and personnel. The RFT was released one day later than planned, on 23 August 2022, with a closing date of 24 October 2022 (nine weeks). At the request of potential tenderers, two extensions were granted by AMSA and the RFT closed on 27 February 2023.

3.13 The contents of the evaluation plan were consistent with the RFT, with the exception of AMSA not disclosing in the RFT the weighting of the four evaluation criteria (see paragraphs 2.16 to 2.19).

Did AMSA evaluate tenders in accordance with the Request for Tender?

The tender received for AtoN maintenance services was evaluated in the manner required by the RFT. At the conclusion of tender evaluation, AMSA was unable to conclude that the tender offered value for money. This conclusion drew upon evaluation results against the four weighted criteria, as well as analysis of the price tendered. AMSA also took into account the nature and extent of contractual non-compliance identified, and the related risks, in identifying that tender clarification would, in effect, amount to bid repair.

3.14 Consistent with the CPRs, the RFT set out that the objective of evaluation of tenders was to: 'identify the Tenderer which represents the best value for money.'

27 Auditor-General Report No.23 2017–18 *Delivery of Moorebank Intermodal Terminal*, p.13, [Internet], available from <https://www.anao.gov.au/work/performance-audit/delivery-the-moorebank-intermodal-terminal> [accessed 24 April 2024].

3.15 The RFT provided that AMSA may:

- shortlist tenders at any time during the evaluation process (10.4.3), without identifying the criteria that may be applied to any shortlisting; and
- ‘at any time exclude from consideration Tenders that in AMSA’s opinion are incomplete or clearly not competitive. However, AMSA may consider such Tenders and seek clarification’ (10.4.4).

3.16 There was no shortlisting undertaken as part of the AtoN procurement (one tender was received) and AMSA did not exclude the tender it received from consideration.

3.17 The RFT stated that the evaluation of tenders would initially consider responses for the AtoN maintenance service and ETC services individually in two stages and would be completed with AMSA considering overall value for money outcomes.

3.18 As it was conducted as one procurement with two contracts that permitted tenderers to submit a response for one or both contracts, the evaluation approach involved consolidated evaluation reports being prepared. Specifically, the conduct and results of the evaluation were documented in an Initial Evaluation Report (endorsed 8 June 2023), a Value for Money Assessment Report (signed by the six panel members between 8 June and 12 June 2023) and a Tender Evaluation Report (signed by the panel chair and all members of both evaluation committees between 15 June and 19 June 2023).

Stage 1: compliance assessment

Conditions for participation

3.19 The RFT identified two Conditions for Participation.

3.20 The tender for AtoN maintenance (as well as those for ETC services) was assessed to meet the first Condition (which required the tenderer and each of its proposed subcontractors not be bankrupt, insolvent or subject to external administration or have been in the last 5 years).

3.21 The second Condition related to the shadow economy and refers to dishonest and criminal activities that take place outside the tax and regulatory systems. The tenderer for AtoN maintenance, as well as two of the tenderers for the ETC services contract, was initially assessed to not meet the second Condition. The relevant Procurement Evaluation Committee and the Consolidation Evaluation Panel considered that because most tenderers missed this requirement, it suggested the omissions were unintentional and tenderers were provided the opportunity to provide the required documentation.

3.22 Following the provision of a valid Statement of Tax Record through tender clarification²⁸ the tender for AtoN maintenance services was assessed as compliant.

Minimum content and format requirements

3.23 The tender for AtoN maintenance services was assessed as compliant with the minimum content and format requirements.

28 Probity advice on the first of the requests for clarification, and the responses received, was sought by AMSA after it had issued the clarification requests and received responses. The probity advisor reported that he did not see any issues with the process that was followed. The Statement of Tax Record was sought from the tenderer for AtoN maintenance services as the second request for clarification issued to that tenderer.

Stage 2: evaluation against the four criteria

3.24 The quality, health, safety and environment compliance evaluation was completed on 20 March 2023. It resulted in a score of 19 out of 20. Each questionnaire was worth 10 points, with the tender receiving 10 points for the quality questionnaire and 9 points for the environment, health and safety questionnaire.

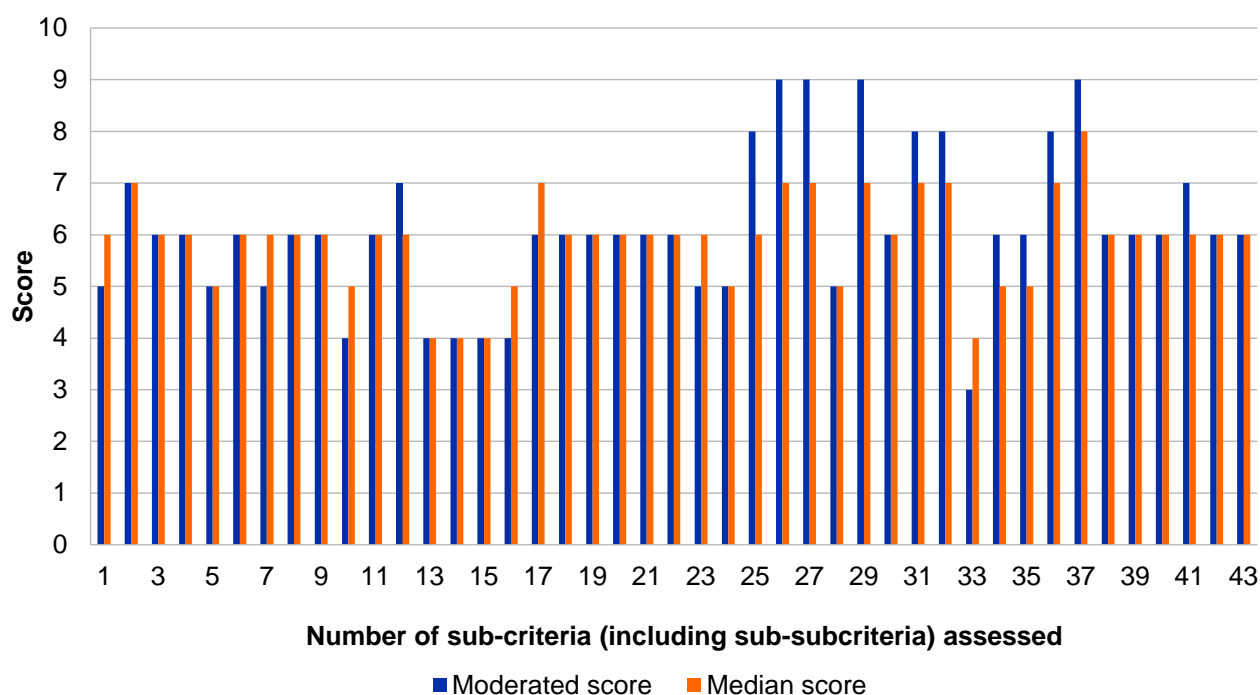
3.25 The individual evaluations of the three scoring members of the Procurement Evaluation Committee were completed on 16 March 2023, 20 March 2023 and 22 March 2023. The moderation process took place on 24 March 2023 and was recorded in a consolidated assessment spreadsheet. The chair of the Procurement Evaluation Committee recorded the moderation discussion.

3.26 The probity advisor's invoicing recorded that he had attended, observed and provided probity advice at the first moderation meeting for the AtoN evaluation on 24 March 2023. The interim probity report stated that:

The Probity Advisor attended the evaluation moderation meeting of the PEC for the AToN component of the Approach to Market. It was evident that PEC members had a clear understanding of the evaluation methodology and their probity obligations. The Probity Advisor observed that each member had individually assessed and scored the tender responses against the criteria. The Probity Advisor observed open and sound discussions by PEC members in arriving at the moderated scores and supporting comments.

3.27 Figure 3.2 compares the median score of the three scoring members against the final moderated outcome. In seven instances the moderated score was lower and in twelve instances the moderated score was higher.

Figure 3.2: Median score of three scoring members and final moderated score^a



Note a: The overall score was 57.9 per cent (also referred to by AMSA as 'marginal').

Source: ANAO analysis of the Procurement Evaluation Committee consolidated assessment sheet.

