

Senate Economics References Committee

Inquiry into Australia's sovereign naval shipbuilding capability –
07 September 2020

ANSWER TO QUESTION ON NOTICE

Department of Defence

Topic: SERC - Q4 - 07 September 2020 - Axes in evaluating tenders and value for money - Gallacher

Question reference number: 4

Senator/Member: Alex Gallacher

Type of question: Written

Date set by the committee for the return of answer: 21 September 2020

Question:

At the Hearing on 14 August 2020, Mr Dalton said “Value for money is what provides you the best value for money for the enterprise that you're going into, and that can be quite a long view. There are a number of axes that you would look at in determining what creates value for money”.

- a. Please detail the axes that Defence would look at and the relative weightings that would be attributed to each in evaluating a tender?
- b. Please identify in which Defence procurement guidance documents these axes and their relative weighting are described – and please provide copies of those documents to the Committee.

Answer:

- a. Given the wide range of Defence procurements, evaluation criteria can vary and are driven by factors including applicable legislation, government policy and capability requirements. The standard conditions of tender in the endorsed Defence contracting templates include evaluation criteria that meet the requirements of the Commonwealth Procurement Rules for determining value for money. This enables Defence officials to properly consider the relevant financial and non-financial costs and benefits of tenders.

Defence contracting templates do not typically weight evaluation criteria or put them into any priority order of importance. This allows the evaluation team to undertake its evaluation and determination of best value for money on the balance of its assessment of tenders against all the criteria. Typically, Defence tender evaluation methodologies will comprise a mix of qualitative and quantitative assessments together with a comparative assessment and ranking of tenders.

- b. The Defence Procurement Policy Manual contains mandatory policy and instructions relating to procurement, and is supported by a number of Better Practice Guides, templates, tools and factsheets to assist Defence officials in conducting procurement activities on behalf of the Commonwealth.

Copies of requested documents are attached.

- Attachment A – Defence Procurement Policy Manual
- Attachment B – Tender Evaluation for Complex Procurement Better Practice Guide

Monitor and Review

This Manual will be reviewed whenever relevant sections of any of the identified references are updated or amended. All feedback and suggestions for improvement should be sent to:

Procurement.Policy@Defence.gov.au

Note to External Agencies

External agencies intending to use this template will need to tailor it in order to meet their specific procurement requirements (including relevant internal guidance) and should seek appropriate professional guidance as required.

Disclaimer

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Please note that while the Procurement Policy Help Desk can respond to DPPM policy questions, this service is not available to those outside of Defence. Contractors should, in the first instance, seek guidance from the relevant Contact Officer for their specific procurement.

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This publication should be attributed as the *Defence Procurement Policy Manual 1 July 2019*.

DPPM Amendment List

Version Number	Change	Date
Version 1.0	Original	1 April 2017
Version 1.1	Version 1.1 Matrix of Changes	19 December 2017
Version 1.2	Version 1.2 Matrix of Changes	8 November 2018
Version 1.3	Table of Changes to CPRs	1 January 2019
Version 1.4	Version 1.4 Matrix of Changes	20 April 2019
Version 1.5	Version 1.5 Matrix of Changes	1 July 2019
Version 1.6	Version 1.6 Matrix of Changes	May 2020

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Chapter 1

Introduction to the Defence Procurement Policy Manual

Overview

1. Welcome to the new version of the Defence Procurement Policy Manual (DPPM). The DPPM has been completely re-written to more clearly set out for Defence *officials* the mandatory policy that **must** be complied with when undertaking *procurement*.
2. The DPPM has also adopted a completely new structure and format. In particular, the DPPM now incorporates the Commonwealth Procurement Rules (CPRs) so that *officials* can find in one place the Commonwealth and Defence *procurement* related policy that applies to them.
3. There are many terms in *italics*. This normally means that the term is a defined term. Appendix B to the CPRs (and the DPPM) sets out the definitions of these terms.

Policy Statement

4. The DPPM incorporates both the CPRs and additional Defence Procurement Policy Directives that **must** be complied with by Defence *officials* in relation to *procurement*. Defence Procurement Policy Directives supplement specific CPRs in the context of the particular circumstances and needs of the Department of Defence ('Defence').

Defence Procurement Policy Directive

- D1. In addition to complying with the CPRs, Defence *officials* must comply with the Defence Procurement Policy Directives in the DPPM when undertaking *procurement*. Defence Procurement Policy Directives are generally denoted by the term 'must' (or 'must not').¹

5. Together with the guidance, templates, tools and other resources referred to in the DPPM, the DPPM is an internal control system that forms part of the framework that applies the principles and requirements of the resource management and *procurement* frameworks (focusing on Defence's operations). The DPPM provides primary operational instructions to Defence *officials* in carrying out their duties related to *procurement*, in a way that is tailored to Defence's particular circumstances and needs.

Scope and applicability of this manual

6. The DPPM applies to all Defence *officials*. In addition, a *contract* may extend the application of this manual to a *contractor*,² or a *contractor* may be prescribed to be a Defence *official* in accordance with Defence's Accountable Authority Instructions.

What is the purpose of this manual?

