

AUSTRALIAN GOVERNMENT
PUBLIC SERVICE EXPRESSION OF INTEREST AND TENDERING PROCESSES
AND THE EFFECT ON COMPETITION

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Introduction

I have been involved in responding to many, and varied, Expressions of Interest (EOI) and Tenders (RFT) across many portfolio agencies of the Australian government, on behalf of Australian and multinational corporations who are small to medium enterprises and multi-billion dollar multinational entities, since the eighties. In my view the processes and practices can be manipulated to favour incumbents or technical specificity can be used to cull the field, effectively delivering a known end result. Competition is stifled or eliminated.

I am cognisant of the limitations on the ACCC being able to direct federal and state agencies and the limitations of the Competition regime to governments. The proposition of competitive neutrality, competition reform and the sanctions system appears to be a forlorn exercise, perhaps window dressing given COAG's intransigence, and inability to implement national interest policies and practices and the apparent failure of the COAG Reform Commission to deliver meaningful change.

The content of this paper specifically refers to the development (through some form of osmosis) of systems, processes and procedures in the period 2000 – 2012 and mechanisms regarding doing business with the Australian government and its agencies. This paper is not government (Labor or Coalition government specific) specific, it is agnostic.

The paper commentary, and opinions, is framed, inter alia, within a context where I acknowledge the following:

- Probity policies and tendering processes and rules
- Fairness and transparency
- Public Service Code of Conduct
- Commercial confidentiality
- Intellectual Property
- Cost of response
- Risk and requirements
- Value to government
- Value to tax payer
- Politics and policy
- The inclusion of a confidentiality clause in the EOI or tender that threatens sanctions for public discourse of the content

I have received formal written threats from officers of agencies for communicating with members of parliament regarding the operation and outcome of EOIs and RFTs.

I do not believe that the current processes are common across the APS and quasi government enterprises, nor are they transparent. They do not, in my opinion provide value for money to all the parties involved and are favourable to the agency to the disadvantage of respondents and the minimisation even elimination of competition. They exhibit an "all care but no responsibility and accountability mentality" in an environment where some aspects are parasitic on industry and commerce.

CONTENT RESPONSE SCHEDULES COMMON INFORMATION

The Commonwealth approach to tendering is far and away more sophisticated, and structured, than states and territories. Having said that it is far more costly for business to respond to EOIs and RFTs from the Commonwealth agencies than it is from the others.

However the sheer workload and process can have the effect of eliminating or reducing competition due to costs and resource requirements, which are more arduous for SMEs than large corporations.

The production of a Commonwealth RFT requires reams of paper, a cast of thousands and a gaggle of lawyers and consultants all earning big bucks for their contribution. This takes an inordinate amount of time in the agencies and in the respondent's enterprise. Much of the document is superfluous and value questionable. The documents are very legalistic, repetitive and onerous, with a plethora of seemingly unrealistic demands and detail request that are often irrelevant to the underlying intent of the exercise. They are prescriptively written to place the entire onus on the respondent with risk and accountability deflection away from the agency, permeating the document. The demands for insurance and risk to be passed to the private sector can frighten many bidders away or eliminate SMEs who have no way of covering same.

Schedules are often duplicated under different categories and parts of EOIs and RFTs.

Each EOI, or RFT, is a single exercise in its own right. By this I mean that information, such as financial and corporate data and basic common information, presented in one response to an agency, is not available to other agencies even though the timeframes are current and relative e.g financial and corporate schedules cannot be referred to as being resident in some other EOI or RFT a company may have responded to.

Additionally an agency, itself, cannot access the records of another agency in terms of their tenders to cross check and save everyone time, resources and money. Cross referencing databases is an exercise that agencies such as ATO and Centrelink do constantly in their own internal work so it is neither rocket science nor improbable to consider a similar cross referencing for Tenders and EOIs to reduce costs of bidders. Industry respondents should be able to simply refer the requesting agency to an EOI or RFT lodged with another agency, by ATD number, within a mandated time currency e.g 12 to eighteen months, with an attendant statement that nothing has materially changed in reference to that particular schedule request information.

