

The Auditor-General
Audit Report No.54 2013–14
Performance Audit

Establishment and Use of Multi-Use Lists

Across Agencies

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Canberra ACT
26 June 2014

Dear Mr President
Dear Madam Speaker

The Australian National Audit Office has undertaken an independent performance audit across agencies titled *Establishment and Use of Multi-Use Lists*. The audit was conducted in accordance with the authority contained in the *Auditor-General Act 1997*. 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, appearing to read 'Ian McPhee', is positioned above the printed name.

Ian McPhee
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

The Auditor-General is head of the Australian National Audit Office (ANAO). The ANAO assists the Auditor-General to carry out his duties under the *Auditor-General Act 1997* to undertake performance audits, financial statement audits and assurance reviews of Commonwealth public sector bodies and to provide independent reports and advice for the Parliament, the Australian Government and the community. The aim is to improve Commonwealth public sector administration and accountability.

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Abbreviations

ACC	Australian Crime Commission
AGD	Attorney-General's Department
ANAO	Australian National Audit Office
ATM	Approach to market
BoM	Bureau of Meteorology
CAC Act	<i>Commonwealth Authorities and Companies Act 1997</i>
CEIs	Chief Executive's Instructions
CPRs	Commonwealth Procurement Rules
Defence	Department of Defence
DHS	Department of Human Services
Finance	Department of Finance
FMA Act	<i>Financial Management and Accountability Act 1997</i>
FMA Regulations	Financial Management and Accountability Regulations 1997
Industry	Department of Industry
LSMUL	Legal Services Multi-Use List
MUL	Multi-Use List
RFQ	Request for quote
RFT	Request for tender
VFM	Value for money

Glossary

Approach to market (ATM)	Any notice inviting potential suppliers to participate in a procurement which may include a request for tender, request for quote, request for expression of interest, request for application for inclusion on a multi-use list, request for information or request for proposal.
AusTender	The central web-based facility for the publication of Australian Government procurement information, including business opportunities, annual procurement plans and contracts awarded.
Chief Executive's Instructions (CEIs)	Directions issued by the Chief Executive of an agency to achieve compliance with the <i>Financial Management and Accountability Act 1997</i> and to ensure the efficient, effective, economical and ethical use of Commonwealth resources.
Commonwealth Procurement Rules (CPRs)	Rules governing procurement issued by the Minister for Finance (Finance Minister) under Regulation 7 of the <i>Financial Management and Accountability Regulations 1997</i> .
Conditions for participation	Minimum conditions with which potential suppliers must demonstrate compliance in order to participate in a procurement process or for submissions to be considered.
Limited tender	Involves an agency approaching one or more potential suppliers to make submissions, where the process does not meet the rules for open tender or prequalified tender.
Multi-use list	A list of suppliers who have satisfied the conditions for participation on the list and may be approached for subsequent procurement opportunities.

Open approach to market	An approach which involves publication of a notice inviting potential suppliers to participate in procurement opportunities. An open approach to market may include a request for tender, request for quote, request for expression of interest, request for application for inclusion on a multi-use list, request for information and request for proposal.
Open tender	Involves publishing an open approach to market and inviting submissions from all potential suppliers.
Panel	An arrangement under which a number of potential suppliers, usually selected through a single procurement process, may each supply goods or services to an agency as specified in the panel arrangements.
Parcelling arrangement	An arrangement under the Legal Services Multi-Use List that allows agencies to approach legal service providers to submit detailed quotes for parcels of legal services that, individually, may be valued at or above the relevant procurement threshold.
Potential supplier	An entity or person who may respond to an approach to market.
Prequalified tender	<p>Involves publishing an approach to market inviting submissions from all potential suppliers on:</p> <ul style="list-style-type: none"> (a) a shortlist of potential suppliers that responded to an initial open approach to market on AusTender; (b) a list of potential suppliers selected from a multi-use list established through an open approach to market; or (c) a list of all potential suppliers that have been granted a specific licence or comply with a legal requirement, where the licence or compliance with the legal requirement is essential to the conduct of the procurement.

Procurement	The purchase of goods and services. The procurement cycle generally encompasses the processes of risk assessment, seeking and evaluating alternative solutions, the awarding of a contract, delivery of and payment for the goods and services and, where relevant, ongoing contract management and consideration of disposal of goods.
Procurement thresholds	<p>An amount above which additional procurement rules apply. The procurement thresholds (including GST) in the CPRs are:</p> <ul style="list-style-type: none"> (a) for agencies subject to the <i>Financial Management and Accountability Act 1997</i> (FMA Act), other than for procurements of construction services, the procurement threshold is \$80 000; (b) for relevant <i>Commonwealth Authorities and Company Act 1997</i> (CAC Act) bodies, other than for procurements of construction services, the procurement threshold is \$400 000; or (c) for procurements of construction services by FMA Act agencies and relevant CAC Act bodies, the procurement threshold is \$7.5 million.
Request documentation	Documentation provided to potential suppliers to enable them to understand and assess the requirements of the procuring agency and to prepare appropriate and responsive submissions. This general term includes documentation for expressions of interest, multi-use lists, open, limited and prequalified tender processes.

Summary and Recommendations

Summary

Introduction

1. Procurement is an integral part of the way the Australian Government conducts business. In 2012–13, Australian Government agencies published some 67 000 contracts for goods and services valued at in excess of \$39.2 billion.¹ Given the large number of procurements undertaken and the centrality of this activity to the operation of government and program delivery, agencies' procurement practices are expected to be efficient, effective, economical and ethical, consistent with the policies of the Commonwealth and suited to the size, nature and complexity of the goods or services sought.

2. In undertaking procurement, agencies are required to adhere to the *Commonwealth Procurement Rules* (CPRs). The CPRs underpin Australia's international obligations in accordance with free trade agreements, and promote sound and transparent procurement practices that seek to achieve value for money² and encourage competition in government procurement. The CPRs describe three methods that agencies can use when conducting procurements: open tender, limited tender and prequalified tender. This audit focuses on one form of prequalified tender—the use of multi-use lists (MULs), which allow agencies to prequalify suppliers for subsequent procurement opportunities.

Prequalified procurement – from a multi-use list

3. A MUL is a list of suppliers who have applied for inclusion on the list and satisfied a set of conditions for participation.³ The process of establishing a MUL is not a procurement itself and it does not involve the assessment of value for money; rather it is an activity that qualifies suppliers who may wish to participate in future procurement processes, and as such represents a

1 Department of Finance, *Statistics on Australian Government Procurement Contracts 2012–2013* [Internet], Finance, available from <<http://www.finance.gov.au/procurement/statistics-on-commonwealth-purchasingcontracts>> [accessed June 2014].

2 Determining value for money involves a range of considerations including: fitness for purpose; the performance history of each prospective supplier; the relative risk of each proposal; the flexibility to adapt to possible change over the lifecycle of the goods or service; financial considerations; and the evaluation of contract options. Finance, *Commonwealth Procurement Rules* (CPRs), July 2012, section 4.5.

3 Multi-use lists are provided for under international trade agreements.

support process. A MUL can be quick and relatively inexpensive for an Australian Government agency to establish as the comparative assessment of suppliers to determine value for money is undertaken later, at the time that the goods and/or services are procured from a supplier on a MUL.

4. A MUL would typically only be used by an agency where it:
- frequently procures particular goods or services;
 - requires flexibility in its approaches to the market; or
 - requires a list of suppliers that meet specific conditions for participation (such as having specific expertise).⁴

5. Analysis of AusTender data indicates that in 2013, approximately 35 per cent of contracts let by agencies were open tender, 57 per cent limited tender, and the remaining eight per cent all types of prequalified tender. Prequalified tender procurements represented approximately \$6.5 billion of expenditure and 5000 contracts. AusTender data does not identify the proportion of the prequalified tender contracts that specifically relate to procurement from a MUL.

6. Australian Government agencies have established MULs for a variety of purposes. As at October 2013 the Bureau of Meteorology (BoM) had 11 MULs covering a broad variety of goods and services ranging from printing, shipping and freight, to more technical services such as support for a tsunami warning system. The Department of Industry (Industry) had four MULs relating to the recruitment of temporary personnel, outreach tour transport, exhibition transportation services and interactive exhibition development services. The Attorney-General's Department (AGD) had one MUL, the Legal Services Multi-Use List (LSMUL) which was introduced in June 2012 as part of ongoing reforms to the provision of legal services for Australian Government agencies. The *Legal Services Directions 2005*⁵ require all Australian Government agencies subject to the *Financial Management and*

4 Finance, *Buying for the Australian Government, Procurement Practice, Panel Arrangements and Multi-Use Lists*, paragraph 24 [Internet], available from <<http://www.finance.gov.au/procurement/procurement-policy-and-guidance/buying/procurement-practice/panel-and-mul/practice.html>> [accessed June 2014].

5 The *Legal Services Directions 2005* are a set of binding rules for the performance of Commonwealth legal work. The Directions set out requirements for sound practice in the provision of legal services to the Australian Government. [Internet], Comlaw, available from <<http://www.comlaw.gov.au/Details/F2012C00691/Download>> [accessed June 2014].

Accountability Act 1997 and certain entities subject to the *Commonwealth Authorities and Companies Act 1997* (CAC Act) to use the LSMUL when purchasing external legal services.

Previous ANAO audits

7. The ANAO has conducted four audits since 2007 that have focussed on aspects of procurement across Australian Government agencies.⁶ Each of these audits has identified some shortcomings with respect to agencies' application of the *Commonwealth Procurement Guidelines*⁷ for a significant proportion of procurements examined. In particular, agencies needed to employ more competitive procurement processes, better document value for money assessments and obtain appropriate approvals.

Audit approach

8. The objective of the audit was to assess the extent to which agencies have arrangements to establish and use multi-use lists (MULs) to support value for money, efficiency and effectiveness in procurement.

9. To conclude on this objective, the ANAO's broad criteria included whether agencies had adhered to the requirements of the *Commonwealth Procurement Rules* and applied sound practices when establishing and using MULs.

10. The scope of the audit included the examination of both the policies and practices supporting the establishment and use of 16 MULs across three agencies and procurements from these MULs where the procurement had a value greater than \$80 000.⁸

11. The three agencies included in this part of the audit were the:

- Bureau of Meteorology (BoM);
- Department of Industry (Industry); and
- Attorney-General's Department (AGD).

6 ANAO, Audit Reports: No.31 2011–12 *Establishment and Use of Procurement Panels*; No.11 2010–11 *Direct Source Procurement*; No.14 2009–10, *Agencies' Contract Management*; and No.21 2006–07 *Implementation of the Revised Commonwealth Procurement Guidelines*.

7 At the time these audits were undertaken, agencies were subject to the *Commonwealth Procurement Guidelines* (CPGs). The CPGs were superseded by the CPRs in July 2012.

8 The main purpose of establishing a MUL is to allow for future prequalified tendering for higher value procurements (referred to as Division 2 procurements under the CPRs). Procurements under \$80 000 were therefore excluded from the audit.

12. The ANAO also examined the approaches adopted by three additional agencies to procuring legal services using the Legal Services Multi-Use List (LSMUL) established by AGD. These three agencies were the:

- Australian Crime Commission (ACC);
- Department of Defence (Defence); and
- Department of Human Services (DHS).

13. To obtain feedback on the operation of the LSMUL, the ANAO also consulted representatives of legal service providers. Where appropriate, feedback from the providers consulted is included in the report.

Overall conclusion

14. Procurement of goods and services is a key activity for Australian Government agencies and, in undertaking procurement, agencies are required to adhere to the *Commonwealth Procurement Rules* (CPRs). In order to achieve efficient procurement arrangements which still meet the requirements of the CPRs, a range of approaches have been developed to streamline procurement practices for frequently purchased goods or services. These include the use of multi-use lists (MULs) and procurement panels:

- MULs allow agencies to prequalify suppliers for later use in a procurement. They provide flexibility and enable agencies to easily identify suppliers that meet certain conditions or that have specific expertise. All suppliers who meet the conditions must be included on the list. Inclusion of a supplier on a MUL does not involve a value for money assessment of suppliers and does not usually create a contractual relationship. Suppliers can be added to a MUL enabling agencies to include new market entrants over time.
- Procurement panels are established following a competitive value for money assessment process and involve a contractual relationship for a set period of time. Once established, panels generally provide ready access to goods and services, particularly for high value procurements as the additional rules in the CPRs for such procurements do not apply. Generally, panels do not allow for new suppliers to be added to the panel once established.

Of these two approaches, the arrangements applying to MULs are not so well understood and, in most cases, greater consideration needs to be given to

whether a MUL is most suited to an agency's particular procurement objectives. Where procurement processes are not well understood and objectives not well-defined, there is a clear risk of agencies undertaking procurements which are not consistent with the requirements of the CPRs.

15. This audit, which focussed on the arrangements to establish and use MULs in the Bureau of Meteorology (BoM), the Department of Industry (Industry) and the Attorney-General's Department (AGD), highlights these risks to varying degrees. Common areas where agencies did not adhere to requirements of the CPRs included; approaching too few suppliers, providing insufficient time for suppliers to respond to requests for work and not treating suppliers consistently. Consequently agencies' approaches, to varying degrees, were not fully effective in satisfying the procurement principles, which among other things encourage fair and open competition.

16. In addition, there were questions about whether value for money was being achieved in the subsequent procurement action given the approaches being adopted by agencies. By way of background, once a decision is taken to establish a MUL, agencies need to be mindful that the process of its establishment was not a procurement, so when selecting suppliers, an assessment of value for money still needs to be undertaken. Agencies ought to approach a sufficient number of suppliers to allow a reasonable assessment, commensurate with the scale and scope of the procurement. The ANAO observed instances in most agencies where a competitive assessment of suppliers was either not undertaken at all, or not done well. The CPRs establish several requirements for undertaking a prequalified tender.⁹ Based on the sample examined, all of the procurements at BoM and Industry, and the majority of procurements at AGD, fell short of certain CPR requirements relating to prequalified tender. In particular, for higher value procurements the CPRs impose strict timeframes designed to allow suppliers reasonable time to respond to requests for work. Generally, MULs do not lend themselves to services required at short notice and the ANAO found these timeframes were often not met. As a result, it was more difficult for audited agencies to demonstrate that competition was genuine and value for money was achieved.

9 In relation to MULs, prequalified tender includes publishing an approach to market inviting submissions from all potential suppliers on a list of potential suppliers selected from a multi-use list established through an open approach to market.

17. Further, in seeking to obtain efficiencies, agencies need to be aware of the costs of their approaches on providers. MULs provide for streamlined procurement approaches, but these benefits are limited where agencies do not make full use of information obtained as part of the initial application process. During the course of this audit, a number of service providers on the LSMUL indicated frustration at having to provide the same or similar information at the establishment stage and subsequently when responding to agency requests for quotes.

18. Efficiencies in the use of MULs can also be fostered by agencies increasing their knowledge of the supplier market. This was an important aspect of the design of the arrangements for the LSMUL. More generally, enhancing measures to support the sharing of information within and across agencies (including information on performance, expertise and experience of providers) could assist agencies in becoming more informed purchasers; and, in turn, this could limit the demands on suppliers. Centralising procurement advice within agencies may also allow better coordination of effort and, as a consequence, achieve greater efficiencies and better results.

19. At an appropriate time during the lifecycle of a MUL, agencies should assess whether the arrangement has achieved the anticipated benefits and whether it has been an efficient and effective approach to support business requirements. Such assessment can help shape the design of any future MUL or alternative procurement arrangements. Of the audited agencies only AGD had reviewed the effectiveness of its MUL in meeting procurement requirements and used this information to assist in the design of prospective procurement arrangements.

20. The ANAO has made two recommendations aimed at improving agency procurement practices in relation to MULs. More broadly, the audit draws attention to the complexities of the CPRs, appreciating they are designed to promote sound and transparent procurement practices that encourage competition and achieve value for money in government procurements. Other ANAO audits of procurement have also identified the importance of placing greater emphasis on the procurement principles in Australian Government procurement activities.¹⁰ Such an emphasis provides a

10 ANAO Audit Reports: No.31 2011–12 *Establishment and Use of Procurement Panels* and No.11 2010–11, *Direct Source Procurement*, 2010 [Internet], available from <<http://www.anao.gov.au/Publications>> [accessed June 2014].

stronger focus for those involved in procurement decisions to achieve positive outcomes that are supported by competitive processes and provide value for money. A key step in achieving this is adequate planning, including consideration of the extent to which the procurement method meets the identified need.

21. When seeking to achieve efficiencies, prequalified and limited tender methods provide a streamlined process. However, an efficient process is only valuable if it also supports the achievement of the procurement principles. Agency central procurement units (CPUs) are generally well placed to identify and pursue more efficient purchasing arrangements, provide advice and support practices that encourage competition and enhance value for money. Therefore there would be merit in agencies involving CPUs more in the selection of procurement methods, and in establishing processes to be adopted within agencies particularly in a devolved procurement environment. Measures of this kind would assist agency staff to better navigate the CPRs.

Key findings by chapter

Establishment of multi-use lists (Chapter 2)

22. Effective procurement is supported by agencies clearly defining the objectives for the procurement and taking a considered approach to determining the procurement processes best suited to achieving their objectives. Typically a MUL is most effective where an agency: frequently procures particular goods or services; requires market flexibility (including in the frequency of purchases, and the amounts of goods or services); or requires a list of suppliers that meet specific conditions (such as having specific expertise).

23. The ANAO identified that agencies need to give greater consideration to whether a MUL is most suited to meeting their procurement objectives or whether alternative procurement arrangements would be more appropriate. In the case of BoM, specific procurement objectives for its MULs had not been defined and, in some cases MULs were subsequently used very infrequently or not at all. In Industry, to varying degrees, some MULs had defined objectives. However, in regard to Industry's temporary personnel MUL, where services may have been required at short notice, an alternative procurement method such as a panel would have enabled Industry to better meet its procurement objective and demonstrate the achievement of value for money.

24. In contrast, AGD, having had the benefit of two prior reviews, had clearly defined the objectives for the LSMUL. Agencies and legal service providers interviewed by the ANAO generally agreed the LSMUL had met a key objective of opening up the market to competition. Both groups however, were less certain of whether or not the LSMUL had achieved its other objectives including whether the current processes for the purchase of legal services were more efficient, effective, or achieved greater value for money than previous approaches. There were also mixed views on whether agencies were becoming more informed purchasers of legal services.

25. Agencies are required to treat suppliers equitably when being assessed for inclusion on a MUL. Accordingly, appropriate records of supplier assessment and notification of outcomes should be maintained to provide transparency of the process. Both BoM and Industry included suppliers in their MUL registers that had not met some of the requirements contained in the application for inclusion. Further there was no evidence of screening or verification of claims made by potential suppliers.

Procurements from multi-use lists (Chapter 3)

26. When procuring goods and services, the Australian Government's procurement framework has a principal objective of achieving value for money. Value for money is enhanced by encouraging open competition, using resources in an efficient, effective, economical and ethical way, and making decisions in an accountable and transparent manner. When using streamlined approaches such as MULs, agencies must undertake procurements in a manner that is consistent with the procurement framework as set out in the CPRs. The CPRs impose requirements for higher value procurements and where agencies require services at short notice they still need to consider the minimum timeframes established in the CPRs.¹¹ Agencies can draw on the exemptions in the CPRs if they qualify however, if the goods or services are needed frequently at short notice, a better approach would be to put in place alternative procurement arrangements.