3.28 Table 3.1 outlines the moderated overall scores converted to the weighted criteria. Adding in the 19 out of 20 assessment score for quality, health, safety and environment compliance (see paragraph 3.24) the total moderated scoring result for the evaluation criteria was 65.3 per cent. AMSA ‘did not set a threshold below which a moderated score would be unacceptable’ although the evaluation result was described as ‘low’. Specifically, in relation to the experience and expertise, capability and technical evaluation criteria,²⁹ the combined score of which was 46.3 out of 80 (or 57.9 per cent) AMSA’s Tender Evaluation Report stated this, ‘did not provide a level of confidence that the contract requirements (including all deliverables) will be met to the required standard’. The Tender Evaluation Report further concluded that ‘the non-compliances listed are major commercial exceptions that may increase the tendered price’.

Table 3.1: AMS Group Procurement Evaluation Committee moderated scores

Tender requirements		
Evaluation criteria	Weighting	AMS Group score
Experience & expertise	20	11.75
Capability & capacity	40	20.8
Technical	20	13.75
Total	80	46.3

Source: ANAO analysis of the Procurement Evaluation Committee consolidated assessment sheet.

Value for money assessment

3.29 The RFT clearly set out how AMSA would assess value for money, through an approach that was consistent with the CPRs, as follows:

The Value for Money assessment will include:

- Compliance and risk assessments for all tenderers against the conditions for participation and evaluation criteria, including relative ranking of tenderers against each criterion;
- Scores against weighted criteria;
- An explanation of the key areas for discrimination between the tenderers;
- An overall assessment of the risks associated with each Tenderer and their capacity to perform, including an indication of the risk management strategies that are considered necessary;
- Non-compliance to the draft contracts;
- Financial viability;
- An explanation of the actions that would be necessary to enter into a contract;
- Contracting risks and opportunities; and
- Total price and any discount arrangements offered.

3.30 AMSA documented its value for money analysis, consistent with the considerations outlined in the RFT. Invoicing from the probity advisor recorded that they reviewed a draft value for money

²⁹ These three criteria combined were referred to as the ‘technical assessment’.

assessment report on 24 and 25 April 2023,³⁰ and an updated version of the value for money assessment report on 7 June 2023.³¹

3.31 The finalised Value for Money Assessment Report of 12 June 2023 included a comparison of the tendered price to the pre-tender estimate (which was premised on full tenderer compliance with the draft contract, whereas the tender received was assessed to involve non-compliances) as well as to the amount it was paying the incumbent contractor to provide AtoN maintenance services.³² The value for money evaluation report recorded that:

In the absence of competition, with an unclear tender response evident by the low moderated score, it is not possible to confirm whether value for money has been obtained for the AtoN Maintenance Services.

3.32 In turn, the Tender Evaluation Report signed by the Consolidation Evaluation Panel chair on 19 June 2023 recorded as follows in relation to the AtoN contract:

The AtoN maintenance procurement resulted in a single tender from the incumbent provider (Australian Maritime Systems Group, AMSG). The subsequent value for money decision was not clear cut. The tender scores were marginal in a number of areas.³³ The tendered price was significantly higher than currently paid for a similar service, although close to the pre-tender estimate. Overall, the Consolidation Evaluation Panel (CEP) concluded that the AtoN component of the Tender did not deliver a Value for Money outcome.

Has AMSA clearly communicated the reasons for not awarding a contract?

AMSA has not clearly communicated the reasons for not awarding the AtoN contract. The result of the tender evaluation was that the tender received for the AtoN maintenance services had been assessed to not represent value for money. Statements by AMSA that a value for money assessment was not completed, or that the tendered price for AtoN maintenance services was not evaluated, are inconsistent with AMSA's tender evaluation records:

- A Value for Money Assessment Report was prepared, and signed in June 2023 by each member of the two Procurement Evaluation Committees. It applied the methodology set out in the RFT to assess the value for money offered by the tenders received for the two contracts. This included comparing tendered prices to the pre-tender estimate, other ETC tenders (where there was competition) and to the cost of the existing AtoN maintenance contract (where there was no competition).

30 The document reviewed by the probity advisor in April 2023 was a discussion paper prepared for the Consolidation Evaluation Panel. The probity advisor was informed by the chair of the AtoN Procurement Evaluation Committee who was also a member of the Consolidation Evaluation Panel, the discussion paper was seen as necessary because 'In endorsing the value for money recommendation from the scoring panel, they are taking a significant decision and need to be cognisant of the wider details.'

31 The document provided to the probity advisor on 7 June 2023 was a draft of the value for money assessment.

32 A comparison of the tendered prices to an existing contract is relevant to value for money considerations, as set out in Auditor-General Report No. 45 2016–17 *Replacement Antarctic Vessel*, p. 42.

33 The number of sub-criteria/sub-sub criteria that were scored at 5 or below meant the cumulative impact would have contributed to bid repair had AMSA provided AMS Group the option to address the scores (see Figure 3.2).

- The final Tender Evaluation Report, signed in June 2023 by each member of the Consolidation Evaluation Panel, recorded the Panel’s assessment of whether the tender received for AtoN maintenance services, as well as the tenders received for ETC services, represented value for money.

The value for money assessment, documented in these two evaluation reports, was relied upon by AMSA to support it awarding a contract for ETC services to the tender assessed as offering the best value for money. The same documents set out the evaluation conclusion that the one tender received for the AtoN maintenance services did not represent a value for money outcome and a contract should not be awarded.

If AMSA had not completed a value for money assessment, as AMSA has stated was the case, it would have been inconsistent with the RFT, as well as a breach of the CPRs.

3.33 The CPRs require:

- transparency in procurement activities, including by officials taking steps to enable appropriate scrutiny of their procurement activity; and
- following the rejection of a submission or the award of a contract, officials must promptly inform affected tenderers of the decision and that debriefings be made available, on request, to unsuccessful tenderers outlining the reasons their submission was unsuccessful.³⁴

3.34 AMSA’s communication of the reasons for not awarding a contract have not been consistent with records of its tender evaluation and so have not provided the transparency required by the CPRs. Specifically:

- AMSA’s record of the debrief it provided to the unsuccessful tenderer stated that the decision not to proceed was made on the basis of the technical score and, when pressed about whether the price was considered, there was insufficient information to inform a value for money assessment;
- in response to the procurement complaint from the unsuccessful tenderer, AMSA obtained legal advice with the advice recording that: ‘We are instructed that the delegate decided before the value for money assessment that the only tender submitted in relation to AtoN services was lacking in technical detail, and therefore scored too low to necessitate a formal value for money assessment’;³⁵and

34 Department of Finance, *Commonwealth Procurement Rules*, paragraphs 7.1 and 7.17, [Internet], Department of Finance, Australia 2022, available from <https://www.finance.gov.au/government/procurement/commonwealth-procurement-rules/accountability-and-transparency> [accessed 24 April 2024].

35 AMSA briefed its legal advisor to this effect in response to the legal advisor proposing in its quote to provide the advice that:

in our advice we will assume that AMSA is comfortable with its conduct of the procurement, including that the delegate formed and appropriately documented their view that no tenderer represented value for money for the AtoN services component of the Approach to Market.

- on 25 March 2024 AMSA gave evidence to the Rural and Regional Affairs and Transport Legislation Committee that: ‘We did not actually proceed to a value-for-money assessment on the basis of the marginal technical score.’³⁶

3.35 Value for money is the core rule of the CPRs. Consistent with the CPRs, the RFT required that the evaluation of tenders ‘be completed with AMSA considering overall value for money outcomes’. If AMSA had not conducted a value for money assessment it would have acted inconsistently with the RFT it released to the market, and also breached the CPRs. In a letter dated 9 April 2024 to the Chair of the Rural and Regional Affairs and Transport Legislation Committee, the CEO of AMSA corrected the evidence provided on 25 March 2024 including:

To be clear, the tender evaluation did proceed to a Value for Money assessment and concluded that the AtoN component of the tender did not deliver a Value for Money outcome.

3.36 AMSA’s statements that value for money was not assessed are inconsistent with its procurement records. Those records show that AMSA assessed value for money in the manner required by the RFT (see paragraphs 3.29 to 3.32). Reflecting that AMSA conducted one procurement with two contracts that permitted tenderers to submit a response for one or both contracts, consolidated evaluation reports were prepared, including in relation to value for money. The Value for Money Assessment Report was signed by the six members of the two Procurement Evaluation Committees (by three members on 8 June 2023, two members on 9 June 2023 and one member on 12 June 2023). The Value for Money Assessment report documented the value for money conclusion reached in relation to each of the two contracts, as follows:

- the one tender received for AtoN maintenance services ‘does not present AMSA with a value for money option’; and
- two tenders received for ETC services were assessed as representing value for money, with the preferred tender identified as the one assessed as offering the ‘greatest value for money’.