INTELLECTUAL PROPERTY

Some within industry see the public service penchant for EOIs to be nothing more than having industry do the work of the public service. Rather than simply ask for general information, the EOIs are seeking very detailed, often proprietary information, which, in the case of, say Information technology, serves to enable in-house government agency IT personnel to frame their own knowledge and their own internal bids against external parties. The practice, and extent, if at all, of internal agency contractors lodging competing bids are anecdotal, not known.

Some might disingenuously believe that tenders and EOIs are written to protect the longevity of employment of the IT personnel within the agency, or the contractors engaged on the particular project. Transport Security (ports and airports and transport) within DIT (subject of a less than flattering Australian government audit) has been engaged in “looking” for years, they euphemistically call it “an environmental scan” of what industry has to offer.

Delays, I think, are more a product of poor Ministerial policy guidance and national security focus than the Department’s fault. It is like they are treading water waiting. One feels sorry for agencies where the decision making is beyond their control. However it has the effect of eliminating external offers and competition.

Whatever the excuses, EOIs, Environmental Scans or whatever, including RFTs, are very often blatant exercises in getting industry to do the leg work and the transfer of intellectual property to the agency, without due compensation or consideration.

This may be considered synonymous with a large corporation, such as a retailer, using its power and market position to make demands to hand over IP that are unrealistic and even unconscionable.

This is particularly troublesome where APS personnel involved in the EOI, or RFT, are contractors and consultants from outside, accessing confidential information and IP. The information sought goes well beyond what the assessment team needs to know to determine suitability for the task.

One might well argue that it is “the references of assignments completed successfully” that are the major pointers to capability to do the job rather than filling out a schedule.

PRESCRIPTION AND DESCRIPTION – WINNERS AND LOSERS

In the case of information technology it is clear that many agencies, involved in large projects, are unable to actually define what they want and are unable to technically describe the exact solution being sought. RFTs can contain requirements which force respondents to deal with archaic infrastructure, old technology assets that the department may own and want to include or they specifically exclude items which would if included, collectively offer better value to government and the tax payer. The Treasurer, the Honourable Joe Hockey, has categorically referred to the ancient and totally unsuitable architecture of Human Services agencies Medicare and Centrelink which is maintained by one company with one other client in the US. There is no competition.

The following are cases in example of technically crafted, somewhat anti-competitive RFTs:

- Access Card – Human Services
- JP 2099 Identity – Defence, various EOIs RFTs issued and stopped, mandating certain accreditations and products that are rare or not justifiable
- Passports – DFAT, EOI has 63 responses, RFT two years later has three, Microsoft certification demanded, EOI respondents withdrew believing the winner was already chosen and so it came to pass
- Patient record – Nehta, no competitors for services and products, Australian Medical Association withdrew from participation due to IT demands and intransigent views, effectively wasting millions of dollars of public funds

The inclusion of "risk demands" and "risk management models" which again are often extraneous to the actual fact that respondents have done projects of similar type elsewhere and onerous clauses transferring all risk to the respondent are seen as mechanisms to not only transfer risk but to cull competitive bids either willingly or as an indirect consequence. Not minimise risk, but to transfer it as much as possible away from the agency personnel.

Simply put politicians, and public servants, want the private sector to bear all of the risk and any loss to the taxpayer, or business, in engaging in wasted exercises appears to be of no consideration in the exercise. There seems to be no mutual reciprocity, accountability or respect within the framework of the exercise. In these cases the winners are the lawyers and the contract/consultants.

THE POLICY OF TRANSFERRING ALL RISK CHILLS THE COMPETITIVE OPPORTUNITY

The agencies make demands that respondents adhere to stated timelines yet the agency itself usually fails to meet any of the time line benchmarks, is short on information and rarely provides bidders with an idea of the status or what is occurring.