27. The ANAO reviewed procurements at BoM, Industry and AGD which had been undertaken from MULs. When considered against the CPRs, these

11 The time limit for potential suppliers to lodge a submission must be at least 25 days from the date and time that an agency publishes an approach to market for an open tender or a prequalified tender, except under certain circumstances where it is allowed to be no less than 10 days. Finance, *Commonwealth Procurement Rules*, 2012, section 10.19.

procurements largely did not meet relevant requirements of prequalified tender. In BoM, the majority of procurements examined involved direct approaches to suppliers who were not on a MUL and therefore were not prequalified. All of Industry's procurements and most of AGD's did not involve an appropriately competitive process, or provide sufficient time for supplier responses. Under the CPRs where a procurement is not undertaken as an open or prequalified tender, it can only be classed as a limited tender by default.¹² However, in several respects the majority of procurements examined by the ANAO also failed to meet conditions established in the CPRs for limited tender.

28. In relation to the LSMUL, audited agencies and legal service providers reported that the arrangements did not lend themselves to services required at short notice: two audited agencies (ACC and DHS) have introduced parcelling arrangements¹³ to accommodate this. While parcelling can overcome CPR timing issues the approach, which can be similar to limited tender, can reduce competition and new and small providers may face difficulties entering such an arrangement.¹⁴ Agencies need to be mindful that the field of suppliers invited to apply for a parcel should not be too narrow. Given the purpose of the LSMUL is to promote competition and reduce costs, there is merit in AGD and Finance working together to reinforce the obligation to achieve value for money and share agency experiences with using the LSMUL.

Procurement support and review (Chapter 4)

29. Agencies determine their own procurement practices, consistent with the CPRs, through Chief Executive's Instructions (CEIs) and, if appropriate, supporting operational guidelines. Agency central procurement units (CPUs) are internal units containing procurement specialists used by agencies to advise staff and delegates in undertaking appropriate procurement processes. Procurement monitoring and review is also an important activity for agencies

12 Limited tender allows a direct approach to one provider. However, under the CPRs, an agency must only conduct a procurement at or above the relevant procurement thresholds through limited tender if certain conditions are met. Refer to Appendix 3 of this report for the list of conditions.

13 Parcelling means that an agency can approach service providers from the LSMUL to submit detailed quotes for parcels of legal services that, individually, may be valued at or above the relevant procurement thresholds amount. The LSMUL guidance allows parcels to be established for any value through inviting a minimum of two service providers to apply.

14 New and small suppliers may be disadvantaged by overstatement of procurement needs or onerous selection processes when agencies form parcels. These suppliers can also be perceived as higher risk than larger suppliers who could for example provide a broader range of services.

to determine the performance of their procurement activities and to inform future procurement planning and management.

30. Agencies generally had procurement policies, guidance and training in place. However, the use of MULs was often not well understood and associated procurements were not well conducted. To better assist staff and delegates to conduct procurements from MULs in accordance with the CPRs, agency CEIs and relevant operational guidelines, there would be benefit in agencies actively drawing on the expertise available in central procurement units and reinforcing to staff and delegates their responsibilities in relation to procurement.

31. Assessing procurement activity at an appropriate time during the lifecycle of a MUL enables agencies to understand the extent to which the initial business rationale for establishing the MUL is being met. Such assessment can also help shape the design of any future MUL or alternative procurement arrangement. Both BoM and Industry would benefit from reviewing the efficiency, effectiveness and value for money provided by their MULs.

32. There is merit in AGD continuing to review options going forward in relation to the operation of the LSMUL that are consistent with the CPRs. A more effective solution may need to be developed to better balance agencies' business needs and the formal requirements of the CPRs. Opportunities for improving the LSMUL identified during the course of the audit include:

- allowing faster access to legal services;
- enhancing arrangements to share information including on service providers skills, experience and performance;
- strengthening education on the use of the LSMUL to ensure agency procurements are consistent with the CPRs; and
- building more transparency into parcelling arrangements.

In addition, agencies need to take steps to become more informed purchasers of legal services. This includes making better use of information already available to them on the LSMUL, sharing agency experience and drawing on expertise within CPUs to ensure procurement processes are efficient and adhere to the CPRs.

Summary of agencies' responses

33. The audited agencies' summary responses to the audit report are provided below. Appendix 1 contains the agencies' full response to the audit report.

Attorney-General's Department

AGD welcomes the ANAO's report. AGD acknowledges that agency practices in using the LSMUL could be improved and that AGD can play a greater leadership role across government in this regard. AGD is of the strong view that legal services procurement from the LSMUL need not be onerous or overly administratively burdensome. Agencies should adopt a procurement process that is commensurate with the scale of the procurement, recognising the nature of legal services. In particular, informed purchasing is vital to efficient and effective legal services procurement.

Bureau of Meteorology

The Bureau of Meteorology welcomes this report and found the process undertaken by the ANAO valuable. The Bureau agrees with the recommendations of the report and is taking action to implement them. As noted in the report, the Bureau is currently updating its procurement processes and the ANAO's findings fully support the current investment being made in improvements, including new gazettal processes and the establishment and use of multi-use lists.

Department of Industry

The Department of Industry acknowledges the findings of the ANAO audit on the Establishment and Use of Multi-Use Lists and supports the recommendations proposed in the report. The Department found the audit process to be a valuable exercise and appreciates the positive feedback on the Department's procurement policy and guidance material.

Australian Crime Commission

The Australian Crime Commission (ACC) agrees with the findings of the audit and will undertake the appropriate action to implement the relevant recommendations.

Department of Defence

The Department of Defence agrees with the ANAO report and its recommendations that agencies are to provide efficient and effective procurement and the achievement of value for money. The establishment of the Legal Services Multi-Use List has enabled Defence to use and meet a wide

range of external services providers, including small to medium enterprises that would not have had an opportunity to bid successfully for services under a panel or parcel arrangement.

Defence agrees it is important to have a greater accountability and transparency in documenting our procurements, while being able to maintain a level of flexibility in procuring legal services given the nature of legal work required by an agency and the need to ensure competitiveness while achieving value for money for the Commonwealth.

Department of Human Services

The Department of Human Services (the Department) welcomes the findings of the audit report and considers that the implementation of its recommendations will further enhance the use of multi-use lists by the Department.

Recommendations

The recommendations are based on findings from fieldwork at the audited agencies. The recommendations are likely to be relevant to other Australian Government agencies. Therefore, all Australian Government agencies are encouraged to assess the benefits of implementing these recommendations in light of their own circumstances, including the extent to which each recommendation, or part thereof, is addressed by practices already in place.

Recommendation No.1
Paragraph 2.37 To provide for efficient and effective procurement processes and the achievement of value for money the ANAO recommends agencies:

- (a) clearly define objectives in order to determine the most appropriate procurement method; and
- (b) where a multi-use list is chosen, strengthen processes to promote competition and equitable treatment of suppliers.

Response from relevant agencies: *Agreed.*

Recommendation No.2
Paragraph 3.34 To provide for greater accountability and transparency when using a multi-use list, the ANAO recommends agencies concisely document the basis for short listing potential suppliers and the basis for selecting a particular supplier to evidence value for money.

Response from relevant agencies: *Agreed.*

Audit Findings

1. Introduction

This chapter introduces the legislative and policy framework applicable to government procurement, and the purpose of multi-use lists to support procurement. The chapter also outlines the audit approach.

Background

1.1 Effective procurement of goods and services underpins the delivery of programs by Australian Government agencies. In 2012–13, Australian Government agencies published some 67 000 contracts for goods and services valued at in excess of \$39.2 billion.¹⁵ Given the large number of procurements undertaken and the centrality of this activity to the operation of government and program delivery, agencies' procurement practices are expected to be efficient, effective, and commensurate with the scale, scope and risk of the procurement. Where an agency needs to make regular purchases of goods or services, multi-use lists (MULs) can assist to streamline procurement practice.

Legal and policy framework for government procurement

1.2 Chief Executives of departments and agencies subject to the *Financial Management and Accountability Act 1997* (FMA Act) must promote the proper use of Commonwealth resources.¹⁶ To help achieve this, under the *Financial Management and Accountability Regulations 1997* (FMA Regulations), the Finance Minister issues the *Commonwealth Procurement Rules* (CPRs) for officials to follow when performing duties in relation to procurement.¹⁷ The CPRs also apply to certain entities established under the *Commonwealth Authorities and Companies Act, 1997* (CAC Act). From 1 July 2014, the FMA and CAC Acts will be replaced by the *Public Governance, Performance and Accountability Act 2013* (PGPA Act) and the CPRs will form part of the rules to be issued pursuant to the PGPA Act.

15 Department of Finance, *Statistics on Australian Government Procurement Contracts 2012–2013* [Internet], Finance, available from <<http://www.finance.gov.au/procurement/statistics-on-commonwealth-purchasingcontracts>> [accessed June 2014].

16 Proper use of Commonwealth resources means efficient, effective, economical and ethical use that is not inconsistent with the policies of the Commonwealth. FMA Act, section 44(3).

17 FMA Regulation 7 requires officials to act in accordance with the CPRs. The CPRs may also apply; following a direction by the Minister for Finance, to Commonwealth entities subject to the CAC Act listed in Schedule 1 of the *Commonwealth Authorities and Companies Regulations 1997* as being subject to section 47A of the CAC Act. The audit did not include an examination of entities subject to the CAC Act.

1.3 The CPRs underpin Australia’s international obligations in accordance with free trade agreements, and promote the use of sound and transparent procurement practices that seek to achieve value for money¹⁸ and encourage competition in government procurement. In undertaking procurement, agencies are required to adhere to the CPRs which describe three methods that agencies can use when conducting procurements. These are:

- Open tender
 - open tender involves publishing an open approach to market and inviting submissions;
- Limited tender
 - limited tender involves an agency approaching one or more potential suppliers to make submissions, where the process does not meet the rules for open tender or prequalified; and
- Prequalified tender
 - involves publishing an approach to market inviting submissions from all potential suppliers on:
 - a. a shortlist of potential suppliers that responded to an initial open approach to market on AusTender;
 - b. a list of potential suppliers selected from a multi-use list established through an open approach to market; or
 - c. a list of all potential suppliers that have been granted a specific licence or comply with a legal requirement, where the licence or compliance with the legal requirement is essential to the conduct of the procurement.¹⁹

1.4 The CPRs include mandatory requirements which agencies must follow. The extent to which all rules of the CPRs apply depends on the value of the procurement and is set out in the two divisions of the CPRs:

18 Determining value for money involves a range of considerations including: fitness for purpose; the performance history of each prospective supplier; the relative risk of each proposal; the flexibility to adapt to possible change over the lifecycle of the goods or service; financial considerations; and the evaluation of contract options. Finance, *Commonwealth Procurement Rules*, 2012, section 4.5.

19 *ibid.*, sections 9.8-9.12.

- Division 1 sets out rules applying to all procurements regardless of value. Officials must comply with the rules of Division 1 when conducting procurements; and
- Division 2 sets out additional rules that apply to all procurements valued at or above the relevant procurement thresholds.

1.5 The procurement thresholds (including GST) for application of Division 2 are:

- for FMA Act agencies, other than for procurements of construction services, the procurement threshold is \$80 000;
- for relevant CAC Act bodies, other than for procurements of construction services, the procurement threshold is \$400 000; or
- for procurements of construction services by FMA Act agencies and relevant CAC Act bodies, the procurement threshold is \$7.5 million.²⁰

1.6 In addition to the mandatory requirements, the CPRs also contain desirable practice elements which agencies are encouraged to adopt. These include providing guidance on what agencies should consider when determining whether a procurement will deliver the best value for money and the type of documentation agencies could maintain to support each procurement.

1.7 In relation to procurement, Chief Executive's Instructions (CEIs)²¹ and operational guidance are normally issued by agencies to assist delegates and staff involved in procurement processes. These agency materials generally build on the legislative and policy framework outlined in the CPRs by focussing on implementing government procurement requirements and having reference to the agency's particular procurement needs and any complementary operational guidance. CEIs should be accessible to agency staff and provide clear instructions on the key requirements that apply to resource management within the particular agency. Generally it would be expected that staff responsible for procurement would be provided with appropriate training to enable them to gain an understanding of the requirements of the CPRs and the agency's CEIs.

²⁰ Finance, *Commonwealth Procurement Rules*, 2012, section 3.3.

²¹ The Chief Executive of an agency is authorised to give Chief Executive's Instructions to officials in that agency on any matter necessary or convenient for carrying out or giving effect to the FMA Act or the FMA Regulations.

Procurement documentation

1.8 The Australian Government emphasises the importance of being accountable and transparent in its procurement activities. Accountability means that officials are responsible for the actions and decisions that they take in relation to procurement and for the resulting outcomes. Under the CPRs, it is mandatory for agencies to maintain appropriate documentation for each procurement they undertake. While the specific content of such documentation is not prescribed, the CPRs indicate that desirably such documentation would include: providing concise information on the requirement for the procurement; the process that was followed; how value for money was considered and achieved; and relevant decisions, including under the FMA Regulations, and the basis of those decisions.²² The appropriate mix and level of documentation depends on the nature and risk profile of procurement being undertaken.

Multi-use lists (MULs)

1.9 The focus of this audit is on agencies' establishment and use of multi-use lists (MULs), which is one method of prequalifying suppliers for subsequent procurement processes. A MUL is a list of prequalified suppliers who have applied for inclusion on the list and satisfied a set of the conditions for participation. The process of establishing a MUL is not a procurement itself and it does not involve the assessment of value for money; rather it is an activity that pre-qualifies suppliers who may wish to participate in future procurement processes and as such represents a support process.

1.10 The main purpose of establishing a MUL is to allow for future prequalified tendering for higher value procurements (referred to as Division 2 procurements under the CPRs). A MUL can provide agencies with an effective means to streamline and simplify procurement processes where they regularly procure goods and services with common elements.²³ A MUL is different from a panel, which is another common arrangement agencies use for the procurement of goods or services they regularly acquire. The primary differences are:

22 Finance, *Commonwealth Procurement Rules*, 2012, p. 20, sections 7.2-7.4.

23 Finance, *Buying for the Australian Government, Procurement Practice, Panel Arrangements and Multi-Use Lists*, paragraph 4 [internet], available from <<http://www.finance.gov.au/procurement/procurement-policy-and-guidance/buying/procurement-practice/panel-and-mul/principles.html>> [accessed June 2014].

- MULs allow agencies to prequalify suppliers for later use in a procurement. They provide flexibility and enable agencies to easily identify suppliers that meet certain conditions or that have specific expertise. All suppliers who meet the conditions must be included on the list. Inclusion of a supplier on a MUL does not involve a value for money assessment of suppliers and does not usually create a contractual relationship. Suppliers can be added to a MUL enabling agencies to include new market entrants over time.
- Procurement panels are established following a competitive value for money assessment process and involve a contractual relationship for a set period of time. Once established, panels generally provide ready access to goods and services, particularly for high value procurements as the additional rules in the CPRs for such procurement do not apply. Generally panels do not allow for new suppliers to be added to the panel once established.²⁴

1.11 Key differences between a MUL and a panel are outlined further in Appendix 2.

1.12 Australian Government agencies use MULs to assist in procurement activities to a varying extent. For example, as at October 2013, the Bureau of Meteorology had 11 MULs covering a broad variety of goods and services ranging from printing, shipping, and freight to more technical services such as support for a tsunami warning system. The Department of Industry had four MULs. These were for the recruitment of temporary personnel, outreach tour transport, exhibition transportation services and interactive exhibition development services to support the National Science and Technology Centre (Questacon).

1.13 At the whole-of-government level, the Attorney-General's Department Legal Services Multi-Use List (LSMUL) was introduced in June 2012 as part of reforms in the provision of legal services to Australian Government agencies. The reforms aimed to achieve better value for money when purchasing

²⁴ Depending on the value of the procurement an agency would generally approach either one or a number of suppliers on the panel and assess which supplier(s) represent value for money.

external legal services.²⁵ In particular, cost efficiencies were expected to be derived from increasing market participation by legal service providers and agencies were expected to become more informed purchasers²⁶ of legal services through increased sharing of information about provider performance across Commonwealth agencies. The reforms also sought to reduce red tape for agencies and legal service providers through developing streamlined processes and more uniform conditions. The *Legal Services Directions 2005*²⁷ require all Australian Government agencies subject to the FMA Act and certain bodies subject to the CAC Act to use the LSMUL when purchasing external legal services.²⁸

Previous audits

1.14 The ANAO has conducted four audits since 2007 that have focussed on aspects of procurement across Australian Government agencies.²⁹ Each of these audits has identified some shortcomings with respect to agencies' application of the Commonwealth Procurement Guidelines³⁰ for a significant proportion of procurements examined. In particular, agencies needed to employ more

25 Two previous reviews into the procurement of legal services had identified potential cost savings. The Blunn Krieger *Report of the Review of Commonwealth Legal Services Procurement*, 2009 concluded the system of agencies individually establishing panels was inefficient and significant savings could occur by increasing agency capacity to make informed decisions around legal services procurement. A later review, Lateral Economics, *Learning from experience: Purchasing legal services*, 2011, known as the Gruen report, identified the opportunity to increase market participation and reduce duplication in tendering costs for service providers and the Commonwealth.

26 An informed purchaser is described as an individual (or group), with good knowledge of agency 'business' and the law and legal practice, who is to coordinate legal service arrangements; link strategic decisions to their daily implementation; and ensure the agency obtains value-for-money legal services; and has knowledge of procurement policies, guidelines and processes. ANAO Better Practice Guide—*Legal Services Arrangements in Australian Government Agencies*, August 2006, Canberra, p. 20.

27 The *Legal Services Directions 2005* (the Directions) are a set of binding rules for the performance of Commonwealth legal work. The Directions set out requirements for sound practice in the provision of legal services to the Australian Government. [Internet]<<http://www.comlaw.gov.au/Details/F2012C00691>> [accessed June 2014].

28 AGD's guidance states limited exceptions to the requirement to use the LSMUL include those agencies that are: Government Business Enterprises; currently exempt from complying with Appendix F of the Directions under paragraph 13.1(a) of the Directions; or Commonwealth companies that, in accordance paragraph 12.3(f) of the Directions, are not required to comply with Appendix F of the Directions. *AGD Legal Services Multi-Use List Guidance Material*, May 2012, p. 4.

29 ANAO Audit Report: No.31 2011–12 *Establishment and Use of Procurement Panels*; No.11 2010–11 *Direct Source Procurement*; No.14 2009–10 *Agencies' Contract Management*; and No.21 2006–07 *Implementation of the revised Commonwealth Procurement Guidelines*.

30 At the time these audits were undertaken, agencies were subject to the *Commonwealth Procurement Guidelines* (CPGs). The CPGs were replaced by the CPRs in July 2012 although requirements relating to MULS remained similar.

competitive procurement processes, better document value for money assessments and obtain appropriate approvals.

Audit approach

Audit objective, criteria and scope

1.15 The objective of the audit was to assess the extent to which agencies' have arrangements to establish and use multi-use lists (MULs) to support value for money, efficiency and effectiveness in procurement.

1.16 To conclude against this objective the ANAO adopted the following broad criteria:

- agencies adhered to the requirements of the *Commonwealth Procurement Rules* and applied sound practices when establishing and using MULs to support procurement activities; and
- agencies' procurement frameworks supported procurement from MULs; and effective procurement monitoring and review arrangements had been established by agencies to inform consideration of the effectiveness of their establishment and use of MULs.

1.17 The scope of the audit included the examination of policies and practices supporting the establishment and use of 16 MULs across three agencies. The three agencies included in this part of the audit were the:

- Bureau of Meteorology (BoM);
- Department of Industry (Industry); and
- Attorney-General's Department (AGD).