36 Parliament of Australia, *Rural and Regional Affairs and Transport Legislation Committee - 25/03/2024 – Estimates*, [Internet] Parliament of Australia, Australia 2024, available from https://www.aph.gov.au/Parliamentary_Business/Hansard/Hansard_Display?bid=committees/estimate/27848/&sid=0000 [accessed 30 April 2024].

Recommendation no. 3

3.37 When debriefing tenderers and in any public statements on the results of procurement processes, the Australian Maritime Safety Authority promote transparency by ensuring the reasons it provides are consistent with the tender evaluation reports.

Australian Maritime Safety Authority response: *Agreed*

3.38 *AMSA accepts that there has been inconsistency and inaccuracy in public statements on the results of the procurement process. This has not been deliberate and there is no reason for AMSA to have avoided transparency on this topic within the confines of the Commonwealth Procurement Rules. However, AMSA certainly accepts that a more consistent approach to framing the explanation in line with the tender evaluation report findings would have improved understanding of the outcome.*

4. Ethics, accountability and transparency

Areas examined

The ANAO examined whether, in its conduct of a procurement process and when dealing with complaints from the unsuccessful tenderer, AMSA acted ethically and has been accountable and transparent.

Conclusion

Important elements of a framework for conducting the procurement ethically were in place including a probity plan and the engagement of a probity advisor. There was no probity plan in place for the industry engagement activities that informed the design of the Request for Tender (RFT). There were also a number of shortcomings in the implementation of the probity framework for the RFT, including insufficient risk management and a lack of evidence that all procurement personnel received probity briefings and completion of conflict of interest declarations. AMSA's investigation of the procurement complaint made by the unsuccessful tenderer under the *Government Procurement (Judicial Review) Act 2018* was timely and scoped appropriately. There were errors in the investigation report although those errors did not affect the findings that the alleged breaches of the Commonwealth Procurement Rules (CPRs) had not occurred.

Areas for improvement

The ANAO made one recommendation relating to more comprehensive coverage of probity plans, including risk assessment and a suggestion for improving probity administration records.

4.1 The CPRs require that procuring entities act ethically throughout the conduct of a procurement process. Ethical behaviour includes recognising and dealing with actual, potential and perceived conflicts of interest, dealing with potential suppliers, tenderers and suppliers equitably and carefully considering the use of public resources.³⁷ The CPRs also require that, if a complaint about a procurement is received, relevant entities must apply timely, equitable and non-discriminatory complaints handling procedures.³⁸

4.2 The CPRs also require accountability and transparency. Accountability means that officials are responsible for the actions and decisions that they take in relation to procurement and for the resulting outcomes. Transparency involves relevant entities taking steps to enable appropriate scrutiny of their procurement activity.

Was a probity management framework in place?

A probity plan was not in place to govern the industry engagement activities that informed the design of the procurement process. A probity plan was in place for the RFT process, and an external probity advisor was engaged. AMSA did not specifically assess probity risk and did not fully adhere to the probity plan requirements for procurement personnel to receive probity briefings and make conflict of interest declarations. The probity advisor provided an interim

37 Department of Finance, *Commonwealth Procurement Rules*, paragraph 6.6, [Internet], Department of Finance, Australia 2022, available from <https://www.finance.gov.au/government/procurement/commonwealth-procurement-rules/value-money> [accessed 24 April 2024].

38 Department of Finance, *Commonwealth Procurement Rules*, paragraph 6.8, [Internet], Department of Finance, Australia 2022, available from <https://www.finance.gov.au/government/procurement/commonwealth-procurement-rules/value-money> [accessed 24 April 2024].

report at the completion of tender evaluation, and a final report following completion of the procurement process.

Risk assessment, including of probity risks

4.3 AMSA has an enterprise level Risk Management Framework which sets out that AMSA risk methodology 'is aligned to, and based, upon the international standard on risk management (ISO 31000:2018)'.

4.4 The AMSA procurement area provides internal specific advice on risk in procurement to staff on AMSA's intranet. This includes:

Throughout all stages of the procurement and contract management processes, it is necessary to be aware of risks, their sources or causes, and their potential impacts. Where the procurement is of significant size and complexity, overall risk is likely to be medium or high and so a risk assessment should be undertaken. Formally documented risk assessments should be undertaken for complex and covered procurements, and encompass the entire procurement and contract management lifecycle. Regular review/monitoring/controlling of risks and risk treatments should occur throughout the procurement/contract life-cycle.

4.5 A brief dated 21 July 2021 to the AMSA Executive outlined the procurement strategy. It included the advice that 'a risk register will be developed and maintained throughout the procurement'. A paper to the 22 September 2021 AMSA Board stated the same. This did not occur.

4.6 As a result, there was no specific assessment of probity risk. Such an assessment would have been of value to inform decisions about the evaluation governance arrangements including, for example, the likely extent of any probity advice that might be required during the conduct of the procurement. The change in Chair of the AMSA Board during the latter stages of the tender process would have also required an update to any risk assessment.

Engagement of probity advisor and provision of probity reports

4.7 An external probity advisor, Management Options Pty Ltd, was engaged by AMSA. The external probity advisor reported to the Project Manager.

4.8 The probity advisor was engaged via a Request for Quote process in December 2021 with four firms invited to respond. In April 2024, AMSA advised the ANAO that:

AMSA selected candidate organisations with the appropriate skills based on the knowledge and experience of AMSA staff. The approach was consistent with AMSA's internal procurement framework. How those four (4) specifically came to be selected as candidates was not recorded.

4.9 Two responses were received with the higher ranked candidate, with a lower hourly rate, successful. AMSA approved an engagement for a nine-month period, with a commencement date of 1 April 2022, an end date of 19 December 2022, and valued at \$23,716 (GST inclusive). By November 2023, the contract had been varied four times, extending its duration out to 25 months (an end date of 31 March 2024) and increased the maximum fee to \$28,193 (GST inclusive), which reflected an additional 10 hours of probity advice compared with the 98 hours originally contracted for.

4.10 The probity plan required the probity advisor to provide a written interim probity report on the procurement process. The interim report, addressed to the AMSA Chief Executive Officer (CEO),

was provided on 15 June 2023, at the conclusion of tender evaluation. The interim report made no adverse findings. It stated that the probity advisor was of the opinion that:

- The processes developed and executed for inviting tenders were fair,
- The evaluation methodology facilitated the objectives of the ATM,
- Appropriate steps for identifying, clarifying and managing conflicts of interest were put in place,
- Probity advice was sought and considered,
- The methodology for the maintenance of confidentiality and security was satisfactory,
- The tender was consistent with the fundamentals of CPRs, and
- The Tender Evaluation Report and supporting documents provides a defensible record of the actions and decisions of the relevant PECs and CEP and supports the recommendations therein.

4.11 The probity plan also required that a written final probity report be provided following the completion of any contract negotiations and after tenderer debriefings.³⁹ The debriefing to the unsuccessful tenderer for the AtoN maintenance services contract was held on 25 July 2023 with the award of the ETC services contract announced on 20 December 2023.

4.12 The final probity report (dated 9 April 2024) included the findings from the interim report with the additional finding that: ‘the debriefing processes were consistent with the Probity Plan and the expected standards of probity under the Commonwealth Procurement Rules’.

Probity plan

4.13 A probity plan for the combined AtoN maintenance and ETC services procurement was developed, with the first draft prepared by the probity advisor. The probity plan was endorsed by the senior AMSA personnel responsible for the procurement, including the chair of the Consolidation Evaluation Panel, as well as by the probity advisor. It was approved by the AMSA CEO on 9 May 2022. The probity arrangements were incorporated into the approved Procurement Evaluation Plan.

Industry engagement activities prior to the procurement

4.14 The CPRs state that all potential suppliers must be treated equitably based on their commercial, legal, technical and financial abilities.⁴⁰ When an incumbent provider competes for new work, it may have (or be perceived to have) certain advantages, such as understanding of an

39 Similarly, the tender evaluation report stated that: ‘A final report on the management of probity during the entire procurement will be provided to AMSA separately at the completion of the de-briefs to Tenderers by the Probity Advisor.’