Then we have the abandoned projects most notably the Access Card and JP2099 Defence Identity Project. In the case of the Access Card a change of government, philosophy and policy, caused a loss of tens of millions of dollars to taxpayers, and to industry, without so much as "we are sorry".

In one of my many discussions with the APS I suggested that since so much work had been done on that project the material should be used to inform other projects or to provide a benchmark for the APS to assess the capacity, of those who responded, for other work of significant value and complexity. I was informed that the tender responses were to be locked away never to be accessed again. What a waste on every scale and measure.

In the case of JP 2099 a project which the Department assessed to be valued at \$100,000,000 and specified technologically to be in that range was cancelled after two years of respondent's work and short list on the grounds of poor value for money. The original lists of competitors were culled. Industry can only respond to what is published in the RFT and if the consultants writing the document are not up to the task then that is very problematic.

USING PROJECT FUNDS IN AGENCIES

With budget austerity, return on investment (productivity dividend) requirements by the government (a concocted internal book keeping exercise) and other restrictions, agencies are to my mind under pressure to be very creative in how they fund their internal operations. Thus a project presented to the Minister, and the Cabinet, for funding may be costed to allow for a host of internal running costs. Being blunt an agency might use up to 70% of the project value on internal activities with 30% left to actually acquire the goods and services from an external supplier. To my mind this seems to be the case with the current DFAT Passport Renewal project.

TOTAL COST OF OWNERSHIP OR IS IT JUST A "CHEAP" MENTALITY?

Given the above proposition, agencies then find that they have to go cheap or they may have to then use a "value for money" excuse, and cancel the project, otherwise the practice described above of fusing granted project funds (by parliament) for general internal operations might be exposed.

The internal costs of agencies, in doing work around EOIs and RFTs, are quite extraordinary (compared to what an outside organisation might expect to spend on the same sort of work) and the value for effort inside an agency may be considered by some people outside looking on, to be quite low in terms of productivity within the whole value of the project total budgeted cost approved by Cabinet. The lack of competitive assessment, by a number of competing external parties advising parliament, of what a project should cost, as against the agency doing the estimation may be a hidden excessive cost or a vested interests protection mechanism.

One might consider auditing what the actual ratio of internal cost to external (what is left over to buy the goods and services from tenders) is for each major project in RFTs for the past five years. What a shocker it might turn out to be, most funds went on internal agency operations!

Perceptions of industry may also be that the "bean counter" will have the final say. All things being equal these guardians of the money will simply ask who can do the job, at what price? Thus companies with no or little history, in a particular project elsewhere of status in the world, in a consortium of well - respected firms, may win because they are cheaper. This is rather an economic assessment than a competition one.

Additionally the winner may have no longevity of business here in Australia, may be totally off shore and they will win against other Australian based firms employing people and contributing to society and economy will lose. There is no regard of contribution or value. WTO rules, to which Australia may blindly comply, are not considerate of such principles. Again this is a policy matter and not a competition one, however if, as a result, Australian firms disappear competition suffers locally in the long term along with the socio-economic flow on.

The risk, shifted to the contractor, provides an indemnity against accountability, and responsibility, by the APS, and the Minister, if it goes wrong. Thus the actual winner may be of little concern when compared to others who are contributing to the nation, the government and the APS.

There are cases where the RFT specifically states that a proven reference history is required for compliance but the chosen prime offer winner cannot demonstrate that compliance. Price takes precedence.

There is a distinct difference between total value (tangible and intangible) and price.

PRE KNOWN OR PRE DETERMINED OUTCOMES?

Here I am referencing a particular project, DFAT11 – IMD 16 – "Request for Tender for the provision of an Australian Travel Document Issuance System". I am not implying any objection to the manner in which DFAT conducts business because it actually is one of the better agencies to deal with and is very open except within its Information Technology Division.