1.18 The ANAO examined 50 procurements over \$80 000³¹ recorded on AusTender as having been conducted by prequalified tender. The audit sample period covered contracts that had been entered into between 1 July 2012 and 30 September 2013.

31 The main purpose of establishing a MUL is to allow for future prequalified tendering for higher value procurements (referred to as Division 2 procurements under the *Commonwealth Procurement Rules*). Procurements under \$80 000 were therefore excluded from the audit.

1.19 The ANAO also examined the approaches adopted by three additional agencies to procuring legal services using the legal services multi-use-list (LSMUL) established by AGD. These three additional agencies were the:

- Australian Crime Commission (ACC);
- Department of Defence (Defence); and
- Department of Human Services (DHS).

1.20 To obtain feedback on the operation of the LSMUL, ANAO also consulted representatives of legal service providers. Where appropriate, feedback from the providers consulted is included in the report.

1.21 The audit has been conducted in accordance with the ANAO’s Auditing Standards at a cost to the ANAO of \$634 645.

Report structure

1.22 The remainder of this report is structured as follows:

Chapter	Overview
2. Establishment of Multi-Use Lists	This chapter examines agencies’ establishment of multi-use lists to meet their procurement objectives, and whether the requirements of the <i>Commonwealth Procurement Rules</i> have been met.
3. Procurement from Multi-Use Lists	This chapter examines agencies’ use of multi-use lists to support actual procurement and whether the requirements of the <i>Commonwealth Procurement Rules</i> have been met.
4. Procurement Support and Review	This chapter examines agencies’ arrangements to support their procurement activity. These include procurement policy and guidance, the role of central procurement units, training and monitoring and review arrangements.

2. Establishment of Multi-Use Lists

This chapter examines agencies' establishment of multi-use lists to meet their procurement objectives, and whether the requirements of the Commonwealth Procurement Rules have been met.

Introduction

2.1 Procurement is the acquisition of goods and services by Australian Government entities to support the achievement of Government policy objectives, the delivery of programs and the operational requirements of entities. Applying the principles of value for money, encouraging competition, efficient, effective and ethical use of resources, and accountability and transparency in decision-making is a requirement of the *Commonwealth Procurement Rules* (CPRs). Effective procurement is supported by agencies clearly defining the objectives of any procurement and taking a considered approach to determining the procurement processes best suited to achieving their objectives.

2.2 The ANAO examined four key areas supporting the establishment of MULs: agency planning; the information provided to potential suppliers when inviting applications for the MUL (referred to as request documentation in the CPRs)³²; including the specified conditions for participation³³; the approach to market process; and evidence of agency assessment and notifications to suppliers.

2.3 The ANAO reviewed all of the MULs established by BoM, Industry and AGD. Each of these MULs was established prior to the introduction of the

32 Request documentation is documentation provided to potential suppliers to enable them to understand and assess the requirements of the procuring agency and to prepare appropriate and responsive submissions. The CPRs include a number of mandatory requirements for request documentation for procurements at or above the procurement thresholds. Such documentation must include a complete description of: a) the procurement; b) any conditions for participation; c) any minimum content and format requirements; d) evaluation criteria to be considered in assessing submissions; and e) any other terms or conditions relevant to the evaluation of submissions. Finance, *Commonwealth Procurement Rules*, 2012, sections 10.6–10.12.

33 Conditions of participation are minimum conditions that potential suppliers must demonstrate compliance with, in order to participate in a procurement process or for submissions to be considered. *ibid.*, Appendix C: Definitions, p. 39.

CPRs.³⁴ A summary of the ANAO’s assessment of performance against each of these key areas is provided in Table 2.1. Detailed discussion for each of the results is provided in the following sections.

Table 2.1: Agency results relating to the establishment of their multi-use lists

	BoM	Industry	AGD
Planning	x	✓	✓✓
Request documentation including conditions of participation	✓	✓	✓
Approach to market	x	x ^(a)	✓
Evidence of assessment and notifications to suppliers	x	x	✓✓

Source: ANAO analysis.

Legend: x not adequate; ✓ scope to improve; ✓✓ satisfactory

Note (a): Refer paragraph 2.28 for further details.

Planning

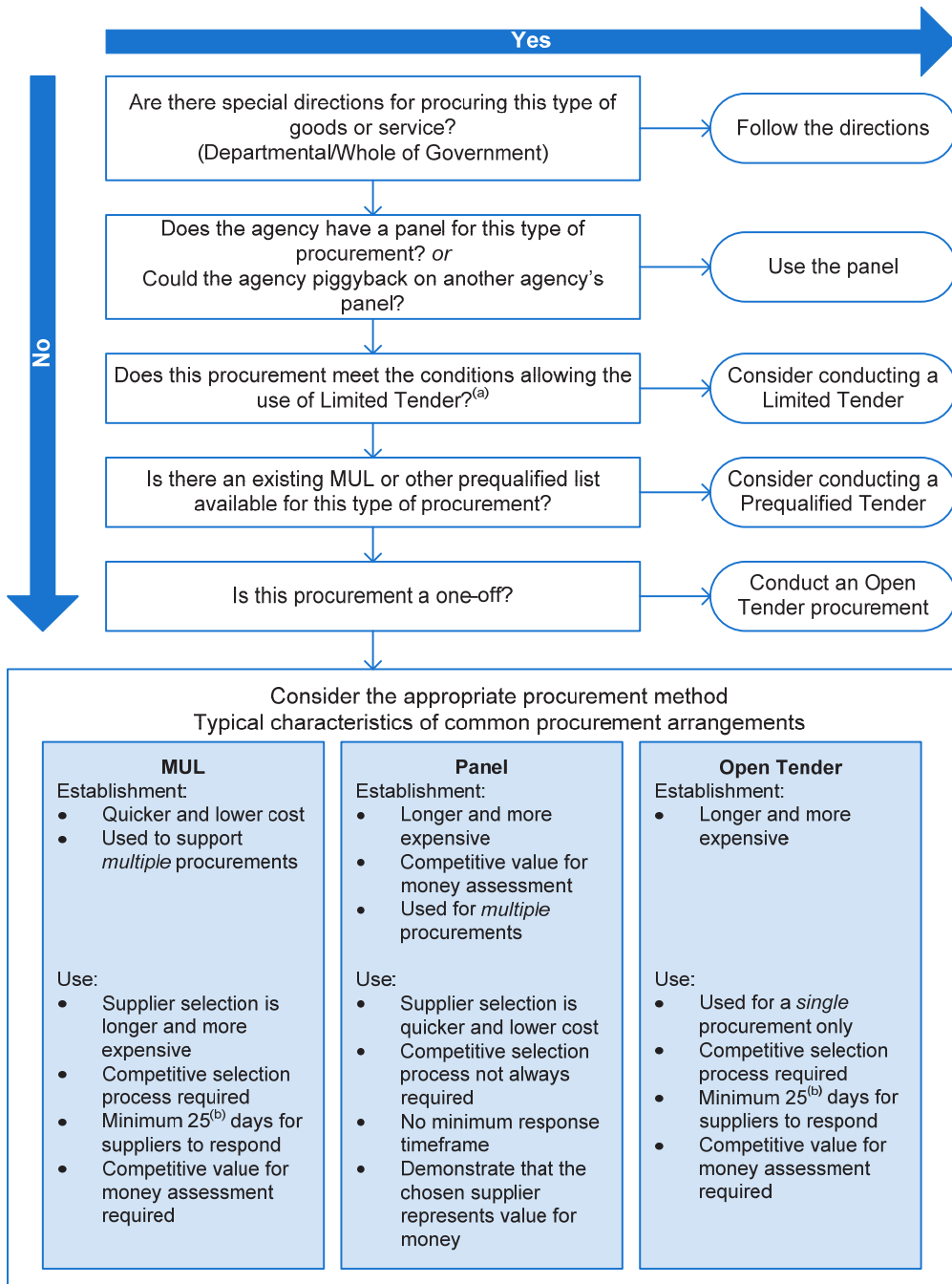
Key issues in selecting a procurement process

2.4 When a business requirement arises, agencies need to consider whether a procurement will deliver best value for money having regard to such issues as non-procurement alternatives, pre-existing arrangements, resourcing and business needs. If an agency determines that procurement represents the best option, the procurement principles and the estimated value of the procurement should inform the selection of an appropriate procurement method.

2.5 As discussed in paragraphs 1.4 and 1.5, the CPRs establish value thresholds above which additional rules apply. Typical considerations for procurements over the relevant thresholds which were the subject of this audit are outlined in Figure 2.1.

34 At the time these MULs were established, agencies were subject to the *Commonwealth Procurement Guidelines* (CPGs). The ANAO examined 11 MULs in BoM, four in Industry and one in AGD. The CPGs were replaced by the CPRs in 2012 although in relation to the establishment of MULs the requirements remained similar.

Figure 2.1: Typical considerations for selecting procurement method



Source: ANAO based on requirements of the CPRs.

Note (a): The requirements for limited tender are shown in Appendix 3.

Note (b): See paragraph 2.11 for discussion of minimum timeframes.

2.6 When deciding on a procurement approach there are a number of factors to be considered, and different procurement arrangements can be established depending on the need. Although establishing a MUL can be quick and relatively inexpensive for an Australian Government agency, each subsequent use of a MUL takes time. The reason for this is that the process of establishing a MUL is not a procurement in itself and does not involve a comparative assessment of suppliers to determine value for money. The value for money assessment is undertaken later, at the time that the goods and/or services are procured from the MUL. The Department of Finance (Finance) also advise that where future procurement of goods or services is likely to be urgent a panel may be more suitable.³⁵ Table 2.2 provides some key differences between the requirements to conduct an open tender as compared to creating a MUL.

Table 2.2: Differences in the process and assessment for open tender and inclusion on a multi-use list

	Open tender	Creation of a MUL
Open approach to market ^(a)	Yes	Yes
Selected through a competitive process	Yes	No ^(b)
Detailed selection criteria	Yes	Typically no
Value for money assessment conducted	Yes	No

Source: ANAO based on the requirements of the CPRs.

Note (a): An open approach to market is any notice inviting all potential suppliers to participate in a procurement which may include a request for tender, request for quote, request for expression of interest, request for application for inclusion on a multi-use list, request for information and request for proposal.

Note (b) Inclusion on the MUL can be based on acceptance of a potential supplier's claims without further verification or after a more detailed verification process. The rigour of the prequalification process will depend on each agency. These issues are discussed further in this chapter.

2.7 The main purpose of establishing a MUL is to allow for future prequalified tendering in accordance with the CPRs for procurements at or above the relevant procurement thresholds. Finance guidance notes that a MUL would typically only be used by an agency where it:

- frequently procures particular goods or services;

35 Members of the panel may then be used based on the contract or deed of standing offer that was established during the procurement activity. For further discussion on the differences between a MUL and a panel see Appendix 2.

- requires flexibility in its approaches to the market (for example, frequency of purchases, or varying the amounts of goods or services); or
- requires a list of suppliers that meet specific conditions for participation, or that have specific expertise.³⁶

2.8 As discussed in paragraph 1.10 a panel arrangement is another common procurement arrangement used by agencies for frequently purchased goods or services. Panels typically are more expensive for an Australian Government agency and take longer to establish than MULs. However, once established, panels are generally quicker to access particularly for procurements over the thresholds set in the CPRs. The key differences between a MUL and a panel are further explained in Appendix 2.

2.9 The establishment and management of a MUL can be resource intensive and may not be the most effective and efficient procurement option for an agency. However, the prequalification provided through the MUL can assist in streamlining subsequent procurement processes particularly where acceptance of particular terms and conditions has been agreed as part of a supplier's application to join the MUL. To support effective procurement, the appropriateness of a MUL should be carefully considered against other procurement options.

Procurements under the procurement thresholds

2.10 For procurements under the CPR thresholds outlined in paragraph 1.5, a MUL is unlikely to be the most efficient and effective procurement arrangement. This is because there is generally limited benefit in establishing a MUL when agencies can directly approach any potential suppliers to undertake the procurement provided the delegate has reasonable assurance that value for money can be achieved.³⁷

Procurements over the procurement thresholds

2.11 For all procurements that have values over the CPR thresholds, the additional rules of Division 2 apply. These include requirements relating to:

³⁶ Finance, *Buying for the Australian Government, Procurement Practice, Panel Arrangements and Multi-Use Lists*, paragraph 24 [Internet].

³⁷ Agency practices are also influenced by any additional requirements in agencies' Chief Executive Instructions and other agency guidance.

request documentation³⁸; conditions for participation; and minimum time limits, including a minimum of 25 days, or in some cases, ten days³⁹ for suppliers to respond to an approach to market or request for quotation.

2.12 A MUL does not offer any time savings or reduce these minimum time limits and conducting a prequalified procurement from a MUL is, in some respects, similar to conducting an open tender. The key difference is that with an open tender, agencies must make the procurement opportunity available to the open market. Under a MUL, Finance Guidance suggests only two or more suppliers from the MUL need to be approached as an open approach to the market has already been made at its establishment. In either case agencies must adhere to the required timeframes. Therefore, a MUL may not necessarily facilitate the timely procurement of good and/or services required at short notice. The requirements of open and prequalified tender for procurements above the procurement thresholds are highlighted in Table 2.3.

Table 2.3: Requirements for open and prequalified tender for procurements above the procurement thresholds

	Open tender	Prequalified tender from a MUL
How many suppliers must be approached	Open to the entire market	Finance guidance suggests at least two from a MUL
CPR requirements for request documentation and for conditions for participation ^(a)	Identical	Identical
CPR requirements for minimum time limits	Identical Minimum 25 days unless certain conditions allow minimum of 10 days	Identical Minimum 25 days unless certain conditions allow minimum of 10 days

Source: ANAO based on requirements of the CPRs.

Note (a): Refer to footnote 38 for details of requirements for request documentation.

38 These include the need to include a complete description of: a) the procurement; b) any conditions for participation; c) any minimum content and format requirements; d) evaluation criteria to be considered in assessing submissions; and e) any other terms or conditions relevant to the evaluation of submissions.

39 Section 10.19 of the *Commonwealth Procurement Rules*, outlines various conditions which if met, provide for a period of not less than 10 days.

2.13 In summary, when considering establishing a MUL, agencies need to have clearly defined objectives. This allows agencies to consider whether the procurement method they propose to use is appropriate or if an alternative method better suits their needs.

Agency decision making when establishing a MUL

BoM

2.14 BoM's 11 current MULs were established between 2011 and 2013. In establishing the MULs, BoM had not clearly defined their procurement objectives. In addition, planning documentation had generally not been developed or maintained and with the exception of one of its MULs, there was no evidence that BoM had considered the requirements of prequalified tender, or the basis for establishing a MUL. Documenting such considerations facilitates subsequent assessment of whether the processes adopted have allowed an agency to meet its procurement objectives. In July 2013 BoM piloted the release of new planning tools for staff aimed at establishing a consistent process for the creation of MULs at BoM. This process was still in progress as at May 2014.⁴⁰

Industry

2.15 Industry's four MULs were established between 2010 and 2012 and were for services it frequently procured. Of the four MULs reviewed at Industry three had, to varying degrees, evidence of planning which included consideration of the requirement, purpose and basis for the establishment of the MUL. For one of these, documentation stated a MUL was preferred over a panel arrangement as, among other things, it would be quicker and easier to assess potential suppliers. However, as noted in paragraph 2.6, the CPRs require agencies to undertake a full tender process each time they procure at or above the relevant procurement thresholds. Accordingly, a panel would have been more appropriate if goods or services were required quickly. This suggests the requirements of prequalified tender using a MUL were not fully understood at the time the decision to establish a MUL was made.

⁴⁰ BoM advised that it would use the results of this audit to inform the creation of new planning tools and therefore would not formally issue the revised tools until this audit was finalised.

AGD

2.16 The planning undertaken to establish the legal services multi-use list (LSMUL) was extensive and included consideration of the outcomes of reviews of legal services; consultations with stakeholders; potential risks with the approach; and consideration of alternative procurement options such as a panel. Some of the key aspects relating to the establishment of the LSMUL are outlined below.

The Legal Services MUL (LSMUL) was introduced in June 2012 to provide a more holistic and strategic approach to the provision of legal services, and to help contain Australian Government expenditure on external legal services. The development of the LSMUL was informed by two reviews^(a), consultation with stakeholders and advice from the Department of Finance.

The first review, the *Blunn Krieger review*, concluded the system of agencies individually approaching the market to establish panels was inefficient and significant savings could occur by increasing agency capacity to make informed decisions around legal services procurement.

The second review, the *Lateral Economics review* (known as the *Gruen review*), identified the opportunity to increase market participation (as 89 per cent of legal fees were earned by 10 law firms in 2009-10) and reduce duplication in tendering costs for service providers and the Australian Government (at the time there were 72 separate legal panels each of which cost the Commonwealth around \$120 000 to establish).

The *Legal Services Directions 2005*^(b) require all Australian Government agencies subject to the *Financial Management and Accountability Act 1997* and certain entities subject to the *Commonwealth Authorities and Companies Act 1997* to use the LSMUL when purchasing external legal services.

The objectives of the LSMUL are to:

- provide a streamlined whole-of-government approach for engaging suitably qualified legal service providers across government;
- assist agencies become more informed purchasers of legal services;
- increase market participation for Australian Government legal work by reducing barriers to entry which in turn would encourage greater competition and sharper pricing^(c) among suppliers; and
- provide flexibility to purchase from the MUL in a variety of ways while still achieving value for money.^(d)

Note (a): Blunn Krieger *Report of the Review of Commonwealth Legal Services Procurement*, 2009, p. 10 and Lateral Economics, *Learning from experience: Purchasing legal services*, 2011, pp. vii, 24 and 81.

Note (b): The *Legal Services Directions 2005* are a set of binding rules about the performance of Commonwealth legal work. The directions set out requirements for sound practice in the provision of legal services to the Australian Government.

Note (c): Reducing the number of legal services panels was expected to reduce tendering costs which may lead to lower rates being charged by service providers.

Note (d): AGD's consultation draft *Legal Services Multi-Use List*, 14 June 2011.

2.17 In summary, the audit found that in establishing MULs, BoM and Industry needed to give greater consideration to whether a MUL was the most appropriate procurement method to achieve their objectives. If more consideration had been given, these agencies may have determined that alternative procurement methods may have better suited their needs. In contrast AGD had clearly defined objectives which reflected the Government's policy intent, particularly with respect to opening up the market and streamlining the approach for agencies and suppliers.

Request documentation and conditions for participation

2.18 When establishing a MUL agencies need to outline the nature of the goods and services sought, particular requirements to be fulfilled, relevant conditions for participation and/or technical specifications. Generally such request documentation would also establish any rules of operation for the MUL.⁴¹

2.19 The CPRs advise that agencies may specify conditions that potential suppliers must be able to demonstrate compliance with in order to participate in a procurement. If such conditions are specified, they must be limited to those that ascertain that a potential supplier has the legal, commercial, technical and financial abilities to fulfil the requirements of the procurement.⁴² Conditions for participation also provide suppliers with information that can assist them in making decisions about applying for inclusion in a MUL. Finance's guidance advises that careful consideration should be given to the conditions for participation for inclusion on a MUL, since there is no discretion to evaluate or rank responses. Where a supplier meets the conditions for participation, they are placed on the list.⁴³

41 The rules of operation of a MUL should include items such as: details of who will compile and manage the list; the procedure for dealing with changes to the details of listed potential suppliers; a register of which agencies may use the list (if relevant); a notification that participants who cease to meet the required conditions for participation or operation for inclusion will be removed, and the procedure for doing so; and a notification that the agency may procure this type of goods or service without using the MUL, where appropriate. Finance, *Buying for the Australian Government, Procurement Practice, Panel Arrangements and Multi-Use Lists* [Internet].