40 Department of Finance, *Commonwealth Procurement Rules*, paragraph 5.4, [Internet], Department of Finance, Australia 2022, available from <https://www.finance.gov.au/government/procurement/commonwealth-procurement-rules/encouraging-competition> [accessed 24 April 2024] and Department of Finance, *Commonwealth Procurement Rules*, paragraph 6.6b, [Internet], Department of Finance, Australia 2022, available from <https://www.finance.gov.au/government/procurement/commonwealth-procurement-rules/efficient-effective-economical-and-ethical-procurement> [accessed 24 April 2024].

agency's needs, established relationships with agency staff, and knowledge that is not available to other potential suppliers.⁴¹

4.15 As the market sounding undertaken by AMSA, and AMSA's engagement with the incumbent contractor to inform the procurement approach, was not defined as being part of the procurement process the probity plan did not apply to those activities. A separate probity plan was also not in place to govern the industry engagement activities that preceded the procurement.⁴²

Recommendation no. 4

4.16 To effectively manage probity risks in procurement activities, the Australian Maritime Safety Authority:

- include an assessment of probity risks and identify how they should be managed within the risk register for large and/or complex procurements; and
- have in place a probity plan that governs any pre-procurement activities including industry engagement and addresses the way it will engage with any incumbent contractor(s) during the planning for, and conduct of, the procurement process.

Australian Maritime Safety Authority response: *Agreed.*

Conflict of interest declarations

4.17 Department of Finance guidance to entities on ethics and probity in procurement states that 'persons involved in the tender process, including contractors such as legal, commercial or probity experts, should make a written declaration of any actual, potential or perceived conflicts of interest prior to taking part in the process.'⁴³ Consistent with this guidance, each person involved in the procurement process was required to complete a confidentiality and conflict of interest declaration. Any identification of a real, potential or perceived conflict of interest was to be assessed by 'the Consolidation Panel Chair and/or Project Sponsor, in consultation with AMSA's procurement section and the [external] probity advisor'.

4.18 AMSA maintained a conflict of interest and confidentiality declaration register for procurement personnel. The register identified 33 declarations.

4.19 There were 31 declaration forms in AMSA's records. AMSA advised the ANAO in March 2024 that, in relation to the two people who did not complete forms (although both were listed in the Procurement Evaluation Plan), one did not have a role in the procurement and the other did not provide expert knowledge nor was in a decision-making role. That individual was an administrative

41 NSW ICAC, *Dealing with incumbent providers in procurement* [Internet], NSW ICAC, available from <https://www.icac.nsw.gov.au/prevention/corruption-prevention-publications/latest-corruption-prevention-publications/dealing-with-incumbent-providers-in-procurement> [accessed 24 April 2024].

42 The probity risks from such activities are discussed in Auditor-General Report 42 2021–22 *Procurement of delivery partners for the Entrepreneurs' Programme*, pp. 43–46 [Internet], available from <https://www.anao.gov.au/work/performance-audit/procurement-delivery-partners-the-entrepreneurs-programme> [accessed 24 April 2024].

43 Department of Finance, *Ethics and Probity in Procurement* [Internet], available from <https://www.finance.gov.au/government/procurement/buying-australian-government/ethics-and-probity-procurement> [accessed 24 April 2024].

officer for the procurement, for example they authorised AusTender notices for publication and signed procurement correspondence.

4.20 Of the 31 declaration forms in AMSA's records: one was not signed by a witness; two did not declare whether they did or did not have a conflict of interest;⁴⁴ and one declared they both did, and did not, have a conflict of interest.⁴⁵

4.21 The tender evaluation report stated that 'a probity briefing on the management of probity risk was given to all participants in the tender evaluation (on 23 May 2022, 15 June 2022 and 23 February 2023 respectively) before evaluation of the tenders'. Inconsistent with this statement, the probity register recorded that seven of 25 procurement personnel (or 28 per cent) had not attended a probity briefing. Emails show that the external probity advisor advised the Project Manager: 'I strongly suggest we hold two briefings to catch everyone' and provided two dates for this. The Project Manager responded: '... it is difficult to arrange a time with more than two attendees'. AMSA's record of who received probity briefings and on what dates, did not align with an accepted invoice from the probity advisor for twenty staff (nine individuals received a briefing on 23 May 2022, four individuals received a briefing on 15 June 2023 and the members of the Procurement Evaluation Committee and Consolidation Evaluation Panel were briefed on 23 February 2023).

4.22 AMSA advised the ANAO in March 2024 that nine experts from three commercial businesses⁴⁶ were involved in the procurement. Of these, five completed declarations stating they had no conflict of interest which were correctly recorded in the register. The individuals were not recorded as attending a probity briefing and AMSA confirmed to the ANAO in April 2024 that they had not attended a probity briefing. Four others were not listed in the register and declaration forms were not on file.

Opportunity for improvement

4.23 AMSA implement processes requiring:

- fully completed conflict of interest and confidentiality declarations from all personnel involved in procurement activities;
- that the probity register for individual procurements records declaration information; and
- that all personnel involved in procurement activities attend probity briefings.

Engagement with the incumbent contractor

4.24 The Procurement Evaluation Plan outlined that: 'Personnel will need to declare any relationships or connections they currently have, or have previously had, with Tenderers, organisations related to Tenders, or the employees of Tenderers.' There was one declared conflict of interest in relation to the officer being required to meet with the incumbent provider for current contract management of the AtoN and ETC contracts, including discussion of service delivery

44 One officer had a decision-making role in the ETC component of the procurement.

45 The individual was a member of the Consolidation Evaluation Panel.

46 Four were from Rider Levett Bucknall Victoria Pty Ltd; two were from Management Options Pty Ltd; and three were from EY.

performance. External probity advice was sought on this matter with the advice being that the declarant:

- maintain a clear separation between business-as-usual activities with the incumbent supplier and the AtoN maintenance and ETC procurement project;
- refer any queries from the incumbent supplier to the single point of contact for the tender (the Project Manager); and
- ensure all meetings during the procurement period with the incumbent supplier were formal and where an agenda is not used that a record be taken as to the discussion points.

4.25 AMSA maintained a probity register in relation to the procurement from 10 May 2022. There was evidence that the individual with the declared conflict of interest had logged interactions with the incumbent provider, with mitigating actions recorded.

4.26 Prior to the tender release, AMSA received a complaint in July 2022 regarding a different AMSA officer who was performance managing the incumbent contractor due to key performance indicators not being met.⁴⁷ In August 2022, the external probity advisor outlined in an email to the Project Manager that the officer should: ‘update [their] Conflict of Interest declaration in light of the complaint and with a specific focus on [their] involvement in the management of the incumbent supplier over the current contract period and to obtain a statement as to whether [they] believe [they] can undertake the role of an evaluator in a fair and impartial manner’. Notwithstanding this advice, the conflict of interest form dated February 2023⁴⁸ for this individual and the conflict of interest and confidentiality declaration register did not record a conflict of interest. Inconsistent with this situation, the Tender Evaluation Report stated as follows:

All participants have declared (at any point during the entire procurement and Tender evaluation process) the existence of any real or perceived conflict of interest to the Probity Advisor and implemented his advice immediately.

What assurance activities did AMSA undertake to assure itself of procurement probity?

AMSA engaged a probity advisor for the RFT process and an internal audit of the procurement was undertaken. The commissioning of the internal audit did not follow AMSA’s internal processes and AMSA’s Board Audit and Risk Committee was not informed of the limitations regarding the assurance level of the work that was undertaken. The format of the report, a brief email, was not fit for its purpose.

4.27 As discussed at paragraphs 4.7 to 4.12, a probity advisor was engaged by AMSA for the RFT process.

47 AMSA advised the ANAO in April 2024 that:

The individual concerned reported the complaint himself and his second declaration on 28 February 2023 specifically acknowledged the relationship with AMSG. In the circumstances, AMSA accepts that there was a breakdown in communication that led to the advice not being followed and made the quoted reference in the tender evaluation report inaccurate, but the mitigating factors are equally important, as is the fact that the individual was not a scoring member of the evaluation team.

48 The Conflict of Interest form included an annotation stating: ‘I note that AMSG ... are existing service providers whose contracts are managed within ... I am aware of the need to manage the relationship in such a way to avoid a conflict of interest. I have no personal connections with any of the companies.’