Kevin R Beck, May 2014

Like Access Card and JP 2099, among other major projects, the Passport Redevelopment project has been a long drawn out exercise costing the taxpayer and industry millions. This is largely due to process not necessarily capability. The project is scheduled to be completed in 2016. The reduction in competition addressed in this part of my submission has brought about excessive costs and delays and limited the technology available.

DFAT sought information in 2008, and 2010, and a plethora of DFAT consultants and others engaged in a global fact finding mission. The EOI of 2010 was responded to by the world's best Passport solution providers who collectively produce most, if not all, of the world's passports. Then silence. The department had indicated, or it was implied, at the time that a short list would be chosen, a process similar to JP2099 Project assessment used by Defence Department.

DFAT, IMD 16 issued October 2011 however it was an open RFT. This was reasonable given the elapse of time and I actually engaged in a number of meetings with DFAT Passport management putting the proposition that they should go to open market. DFAT after all was seeking to create one of the world's leading passports. The decision to go to market was good.

However this latter objective of a world leading passport travel document met some hurdles.

Books (not the flashiest one can have, provided by the now renowned Note Printing Australia, using old generation pigment inks) were out of scope in the bid (this impacted bidders causing a reduction in competitive respondents) an unusually large smart chip (a one megabyte Sharp chip, portioned off so that only a small area is used) had to be accommodated, not at the front or the back which is normal for all passports but in the middle of the book (Australia has to be different) and the laminates (from 3M and somewhat old technology) had to be used. These two again further impacted the opportunity for competitive bids. The Department owns all desktop passport printers which are either to remain or be made redundant and taken by the bidder. They cost just over \$A2,000,000 a few years back.

Thus having a world leading product out of that would seem, on the face of it, to be a major challenge.

Then another obstacle appeared to the government and the tax payers getting the best value and the best offers. Only three prime bidders responded, ATOS, IBM and Fujitsu.

These are not three companies I would list as world leading proponents of major passport projects, compared to say Unisys, Gemalto, Accenture, Canadian Banknote, Datacard and Muhlbauer among others. DFAT uses Muhlbauer desktop machines but the RFT called for the productive capacity of large bureau machines. As I visited with the world's leading passport, and travel document, providers a common view was imparted to me. They were not going to bid because in their view Fujitsu would win.

Now the justification for this view by competitors may well be a Canberra thing. A sort of hybrid awareness of likely outcomes or maybe it is a long history of a sharing of the spoils of government who must engage in the ticklish and fraught exercise of trying to keep major employment providers in the ACT. Who knows?

Logic which stopped the world's leading prime providers of passports from bidding might have been that Fujitsu is an incumbent provider of services to DFAT, that its bid partners are also providers of goods and services – not actual travel documents and passports but an e-commerce platform, application handling software and biometrics.

The collective perceptions were accurate - Fujitsu won.

As a nation we were denied the opportunity to have a key agency assess what the world has to offer us in the way of a world leading passport and competition was effectively but subtly and legally reduced and eliminated.

Problematically a large amount of the very big allocation of funds has been spent internally within DFAT making the price a real factor. Given the timeline, budget austerity and probable embarrassment along with the need to fix the current passport, DFAT cannot defer and go to market again. DFAT has to take a punt on technology, risk and the expertise of providers with lesser experience than those who chose not to bid.

All in all I have come to the conclusion that the above arguments and opinions point to a need for a good look at how EOIs are RFTs are framed, in order not to subvert competition (inadvertently or otherwise, what their fundamental purpose is, the IP transfer issue and the end result of the process. Of course the APS would argue that its probity process including use of probity lawyers and confidentiality and open question answering meets all of this but the questions I raise within this paper may require answering. An assessment of the APS processes as against a rework to ensure real competition may point to greater benefits being realised.

Doing business with the Australian government, of any political persuasion, is very costly and onerous and on many occasions questionable in terms of open competition. Current mechanisms for doing business are not, to my thinking and analysis, world best practice methodologies.