42 Finance, *Commonwealth Procurement Rules*, 2012, section 10.13.

43 Finance, *Buying for the Australian Government, Procurement Practices, Panel arrangements and Multi-Use lists* [Internet].

BoM and Industry

2.20 To varying degrees the documentation developed by BoM and Industry outlined requirements for the services sought and established rules of operation for each MUL. In most cases, BoM did not specify conditions in the application for inclusion for its various MULs, but instead required applicants to indicate they could meet the scope of requirements that was provided.

2.21 For one MUL in BoM and two in Industry, conditions for participation were specified, which required applicants to accept standard contract terms and conditions. Including standard terms and conditions allows agencies to streamline subsequent procurement processes as suppliers have agreed to the terms and conditions at the time of joining the MUL. Agencies should keep in mind that in some cases agreeing to terms and conditions at the establishment stage of a MUL may affect the achievement of value for money in future procurements as the terms and conditions cannot then be tailored to suit the specific procurement objective.

AGD

2.22 The request documentation developed by AGD for the LSMUL included conditions for participation, guidance material for applications, a legal services MUL deed and the application for inclusion. The conditions of participation set out in the application for inclusion required potential suppliers to:

- provide list rates and innovative fee arrangements;
- have public liability insurance and professional indemnity insurance for an amount not less than \$10 million (AUD) per event per policy;
- provide two duly completed and executed LSMUL Deeds; and
- demonstrate understanding and capacity to meet the requirements of the *Legal Service Directions 2005*, including commitment to pro-bono legal work.⁴⁴

44 Attorney-General's Department, *Legal Services Multi-Use List – Conditions for participation and guidance material for applicants*, section 3 part 11 [Internet], AGD available from <<http://www.ag.gov.au/LegalSystem/LegalServicesCoordination/Pages/Legalservicesmultiuselistsandserviceproviders.aspx>> [accessed June 2014].

2.23 When considered against Finance guidance and the CPRs, the conditions for inclusion on the LSMUL included conditions that could be considered to be additional to the minimum required to ascertain whether the supplier had the legal, commercial, technical and financial ability to fulfil the requirements of the procurement.⁴⁵ This may have resulted in a more onerous and costly⁴⁶ application process for suppliers however, the inclusion of these conditions reflected that the LSMUL was a whole-of-government arrangement and sought to streamline the later procurement processes for both suppliers and agencies.

Approach to market

2.24 Once a decision is made to establish a MUL, agencies must take steps to notify the market in order to allow suitably qualified suppliers to apply. Unlike an open tender process which is used for a single procurement, a MUL is a list intended for use in more than one procurement process. A MUL can also be open to new applicants throughout the period of its operation.

Advertising on AusTender

2.25 The CPRs require that an approach to market inviting applications for a MUL must be published continuously on AusTender for the entire period of the MUL's operation. In contrast, Finance's website guidance suggests advertising MULs is optional as it states after the list has been created, an agency may use AusTender to advertise the existence of the list. This may include a short description of the MUL and a link to the list on the agency's website.⁴⁷

2.26 The ANAO assessed the audited agencies' approaches to notifying potential suppliers on the existence of their various MULs on AusTender. As outlined in Table 2.4 all three agencies had listed the MULs under the AusTender category of current MULs. However, only AGD had a current notification in the approach to market section of AusTender.

45 This is in line with Australia's commitment in bilateral trade agreements and provisions in other international agreements that deal with public procurement.

46 For example, suppliers were required to obtain the prescribed level of insurance prior to being assessed as suitable for being included on the LSMUL.

47 Finance, *Buying for Australian Government Multi-Use Lists* [Internet] available from <<http://www.finance.gov.au/procurement/procurement-policy-and-guidance/buying/procurement-practice/panel-and-mul/practice.html>> [accessed June 2014].

Table 2.4: Agencies' advertising of multi-use lists on AusTender

	BoM	Industry	AGD
Listed in approach to market section of AusTender	x	x ^(a)	✓
Listed in current MUL section of AusTender	✓	✓	✓

Source: ANAO.

Note (a): Refer paragraph 2.28 for further details.

2.27 The approach to market (ATM) section in AusTender has certain functionality attached to it that affects both suppliers and agencies. In particular, if agencies issue an ATM on AusTender, eligible potential suppliers⁴⁸ receive an email notification advising them of the procurement opportunity. However, agencies cannot access supplier responses until the application period has expired. In the case of a MUL which is continuously open to new applications for inclusion, this is not practical. Further, reporting the existence of the MUL only in the current MUL section of AusTender does not trigger the automatic notification of the procurement opportunity to eligible suppliers, potentially limiting supplier opportunities.

2.28 As indicated in Table 2.4, BoM published details of MULs only in the current MUL section of AusTender and not in the ATM section. Industry had published an approach to market on AusTender for one its MULs. However on advice from Finance, Industry removed it from the ATM section and included it under the MUL section. Industry advised that subsequent MULs were published the same way. The differences in wording in the CPRs and Finance's guidance are likely to have contributed to the confusion around how MULs should be advertised. To promote a more consistent understanding of requirements there would be benefit in Finance clarifying the requirements relating to the publication of the establishment of a MUL on AusTender and considering possible enhancements to AusTender functionality to include notification of MUL business opportunities to potential suppliers that match their specified profile.

48 AusTender provides an online automatic notification facility for registered users who have registered particular areas of Planned Procurements via e-mail once business opportunities that match their specified profile are published. Refer to AusTender Help [Internet] available from <<https://www.tenders.gov.au/?event=public.help.list>> [accessed June 2014].

2.29 Finance has advised references to multi-use-lists in paragraph 7.13 of the 2012 CPRs are being amended to emphasise the obligation to publish invitations to lodge applications for inclusion on a multi-use list on AusTender.

Assessment and notifications to suppliers

2.30 A key principle of the CPRs is the overarching obligation to treat potential suppliers consistently, equitably and ethically. Processes where conditions are imposed on potential suppliers and then not applied consistently in the evaluation of tender responses, or lack of documentation to indicate that suppliers were treated equitably, risks achieving the outcomes envisaged by the CPRs.⁴⁹ The ANAO reviewed applications from, and notifications to, potential suppliers for each of the MULs reviewed, as well as the agencies' records of whether suppliers had met the required conditions for participation to determine the extent to which applications for inclusion were treated consistently and equitably.

BoM and Industry

2.31 Both agencies maintained records (referred to as MUL registers or supplier lists) that recorded the responses made by suppliers against the requirements for inclusion on the MUL. In general however, supporting records at these agencies were incomplete, and, in some instances, applications and/or notifications were located for suppliers that had not been included on the particular MUL register or listing maintained by the agency.

2.32 In both agencies suppliers had been included on MUL registers when they had not met some of the requirements contained in the application for inclusion. There was also no evidence of screening or verification of claims made by potential suppliers to assess their eligibility for inclusion.

2.33 The ANAO noted a number of inconsistencies in the way supplier responses were treated in BoM and Industry. For example:

- in BoM 12 applicants did not provide all the requested information but none were rejected on this basis; and

⁴⁹ Finance, *Commonwealth Procurement Rules*, 2012, sections 6.5-6.6.

- in Industry the ANAO observed:
 - for one MUL there was insufficient evidence to confirm whether all suppliers were treated equitably with respect to requests to vary terms and conditions⁵⁰;
 - that three expressions of interest (applications) were submitted after the specified closing date and all three suppliers were included on the MUL register. Industry subsequently entered into contracts with two of these three suppliers.
 - for two suppliers included on the MUL register, there was no documentation (application for inclusion, evidence of verification or notification to suppliers) available. However, both of these suppliers were awarded subsequent contracts.
 - for one MUL potential applicants were advised that ‘submissions would be assessed on the basis of value for money’ through the application of the evaluation criteria, but pricing information was not required.

2.34 In summary, there is a risk that suppliers may not have been given fair and equitable treatment in their application of inclusion on the MULs in BoM and Industry. These agencies should strengthen processes for establishing MULs to make sure suppliers are treated equitably in their application.

AGD

2.35 As at 27 March 2014, there were 112 providers included on the LSMUL. The ANAO reviewed the records of assessments/evaluations and notifications to potential suppliers for a sample of 36 applications for inclusion on the LSMUL. AGD was able to provide copies of documentation supporting the application, evaluation, notifications of inclusion or exclusion to the potential suppliers for all the sampled applications for inclusion and on the basis of the sample reviewed, all appeared to be treated consistently.

50 Terms and conditions were revised shortly after the establishment of the MUL. However, prior to this some service providers had been advised that terms and conditions were unable to be changed. There is a risk that potential suppliers declined to participate under the original terms and conditions but were unaware they had changed.

Service provider views on the establishment of the legal services multi-use list

2.36 The ANAO consulted a range of service providers to ascertain their views on the establishment of the LSMUL and whether it has streamlined the procurement approach and opened up the market to competition. Overall views were mixed. A summary of the key comments against the objectives is provided below.

Provide a streamlined approach

Providers commented that the amount of effort to get on the LSMUL was comparable to a panel. Although neither guarantee work, the chances of getting work on a panel with a small number of providers was considered higher than the LSMUL with over 100 providers. This reportedly made it difficult to offer volume rate discounts. Many providers felt that the increase in administrative effort to join and provide services under the LSMUL would ultimately lead to a rise in rates.

Whether the LSMUL opened up the market, increased competition and sharpened pricing from providers

The LSMUL was considered to have opened up the market to new entrants, but the extent to which new entrants obtained work is not known. The majority of the work is reported to be still going to the same providers as it did prior to the introduction of the LSMUL^(a). Anecdotally the new entrants are medium sized firms. The benefit of new entrants however, may be reduced by agency parcelling. Most providers interviewed considered the advertising of proposed parcelling arrangements was not transparent.

In terms of provider rates, some providers indicated the rates offered were highly competitive reflecting the maturity of the legal services market in Canberra. However, the administrative effort associated with responding to quotes and reporting on activities could be further streamlined both across and between agencies.

Note (a): AGD *Legal Services Expenditure Report 2012–13* p. 12. The LSMUL commenced in June 2012. Under transitional arrangements its use was not made mandatory until June 2013.

Recommendation No.1

2.37 To provide for efficient and effective procurement processes and the achievement of value for money the ANAO recommends agencies:

- (a) clearly define objectives in order to determine the most appropriate procurement method; and
- (b) where a multi-use list is chosen, strengthen processes to promote competition and equitable treatment of suppliers.

2.38 This recommendation was directed to AGD, BoM and Industry. The Department of Finance also commented.

Attorney-General's Department

2.39 *AGD agrees. AGD welcomes the ANAO's finding that it appropriately defined the objectives prior to establishing the LSMUL. Having regard to the nature of legal services and the requirements of the CPRs, the Department will consider, in consultation with the Department of Finance, whether the use of the LSMUL or the approach to the procurement of legal services could be strengthened to more appropriately achieve these objectives.*

Bureau of Meteorology

2.40 *Agreed. The Bureau is strengthening its processes to encourage competitive tension in the procurement process and promote equitable treatment of suppliers. The Bureau is pleased to confirm that several initiatives are currently being implemented, including new business case requirements in the early stages of multi-use list planning and improved training for Bureau staff to leverage greater value from multi-use lists. The Bureau is currently reviewing all current multi-use lists in line with the ANAO findings.*

Department of Industry

2.41 *Agreed. The Department of Industry agrees with the recommendation. The Department will undertake a review of its guidance material and make changes as required to ensure that it provides officers undertaking procurement with appropriate levels of assistance.*

Department of Finance

2.42 *Supported. The mandatory requirement in the Commonwealth Procurement Rules (CPRs) is that all Australian Government agencies achieve value for money in procurement. An agency's operational processes, including those associated with establishing a multi-use list and procuring from that list, must be consistent with the principles of CPRs. Operational processes should additionally require the consideration of risks for each procurement on a case-by-case basis.*

Conclusion

2.43 Where procurement objectives are not well defined or processes are not well understood, there is a clear risk of agencies undertaking procurements that are not consistent with the requirements of the CPRs. Overall, the ANAO identified that agencies need to give greater consideration to whether a MUL is most suited to meeting their procurement objectives or whether alternative procurement arrangements would be more suitable. In the case of BoM, the objectives for its MULs were not defined and in some cases MULs were subsequently used very infrequently or not at all. In Industry, to varying degrees, some MULs had defined objectives. However, in regard to Industry's temporary personnel MUL in particular, an alternative procurement method such as a panel would have enabled Industry to better meet its procurement objective and demonstrate the achievement of value for money. In contrast, AGD had clearly defined the objectives for the LSMUL. These were directed towards opening up the market to competition, streamlining procurement processes to reduce the cost of legal services and promoting more informed purchasers of legal services.

2.44 Suppliers should be treated equitably when being assessed for inclusion on a MUL, and appropriate records of supplier assessment and notification of outcome should be maintained to provide transparency of the process. Both BoM and Industry included suppliers in their MUL registers that had not met some of the requirements contained in the application for inclusion. Further there was no evidence of screening or verification of claims made by potential suppliers.

2.45 Agencies and legal service providers interviewed by the ANAO generally agreed the LSMUL had met a key objective of opening up the market to competition. However, both groups were less certain of whether the purchase of legal services by Australian Government agencies was more efficient, effective, or achieved at a lower cost than under previous arrangements.

3. Procurement from Multi-Use Lists

This chapter examines agencies' use of multi-use lists to support actual procurement and whether the requirements of the Commonwealth Procurement Rules have been met.

Introduction

3.1 Having established a multi-use list (MUL), agencies should determine the best way to use it to meet their business needs. This requires employing appropriately competitive processes and treating suppliers equitably in determining value for money in the expenditure of public funds. To provide accountability and demonstrate that legislative and policy requirements are met when procuring from a MUL, agencies must maintain appropriate documentation for each procurement. Documentation should be commensurate with the scale, scope and risk of the procurement. Desirably, such documentation includes providing concise information on the requirement for the procurement, the process that was followed, how value for money was considered and achieved, and relevant decisions, and the basis of those decisions.⁵¹

3.2 The ANAO examined 50 procurements over \$80 000 recorded on AusTender as having been conducted by prequalified tender. The audit sample period covered contracts that had been entered into between 1 July 2012 and 30 September 2013. The number of procurements per agency is outlined in Table 3.1 below.

Table 3.1: Number of procurements per agency in the audit sample

	BoM	Industry	AGD	Total
Sample total	6	28	16	50

Source: ANAO analysis.

3.3 The ANAO assessed whether the processes adopted supported the achievement of value for money and in particular examined the following key aspects of the procurement process:

51 Finance, *Commonwealth Procurement Rules*, 2012, sections 7.2-7.4.

- approaching suppliers for tenders;
- evaluation of submissions, approvals and demonstrated consideration of value for money; and
- reporting contracts on AusTender.

3.4 As noted in paragraph 1.3, the CPRs allow three methods of tender: open, prequalified and limited. MULs are designed to support the conduct of prequalified tenders. The CPRs indicate that procurements which do not fulfil the requirements of an open tender or prequalified tender can only be classed as a limited tender. Overall, all of the procurements at BoM and Industry and the majority at AGD reported as prequalified tender did not meet important requirements of the CPRs and had, by default, been conducted as limited tenders.⁵²

3.5 This was largely due to agencies failing to give suppliers the required time to respond for requests for request for quote.⁵³ There were also instances of agencies approaching only one or a small number of suppliers which limits competition. As a result, it was more difficult for audited agencies to demonstrate that value for money was achieved.

3.6 In addition there were instances of insufficient documentation to indicate the processes that were undertaken and agencies often did not record why particular suppliers from the MULs were invited to quote for work.

3.7 While limited tenders are allowed for in the CPRs, a series of strict conditions apply to their use.⁵⁴ In several respects the majority of procurements examined by the ANAO not only failed to meet the conditions for prequalified tender but they also failed to meet the requirements for limited tender. As a result, these procurements were non-compliant with the CPRs and it was difficult for the agencies to demonstrate the achievement of value for money.

52 Limited tender involves an agency approaching one or more potential suppliers to make submissions, where the process does not meet the rules for open tender or prequalified tender. *ibid.*, section 9.11.

53 The time limit for potential suppliers to lodge a submission must be at least 25 days from the date and time that an agency publishes an approach to market for an open tender or a prequalified tender except under certain circumstances where it is allowed to be no less than 10 days. *ibid.*, section 10.19.

54 Situations where limited tender is permissible for procurements at or above the procurement thresholds include where an open approach to market receives no response, the need to act with extreme urgency or exploit advantageous conditions or where the goods and services can only be supplied by one business and no reasonable alternative is available. The complete list of conditions is included in Appendix 3 of this report. Limited tender procurements under the thresholds, are not subject to any additional requirements. All procurements examined by the ANAO were above the procurement thresholds.

Approaching suppliers for tenders

3.8 Key considerations when undertaking a procurement involve identifying the procurement need, the scope of requirements and the process for selecting suppliers having regard to encouraging competition (for example by obtaining multiple quotes). The value over the full lifecycle of the procurement must also be estimated before a decision on the procurement method is made. These factors, and potential risks and any agency procedural requirements should shape the approach taken to select a supplier. It is particularly important therefore that agencies' processes for selecting suppliers from a MUL encourage competition and reflect the scale and scope of the procurement.⁵⁵

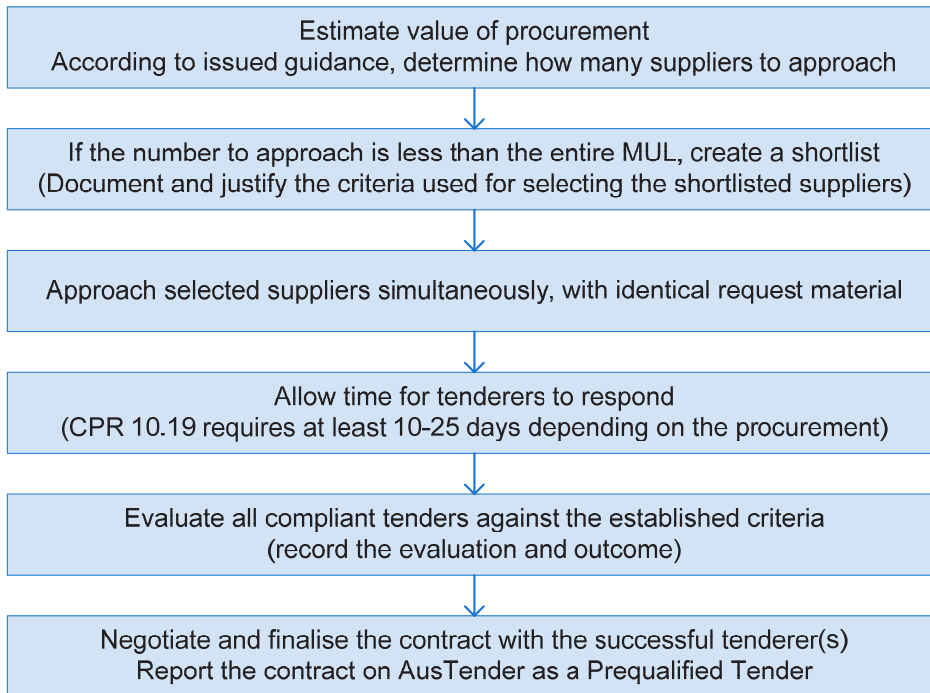
CPRs and Finance Guidance

3.9 Procuring from a MUL removes the need for agencies to undertake an open approach to the market, as this occurred at the time of the establishment of the MUL however, it is still a requirement to achieve value for money. For purchases under \$80 000, the CPRs do not require agencies to seek more than one quote as long as there is reasonable assurance value for money is being achieved. For purchases over \$80 000⁵⁶ a MUL allows agencies to approach two or more suppliers to obtain quotes for the scope of work required. The prequalification provided through the MUL assists in streamlining the selection process where acceptance of particular terms and conditions has been agreed as part of the application for inclusion on the MUL.