4.28 In addition, in April 2023, AMSA management decided that an internal audit of the procurement should be undertaken by AMSA's contracted internal auditor, Ernst & Young Australia (EY). AMSA records outline that an internal audit was a mitigation strategy in the event a tenderer complained about the conduct of the procurement, which AMSA saw as likely, and that an internal audit would provide confidence to the Board. Advice to AMSA from its probity advisor was that they did not have probity concerns with an internal audit being undertaken and agreed it was a prudent step in the circumstances.

4.29 It took some time for the internal audit to be undertaken. Information was provided by AMSA to its internal auditor on 20 April 2023. A draft plan was provided by the internal auditor to AMSA on 30 May 2023.

4.30 EY's scoping document identified an objective of assessing 'AMSA's compliance with procurement requirements for the tender for AtoN maintenance 22AMSA117'. There were four items scoped for inclusion:

- compliance with AMSA's procurement policies and procedures;
- risk management strategies in place for the procurement;
- compliance with the Procurement Evaluation Plan; and
- documentation of the value for money assessment.

4.31 The deliverable was to be 'a memo report detailing findings and recommendations will be prepared for submission to AMSA's Board Audit, Risk and Finance Committee'. At odds with the reason why the internal audit was requested as well as the stated objective and items to be audited, the scoping document stated that the work 'does not express any form of assurance'. EY advised AMSA that its internal audit took 6 days to complete and cost \$8,000. EY did not bill for this cost.

4.32 On 13 June 2023, AMSA management inquired as to progress, with the report (in email format) provided to AMSA on 16 June 2023. The findings/conclusions comprised four dot points:

- AMSA's compliance with its procurement policies and procedures – No issues were noted in our review of the ATM, TEP or TER. AMSA's documentation of the procurement was well organised and available as needed.
- AMSA's risk management strategies in place for this procurement – AMSA was aware of the risks associated with the tender and during discussions and review of the documentation it was noted that AMSA had articulated those risks and had plans in place to try and mitigate them. AMSA has considered the risks associated with not proceeding with the procurement and has a proposed way forward.
- AMSA's compliance with the Procurement Evaluation Plan – Provision of Aids to Navigation Maintenance (AtoN Maintenance) & Level 1 Emergency Towage Capability (ETC) Services – Our review of the PEP and the TER did not note any issues of non-compliance or opportunities for improvement.
- AMSA's documentation of the value for money assessment – The value for money assessment clearly outlines the process undertaken and the considerations in relation to the Tender. We provided feedback to AMSA that the value for money assessment could be made clearer to articulate the Technical Capability of the Tender separately from the cost.

4.33 AMSA's Board Audit and Risk Committee was not provided with the report.

4.34 AMSA accepted the report of the internal audit as provided by EY. AMSA advised the ANAO in February 2024 that: ‘no formal report was written although [EY] did indicate they were happy to convert the email content into formal correspondence if required’.

4.35 AMSA’s 2023–26 Strategic Internal Audit Plan⁴⁹ dated May 2023 included the AtoN maintenance procurement as a proposed topic for 2025–26. The direction in the 2023–26 Strategic Internal Audit Plan was: ‘Where priorities change during delivery of the plan, there is scope to bring forward topics, subject to Board Audit and Risk Committee agreement’. While the internal audit was undertaken by EY in the context of AMSA’s internal audit program it did not appear on the schedule for the year it was undertaken and approval was not sought from AMSA’s Board Audit and Risk Committee to bring it forward.

4.36 The EY internal audit was described to the Board on 6 July 2023 as having been undertaken as a mitigation against the risk that ‘an unsuccessful tenderer could successfully challenge the decision’. The report of the EY internal audit was not provided, with the Board paper simply outlining: ‘the consultant (EY) has confirmed the procurement process was sound’. In addition:

- the letter prepared by the department for the minister requesting the Auditor-General undertake an ‘urgent assurance review’ stated that ‘an independent audit of the procurement, requested by the AMSA Board, supported the conclusion that the procurement met relevant legal requirements’;⁵⁰ and
- the procurement complaint investigation (see paragraph 4.44) placed reliance on the internal audit as follows:

Given the consequences that would arise for AMSA if no AtoN Maintenance Service was in place, AMSA initiated a review of AMSA’s compliance with its procurement policies and procedures (which include compliance with the CPRs) by Ernst and Young (EY) prior to the decision not to proceed to contract with any tenderer. EY raised no concerns with respect to compliance with the CPRs or the process more generally.

4.37 On 29 November 2023, AMSA’s Board Audit and Risk Committee (which did not see the internal audit and was not advised of the limitations) asked that the Board be given a copy of the findings. The findings as outlined in paragraph 4.32 were provided to the Board on 13 December 2023.

Were complaints handled appropriately?

There have been three complaints by the unsuccessful tenderer in relation to the AtoN tender.

- An August 2023 complaint under the *Government Procurement (Judicial Review) Act 2018* alleging breaches of the CPRs was handled appropriately by AMSA. The investigation was appropriately scoped and completed in a timely fashion. There were

49 Prepared by EY.

50 Australian National Audit Office *Assurance review of the AMSA AtoN procurement*, [Internet] ANAO, Australia 2024, available from <https://www.anao.gov.au/work/request/assurance-review-the-australian-maritime-safety-authoritys-amsa-aids-to-navigation-aton-procurement> [accessed 2 May 2024].

two errors of fact⁵¹ in the investigation report. Those errors did not affect the investigation's conclusion that the alleged contraventions of the CPRs had not occurred.

- In November 2023 the unsuccessful tenderer alleged that the Chair of the AMSA Board had a conflict of interest. AMSA advised the Department of Infrastructure, Transport, Regional Development, Communications and the Arts (the department) that the results of the evaluation process, and the decision that a contract should not be awarded, was not influenced by the Chair or any other member of the Board.
- Also in November 2023, the unsuccessful tenderer made allegations about the conduct of the chair of the Consolidation Evaluation Panel. Once it became aware of those allegations in January 2024, AMSA took timely and appropriate action to investigate, finding that there was no evidence to support the allegations.

4.38 A well-handled complaint can help generate supplier satisfaction and confidence in Australian Government procurement and administration. If an entity receives a complaint about a procurement, then it is required to apply timely, equitable and non-discriminatory complaint-handling procedures.⁵²

4.39 Accountable authorities of relevant entities also have complaint handling obligations under the *Government Procurement (Judicial Review) Act 2018* (GPJR Act).⁵³ The GPJR Act applies to contraventions, or proposed contraventions, of the relevant CPRs relating to covered procurements by relevant entities. The GPJR Act allows suppliers to make an application to the Federal Court or the Federal Circuit and Family Court of Australia (Division 2) which may grant an injunction and/or order the payment of compensation by the relevant entity to the supplier. Where a supplier decides to seek an injunction from the court, it must have first made a complaint to the accountable authority under section 18 of the GPJR Act and made a reasonable attempt to resolve the complaint.⁵⁴ The accountable authority must investigate complaints made under section 18 and prepare a report of the investigation. The accountable authority must suspend the procurement while the complaint is being resolved unless a public interest certificate is in force.⁵⁵

51 The investigation report did not reflect that tender evaluation had assessed the:

- value for money offered by tenderer and concluded that value for money had not been demonstrated; or
- tenderer's performance history, drawing on the referees nominated by the tenderer in the tender as well as AMSA's assessment of recent performance of the existing contract. The report incorrectly stated that the Commonwealth Procurement Rules did not permit AMSA to consider its relationship with the incumbent contractor and did not identify that the RFT provided for tenderer experience and expertise to be evaluated.

52 Department of Finance, *Commonwealth Procurement Rules*, paragraph 6.8, [Internet], Department of Finance, Australia 2022, available from <https://www.finance.gov.au/government/procurement/commonwealth-procurement-rules/efficient-effective-economical-and-ethical-procurement> [accessed 24 April 2024]

53 Federal Register of Legislation, *Government Procurement (Judicial Review) Act 2018* [Internet] Australian Government, Australia 2021 available from <https://www.legislation.gov.au/C2018A00129/latest/text> [accessed 24 April 2024].

54 The supplier is not required to make a complaint to the accountable authority before making an application to the court for compensation, which may be made independent of an application for an injunction.

55 See further, Auditor-General Report No. 19 2022–23 *Procurement Complaints Handling* [Internet], available from <https://www.anao.gov.au/work/performance-audit/procurement-complaints-handling> [accessed 24 April 2024].

