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Public Sector Panel Contracts – Freedom to Pick and Choose from the Panel?

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The Mandatory Rules have focused attention on panel contracts, an excellent way to achieve great outcomes. Key is whether, when the panel is appointed, the agency has unfettered right to pick and choose from whom to buy.

Except maybe in respect of smaller purchases (and maybe not even then), we think it would be unwise for agencies to pick and choose from the panel without relying on some sort of principled approach. There is a wide variety of potential ways of handling this. As often happens in procurement, each situation depends on its own circumstances.

First, here is a useful summary which explains why public sector agencies should be looking closely at this panel contract option (and why some agencies are actively engaging in this area):

> *"Panel contracts provide a framework agreement in which purchasing leverage is used to negotiate high levels of customer service; timely supply of quality goods and/or services; and highly competitive prices or capped prices with a selected number of suppliers. Legal aspects including the development of a draft standard contract are settled at the time of establishing the panel contract as are targets and measures for contract performance.*
>
> *Use of panel contracts achieves substantial savings and benefits to government in reduced purchasing, administration and transactions costs and simplifies purchasing activity in agencies by:*
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> - *achieving best possible quality, service and prices through the combined purchasing leverage of agencies;*
> - *ensuring high levels of agreed customer service are maintained;*
> - *achieving savings in administrative costs for end users by avoiding duplication in preparing specifications, public requests for tender, calling and evaluating tenders and sourcing services;*
> - *eliminating duplication of effort in re-approaching the market through open tender calls for repetitive supply needs;*
> - *avoiding unnecessary market research;*
> - *focusing on agency-specific requirements and not duplicating criteria already established, tested and met through the panel contract;*
> - *stimulating relationships and opportunities for strategic alliances or partnerships with suppliers;*
> - *achieving standardisation and consistency in tender processes and documentation; and*
> - *reducing the costs to suppliers in responding to fewer tenders."*[1]

[1] Government of South Australia "Joint Procurement Arrangements: Panel Contracts" (State Supply Board Policies, number 4a) (September 1999) (these guidelines

The Mandatory Rules[2] apply compulsorily only to Government Departments and Ministries, but others are encouraged to use them. Although circumstances will differ (so each situation must be separately considered), other public sector entities should consider following similar principles, at least as to panel contracts. Having noted that, the Mandatory Rules say little about what to do.

Under the Mandatory Rules, panel contracts allow the agency to purchase from the panellists that have been selected: *"at its option …, as and when required, identified goods or services …"*.[3]

If this is read in isolation, the agency appears to have unfettered discretion to pick and choose from the panel suppliers once they have been selected, by competitive process, to join the panel.

This would usually, however, be an unwise approach, not only legally but also for probity and other reasons, including potential criticism from the Auditor-General, reputational considerations, etc.

It is generally prudent for agencies to avoid interpreting the Rules restrictively.

The Rules go overboard to minimise restricted application.

We consider a narrow approach is risky. Agencies should adopt the spirit of the Rules.

Audit New Zealand, for example, has indicated that its audit in relation to the Rules will *"… be looking for a proper consideration of underlying policies and how to put them into practice, rather than just a narrow compliance approach."*.

Other parts of the Mandatory Rules[4] indicate that the choice from the panel should seek best value for money for the particular purchase. This includes consideration of efficient process (the point of establishing the panel in the first place), while having regard to fairness as between suppliers, and viability of the panel as a competitive supply base.

A balanced approach in other words.

This is readily achievable while optimising one of the key goals, reducing the time and cost of the procurement process overall.

There are different ways in which a principled approach can be taken, ranging from the most extreme (seeking a quote or equivalent proposal from each of the panellists in respect of the particular job) through to some sort of rotational approach as between panel members. There should be a broad measure of discretion however: so long as the approach is relatively principled and fair, it can be pragmatic with room for some variations in approach. The importance of minimising project risk should not be lost sight of, while trying to minimise probity risk.

Additionally, what seems at first sight to be fair (such as a "rotational" approach), may in fact be quite unfair. For example, a panel may have a range of providers, big and small, with different forms of expertise within each provider. To work simply on a rotational basis (or even to give equal payments to all providers over time), may in itself be unfair. In any event, that could be counter-productive for the agency in terms of getting best outcomes and value for money.

Requiring what looks like "equality" (such as a rotational or equal payment approach) can also drive a real problem with panels: the idea that a small number of panellists should be appointed of similar size and expertise. This can cut out other options such as panels comprising big and small providers, and suppliers with general and with specialist expertise.

That can end up breaching probity requirements and there are plenty of poor examples of this.

There are a number of other options and also ways in which agencies can minimise risk.

As with many issues in the procurement space, each situation will vary. However, attention to broad requirements of fairness will often provide the right and pragmatic answer.

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have since been superseded but they provide an excellent summary).

[2] See our article, Mandatory Rules for Procurement – One year on http://www.wigleylaw.com/Articles/LatestArticles/mandatory-rules-for-procurement-one-year-on/

[3] Paragraph 42 Mandatory Rules.

[4] Such as clause 4, as to consistency with general principles of policy and good practice.

We welcome your feedback on this article and any enquiries in relation to its contents. This article is intended to provide a summary of the material covered and does not constitute legal advice. We can provide specialist legal advice on the full range of matters contained in this article.

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