3.10 The key processes when using a MUL are described in Figure 3.1.

55 Competition is a key element of the Australian Government's procurement framework. Effective competition requires non-discrimination and the use of competitive procurement processes. Finance *Commonwealth Procurement Rules*, section 5.1.

56 The procurement thresholds are higher for construction services.

Figure 3.1: Processes when using a multi-use list

Source: ANAO based on the requirements of the CPRs.

3.11 The CPRs outline the requirements relating to tender documentation provided to potential suppliers during an approach to market for procurements at or above the procurement thresholds. These include specifying the goods or services required, minimum content and format requirements and the evaluation criteria that would be used to assess the tenders. Agencies should include relevant evaluation criteria in request documentation to enable the proper identification, assessment and comparison of submissions on a fair, common and appropriately transparent basis. There are also minimum time limits.⁵⁷

⁵⁷ The time limit for potential suppliers to lodge a submission must be at least 25 days from the date and time that an agency publishes an approach to market for an open tender or a prequalified tender except under certain circumstances where it is allowed to be no less than 10 days. The circumstances relate to: a) whether the agency has published certain details of the procurement in its annual procurement plan requirements; b) where the agency procures commercial goods and services; c) where it relates to second or subsequent approaches to the market for recurring procurements; or d) where a genuine state of urgency renders the normal time limit impracticable. Finance, *Commonwealth Procurement Rules*, 2012 p. 32, section 10.19.

3.12 The CPRs do not specify how many suppliers on a MUL to approach for a procurement or on what basis potential suppliers can be excluded. In relation to MULs the CPRs state:

Prequalified tender involves publishing an approach to market inviting submissions from all potential suppliers on a list of potential suppliers selected from a multi-use list established through an open approach to market.⁵⁸

3.13 However, the guidance on the Finance website states:

An agency may invite all participants on the MUL to tender; or invite only a number of participants on the MUL to tender, provided the invitation is non-discriminatory, and the largest number of potential suppliers is selected consistent with an efficient procurement process.⁵⁹

3.14 Finance has also advised:

To establish value for money is being achieved, a selection process of two or more MUL members should⁶⁰ be undertaken, specifically where the expected value of the contract will be more than \$80 000.

3.15 The variation in the current guidance is a likely contributor to the level of agency misunderstanding regarding the use of MULs.

Agency approaches

3.16 Detailed findings in relation to procurements conducted by each of the audited agencies are provided below.

BoM

3.17 The six procurements examined in BoM showed a number of inconsistencies when considered against the CPRs and Finance guidance:

- four procurements involved direct approaches to suppliers who were not on a MUL;
- one procurement involved one supplier being sent request documentation and given eight days to submit a proposal (less than the

58 *ibid.*, section 9.9.

59 *Finance Buying for the Australian Government, Procurement Practices, Panel arrangements and Multi-Use list, tips* (point 6) [Internet].

60 In the CPRs the term 'should' indicates good practice rather than something that must be complied with. Finance CPRs, 2012, section 2.3.

minimum time limit of 10 days).⁶¹ As this supplier did not respond another supplier was directly approached and asked to respond at their earliest convenience; and

- one included seeking approval to conduct a limited tender with a direct approach to one supplier, so therefore it was not a prequalified tender.

Industry

3.18 Of the 28 procurements examined in Industry, 22 were from the same MUL, the Recruitment and Temporary Personnel MUL. This MUL included 38 potential service providers each offering candidates with different skills and experience. When procuring from the MUL, Industry evaluated the skills, experience and rates of individual job seeker candidates rather than undertaking comparative value for money assessments of the suppliers. While recruiting staff was the purpose of the procurement and considering their rates would be relevant, this is not consistent with the requirements of MULs and in this respect, the MUL was being treated as a panel. Industry advised that going forward this MUL will be replaced with a panel arrangement, which is likely to be more suited to the business need.

3.19 Across all Industry MULs, the ANAO identified several procedural matters in the way Industry approached and selected suppliers. These included instances of suppliers not being allowed the mandatory response period specified in the CPRs and one procurement involved making a direct approach to suppliers on two different MULs. The CPRs only allows for suppliers to be selected from a single MUL.⁶² In addition, it was not clear from documentation provided that there was equitable and consistent treatment of all applicants.

3.20 Information sent to tenderers generally did not include evaluation criteria that would be used to assess tenders. Providing potential suppliers with the criteria they will be evaluated against is mandatory under the CPRs. In two instances the ANAO observed requests from suppliers for clarification of the requirements outlined in the request documentation. While responses to the enquiries were held on file, no evidence was available to indicate that the clarifying information was also provided to other potential suppliers. Finally,

61 The CPRs specify minimum time limits to be given to potential suppliers to provide a response to an approach to market, *ibid.*, sections 10.17–10.27.

62 *ibid.*, section 9.9.

in a number of instances, supporting documentation indicated that the purpose and correct usage of MULs was not clearly understood by some officers within Industry and advice provided to procurers and/or delegates did not correctly set out requirements for procuring from MULs.

AGD

3.21 Obtaining quotes for legal work can be challenging as it is often difficult to predict the extent of services that might be required. For example, in representation/dispute resolution services when the Commonwealth is a respondent to court proceedings both the cost and duration of the services required can increase substantially and services are often required urgently.⁶³ Where there is a need to act with extreme urgency limited tender is permissible and for many proceedings, there may be a reason to select a particular provider (such as familiarity with the case in question or having provided earlier advice or litigation services). The engagement of counsel for any current or anticipated litigation or dispute is exempt from the requirements of Division 2 of the CPRs.

3.22 The LSMUL guidance states that agencies must comply with the CPRs and contains guidance on determining the number of quotes to seek.⁶⁴ For work estimated to be at or above the relevant procurement threshold amount, agencies must select two or more service providers on the LSMUL to supply quotes for the legal services.⁶⁵

3.23 Of AGD's 16 procurements from suppliers on the LSMUL, 11 involved a direct approach to a particular supplier and therefore did not involve obtaining competitive quotes although an estimate of the expected cost was often obtained. For these 11 procurements the direct approach was appropriate as they were either exempted under LSMUL guidance or met the conditions for limited tender. The remaining five procurements were initially conducted as prequalified tenders under \$80 000 but over time the value of the

63 A situation where limited tender is permissible for procurements at or above the procurement thresholds includes where there is a need to act with extreme urgency.

64 Agencies may invite all or some of the listed service providers in the relevant category of legal work to submit a quote. An agency should have regard to the size and complexity of the matter or parcel of work, and any internal agency procurement guidance, when determining the number of quotes to seek. Refer *AGD Legal Services Multi-Use List Guidance Material*, 2012, paragraph 15.2 [Internet].

65 For purchases less than \$80 000, the CPRs do not require agencies to seek more than one quote, as long as there is reasonable assurance that value for money is being achieved.

procurement has reached or exceeded the \$80 000 threshold. For these five procurements AGD:

- sought two quotes for one of the procurements; and
- approached one provider for each of the remaining four.

3.24 In each of these cases, as the value of the procurement increased, the subsequent work was always given to the original provider as approaching a new provider was considered likely to incur additional costs. Where the maximum value of procurement over its entire duration cannot be estimated, the CPRs require the procurement be treated as being valued above the relevant procurement threshold.⁶⁶ AGD advised that in each of these five cases the responsible officers considered the initial estimate was reasonable in the circumstances, even if it subsequently increased.

3.25 In summary, agencies need to be mindful that when using a MUL, a value for money assessment of suppliers was not conducted when the MUL was first established. MULs are not panels and the CPRs establish the requirements to be followed particularly with respect to conducting appropriately competitive processes to achieve outcomes consistent with the CPRs. Where the value of a procurement over its lifecycle is difficult to estimate, the procurement should be conducted in accordance with requirements for procurements at or above the relevant procurement threshold.

Evaluation of submissions, approval and demonstrated consideration of value for money

3.26 FMA Regulation 9 requires a delegate be satisfied, after making reasonable inquiries, that the approval of a spending proposal would be a proper use of Commonwealth resources. Proper use of resources includes consideration of value for money consistent with the CPRs. Value for money in procurement requires:

- a. encouraging competitive and non-discriminatory processes;
- b. using Commonwealth resources in an efficient, effective, economical and ethical manner that is not inconsistent with the policies of the Commonwealth;
- c. making decisions in an accountable and transparent manner;

⁶⁶ Finance, *Commonwealth Procurement Rules*, 2012, section 9.6.

d. considering the risks; and

e. conducting a process commensurate with the scale and scope of the procurement.⁶⁷

3.27 As noted in paragraph 1.8 under the CPRs, it is mandatory for agencies to maintain appropriate documentation for each procurement. Desirably such documentation would include: providing concise information on the requirement for the procurement; the process that was followed; how value for money was considered and achieved; and relevant decisions, including under the FMA Regulations, and the basis of those decisions.⁶⁸

3.28 The ANAO examined the documentation maintained by agencies supporting the decisions made to enter into contracts as a result of the procurement processes reviewed. In particular, the ANAO sought evidence of the evaluation of quotations including consideration of supplier rates, experience/expertise and capability to provide the goods/services sought. The ANAO also examined whether appropriate approvals were obtained for each procurement. Approvals should include the key elements of the spending proposal, such as the items, cost, parties, and timeframe.

3.29 In BoM, evidence of FMA Regulation 9 approval was provided for each of the six procurements reviewed. It should be noted, that the agency central procurement unit declined to endorse two of the procurements approved by the relevant delegate as they considered the procurement process deficient but were unable to influence the outcome. In addition, formal records of provision of request documentation and evaluations were not maintained for all procurements.

3.30 In Industry, evidence of FMA Regulation 9 approval was provided for 25 of the 28 procurements reviewed. However, Industry only maintained copies of all the tenders/quotations received for six of the procurements reviewed. In addition, limited evidence of the evaluation of tenders was provided. As previously mentioned for procurements from the Temporary Personnel MUL the evaluation reports were generally limited to an assessment of the candidates offered. In most cases the assessment of candidates was not based on the selection criteria, where provided, in the request documentation. Ten of the procurements from the Temporary Personnel MUL reviewed

67 *ibid.*, section 4.4.

68 *ibid.*, sections 7.2–7.4.

resulted in the re-engagement of an existing contractor through particular recruitment firms, without an appropriate competitive process being undertaken.⁶⁹ As noted in paragraph 3.18, Industry has recognised that a MUL was not an appropriate option for this procurement objective and advised it will be replaced with a panel arrangement.

3.31 In AGD, evidence of FMA Regulation 9 approval was provided for four of the five procurements classed as prequalified procurement. For these procurements AGD obtained:

- two quotes for one of the procurements (although copies of the request for quotes, supplier evaluations, evidence of the consideration of value for money⁷⁰ and the contract were not maintained); and
- a single quote for the remaining four, three of which were for a combination of professional fees (procured from the LSMUL), disbursements and Counsel fees (not procured from the LSMUL). The final procurement was originally estimated to be well under the procurement thresholds but increased when the matter was appealed. In each of these procurements AGD indicated consideration of value for money.

3.32 In summary, as not all of the procurements examined at BoM, Industry and AGD were conducted as a competitive prequalified tender, it is difficult for the agencies to demonstrate the achievement of value for money outcomes due to the lack of competition. Records of key aspects of the procurements, including the process that was followed, consideration of value for money and relevant decisions, and their basis, was not always maintained in each of the agencies.

3.33 The findings indicate the need for agencies to employ more competitive processes and give greater emphasis to clearly demonstrating the basis for short listing and selecting suppliers when procurements are made under a MUL arrangement. In this context, the Joint Committee of Public Accounts and

69 In particular, suppliers were not provided with sufficient time to respond in accordance with the requirements of the CPRs.

70 The ANAO was advised the successful tenderer was selected due to their direct experience settling claims arising out of alleged breach of terms of a software licence but this was not documented at the time of the procurement.

Audit has reinforced the need to document value for money considerations for individual procurements.⁷¹

Recommendation No.2

3.34 To provide for greater accountability and transparency when using a multi-use list the ANAO recommends agencies concisely document the basis for short listing potential suppliers and the basis for selecting a particular supplier to evidence value for money.

3.35 This recommendation was directed to all six agencies included in the audit. The Department of Finance also commented.

Attorney-General's Department

3.36 *AGD agrees. AGD notes that establishing value for money for procurement from the LSMUL may often only require quotes from one or a small number of providers. The process of documenting the basis for procurement decisions does not need to be complicated or onerous, and AGD agrees that it should occur in all cases.*

ANAO comment

3.37 AGD's LSMUL guidance requires agencies to select two or more service providers to supply quotes for procurements valued at or above the procurement threshold.⁷² The LSMUL list rates are maximum rates and agencies can negotiate to take account of circumstances at the time a service is required which may allow for better outcomes to be achieved. As indicated in paragraph 3.5 of the report, where agencies approached only one or a small number of suppliers, competition was limited, and it was more difficult for audited agencies to demonstrate that value for money was achieved.

Bureau of Meteorology

3.38 *Agreed. The Bureau is implementing improvements to current shortlisting and selection practices to more effectively evaluate and document value for money.*

71 Joint Committee of Public Accounts and Audit, *Report 423: Review of Auditor-General's Reports Nos 39 2009–10 to 15 2010–11*, Chapter 4, paragraph 4.99, stated in relation to documenting value for money for individual procurements: *'the Committee considers that undocumented processes should be viewed with high levels of suspicion. In these circumstances, the Committee is of the opinion that the default assumption should be that 'if it's not documented, it's not done', hence value for money is unlikely to have been achieved'*.

72 Finance has advised that to establish value for money, a selection process of two or more MUL members should be undertaken, specifically where the expected value of the contract will be more than \$80 000.

This will also extend to including the criteria for evaluating value for money in all future MUL tender documentation to assist tenderers. Further training will be provided to relevant Bureau staff to ensure the improved processes are fully implemented.

Department of Industry

3.39 *Agreed. The Department of Industry agrees with the recommendation. The Department will undertake a review of its guidance material and make changes as required to ensure that it provides adequate information on the requirements to obtain and document value for money.*

Australian Crime Commission

3.40 *Agreed.*

Department of Defence

3.41 *Defence acknowledges this recommendation and will continue to meet the objectives of the LSMUL and the requirements of the Commonwealth Procurement Rules. Defence agrees to concisely document the reason for the selection of suppliers from the LSMUL as well as demonstrating the value for money considerations for selecting a particular supplier in our procurement documentation. Policy documentation and manuals will be updated to reflection this requirement.*

Department of Human Services

3.42 *Agree. The Department will amend its internal instructions relating to the use of multi-use lists by 1 July 2014 to require, in circumstances where only some potential suppliers on a multi-use list are invited to make submissions in relation to a particular procurement, the documentation of concise reasons for the short listing of those suppliers. The Department currently requires the documentation of the basis for selecting a particular supplier from a multi-use list.*

Department of Finance

3.43 *Supported. Adequate documentation and records are an assumed internal control to support agencies in their decision making processes relating to procurement. Finance notes the proposed audit findings which outline issues associated with establishing and procuring from pre-registered suppliers on a multi-use list. The commentary will inform continuing discussions with the established network of procurement officials for the purposes of strengthening compliance with the CPRs.*

Reporting contracts on AusTender

3.44 Agencies must report contracts and amendments, including identifying the procurement method used, on AusTender within 42 days of entering into (or amending) a contract if they are valued at or above the reporting threshold.⁷³ In the case of a prequalified tender procurement from a MUL, the procurement method reported should be prequalified tender.⁷⁴ AusTender provides a contract start and publication date for all procurements reported. Using this data, ANAO analysed the timeliness of contract reporting for each of the procurements reviewed.

3.45 Contracts were reported within the required 42 day timeframe in:

- all six BoM contracts;
- 22 of the 28 (79 per cent) Industry contracts; and
- 15 of the 16 (94 per cent) AGD contracts.

However, as noted in paragraph 3.4 all of the contracts reviewed at BoM and Industry, and the majority of AGD contracts reviewed did not fulfil the requirements for prequalified tender. The contracts were reported on AusTender as prequalified tender but should have been reported as limited tender.

Other agencies' use of the legal services multi-use list

3.46 As noted in paragraph 1.13, the LSMUL is a whole-of-government procurement arrangement. The two main options for agencies in using the LSMUL are to approach the LSMUL for individual matters each time they arise, or establish parcelling arrangements for legal work particularly where the work is likely to be of similar or repeated nature.

3.47 When using the LSMUL for individual pieces of work, agencies may invite all or some of the listed service providers in the relevant category of

73 The MULs examined in this audit were established under the *Commonwealth Procurement Guidelines*. The audit sample for testing of individual procurements covered contracts that had been entered into between 1 July 2012 and 30 September 2013 and therefore the CPRs applied.

74 When reporting the procurement method for a contract, officials must base their decision on the CPRs definition and procedural requirements for Open Tender, Prequalified tender or Limited tender. In the case of a prequalified tender from a multi-use list, the procurement method will be Prequalified tender. Finance, *Buying for the Australian Government, Contracts and Agency Agreements, Practice* [Internet] available from <<http://www.finance.gov.au/procurement/procurement-policy-and-guidance/buying/reporting-requirements/contracts-agency/practice.html>> [accessed May 2014].

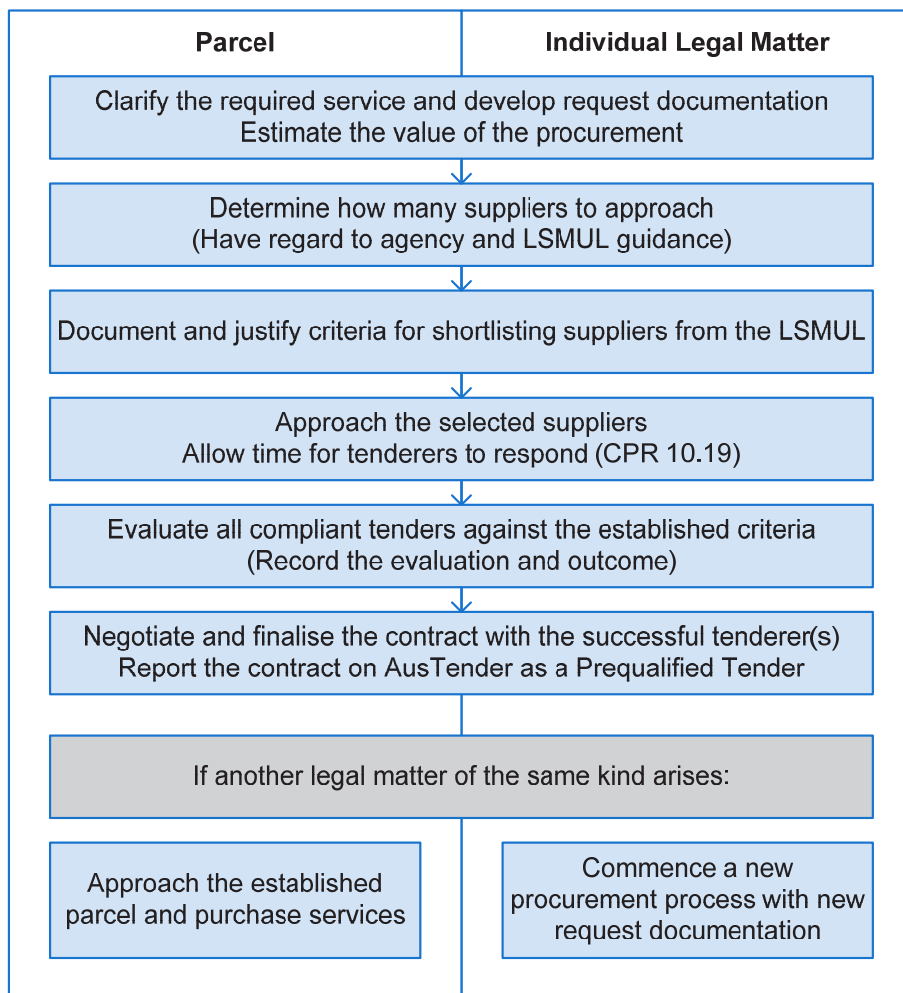
legal work to submit a quote. As discussed in paragraph 3.22 if an agency estimates that the expected cost of the required legal services to be purchased is less than the relevant procurement thresholds, then the agency may make a decision based on a single quote from a service provider on the LSMUL. If the estimated amount for legal services will be at, or above, the relevant procurement thresholds, agencies must select two or more service providers on the LSMUL to supply quotes and must have regard to the minimum time limits set out in the CPRs for potential suppliers to prepare and lodge a submission. In both cases the purchasing officer must have a reasonable degree of confidence that value for money is achieved.