August 2023 complaint from the unsuccessful tenderer alleging breaches of the CPRs

4.40 The complaints process for the procurement was outlined in the approach to market documentation and referred complainants to AMSA's managing procurement complaints webpage.⁵⁶ Prior to 23 February 2024, AMSA's complaints webpage did not contain information about how to make a complaint under the GPJR Act. This was initially raised internally on 24 August 2023 but updated content was not provided by AMSA's procurement area until 23 February 2024. AMSA advised the ANAO in March 2024 that the delay was due to 'competing priorities and staffing issues'.

4.41 On 6 July 2023 the chair of the Consolidation Evaluation Panel rang the CEO of AMS Group advising of the unsuccessful outcome, with AMSA providing written advice on 7 July 2023. On 20 July 2023 AMSA posted on LinkedIn advising the AtoN procurement had been discontinued.⁵⁷ This was not the case. Rather than discontinuing the procurement, AMSA had concluded the AtoN component by deciding a value for money outcome was not achieved and was still progressing the ETC services component through to contract award. In April 2024, AMSA advised the ANAO that:

AMSA accepts that the words used could have been more consistent with the formal findings but it was not intended to provide formal notice or explanation of the decision to the tenderer, who had already received notification that we would not be proceeding to contract award, only to advise about the process. It may also be helpful to provide some context around this. The probity log shows a number of approaches from industry and media enquiries were also starting.⁵⁸ The probity advisor was content with wording prior to publication.

4.42 A debrief was provided to the unsuccessful tenderer on 25 July 2023. On 2 August 2023, the Executive Chair of the tenderer met with the AMSA CEO.

4.43 On 8 August 2023, the tenderer lodged a complaint with AMSA under the GPJR Act alleging contraventions of the CPRs.

Investigation of the complaint

4.44 The tenderer's complaint referenced five specific provisions of the CPRs, of which four were 'relevant provisions' for the purposes of the GPJR Act.⁵⁹ AMSA documented there were three additional complaint matters 'related to contractual management with inferences to the CPRs ... not directly covered by the Act' but that AMSA would investigate these as well. This decision was consistent with AMSA's obligations under the CPRs.⁶⁰

56 AMSA, *Managing Procurement Complaints* [Internet], AMSA, Australia 2024, available from <https://www.amsa.gov.au/about/reporting-and-accountability/managing-procurement-complaints> [accessed 27 February 2024].

57 This statement was not correct as the RFT did not allow AMSA to discontinue, or terminate, the AtoN maintenance component while proceeding with the ETC services component. The RFT did enable AMSA to award a contract for ETC services and not award a contract for AtoN maintenance where the evaluation concluded that no tender received represented value for money.

58 See paragraph 4.55.

59 The 'relevant' CPR provisions referenced in the complaint were 5.4, 7.15, 10.35, and 10.36; and the other provision was CPR 7.23.

60 Department of Finance, *Commonwealth Procurement Rules*, paragraph 6.8, [Internet], Department of Finance, Australia 2022, available from <https://www.finance.gov.au/government/procurement/commonwealth-procurement-rules/efficient-effective-economical-and-ethical-procurement> [accessed 24 April 2024].

4.45 On 10 August 2023 AMSA acknowledged receipt of the letter and on 14 August 2023 formally acknowledged receipt of the complaint and advised that AMSA would investigate the complaint.

4.46 AMSA appointed a senior manager who had not been involved in the conduct of the approach to the market to investigate the complaint. A report was finalised on 24 August 2023. According to the report:

- the investigation was ‘primarily informed by a desktop review of key documents’ with no formal interviews conducted and any clarification was sought from individuals involved by email; and
- no contraventions of the CPRs were identified (in response to the five specific CPRs raised by the tenderer, as well as three other complaints related to contractual management which AMSA identified as making inferences to the CPRs).

4.47 The investigation placed reliance on the internal audit (see paragraphs 4.28 to 4.37) and the interim report from the probity advisor (see paragraph 4.7).

4.48 Similar to incorrect public statements made by AMSA⁶¹ and the incorrect advice provided to the tenderer in its tender debrief (see paragraph 3.34) the complaint investigation report did not identify that the decision to not award a contract was because the tender evaluation had concluded the tender did not represent value for money. Rather, it focused on one of the value for money considerations (see paragraph 3.31), as follows:

AMSG’s tender response, as submitted, was evaluated in accordance with the Procurement Evaluation Plan. It did not demonstrate adequate capability or capacity.

4.49 The complaint investigation report incorrectly suggested that the CPRs (specifically, paragraph 4.5)⁶² did not permit AMSA’s tender evaluation to consider its relationship with the incumbent contractor ‘as this might cause advantage or disadvantage compared to other tenderers with whom AMSA has not dealt with previously’. While it is important that incumbency risks be managed in any procurement process, the CPRs provide that ‘potential supplier’s relevant experience and performance history’ is relevant to evaluating value for money.⁶³ This was reflected in the RFT, as follows:

- one of the evaluation criteria was ‘the extent to which the Tenderer is assessed as having the experience and demonstrated expertise to meet the requirements set out in the Statement of Requirements and the Draft Contract’⁶⁴ (see Table 2.2); and

61 Parliament of Australia, *Rural and Regional Affairs and Transport Legislation Committee - 25/03/2024 – Estimates*, [Internet] Parliament of Australia, Australia 2024, available from https://www.aph.gov.au/Parliamentary_Business/Hansard/Hansard_Display?bid=committees/estimate/27848/&sid=0000 [accessed 30 April 2024].

62 Department of Finance, *Commonwealth Procurement Rules*, paragraph 4.5, [Internet], Department of Finance, Australia 2022, available from <https://www.finance.gov.au/government/procurement/commonwealth-procurement-rules/value-money> [accessed 24 April 2024].

63 *ibid.* See also Department of Finance, *Due Diligence in Procurement*, November 2023, [Internet], Department of Finance, Australia 2023, available from <https://www.finance.gov.au/sites/default/files/2023-11/Due-Diligence-in-Procurement.pdf> [accessed 24 April 2024].

64 The documents provided to the reviewer for examination included the evaluation plan, which identified the criteria.

- required tenderers to nominate two referees with the RFT stating that: ‘AMSA may use any relevant information obtained in relation to a Tenderer (through this Approach to Market or by independent inquiry of the Tenderer’s referees or references or from any other source) in the evaluation of Tenders’. Consistent with this:
 - AMSA recorded in the ‘referee reports’ section of the June 2023 Value for Money Assessment Report (which was one of the internal documents included in those provided to the reviewer for examination) that:
 - one of the referees nominated by the tenderer did not respond to requests to provide input;
 - the other referee provided input (that referee was in relation to the existing contract with AMSA); and
 - ‘AMSA’s internal referee report’ was based on ‘the information already provided to AMSA’s Board through formal reports on AMMSG’s performance, presented prior to tender closure (December 2022) and in an updated report submitted to the Board (May 2023)’;⁶⁵ and
 - The June 2023 Tender Evaluation Report (which was also one of the internal documents included in those provided to the reviewer for examination) recorded that ‘the CEP decided that given the tenderer had nominated current contracts with AMSA for the referee reports, then AMSA’s current view of service delivery by AMMSG should be considered’. The report summarised the feedback as follows:

historically AMSA had been satisfied with the performance of AMMSG across its main contracts. However, aspects of AMMSG’s service delivery over the last two years have been disappointing. For example, there have been delays to the annual AtoN work programme, deficiencies in Search And Rescue equipment maintenance and reporting, and poor change management on the ETC contract that led to an off-line period and substantial Key Performance Indicator deductions.

These concerns had been raised with CEO AMMSG over a series of meetings.

There are signs the level of service is improving as additional staff have been recruited and improved management processes implemented. While there may have been mitigating circumstances as the country came out of COVID, including unseasonal wet weather that hampered site access, it is taking time to train new resources and restore desired service levels.

4.50 In a letter dated 24 August 2023⁶⁶ to the unsuccessful tenderer, AMSA advised that an investigation into the complaint had found that ‘no breach of the CPRs had occurred’ and that AMSA ‘will not be proceeding to contract for AtoN maintenance services at this time’.⁶⁷ AMSA provided the unsuccessful tenderer with a copy of the investigation report and also advised that the

65 On 31 May 2023, AMSA sought advice from its probity advisor on this approach, stating that the RFT permitted ‘independent inquiry of ... references or from any other source’. AMSA informed the probity advisor that ‘There is negligible impact as the referee report we have obtained did not change the value for money decision’. The probity advisor endorsed AMSA’s approach.