3.48 Parcelling involves an agency approaching service providers from the LSMUL to submit detailed quotes for parcels of legal services that, individually, may be valued at or above the relevant procurement thresholds amount. Parcels may range from a specific task or matter, to broader categories of work required over a period of time. Parcelling arrangements would be suitable for those agencies with high volume routine matters, with a more-or-less guaranteed level of work or expenditure or may also apply to complex or high volume litigation matters.⁷⁵ The LSMUL allows agencies to establish parcels for any value through selecting a minimum of two service providers to apply. Agencies undertake a competitive value for money assessment to establish the parcel and create a contractual relationship with each supplier. Agencies need to be mindful that parcelling can reduce competition, especially if agencies are too narrow in their selection process and only select a small number of providers.

3.49 Under the LSMUL guidance, where an agency establishes a parcel, it is no longer necessary for that agency to conduct a prequalified tender process for every purchase over \$80 000, nor does the agency have to assess value for money for individual purchases valued above the relevant threshold. The reason for this is that value for money is expected to have been assessed at the point of establishing the parcel arrangement. The key factors agencies should consider when establishing and procuring legal services from parcels or individually are outlined in Figure 3.2.

⁷⁵ Attorney-General's Department (AGD), *Legal Services Multi-Use List Guidance Material* paragraph 11.4, AGD [Internet].

Figure 3.2: Procuring legal services from parcels or individually



Source: ANAO analysis.

3.50 ANAO Audit Report No.31 2011–12 *Establishment and Use of Procurement Panels*, identified there are benefits and risks for both agencies and suppliers in the establishment and use of panel arrangements. As parcelling arrangements are similar in some respects to panel arrangements many of these benefits and risks would still apply. In relation to parcelling under the LSMUL, some of the benefits and risks of parcelling for both agencies and suppliers, as compared to approaching the LSMUL for individual matters, are outlined in Table 3.2.

Table 3.2: Potential benefits of parcel arrangements and risks to manage

Agencies	
Benefits	Risks to manage
<ul style="list-style-type: none"> • A prequalified tender process only needs to be carried out once. • Aggregated demand may increase competition among suppliers and contribute to improved pricing, terms and conditions. • Ability to build effective working relationships with suppliers who are familiar with the agency's needs and preferences. 	<ul style="list-style-type: none"> • If the process to establish the parcel is not sufficiently robust, value for money may not be achieved. • If the scope of the parcel is defined too broadly or narrowly, this may affect suppliers' pricing. • The cost of managing the parcel may not be well understood—as a general principle, the greater the number of suppliers the greater the work in managing the parcel. Allowing other agencies to access the parcel may also increase costs.
Suppliers	
Benefits	Risks to manage
<ul style="list-style-type: none"> • Increased probability of future work (although work is not guaranteed), which assists forward planning. • Familiarity with common process, terms, conditions and performance criteria for multiple requests for goods or services which can lead to lower costs. • Being included in agencies' parcel arrangements may enhance the supplier's reputation in the market. 	<ul style="list-style-type: none"> • If not invited or unsuccessful in applying to be on a parcel, there may be limited opportunity to undertake work for the agency for the period of the parcel arrangement. If a parcel is then used by other agencies, suppliers can have limited opportunities to work at several agencies. • Small and medium enterprises may be disadvantaged by overstatement of procurement needs or onerous selection processes when agencies form parcels.

Source: ANAO analysis.

3.51 To reduce the risk that parcelling arrangements limit the achievement of the LSMUL's overall objectives and assist in ensuring agencies use parcelling as intended, AGD requires that parcelling arrangements:

- not exceed three years and be reviewed annually by the agency that established the parcel⁷⁶;
- not cover all of an agencies' legal services requirements in a single arrangement for a fixed period or be established with a single provider;

⁷⁶ This review is intended to enable agencies to take full advantage of any new entrants to the LSMUL since the initial parcelling arrangement was established, and to provide assurance agencies are achieving best value for money.

- are not designed to frustrate the operation of the LSMUL; and
- should seek to use or try a broader range of service providers that best suits its needs and not prevent genuine consideration of alternative providers.⁷⁷

Agency approaches

3.52 In order to gain a broader understanding of how the LSMUL was being used, the ANAO examined approaches to obtaining external legal services at three additional agencies; the Australian Crime Commission (ACC); the Department of Defence (Defence) and the Department of Human Services (DHS). ACC and DHS had both established parcelling arrangements whereas Defence had not, and approached the LSMUL for each piece of work.

3.53 Both ACC and DHS established their parcelling arrangements as they considered parcelling to be the most practical way to meet their demand for external legal services. This was due largely to the need to allow for the minimum time limits set out in the CPRs for potential suppliers to prepare and lodge a submission for procurements estimated to be at or above the relevant procurement thresholds. These agencies (and legal service providers) reported that the LSMUL arrangements do not lend themselves to services required at short notice, and consequently these agencies introduced parcelling arrangements.

3.54 Agencies need to be mindful that parcelling incurs a cost on suppliers and selection processes for inviting suppliers to apply for a parcel should not be too narrow or run counter to the LSMUL objectives. In addition, it is reasonable that suppliers should be asked to provide detailed proposals for parcelling to allow the agency to determine which service provider represents best value for money, particularly when the value of parcel arrangements can be in the millions of dollars and value for money was not assessed when the supplier was included on the LSMUL.

3.55 Key findings in relation to the establishment of parcelling arrangements at ACC and DHS are provided in Table 3.3.

⁷⁷ AGD, *Legal Services Multi-Use List Guidance* Material paragraph 11.6-7, AGD [internet].

Table 3.3: Establishment of parcelling arrangements in the Australian Crime Commission and the Department of Human Services

	ACC		DHS	
	Parcel 1	Parcel 1	Parcel 2	Parcel 3
Documented reason to parcel	x	✓	✓	✓
Estimated annual value of parcel arrangement (\$ million)	1	1.2	1.5	0.5
Criteria for shortlist documented	✓	x	x	x
Number of suppliers approached	3	7	11	6
RFQ documentation generally covered the matters outlined in sections 10.6–10.11 of the CPRs	x	✓	✓	✓
Suppliers provided with at least 10 days to respond ^(a)	✓	✓	✓	✓
Formal record of evaluation of submissions	x	✓	✓	✓
Contracts reported on AusTender within 42 days	x	Five of seven contracts resulting from the parcels were reported on time		
Correct procurement method reported on AusTender	x	x ^(b)	x	x
Documented approval under FMA Regulation 9 for each contract resulting from the parcel	✓	✓	✓	✓

Source: ANAO analysis.

Note (a): The time limit for potential suppliers to lodge a submission must be at least 25 days from the date and time that an agency publishes an ATM for an open tender or a prequalified tender, except under certain circumstances where it is allowed to be no less than 10 days. This includes where the agency procures commercial goods and services.⁷⁸

Note (b): The procurement method for the DHS parcels has been changed on AusTender to reflect the fact they were prequalified procurements rather than open tender procurements.

3.56 A number of issues were identified during the ANAO's review of the parcelling arrangements. In particular:

- In ACC, as the value of the contract was above \$80 000 and the request documentation did not meet the mandatory requirements of the

⁷⁸ Finance, *Commonwealth Procurement Rules*, 2012, section 10.19

CPRs,⁷⁹ the establishment of the parcel was by default, under the CPRs deemed to be a limited tender. Specifically, criteria for evaluation were not provided to the potential suppliers. In addition, although ACC gave potential suppliers sufficient time, they were not given equal time. To provide fairness in dealing with potential suppliers, suppliers must be given the same opportunities to respond to a request for quote.

- Both agencies reported their parcelling contracts incorrectly on AusTender. ACC reported it as a prequalified tender. Although ACC considered that it had undertaken a prequalified tender, the way it was undertaken meant that it was a limited tender. DHS reported the contracts as open tender procurements when they had been undertaken as prequalified tenders.

Defence

3.57 Defence determined that it would approach the LSMUL for each individual legal matter. Defence advised this was a deliberate strategy in order to assist in implementing one of the key objectives of the LSMUL—to open up the market to new entrants. Defence highlighted some positive experiences with the LSMUL including:

- That it had used a number of small regional service providers on the LSMUL and considered it had obtained better value for money than it would have under its previous panel arrangement (which included large and medium sized service providers). Defence considered it unlikely that such smaller firms would be able to successfully compete for inclusion on a parcel.
- The LSMUL allowed Defence to follow an individual lawyer (with extensive knowledge and expertise on a particular matter) as they changed their employment from one service provider to another, where the new provider was on the LSMUL. Under its previous panel arrangement when a lawyer moved firms Defence could no longer use that lawyer if the new firm was not on the panel. However, only a few providers were on the panel, whereas the LSMUL has over

79 These include specifying the goods or services required, any conditions for participation, minimum time limits, content and format requirements and the evaluation criteria that would be used to assess the tenders. Agencies should include relevant evaluation criteria in request documentation to enable the proper identification, assessment and comparison of submissions on a fair, common and appropriately transparent basis.

100 providers and new providers can be easily added if not already on it. Defence advised that the previous arrangement resulted in considerable additional costs and delays as another lawyer (from the service provider on the panel) would have to familiarise themselves with the work already undertaken.

3.58 The ANAO reviewed seven Defence contracts valued above \$80 000. Four of the seven procurements conducted by Defence did not allow suppliers the minimum time limit required under the CPRs to meet the requirements for prequalified tender. As a result, they are deemed to have been conducted as limited tender procurements. A summary of the results of the review of contracts in Defence is outlined in Table 3.4.

Table 3.4: Summary of key results of review of Defence contracts

	Overall result	General comments
Contract values	-	Ranged from \$80 000 to over \$1 million
Number of suppliers approached	-	Ranged from two to ten
Documented rationale for short listing of suppliers	✘	Only three of seven processes documented reasons for supplier short listing
Request documentation generally covered the matters outlined in sections 10.6–10.11 of the CPRs except for timeframes	✓	Typically request documentation outlined background information, the type of legal services required, the number of suppliers invited to submit responses, the evaluation criteria; any conditions or for submissions (including page limits) and the deadline for submission
Suppliers provided with at least 10 days to respond	✘	Only three of the seven contracts examined met minimum time limits
Formal record of evaluation of submissions	✓	
Contracts reported on AusTender within 42 days	✓	
Correct procurement method reported on AusTender	✘	Three of the seven contracts were reported correctly as prequalified tender. The remainder should have been reported as limited tender
Documented approval under FMA Regulation 9 for each contract	✓	

Source: ANAO analysis.

3.59 Details of the additional audited agencies approaches and how they relate to the key objectives of the LSMUL are outlined in Table 3.5.

Table 3.5: Agencies’ approaches to the legal services multi-use list and how they relate to its key objectives

Objective of the LSMUL	Met the objectives of the LSMUL
<p>Provided a streamlined approach</p>	<p>Yes</p> <p><i>ACC & DHS parcels:</i></p> <p>Once established ACC’s and DHS’s parcels potentially reduced red tape as it was no longer necessary for the agencies to assess value for money for each individual purchase valued above \$80 000. The parcels also allowed services to be provided quickly.</p> <p><i>Defence:</i></p> <p>For each procurement above \$80 000 Defence needs to conduct a prequalified tender in accordance with Division 2 of the CPRs. Suppliers must be given at least 10 days to respond to a request for a submission. As Defence uses standard LSMUL terms and conditions it can reduce red tape compared to other procurement alternatives.</p>
<p>Opened up the market, increased competition and sharpened pricing from providers</p>	<p>Potentially yes</p> <p><i>ACC & DHS parcels:</i></p> <p>A competitive process was undertaken to join each parcel set up by ACC and DHS. However, once established work was effectively guaranteed. DHS gave higher performing service providers a larger proportion of the available work. Some providers reported parcels as potentially limiting competition. If providers missed out on being included on a parcel; or were not invited to apply or unsuccessful, then they would be locked out for up to three years. Providers reported problems in relation to piggybacking on parcel arrangements which may result in increased rates in the longer run. Providers having tailored their rates based on their knowledge of the client and estimate of the value of work to be obtained are affected by other agencies piggybacking on the initial arrangement.</p> <p><i>Defence:</i></p> <p>Based on a sample of seven contracts Defence on average approached four suppliers for each piece of work. Six of seven contracts were awarded to different service providers which supports competition.</p>
<p>Assist agencies become more informed purchasers</p>	<p>All three agencies generally shortlisted providers (for either inclusion in a parcelling arrangement or for individual work directly from the LSMUL), on the basis of previous knowledge of the service providers or experience with both the subject matter and the agency.</p> <p>Parcelling potentially allowed ACC and DHS to develop a closer relationship with a smaller number of providers. Alternatively Defence’s approach potentially allowed it to work with a broader range of service providers including some small providers in regional locations. Either approach can influence the extent to which agencies become more informed purchasers.</p> <p>Ultimately, as reflected in the comments provided to the ANAO from service providers, some agencies and some staff within agencies are informed purchasers and undertake the procurement of legal services well.</p>
<p>Provided flexibility to purchase from the MUL</p>	<p>Yes</p> <p>The different approaches adopted indicate the flexibility available to agencies.</p>

Source: ANAO analysis.

Agency and service provider views on the use of the LSMUL

3.60 As previously mentioned in paragraph 2.36, the ANAO consulted with a range of service providers to ascertain their views on the use of the LSMUL.

Streamlined approach

- A number of service providers indicated frustration at agencies not making use of information already provided as part of the application for inclusion process. Often providers were required to either replicate this information or provide it in a very similar fashion when being approached to quote.
- Most providers indicated they were asked to provide quotes more often than under previous arrangements.⁸⁰ In some cases the quotes were for very small values, under \$1000. This approach is inconsistent with the principles expressed in the LSMUL guidance as multiple quotes are not mandated for procurements under the relevant procurement thresholds. For all low value procurements, the only mandatory requirement is that the delegate needs to be satisfied the procurement achieves a value for money outcome.
- Some service providers indicated meeting agency internal reporting demands was difficult and time consuming, particularly where agencies required different information in different ways and at different times. Service providers considered a consistent form of reporting across agencies would assist in streamlining the procurement of legal services.

Has the LSMUL resulted in user agencies becoming more informed purchasers?

- Service providers indicated that some agencies were more informed purchasers and undertook the procurement of legal services well. A number of providers considered better results were usually achieved when the procurement of legal services was centralised. Providers also noted that agencies may become better informed as experience with the MUL increases.

80 Prior to the introduction of the LSMUL under the (then) Legal Services Directions, legal services providers that were party to a deed of standing offer such as in a panel arrangement could only be asked to quote for legal services if the value of the services to be provided was likely to exceed \$80 000; or the expertise of the panel was to be tested for a new area of work. This requirement has been removed from the current version.

- A review of the LSMUL in 2013 by AGD identified that the decentralised arrangements within agencies (for the procurement of legal services) can reduce the efficiency and effectiveness of procuring services from external legal services providers. In addition, the LSMUL IT system does not provide sufficient information to agencies, to support them to be informed purchasers of legal services and there was scope for the department to consider options for a new system with more sophisticated capability.

Has the LSMUL provided flexibility to purchase from the MUL in a variety of ways while still achieving value for money?

- Both service providers and AGD identified that agencies are currently using a number of different approaches to procure from the LSMUL, including practices that are inconsistent with the intent of the LSMUL, and may not be achieving value for money for agencies. This finding is consistent with the results of this audit.

Conclusion

3.61 When using streamlined approaches such as MULs, agencies must undertake procurements in a manner that is consistent with the CPRs. Common areas where agencies did not adhere to requirements of the CPRs included approaching too few suppliers, providing insufficient time for suppliers to respond to requests for work and not treating suppliers consistently. Consequently agencies' approaches, to varying degrees, were not fully effective in satisfying the procurement principles, which among other things encourage fair and open competition.

3.62 The ANAO reviewed procurements at BoM, Industry and AGD which had been undertaken from MULs. All of the procurements at BoM and Industry, and the majority of procurements at AGD, did not meet the CPR requirements for prequalified tender. In BoM, the majority of procurements examined involved direct approaches to suppliers who were not on a MUL and therefore were not prequalified. All of Industry's procurements and most of AGD's did not involve an appropriately competitive process, or sufficient time for supplier responses. When considered against the CPRs, these procurements did not meet the requirements of prequalified tender and can only be classed as a limited tender, by default. However, in several respects a number of procurements examined by the ANAO also failed to meet conditions established in the CPRs for limited tender.

3.63 In addition, complete and accurate documentation providing concise information on the achievement of value for money and relevant decisions, was not maintained for all procurements at each audited agency.

3.64 In relation to the use of the LSMUL, AGD has sought to develop an innovative procurement solution to resolve a long standing issue in relation to the procurement of legal services by Australian Government agencies. Audited agencies and legal service providers reported that the arrangements do not lend themselves to services required at short notice: two audited agencies (ACC and DHS) have introduced parcelling arrangements to accommodate this. While parcelling can overcome CPR timing issues the approach, which can be similar to limited tender, can also reduce competition and new and small providers may face difficulties entering such an arrangement. Agencies need to be mindful that parcelling incurs a cost on suppliers and selection processes for inviting suppliers to apply for a parcel should not be too narrow or run counter to the LSMUL objectives. There is merit in AGD and Finance working together to reinforce the obligation to achieve value for money and share agency experiences with using the LSMUL.

4. Procurement Support and Review

This chapter examines the audited agencies' arrangements to support their procurement activity. These include procurement policy and guidance, the role of central procurement units, training and monitoring and review arrangements.

Introduction

4.1 The Commonwealth Procurement Rules (CPRs) represent the Government's policy framework under which agencies undertake procurement. The CPRs are supported by guidance material prepared by the Department of Finance (Finance).⁸¹ Agencies determine their own procurement practices, consistent with the CPRs, through Chief Executive's Instructions (CEIs) and, if appropriate, supporting operational guidelines. Agency central procurement units (CPUs) are internal units containing procurement specialists used by agencies to advise staff and delegates in undertaking appropriate procurement processes. Generally it would be expected that relevant staff would be provided with appropriate training to enable them to understand the requirements of the CPRs and the agency's CEIs when conducting procurements.