66 This was within AMSA’s standard 20 days for resolving complaints.

67 As at 12 April 2024, AMS Group had not formally responded to AMSA’s letter of 24 August 2023, which means the complaint has not been resolved.

procurement was no longer suspended as a Public Interest Certificate had been issued on 22 August 2023.⁶⁸

4.51 On 30 August 2023, the CEO of AMS Group phoned the CEO of AMSA and left a message seeking to discuss the outcome of the AtoN maintenance services contract. AMSA obtained probity advice that supported a meeting occurring given the AtoN component of the tender was concluded. The probity advisor advised that it would be prudent to have another member of AMSA's staff in attendance and that a file note should be taken to summarise the discussion points. AMSA advised the ANAO in April 2024 that a meeting occurred between the CEO of AMSA and the CEO of AMS Group following this call, however 'no minutes or file notes were kept by AMSA'.

4.52 In a letter to the AMSA CEO dated 4 September 2023, AMS Group sought an extension to its existing fixed price contract through a limited tender as a potential solution to the procurement outcome. The proposal was for the current contract conditions to remain unchanged with the timeframe,⁶⁹ pricing⁷⁰ and indexation to be updated.

4.53 The chair of the Consolidation Evaluation Panel was briefed by AMSA's Governance Manager, who had conducted the procurement complaint investigation, on 6 September 2023. The advice was that a limited tender would:

- likely contravene the CPRs;
- the offer did not meet the CPR exception conditions for the use of limited tender; and
- to do so exposed AMSA to other procurement related risks.⁷¹

4.54 AMS Group was advised that a limited tender would not be undertaken by AMSA for AtoN maintenance services by letter dated 25 September 2023. In a letter dated 17 October 2023, AMS Group outlined: 'this letter is a formal response to the alleged failure of the AMS Group tender response'. The letter set out AMS Groups' concerns with the feedback it had been provided with through the debriefing process.

4.55 Between 11 July 2023 and 1 December 2023, AMSA received eighteen direct contacts (phone or email) from six AMS Group representatives and six industry stakeholders regarding the outcome of the AtoN maintenance procurement. There were also two industry publication articles, three mainstream media articles and at least thirteen items of correspondence relating to the outcome of the AtoN procurement were received by AMSA management, the Chair of the AMSA Board, the department or Parliamentarians. The minister received five of those. During that period the Chair of the AMSA Board advised the minister by letter⁷² that:

68 The accountable authority must suspend the procurement while the complaint is being resolved unless a public interest certificate is in force. The GPJR Act allows the accountable authority to issue a public interest certificate stating that it is not in the public interest for the procurement to be suspended while complaints under section 18 are being investigated or applications for injunctions are being considered.

69 AMS Group sought a fixed 5 year period followed by two 2 year options to extend, followed by a final one year option, totalling 10 years.

70 AMS Group set out that the pricing submitted in the tender response reflected CPI increases to the existing contract.

71 Department of Finance, *Commonwealth Procurement Rules* [Internet], Department of Finance, Australia 2022, available from <https://www.finance.gov.au/sites/default/files/2023-06/Commonwealth%20Procurement%20Rules%20-%2013%20June%202023.pdf> [accessed 10 March 2024].

72 Issuing a letter to update the minister following board meetings is standard process for the AMSA Board.

The AtoN maintenance process produced a single tender from the incumbent. Scores awarded by the evaluation team were disappointing and overall, the bid was assessed as only marginally meeting the technical requirements. Given the safety critical nature of the service, and the high cost of the capability, the evaluation team concluded that a contract should not be awarded from the AtoN component of this procurement.

4.56 The Chair of the AMSA Board also met with the minister for the first of what is to be a regular six monthly meeting.

4.57 The AtoN Network Service Project was also put in place by AMSA management with the initial planning meeting scheduled on 22 August 2023. The purpose of the project was ‘to develop detailed plans for and implement alternative AtoN maintenance services arrangements to sustain the AtoN network post 30 June 2024.’ At the request of the department, AMSA provided an update for the minister on 8 September 2023 on the progress of the project work. On 21 November 2023, the AMSA Executive were briefed on the proposed new model, with the strategy for the second procurement approved by the AtoN Network Service Project steering committee on 8 December 2023.

26 November 2023 allegation of a conflict of interest for the Chair of the AMSA Board

4.58 On 26 November 2023, the unsuccessful tenderer wrote to the minister alleging that the Chair of the AMSA Board had an apparent conflict of interest as a result of their partner’s employment and also the Chair’s partner ‘is an active participant on social media and has been derogatory of AMS Group since we commenced pilotage operations in Brisbane in 2022.’⁷³

4.59 The Chair was appointed to this role on 3 July 2023 for a period of four years having been an existing member of the Board. Board Members are required to complete a private interests declaration. In the document signed on 28 August 2020, the now Chair identified their partner and partner’s employment. This was declared again on 24 May 2023 prior to the Board Member becoming the Chair.

4.60 The AMSA Board Charter does not refer to ‘conflicts of interest’, but it does require a member to ‘exercise the degree of care and diligence that a reasonable person would exercise if he or she were an official of a Commonwealth entity authority in similar circumstances’ and ‘to disclose material personal interests that relate to the affairs of that entity’. For the September 2023 Board meeting the Chair updated disclosures to include that she had a personal relationship with the person who wrote the social media post referenced in the complaint from the unsuccessful tenderer.

4.61 In addressing the complaint, AMSA obtained assurances from each member of the Consolidation Evaluation Panel that they had not discussed the procurement with any member of the AMSA Board before the decision was made by the Panel not to proceed with the AtoN maintenance element of the procurement. A similar assurance was sought and obtained from the AMSA CEO. The CEO’s assurance did not cover any discussions with Board members prior to the close of the RFT. AMSA advised the ANAO in April 2024 that the question was worded ‘to allow for

73 AMSA advised the ANAO in February 2024 that the social media post related to a jurisdictional port contract that AMS Group had been unsuccessful in securing and was not linked in any way to the Commonwealth procurement.

the fact that the CEO may have discussed the approach to market with the Board in general terms in the period before the tender period had closed’.

4.62 Email records show that the chair of the Consolidation Evaluation Panel had a meeting scheduled with the Chair of the AMSA Board on 5 July 2023 to brief on the outcome of the procurement.⁷⁴ AMSA advised the ANAO in April 2024 that the Board paper was the basis for this briefing and no minutes or file notes were recorded.

4.63 On 29 January 2024, the minister requested an ANAO ‘urgent assurance review’ of the procurement. On the same date, the minister also signed a letter to the unsuccessful tenderer that stated:

- the AMSA Board was not involved in the tender assessment or decision-making relating to not awarding the contract; and
- the procurement was supported by an independent probity advisor ensuring high standards of integrity and compliance throughout the process.

30 November 2023 allegations about the Chair of the Consolidation Evaluation Panel

4.64 On 8 January 2024, AMSA became aware of allegations made by the unsuccessful tenderer on 30 November 2023 to the minister about the chair of the Consolidation Evaluation Panel. There were seven allegations that AMSA’s corporate services area grouped into the two themes. The first was that the chair of the Consolidation Evaluation Panel ‘had used [their] position to unduly influence the AtoN Approach to Market outcomes’ and secondly, that they had ‘knowingly misled the Parliament and the public’.

4.65 AMSA became aware of these allegations after it received a copy of a department ministerial briefing that included the letter dated 30 November 2024. The department advised the ANAO in April 2024 that the delay in the department bringing the allegations to the attention of AMSA was due to the sensitivity of a peer of the chair of the Consolidation Evaluation Panel acting at that time in the role of AMSA CEO and departmental staff leave over the Christmas holiday season. As preparations were underway for a further procurement process, had some, or all, of the allegations been substantiated, this would have necessitated changes to the management of the further procurement process and, as a result, potentially delayed it.