4.2 Procurement monitoring and review is also an important activity for agencies to determine the performance of their procurement activities and to inform future procurement planning and management. Understanding the nature and value of agencies' procurement and extent of use of different suppliers, need not be an onerous process and can assist agencies to adopt efficient ways to approach the market and achieve better value for money.

4.3 For each audited agency, the ANAO examined:

- procurement policy and guidance;
- the role of the CPU, including the provision of specialist procurement advice;
- the provision of procurement training to delegates and staff; and
- monitoring and review arrangements.

81 Guidance material can be found on the Finance website available from <<http://www.finance.gov.au/procurement/procurement-policy-and-guidance/index.html>> [accessed May 2014].

Policy and guidance

4.4 Complete, informative and up to date policy and guidance is important to foster a good understanding of an agency's procurement responsibilities, and to support the consistent application of sound practices throughout the agency. Delegates and staff must conduct procurements in accordance with the CPRs and their agency's CEIs and relevant operational guidelines, which in turn must be consistent with the CPRs.

4.5 All audited agencies had CEIs in place that covered procurement processes, consistent with the model CEIs issued by Finance. In relation to multi-use lists (MULs) specifically, agency CEIs and procurement guidance on the establishment and use of MULs accorded with the requirements of the CPRs.

4.6 In addition, both AGD and Industry had systems in place to assist in the documentation of procurement activities. AGD requires staff to use its procurement system when undertaking procurements of \$10 000 or more. The system assists in establishing an official record of the procurement activity and includes inbuilt checks, such as providing assurance that commitments to spend public money may only be made by officials with appropriate delegation. Industry's procurement management system is a component of its Financial Management Information System (FMIS) and is used to obtain and record approvals, record and report on agreements with suppliers and raise purchase orders.

4.7 During 2013 and 2014, BoM was in the process of implementing significant changes to its procurement processes. The changes underway included the design, trial and implementation of new procurement policies, procedures and processes, including online courses for delegates and agency wide training. These changes were in response to a 2011 internal review⁸² of procurement processes which had observed:

82 The internal review made seven recommendations aimed at making sure the procurement model at BoM became: more sustainable; compliant with the CPGs; more focused strategic planning; and where project management, accountability and risk management was appropriately delegated. BoM accepted all of the recommendations in the review and developed an action plan to address the issues identified. O'Connor Marsden & Associates Pty Limited, *Bureau of Meteorology Procurement Review, October 2011 to December 2011, 2012.*

- the procurement model and practices in operation at that time were not effective or efficient and did not support achievement of value for money;
- the procurement model was unsustainable and non-compliant with the then Commonwealth Procurement Guidelines⁸³ and agency CEIs; and
- there was inadequate probity management on high value procurements.

4.8 As an interim measure BoM has issued draft guidance to assist in procurement activities until its new arrangements are in place.

4.9 The ANAO’s analysis of the policy and guidance established by the three audited agencies is summarised in Table 4.1.

Table 4.1 Assessment of audited agencies’ procurement policy and guidance as at October 2013

Policy/guidance	BoM	Industry	AGD
Addressed relevant requirements under the FMA Act and FMA Regulations	✓	✓✓	✓✓
Addressed requirements of the CPRs	✓	✓✓	✓✓
Clearly articulated agency procurement roles and responsibilities	✓	✓	✓✓
Readily accessible	✓	✓✓	✓✓
Up-to-date	✘*	✓✓	✓✓

Source: The ANAO analysis of audited agencies’ procurement policy and guidance material

Legend: ✘ not adequate or not finalised and only in draft form; ✓: generally satisfactory, with scope to improve; ✓✓: satisfactory

Note*: The ANAO’s assessment was done on the draft guidance.⁸⁴

Role of central procurement units

4.10 ANAO has previously commented on the benefits of agencies maintaining a CPU to provide specialist advice and support when procurement responsibilities are devolved within the agency.⁸⁵ CPUs are also generally well placed to identify and pursue more efficient purchasing

83 The *Commonwealth Procurement Guidelines* were superseded by the CPRs in July 2012.

84 BoM advised that it would use the results of this audit to inform changes to its procurement policy and guidance and therefore would not issue its revised guidance until this audit had been finalised.

85 For example, in ANAO Audit Report No.11 2010–11 *Direct Source Procurement*, ANAO found greater levels of compliance with the *Commonwealth Procurement Guidelines* where an agency required CPU involvement in decisions to direct source higher value procurements, pp. 121–122.

arrangements, provide advice and support procurement practices that encourage competition and enhance value for money.

4.11 The specific responsibilities given to CPUs vary according to the extent of devolution of procurement responsibilities within an agency.⁸⁶ At each of the three agencies the responsibility for the development and maintenance of procurement policies and systems and coordinating the publication of contracts in accordance with the CPRs was centralised with the CPU. The conduct of procurements and contract management was devolved to the particular business areas or division. In Industry, some of the divisions (such as Questacon) also had administrative units as a first point of contact for procurement support within the division.

4.12 In each agency, the CPU had an advisory role providing support when requested in relation to individual procurements. In BoM and Industry the CPU must be consulted for procurements valued at or above \$80 000 and all requests for tender are required to be reviewed by the CPU. The ANAO observed instances of review of MUL procurements provided by the CPU in BoM and Industry, where the CPU had raised concerns regarding the proposed or the actual process undertaken. However, it was not apparent that these reviews had influenced the procurement process to improve compliance with the CPRs and/or internal requirements.

4.13 For example:

- in BoM, one of the procurements over \$80 000 had expenditure approved by the delegate however, the CPU noted *not endorsed no procurement process followed*, and
- in Industry there were a small number of cases where the CPU noted concerns about the lack of evidence supporting claims of value for money and identified such issues as the need for the delegate to be provided with information indicating the purchases were from a MUL and the number and identity of suppliers approached.

4.14 In AGD there were no mandatory thresholds or procurement processes that required staff to advise/consult or involve the CPU for procurement of

⁸⁶ CPUs' responsibilities may include: strategic procurement planning; oversight or management of procurement processes; provision of procurement advice and support; development and maintenance of procurement policy and guidance; provision of procurement training; monitoring of agency procurement activity; and management of contract data and reporting.

legal services. In relation to the LSMUL, responsibility for the establishment of guidance material for the use of the LSMUL rested with AGD's Office of Legal Services Coordination (OLSC).

4.15 The ANAO considers that, in some cases, agencies' decisions to establish and use MULs may have been different had the agencies' CPUs been more involved in the earlier stages of the procurement process. In view of the matters identified more broadly in this audit, the ANAO considers there is merit in agencies establishing processes to increase the input of CPUs into decisions regarding the establishment of MULs.

Procurement training

4.16 Effectively planning and managing a procurement process requires a range of skills, and an understanding of legislative, policy and agency procurement requirements. Procurement training needs of individual officials vary depending on personal experience, previous training, and the extent of specialist procurement advice and support provided within the agency.

4.17 The extent that agency staff are involved in procurement varies from regular to infrequent depending on the position they are in and the nature of the agency's work. This poses a challenge for agencies in providing procurement training that is well-timed and suited to staff responsibilities and capabilities.

4.18 Each of the agencies had made procurement training available to staff including in relation to prequalified tendering. Generally staff attendance was voluntary. Audit findings outlined in the preceding chapters indicate that the establishment and, in particular, the use of MULs is generally not understood by agency staff. The ANAO considers agencies would benefit by reinforcing in their training the requirements relating to prequalified tender.

Monitoring and review arrangements

4.19 Effective procurement monitoring and review enables agencies to assess whether their procurement objectives are being met and inform future procurement planning and management. The ANAO examined the extent to which agencies had reviewed whether the establishment and use of MULs was enabling them to meet their procurement objectives and adhere to the CPR requirements.

Periodic assessment

4.20 In addition to benefits derived from routine monitoring and reporting on procurement activity, there is also value in agencies periodically assessing the efficiency, effectiveness and value for money provided by MUL procurement. Such assessment activity could consider:

- the volume, nature and relative cost of procurements under the MUL;
- the spread of work between suppliers;
- the performance of suppliers; and
- whether the agency is realising the anticipated efficiencies identified when planning the establishment of the MUL.

4.21 Conducting such assessment at an appropriate time in the lifecycle of a MUL can also assist with monitoring the use and performance of suppliers; and planning for future procurements. This includes whether a MUL is the most effective procurement method to use, and if so, the appropriate scope, rules of operation and process for selecting suppliers.

4.22 BoM and Industry had not formally assessed the performance of MULs. In relation to the LSMUL, AGD undertook consultation with key stakeholders after the first 12 months of operation. In addition, AGD undertook an internal review of the LSMUL in 2013, approximately one year after its introduction. The review included evaluating the risks to AGD of managing the LSMUL, obtaining AGD's experiences and surveying suppliers and users from other Commonwealth agencies. The review made three key findings including:

- the current LSMUL IT System does not provide sufficient information to agencies, to support them to be informed purchasers of legal services⁸⁷ and there is scope for the department to improve the system; and to consider options for a new system with more sophisticated capability;
- the current decentralised arrangements within the department for the procurement of legal services reduce the efficiency and effectiveness of procuring services from external legal services providers; and

87 Noting that the current LSMUL IT System was developed as an interim system solution, and has clear limitations, there is scope for the department to improve the system; and to consider options for a new system with more sophisticated capability.

- agencies are currently using a number of different approaches to procure from the LSMUL including practices that are not in compliance with the intent of the LSMUL, and may not be achieving value for money for agencies.

4.23 In relation to the varying procurement practices adopted by agencies the AGD's review identified instances of agencies:

- parcelling all legal services for a period (as distinct from discrete groups of work);
- parcelling disparate groups of work into a single parcel, and precluding providers from tendering for the parcel unless they are able to perform the full range of services;
- requiring service providers to competitively tender for individual pieces of work under the parcel (whereas the establishment of a parcel should negate the need for further tendering); and
- requiring suppliers to provide information in tender responses which has already been assessed through the OLSC's assessment of the provider's Application for Inclusion for the LSMUL.

4.24 In addition, there was limited cooperative or coordinated procurement⁸⁸ undertaken in relation to legal services.

4.25 The review made a number of recommendations to address the findings and AGD has developed an action plan to guide its progress in actioning each of the recommendations.

4.26 Opportunities for improving the LSMUL identified during the course of this audit, include:

- quicker access to legal services—current CPR timeframes for procurement over the \$80 000 thresholds require a minimum ten days for supplier responses for commercial services. Where agencies require services within the ten day timeframe, they can draw on the

88 Cooperative procurement enables the use of a procurement contract by more than one agency. This can be achieved through either a joint approach to the market and/or where an agency/ies establish a contract or standing offer arrangement that allows other agencies access (often referred to as piggybacking). Coordinated Procurement is a government initiative to establish whole-of-government arrangements for goods and services in common use to maximise market benefits and deliver efficiencies and savings. Where established, coordinated procurement arrangements are mandatory for agencies subject to the FMA Act [Internet] available from <<http://www.finance.gov.au/procurement/wog-procurement/>> [accessed May 2014].

exemptions in the CPRs if they qualify, or put in place an alternative arrangement such as a parcel; and

- greater transparency and rigour built into agency level parcelling approaches—the LSMUL allows agencies to establish parcels for any value through selecting a minimum of two service providers to apply. This approach is not significantly different to limited tender (which allows a direct approach to one provider) and can reduce competition.

Conclusion

4.27 Many procurement processes involve complex requirements and judgements and it is important that agency staff have, or are able to, draw on relevant expertise such as CPUs, to enable them to carry out their procurement activities efficiently and effectively, and in compliance with government and agency requirements. Agencies determine their own procurement practices, consistent with the CPRs, through CEIs and, if appropriate, supporting operational guidelines.

4.28 Agencies generally had procurement policies, guidance and training largely in place. However, the use of MULs was often not well understood and associated procurements were not well conducted. To better assist staff and delegates to conduct procurements from MULs in accordance with the CPRs, agency CEIs and relevant operational guidelines, there would be benefit in agencies actively drawing on the expertise available in CPUs and reinforcing to staff and delegates responsibilities in relation to procurement.

4.29 Assessing procurement activity at an appropriate time during the lifecycle of a MUL enables agencies to understand the extent to which the initial business rationale for establishing the MUL is being met. Such assessment also helps shape the design of any future MUL or alternative procurement arrangement. Both BoM and Industry would benefit from reviewing the efficiency, effectiveness and value for money provided by their MUL arrangements.

4.30 Going forward there is merit in AGD continuing to review options in relation to the operation of the LSMUL. Opportunities for improving the LSMUL identified during the course of the audit include allowing faster access to legal services and enhancing arrangements to share information. Education on the use of the LSMUL could also be strengthened to ensure agency procurements are consistent with the CPRs. In addition, more transparency

could be built into parcelling arrangements as these arrangements can risk competition particularly for new and small providers.

4.31 Agencies could become more informed purchasers of legal services by making better use of information already available to them on the LSMUL and drawing on their CPUs to ensure procurement processes are efficient and adhere to the CPRs. Agencies could also promote greater sharing of their experiences with the LSMUL both within and across agencies.



Ian McPhee
Auditor-General

Canberra ACT
26 June 2014

Appendices

Appendix 1: Agencies' responses



Australian Government
Attorney-General's Department

Secretary

SEC14/0224

16 June 2014

Dr Andrew Pope
Group Executive Director
Performance Audit Services Group
Australian National Audit Office
GPO Box 707
CANBERRA ACT 2601

Dear Dr Pope

Thank you for your letter dated 16 May 2014 enclosing the proposed audit report on the Establishment and Use of Multi-Use Lists. I welcome this opportunity to provide a formal response.

Through the establishment of the Legal Services Multi-Use List (LSMUL), this Department has deliberately sought to drive cultural change in the procurement of legal services to encourage competition and enhance informed purchasing. We have encouraged agencies to utilise the LSMUL to development efficient procurement practices, consistent with the underlying principles of the Commonwealth Procurement Rules (CPRs). I welcome the detailed findings and recommendations in the report that highlight limitations in current approaches and opportunities for improvement of whole-of-government procurement of legal services.

I acknowledge the importance of efficient, effective and equitable procurement activities. I also note that the CPRs provide agencies with flexibility to ensure that procurement processes are sufficiently robust to ensure value for money and encourage fair and open competition, while also not imposing unnecessary administrative burden on agencies or service providers. The LSMUL was designed to provide agencies with this flexibility, taking account of the nature of legal services. For example:

- Legal services are often required at very short notice. This will often dictate the appropriate procurement process, as contemplated by the CPRs.
- As informed purchasers, agencies deal regularly with legal service providers and many have a well developed awareness of the market. There is often a clear understanding of which providers are best placed to address a particular legal need, which may preclude the need to make a broader approach to the market.
- Unlike other multi-use lists, the LSMUL includes list rates for each provider, being the maximum rates that each provider can charge for its services. This, coupled with agencies' understanding of the market, gives agencies information from which value for money can be assessed without multiple quotes on each individual procurement.⁸⁹

3-5 National Circuit, Barton ACT 2600 Telephone (02) 6141 6666 www.ag.gov.au ABN 92 661 124 436

89 ANAO comment: AGD's LSMUL guidance requires agencies to select two or more service providers to supply quotes for procurements valued at or above the procurement threshold. The LSMUL list rates are maximum rates and agencies can negotiate to take account of circumstances at the time a service is required which may allow for better outcomes to be achieved. As indicated in paragraph 3.5 of the report, where agencies approached only one or a small number of suppliers, competition was limited, and it was more difficult for audited agencies to demonstrate that value for money was achieved.

- While it can be difficult to estimate the total value of a legal services procurement in some cases, agencies can often make an informed assessment of costs prior to commencing the procurement activity based on the facts available at the time, including the scope of the work, an understanding of the legal market, consultation with other agencies on similar matters and the maximum costs identified by providers in the LSMUL. This may mean that a shorter prequalified tender process is legitimate and appropriate. In those circumstances where the cost of the legal services does in fact rise above the threshold limit that would have required a more staged process, this does not mean the initial procurement process was incorrect or that value for money has not been achieved.⁹⁰

I strongly support agencies taking advantage of the flexibility inherent in the CPRs and the LSMUL to determine the appropriate procurement approach for legal services in all the circumstances, including appropriately documenting these decisions.

In light of the specific findings in the report, the Department will seek to improve the effective and efficient procurement of legal services from the LSMUL across government. This may include guidance material and training to support agencies to use the LSMUL most effectively, as well as consideration of options to improve the LSMUL itself.

Summary response

AGD welcomes the ANAO's report. AGD acknowledges that agency practices in using the LSMUL could be improved and that AGD can play a greater leadership role across government in this regard. AGD is of the strong view that legal services procurement from the LSMUL need not be onerous or overly administratively burdensome. Agencies should adopt a procurement process that is commensurate with the scale of the procurement, recognising the nature of legal services. In particular, informed purchasing is vital to efficient and effective legal services procurement.

Response to Recommendations

1. AGD agrees. AGD welcomes the ANAO's finding that it appropriately defined the objectives prior to establishing the LSMUL. Having regard to the nature of legal services and the requirements of the CPRs, the Department will consider, in consultation with the Department of Finance, whether the use of the LSMUL or the approach to the procurement of legal services could be strengthened to more appropriately achieve these objectives.
2. AGD agrees. AGD notes that establishing value for money for procurement from the LSMUL may often only require quotes from one or a small number of providers. The process of documenting the basis for procurement decisions does not need to be complicated or onerous, and AGD agrees that it should occur in all cases.

The action officer for this matter is Paul Pfitzner who can be contacted on 02 6141 3185.

Yours sincerely



Roger Wilkins AO

2 of 2

90 ANAO comment: There may be circumstances where a shorter timeframe for procurement is legitimate and appropriate, for example, for reasons of extreme urgency brought about by unforeseen events. However, where it is reasonable to anticipate that the value of a procurement will exceed the threshold, the CPRs require that the procurement must be treated as being valued above the relevant procurement threshold. For procurements which are above the threshold, strict timeframes are applied by the CPRs. These timeframes are designed to allow suppliers reasonable time to respond to requests for work and promote genuine competition.



In reply please quote

DIR 14 0635

Dr Andrew Pope
Group Executive Director
Performance Audit Services Group
GPO Box 707
Canberra, ACT 2601

Dear Dr Pope

The Bureau of Meteorology welcomes this report and found the process undertaken by the ANAO valuable. The Bureau agrees with the recommendations of the report and is taking action to implement them. As noted in the report, the Bureau is currently updating its procurement processes and the ANAO's findings fully support the current investment being made in improvements, including new gazettal processes and the establishment and use of multi-use lists.

Recommendation 1

- 2.36 To provide for efficient and effective procurement processes and the achievement of value for money the ANAO recommends agencies:
- (a) clearly define objectives in order to determine the most appropriate procurement method; and
 - (b) where a multi-use list is chosen, strengthen processes to promote competition and equitable treatment of suppliers

Bureau Response to Recommendation 1

Agreed.

The Bureau is strengthening its processes to encourage competitive tension in the procurement process and promote equitable treatment of suppliers. The Bureau is pleased to confirm that several initiatives are currently being implemented, including new business case requirements in the early stages of multi-use list planning and improved training for Bureau staff to leverage greater value from multi-use lists. The Bureau is currently reviewing all current multi-use lists in line with the ANAO findings.

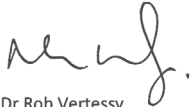
Recommendation 2

- 3.34 To provide for greater accountability and transparency when using a multi-use list the ANAO recommends agencies concisely document the basis for short listing potential suppliers and the basis for selecting a particular supplier to evidence value for money.

Bureau Response to Recommendation 2

Agreed. The Bureau is implementing improvements to current shortlisting and selection practices to more effectively evaluate and document value for money. This will also extend to including the criteria for evaluating value for money in all future MUL tender documentation to assist tenderers. Further training will be provided to relevant Bureau staff to ensure the improved processes are fully implemented.