4.66 AMSA’s corporate services area undertook a formal internal investigation in response to a number of allegations by AMS Group. In planning the investigation, an AMSA internal options brief outlined that: ‘AMSA has, under various Commonwealth Acts, responsibility to investigate and respond to allegations of staff behaviour that might be seen as inappropriate or corrupt. The basis for responding to the allegation is founded in the requirements of *Public Governance, Performance and Accountability Act 2013*, which sets out specific duties that public officials must uphold’. It further outlined that: ‘Noting the nature of the allegations the PID Act, the National Anti-Corruption Commission (NACC) requirements, Commonwealth Fraud Control Framework, [and] AMSA’s Code of Conduct may be relevant’.

74 The Board was being asked to make a decision on the ETC contract only (as the outcome of the tender evaluation for the AtoN contract was that a contract should not be awarded).

4.67 The investigation report to the AMSA CEO dated 17 January 2024 outlined there was no evidence that the chair of the Consolidation Evaluation Panel had in any way unduly influenced the procurement (from development of the tender documentation to the tender evaluation). Further, the internal investigation found there was no evidence that the chair of the Consolidation Evaluation Panel had:

- breached the public trust. The process of the AtoN component of the approach to market appears to have been conducted and decisions made for proper purpose.
- abused [their] office as a public official. There is no evidence to suggest [the individual] has abused [their] office by:
 - engaging in improper acts or omissions in their official capacity, and
 - knowing that those acts or omissions are improper, and
 - intending to gain a benefit for themselves or cause a detriment to another person.
- has caused other officials to behave in a biased manner when carrying out official duties.

4.68 It was further concluded that there was no evidence provided to support the claim the chair of the Consolidation Evaluation Panel had knowingly provided false or misleading evidence to the Senate.

4.69 As the allegations had been made by AMS Group in a letter dated to the minister, and the letter had not been referred to AMSA by the department for response, the outcome was for no internal action to be taken in relation to the chair of the Consolidation Evaluation Panel and the report to be held on file should a third-party investigation be undertaken. The CEO of AMSA advised the department of the outcome of the investigation on 22 January 2024.




Rona Mellor PSM
Acting Auditor-General


Canberra ACT
3 June 2024

Appendices

Appendix 1 Entity responses



Australian Government
Australian Maritime Safety Authority



Acting Auditor General
Australian National Audit Office
By email

Dear Acting Auditor-General


Thank you for providing the Proposed Report under s19 of the *Auditor-General Act 1997* into the 2022-23 Aids to Navigation maintenance procurement. It was shared with relevant officers of AMSA for consideration in accordance with the strict 'need to know' confidentiality requirements, and I offer the following response on the Proposed Report:

- In respect of the entity response at paragraph 23, AMSA provides the following:

AMSA takes seriously its obligations to comply with the Public Governance, Performance and Accountability Act 2013, the Commonwealth Procurement Rules and conducting procurements ethically under its own internal procurement requirements. AMSA appreciates the ANAO's conclusion that AMSA's management of the AtoN maintenance procurement was largely effective and that consistent with the Commonwealth Procurement Rules it was not in the public interest for AMSA to award a contract for AtoN maintenance services. AMSA also accepts the identified recommendations and the suggested opportunity for improvement and will amend its practices accordingly.
- In respect of Recommendation No 1, it is agreed, and no additional response is offered for paragraph 2.20.
- In respect of Recommendation No 2, it is agreed, and no additional response is offered for paragraph 2.24.
- In respect of Recommendation No 3, it is agreed, and the following additional response is offered for paragraph 3.38:

AMSA accepts that there has been inconsistency and inaccuracy in public statements on the results of the procurement process. This has not been deliberate and there is no reason for AMSA to have avoided transparency on this topic within the confines of the Commonwealth Procurement Rules. However, AMSA certainly accepts that a more consistent approach to framing the explanation in line with the tender evaluation report findings would have improved understanding of the outcome.
- In respect of Recommendation No 4, it is agreed, and no additional response is offered for paragraph 4.17.

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AMSA does not dispute the factual findings concerning the work done by EY, set out in paragraphs 4.28 to 4.37 inclusive. AMSA management also accepts that the nature of the work, and its characterisation and subsequent handling, could have been made clearer, but wishes to make clear that it should not be inferred from the way those facts are presented that there was an intent, or plan, to conceal anything from the AMSA Board Audit and Risk Committee or the AMSA Board.

Yours sincerely

A handwritten signature in black ink, appearing to be 'JD', with a long horizontal flourish extending to the right.

Capt Jeanine Drummond
Chair

20 May 2024



Australian Government
**Department of Infrastructure, Transport,
Regional Development, Communications and the Arts**

Secretary
Jim Betts

Ms Rona Mellor PSM
Acting Auditor-General
Australian National Audit Office
GPO Box 707
CANBERRA ACT 2601

Dear Ms Mellor

Auditor-General Proposed Audit Report on the 2022-23 Aids to Navigation maintenance procurement

Thank you for providing the Department of Infrastructure, Transport, Regional Development, Communication and the Arts (the department) with the opportunity to comment on the Auditor-General proposed audit report on the *2022-23 Aids to Navigation maintenance procurement*.

The department appreciates the timely audit and opportunity to see the extract on matters related to the department. As an agency within the Infrastructure, Transport, Regional Development, Communications and the Arts portfolio, I await the report's overall conclusions on the effectiveness of the Australian Maritime Safety Authority's management of the Aids to Navigation maintenance procurement.

The department has not provided a response for inclusion in the summary report.

I would like to thank the Australian National Audit Office for the cooperation of the audit team and the professional manner in which the audit was conducted.

Yours sincerely

Jim Betts
Secretary

13 May 2024

Appendix 2 Improvements observed by the ANAO

1. The existence of independent external audit, and the accompanying potential for scrutiny improves performance. Improvements in administrative and management practices usually occur: in anticipation of ANAO audit activity; during an audit engagement; as interim findings are made; and/or after the audit has been completed and formal findings are communicated.
2. The Joint Committee of Public Accounts and Audit (JCPAA) has encouraged the ANAO to consider ways in which the ANAO could capture and describe some of these impacts. The ANAO's Corporate Plan states that the ANAO's annual performance statements will provide a narrative that will consider, amongst other matters, analysis of key improvements made by entities during a performance audit process based on information included in tabled performance audit reports.
3. Performance audits involve close engagement between the ANAO and the audited entity as well as other stakeholders involved in the program or activity being audited. Throughout the audit engagement, the ANAO outlines to the entity the preliminary audit findings, conclusions and potential audit recommendations. This ensures that final recommendations are appropriately targeted and encourages entities to take early remedial action on any identified matters during the course of an audit. Remedial actions entities may take during the audit include:
 - strengthening governance arrangements;
 - introducing or revising policies, strategies, guidelines or administrative processes; and
 - initiating reviews or investigations.
4. In this context, the below actions were observed by the ANAO during the course of the audit. It is not clear whether these actions and/or the timing of these actions were planned in response to proposed or actual audit activity. The ANAO has not sought to obtain assurance over the source of these actions or whether they have been appropriately implemented.
 - Paragraph 6.6.d⁷⁵ of the CPRs require entities to comply with all directions in relation to gifts or hospitality. During the course of the audit, the ANAO notified AMSA that its published gifts and benefit register had not been updated since March 2022. Australian Public Service agency heads are required to publish a register of gifts and benefits they accept that are valued at over \$AUD100.00 (excluding GST) on their website on a quarterly basis. Since March 2024, AMSA has updated its published register to list all entries since March 2022.
 - Paragraph 7.8⁷⁶ of the CPRs require entities to maintain a current procurement plan containing a short strategic procurement outlook. AMSA advised the ANAO in March 2024 that it did not publish an annual procurement plan during the procurement of the AtoN. AMSA advised that it began publishing its annual procurement plan on December 2023

75 Department of Finance, *Commonwealth Procurement Rules*, paragraph 6.6.d, [Internet], Department of Finance, Australia 2022, available from <https://www.finance.gov.au/government/procurement/commonwealth-procurement-rules/efficient-effective-economical-and-ethical-procurement> [accessed 24 April 2024].

76 Department of Finance, *Commonwealth Procurement Rules*, paragraph 7.8, [Internet], Department of Finance, Australia 2022, available from <https://www.finance.gov.au/government/procurement/commonwealth-procurement-rules/accountability-and-transparency> [accessed 24 April 2024].

and that its 'divisions are canvassed quarterly for relevant procurement information' to maintain it.

- AMSA's complaints webpage now contains information about how to make a complaint under the *Government Procurement (Judicial Review) Act 2018* (see paragraph 4.40).