Yours sincerely



Dr Rob Vertessy
Director of Meteorology and CEO

11 June 2014

Australia's National Meteorological Service

14 Childers St, Canberra ACT 2601 | Tel: (02) 6232 3502 | Fax: (02) 6232 3535 | www.bom.gov.au | ABN 92 637 533 532



Australian Government
Department of Industry

Secretary

Dr Andrew Pope
Group Executive Director
Performance Audit Services Group
Australian National Audit Office
GPO Box 707
CANBERRA ACT 2601

Dear Dr Pope

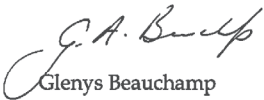
I refer to your letter of 19 May 2014, seeking comment from the department on the proposed audit report on the Establishment and Use of Multi-Use Lists.

The Department of Industry acknowledges the findings of the ANAO audit on the Establishment and Use of Multi-Use Lists and supports the recommendations proposed in the report.

Please find the Department's response to the Recommendations at [Attachment A](#) and a response for inclusion in the body of the report at [Attachment B](#).

I thank you for the opportunity to comment on the proposed audit report.

Yours sincerely


Glenys Beauchamp

13 June 2014

ATTACHMENT A**Department of Industry response to ANAO Recommendation****Recommendation 1:**

To provide for efficient and effective procurement processes and the achievement of value for money the ANAO recommends agencies:

- a) clearly define objectives in order to determine the most appropriate procurement method; and*
- b) where a multi-use list is chosen, strengthen processes to promote competition and equitable treatment of suppliers.*

Department of Industry Response: Agreed

The Department of Industry agrees with the recommendation. The Department will undertake a review of its guidance material and make changes as required to ensure that it provides officers undertaking procurement with appropriate levels of assistance.

Recommendation 2:

To provide for greater accountability and transparency when using a multi-use list, the ANAO recommends agencies concisely document the basis for short listing potential suppliers and the basis for selecting a particular supplier to evidence value for money.

Department of Industry Response: Agreed

The Department of Industry agrees with the recommendation. The Department will undertake a review of its guidance material and make changes as required to ensure that it provides adequate information on the requirements to obtain and document value for money.

ATTACHMENT B

Summary of Department of Industry's response for inclusion in the Report Summary

The Department of Industry acknowledges the findings of the ANAO audit on the Establishment and Use of Multi-Use Lists and supports the recommendations proposed in the report. The Department found the audit process to be a valuable exercise and appreciates the positive feedback on the Department's procurement policy and guidance material.



OFFICE OF THE
CHIEF EXECUTIVE

Our Ref: 14/79611

Dr Andrew Pope
Group Executive Director Performance Audit Services Group
Australian National Audit Office
GPO Box 707
Canberra
ACT 2601

Dear Dr Pope

ACC response to audit report on the Establishment and use of Multi-use Lists

Thank you for the opportunity to comment on the draft audit report on the Establishment and Use of Multi-Use Lists.

Formal response

The Australian Crime Commission (ACC) agrees with the findings of the audit and will undertake the appropriate action to implement the relevant recommendations.

In response to the audit, the ACC has already implemented changes to its processes to ensure the accuracy and timeliness of reporting contract information on AusTender. In addition, the ACC is undertaking a full review of its procurement framework and guidance material to ensure currency and accuracy. This review will be followed by a training and awareness program advising staff and delegates of their responsibilities. It is planned that this training will focus on the findings of the audit, in particular the requirement for adequate documentation to support the various stages and decisions during a procurement exercise.

The ACC appreciates the assistance and professionalism of the ANAO staff in undertaking the audit, and note that it has been beneficial in providing insight into staff's understanding of their procurement responsibilities.

Summary of Response

The Australian Crime Commission (ACC) agrees with the findings of the audit and will undertake the appropriate action to implement the relevant recommendations.

Additional Comments

ACC has no additional matters to add.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Chris Dawson', with a long horizontal flourish extending to the right.

Chris Dawson APM
Chief Executive Officer

13 June 2014



Australian Government
Department of Defence

Chief Audit Executive
Audit and Fraud Control Division
CP3-2-005
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AFCD/CAE/OUT/2014/ 127

Dr Andrew Pope
Group Executive Director
Australian National Audit Office
GPO Box 707
Canberra ACT 2600

Dear ~~Dr Pope~~ *Andrew*

Proposed audit report on the Establishment and Use of Multi-Use Lists

Thank you for the opportunity to review and provide comments on the subject report, provided to Defence on 16 May 2014. The Defence response can be found at Enclosures A and B of this letter. Defence does not have any editorials or comments regarding the proposed report.

If Defence is in a position to develop a Multi-Use List in the future, the recommendations will be implemented at that time.

For Defence's response to the report, please refer to Enclosure A. We understand that this response will be included in the audit report.

Enclosure B outlines Defence's response to the audit recommendations.

Yours sincerely

Geoffrey Brown
Chief Audit Executive
Audit & Fraud Control Division

16 June 2014

Defending Australia and its National Interests

DEFENCE RESPONSE – SUMMARY

The Department of Defence agrees with the ANAO report and its recommendations that agencies are to provide efficient and effective procurement and the achievement of value for money. The establishment of the Legal Services Multi-User List has enabled Defence to use and meet a wide range of external legal service providers, including small to medium enterprises that would not have had an opportunity to bid successfully for services under a panel or parcel arrangement.

Defence agrees it is important to have a greater accountability and transparency in documenting our procurements, while being able to maintain a level of flexibility in procuring legal services given the nature of legal work required by an agency and the need to ensure competitiveness while achieving value for money for the Commonwealth.

Enclosure B

DEFENCE RESPONSE – RECOMMENDATION RESPONSE

ANAO Recommendation	Defence Response
<p>Recommendation No. 2 Paragraph 3.31⁹¹</p> <p>To provide for greater accountability and transparency when using a multi-use list, the ANAO recommends agencies concisely document the basis for short-listing potential suppliers and the basis for selecting a particular supplier to evidence value for money.</p>	<p>Defence acknowledges this recommendation and will continue to meet the objectives of the LSMUL and the requirements of the Commonwealth Procurement Rules. Defence agrees to concisely document the reasons for selection of suppliers from the LSMUL, as well as demonstrating the value for money considerations for selecting a particular supplier in our procurement documentation. Policy documentation and manuals will be updated to reflect this requirement.</p>

Defending Australia and its National Interests

91 ANAO comment: Paragraph 3.31 is now paragraph 3.34.



Australian Government
Department of Human Services

Kathryn Campbell CSC
Secretary

Ref: EC14/177

Dr Andrew Pope
Group Executive Director
Performance Audit Services Group
Australian National Audit Office
GPO Box 707
CANBERRA ACT 2601

Dear Dr Pope 

Thank you for the opportunity to comment formally on the proposed 'section 19' report arising from the Australian National Audit Office's (ANAO) performance audit of the *Establishment and Use of Multi-Use Lists*, dated 19 May 2014.

The Department of Human Services (the department) agrees with Recommendation 2. The department also notes that Recommendation 1 is specifically directed to other agencies involved in the audit and, while the department is not required to respond to this recommendation, it will nonetheless take it into account for multi-use list arrangements within the department.

Attachment A to this letter details our overall response to the proposed report and to the recommendation directed to us.

If you would like to discuss the department's response, please do not hesitate to contact Paul Menzies-McVey, Executive Counsel, on (02) 6223 4512.

Yours sincerely



Kathryn Campbell

 June 2014

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Internet www.humanservices.gov.au

Attachment A

Response to the section 19 report on the performance audit of the *Establishment and Use of Multi-Use Lists*

Recommendation No. 2

To provide for greater accountability and transparency when using a multi-use list, the ANAO recommends agencies concisely document the basis for short listing potential suppliers and the basis for selecting a particular supplier to evidence value for money.

DHS response:

Agree. The department will amend its internal instructions relating to the use of multi-use lists by 1 July 2014 to require, in circumstances where only some potential suppliers on a multi-use list are invited to make submissions in relation to a particular procurement, the documentation of concise reasons for the short listing of those suppliers. The department currently requires the documentation of the basis for selecting a particular supplier from a multi-use list.

Summary of comments for the report summary

The Department of Human Services (the department) welcomes the findings of the audit report and considers that the implementation of its recommendations will further enhance the use of multi-use lists by the department.



Australian Government

Department of Finance

Reference: RMS14/000400
Contact: Ms Yvette Sims
Telephone: 02 6215 2970
e-mail: yvette.sims@finance.gov.au

Dr Andrew Pope
Group Executive Director
Performance Audit Services Group
Australian National Audit Office
GPO Box 707
CANBERRA ACT 2601

Dear Dr Pope

Proposed audit report on the Establishment and use of multi-use lists

Thank you for your letter dated 19 May 2014, requesting comment from the Department of Finance, on the proposed audit report on the *Establishment and Use of Multi-Use Lists*.

As requested, the formal response of the Department of Finance is attached. If you would like to discuss the matter further, the contact officer is Ms Yvette Sims, Assistant Secretary, Procurement Policy Branch on (02) 6215 2970.

Yours sincerely

A handwritten signature in black ink that reads 'JSIMS for'.

John Sheridan
First Assistant Secretary
Technology and Procurement Division
Business, Procurement and Asset Management

John Gorton Building, King Edward Terrace, Parkes ACT 2600 • Telephone 02 6215 2222
Internet www.finance.gov.au

Formal Comments*Recommendation 1*

Supported. The mandatory requirement in the Commonwealth Procurement Rules (CPRs) is that all Australian Government agencies achieve value for money in procurement. An agency's operational processes, including those associated with establishing a multi-use list and procuring from that list, must be consistent with the principles of CPRs. Operational processes should additionally require the consideration of risks for each procurement on a case-by-case basis.

Recommendation 2

Supported. Adequate documentation and records are an assumed internal control to support agencies in their decision making processes relating to procurement.

Finance notes the proposed audit findings which outline issues associated with establishing and procuring from pre-registered suppliers on a multi-use list. The commentary will inform continuing discussions with the established network of procurement officials for the purposes of strengthening compliance with the CPRs.

Appendix 2: Key differences between a multi-use list and a panel

Multi-Use Lists (MULs)	Panels
Nature of arrangement	
<p>A MUL is a prequalification process that lists suppliers that have met conditions for participation. The conditions for participation must be limited to those that will enable agencies to ascertain whether a potential supplier has the legal, commercial, technical and financial abilities to fulfil the identified requirements.</p>	<p>A panel is a standing offer arrangement under which a number of suppliers may supply goods or services to government. Panel arrangements must contain minimum requirements, usually including an indicative or set price or rate for the goods or services to be procured in the period of the panel arrangement. A panel can be established by either open tender or select tender processes.</p>
Level of assessment to establish	
<p>The level of assessment required to establish suitability for inclusion on a MUL will vary depending on the nature of the specific conditions for participation. However, the level of discretion applied to the assessment typically results in a faster assessment process than more thorough selection criteria given that conditions for participation are pass or fail.</p>	<p>As the tendering process for establishing a panel is generally competitive and results in a contractual relationship, the selection criteria for establishing a panel is typically considered and detailed. This results in a substantial level of assessment to evaluate tenders, particularly if a limited number of positions on the panel exist and a large number of tenders have been received.</p>
Cost of establishing	
<p>The cost of establishment is limited to assessment of the conditions for participation. Conditions for participation are not subjective and must be assessed as either being met or not met. Notwithstanding this, conditions for participation can range from a relatively straight forward assessment such as the requirement to hold a specific licence through to a more detailed assessment such as assessing the level of relevant experience and performance of a potential supplier.</p>	<p>As a panel establishes an agreed set of terms and conditions via a deed of standing offer, the level of information required to be provided by tenderers is typically more detailed than that required to establish a MUL. Subsequent assessment of tenders by agencies is typically more comprehensive as well. This more detailed tendering typically results in a more costly and time consuming process for both industry and government.</p>

Multi-Use Lists (MULs)	Panels
Timeframe to establish	
<p>The timeframes for establishing a MUL will vary at the initial stages depending on how many suppliers respond and the number and nature of the conditions for participation. However, a MUL can typically be established within a two to three month period following an approach to market.</p> <p>Typically, most conditions for participation require only a simple review of the information provided to establish if the supplier has met the condition. For example holding of relevant qualifications, licensees and insurance coverage. Other conditions may, depending on the level of information sought, require contact with a referee or a more detailed assessment</p>	<p>As establishing a panel is usually a competitive process leading to a strong contractual relationship, experience indicates that timeframes to establish a panel are longer for both the preparation of tenders and their subsequent consideration than a MUL. Experience across a number of Commonwealth agencies has shown that a panel process typically takes up to 12 months from beginning to end.</p>
Ability to bring on new suppliers	
<p>Inclusion on a MUL is very simple for both suppliers and agencies. Once established, new suppliers that meet the qualification requirements can be added to the MUL either continually or annually, with a recommendation to revalidate all suppliers at least every two years.</p>	<p>It is very difficult for new suppliers to be added to an existing panel. Due to the competitive process, cost and time incurred by industry to seek inclusion on a panel, any new additions to a panel typically only occur when the panel does not have enough capacity to meet the needs of the agencies using it.</p> <p>To add suppliers to a panel, usually a full open tender process would be undertaken. Additions to the panel must meet the existing terms and conditions of the panel, including the existing end date of the panel.</p>
Method of operation	
<p>The model for accessing suppliers on a MUL can be established in the way the lead agency chooses, as long as the approach is not discriminatory. For example, it can be as simple as establishing a template that contains standard terms and conditions and sets out a space to list the specific details of the identified task, any specialised requirements such as preferred qualification levels and pricing details.</p> <p>To establish value for money is being achieved, a selection process of two or more MUL members should be undertaken, specifically where the expected value of the contract will be more than \$80 000.</p>	<p>The method of operation for a panel will vary depending on the panel's rules for use, which should form part of the Tender documentation for the panel.</p> <p>Generally an agency will approach a certain number of suppliers to establish value for money. The approach will contain a description of the task, any specific requirements and the preferred pricing arrangement of the agency—for example a total price or time and materials. The agency then undertakes a comparative assessment of the tenders received before selecting a preferred supplier.</p> <p>Some panels do not require competition among panellists. In these instances, the</p>

Multi-Use Lists (MULs)	Panels
	officer must have a reasonable degree of confidence that value for money is achieved though approaching a single panellist.
Value for money assessment when accessing	
<p>The purchasing officer must have a reasonable degree of confidence that value for money is achieved whenever the MUL is accessed.</p> <p>This assessment must be accompanied by sufficiently documented reasons to support the procurement decision.</p>	<p>This assessment must be accompanied by sufficiently documented reasons to support the procurement decision.</p>

Source: Department of Finance *Buying for the Australian Government, Procurement Practice*, [internet] available from <http://www.finance.gov.au/procurement/procurement-policy-and-guidance/buying/procurement-practice/panel-and-mul/principles.html> [accessed June 2014].

Appendix 3: Conditions for limited tender for procurements at or above the procurement thresholds

Procurements at or above the relevant procurement thresholds that are conducted as limited tender must meet one or more of the conditions outlined in section 10.3 of the CPRs. If an agency cannot meet any of these conditions then it should conduct either an Open or Prequalified Tender procurement process.

Section reference	Type of condition	Definition/description from CPRs
A	Open approach to market where no submissions are received	Where, in response to an approach to the market: <ol style="list-style-type: none"> i. no submissions, or no submissions that represented value for money were received, ii. no submissions that met the minimum content and format requirements for submission as stated in the request documentation were received; or iii. no tenderers satisfied the conditions for participation, and the agency does not substantially modify the essential requirements of the procurement.
B	Extreme urgency brought about by events unforeseen by the agency	Where, for reasons of extreme urgency brought about by events unforeseen by the agency, the goods and services could not be obtained in time under open tender or prequalified tender.
C	Advantageous conditions that only arise in the short term	For procurements made under exceptionally advantageous conditions that only arise in the very short term, such as from unusual disposals, unsolicited innovative proposals, liquidation, bankruptcy, or receivership and which are not routine procurement from regular suppliers.
D	One supplier where there is no reasonable alternative or substitute	Where the goods and services can be supplied only by a particular business and there is no reasonable alternative or substitute for one of the following reasons: <ol style="list-style-type: none"> i. the requirement is for works of art; ii. to protect patents, copyrights, or other exclusive rights, or proprietary information; or iii. due to an absence of competition for technical reasons.

Section reference	Type of condition	Definition/description from CPRs
E	Additional services by original supplier for compatibility reasons	For additional deliveries of goods and services by the original supplier or authorised representative that are intended either as replacement parts, extensions, or continuing services for existing equipment, software, services, or installations, where a change of supplier would compel the agency to procure goods and services that do not meet requirements of compatibility with existing equipment or services.
F	Commodity market	For purchases in a commodity market.
G	Prototype	Where an agency procures a prototype or a first good or service that is intended for limited trial or that is developed at the agency's request in the course of, and for, a particular contract for research, experiment, study, or original development.
H	Design contest	In the case of a contract awarded to the winner of a design contest, provided that: <ul style="list-style-type: none"> i. the contest has been organised in a manner that is consistent with these CPRs, and ii. the contest is judged by an independent jury with a view to a design contract being awarded to the winner.
I	New construction services that repeat similar services where the original contract was awarded following an open tender or prequalified tender	For new construction services consisting of the repetition of similar construction services that conform to a basic project for which an initial contract was awarded through an open tender or prequalified tender, and where the initial approach to the market indicated that limited tender might be used for those subsequent construction services.

Source: Finance, *Commonwealth Procurement Rules*, section 10.3.

Appendix 4: Commonwealth Procurement Rules

Appendix A—Exemptions from Division 2

Procurements that are exempt from the rules of Division 2 by the operation of Appendix A are still required to be undertaken in accordance with value for money and with the rules of Division 1 of these CPRs.

Division 2 does not apply to:
1. leasing or procurement of real property or accommodation (note: the procurement of construction services is not exempt);
2. procurement of goods and services by an agency from other Commonwealth, state, territory or local government entities where no commercial market exists or where legislation or Commonwealth policy requires the use of a government provider (for example, tied legal services);
3. procurements funded by international grants, loans or other assistance, where the provision of such assistance is subject to conditions inconsistent with this document;
4. procurements funded by grants and sponsorship payments from non-Commonwealth entities;
5. procurement for the direct purpose of providing foreign assistance;
6. procurement of research and development services, but not the procurement of inputs to research and development undertaken by an agency;
7. the engagement of an expert or neutral person, including engaging counsel or barristers, for any current or anticipated litigation or dispute;
8. procurement of goods and services (including construction) outside Australian territory, for consumption outside Australian territory;
9. acquisition of fiscal agency or depository services, liquidation and management services for regulated financial institutions, and sale and distribution services for government debt;
10. procurement of motor vehicles;
11. procurement by the Future Fund Management Agency of investment management, investment advisory, or master custody and safekeeping services for the purposes of managing and investing the assets of the Future Fund;
12. procurement of blood plasma products or plasma fractionation services;
13. procurement of government advertising services;
14. procurement of goods and services by, or on behalf of, the Defence Intelligence Organisation, the Defence Signals Directorate, or the Defence Imagery and Geospatial Organisation;
15. contracts for labour hire;
16. procurement of goods and services from a business that primarily exists to provide the services of persons with a disability; and
17. procurement of goods and services from an SME with at least 50 per cent Indigenous ownership.

Source: Finance, *Commonwealth Procurement Rules*, Appendix A: Exemptions from Division 2.

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