7. The purpose of the DPPM is to:
 - a. assist Defence *officials* to implement the requirements of the CPRs and Defence policy when undertaking *procurement*;
 - b. provide Defence *officials* with a plain English document that is simple to understand and use when undertaking *procurement*;
 - c. update Defence's approach to *procurement* to reduce red tape and costs to industry;
 - d. encourage *officials* to use more strategic approaches, commercial expertise and good practice, when procuring for Defence; and

¹ Where the term 'should' or 'may' is used in the DPPM, this generally indicates good practice. See also the section 'How do I read the DPPM' in this Chapter for more information.

² See further paragraph 4.15 of the CPRs and the related Note.

- e. encourage *officials* to engage early with Defence industry to stimulate competition and innovation, and work with industry to develop better solutions and outcomes for Defence.

How do I read the DPPM?

8. The DPPM is divided into five chapters and has two appendices, as follows:

Chapter 1 – Introduction to the Defence Procurement Policy Manual – this chapter provides an overview of the role of the DPPM and how it is designed to be used;

Chapter 2 – An overview of the CPRs and the *procurement* lifecycle – this chapter provides an overview of the CPRs, including the key policy requirements as they apply to the *procurement* lifecycle, and provides a summary of the *procurement* life cycle to get into *contract*,

Chapter 3 – The procurement framework - this chapter incorporates all of the preliminary rules and guidance contained in the CPRs;

Chapter 4 – Achieving Value for Money in *procurement* – this chapter incorporates all the rules from Division 1 of the CPRs, as well as additional Defence Procurement Policy Directives;

Chapter 5 - *Procurements* above the *procurement thresholds* – this chapter incorporates all of the rules from Division 2 of the CPRs, as well as additional Defence Procurement Policy Directives;

Appendix A – Exemptions from Division 2 of the CPRs – this is Appendix A from the CPRs which sets out the list of *procurements* that are exempt from Division 2 of the CPRs;

Appendix B – Definitions – this is Appendix B from the CPRs which sets out the definitions of the terms used in the CPRs. These terms also have the same meaning when used in the DPPM.

9. Chapters 3 – 5 of the DPPM set out the individual CPR rules that **must** be complied with by all *officials* (including Defence *officials*) undertaking *procurement* for the Commonwealth. The CPR rules have been numbered as they appear in the CPRs, and are easily identifiable as having been drafted in the following format:

EXAMPLE ONLY

‘2. Procurement Framework

- 2.1 The Commonwealth Procurement Rules (CPRs) are issued by the Minister for Finance (Finance Minister) under section 105B(1) of the *Public Governance, Performance and Accountability Act 2013* (PGPA Act).
- 2.2 *Officials* from *non-corporate Commonwealth entities* and prescribed *Corporate Commonwealth entities* listed in section 30 of the Public Governance, Performance and Accountability Rule 2014 must comply with the CPRs when performing duties related to *procurement*. These entities will collectively be referred to as *relevant entities* throughout the CPRs.’

10. Many of the CPR rules stand by themselves and need no further explanation or context. Also, in many cases, there are no additional Defence Procurement Policy Directives over and above the individual CPR rule.

11. In other cases, however, there may be one or more additional Defence Procurement Policy Directives that **must** also be complied with by Defence *officials*. These are also easily identifiable as they appear below the particular CPR rules to which they most closely relate, have been numbered with ‘D’ as an identifier, and have been drafted in the following format:

EXAMPLE ONLY

'Defence Procurement Policy Directive

- D3. If a Defence *official* determines that an exemption given under paragraph 2.6 of the CPRs applies to a *procurement*, the *official* must ensure that the reasons supporting that determination are appropriately documented.'

12. Also accompanying a CPR rule or Defence Procurement Policy Directive in many cases are 'Notes'. These Notes assist with the interpretation of, or provide more context for readers about, a particular CPR or Defence Procurement Policy Directives, and how they apply in the Defence *procurement* environment. An example of a Note is as follows:

EXAMPLE ONLY

'Note: The DPPM also sets out the Defence Procurement Policy Directives that Defence *officials* must comply with when they procure *goods* and services for or on behalf of Defence. The DPPM also indicates *good practice*.'

13. These Notes do not form part of the mandatory policy that **must** be complied with under the DPPM. However, they can be used, along with the material in Chapters 1 and 2 of the DPPM, to assist with interpretation and to give greater context for the DPPM user.

14. The headings in the DPPM are usually the headings from the CPRs. However, other headings have also been included where appropriate to help guide the reader.

Commonwealth legislative and policy framework

15. As paragraph 2.10 of the CPRs notes, Defence and its *officials* operate in an environment of legislation and Commonwealth policy. Defence has numerous business policy owners that are responsible for ensuring Defence complies with applicable Commonwealth legislation and policy requirements, as well as with particular State and Territory legislation that may also apply to Defence activities. This legislation and policy often interacts with Defence *procurement* and in many cases is given effect to through *contracts*.

16. The DPPM refers to and incorporates by reference relevant Commonwealth legislation and policy, and other Defence policy, relating to *procurement*. Also, the endorsed Defence contracting templates have been drafted and are regularly updated to give effect to applicable Commonwealth legislation and policy (including the CPRs), and applicable Defence policy. These templates have been developed to assist Defence *officials* to comply with applicable legislation and policy requirements if used for the purposes for which they are intended. Where the *procurement* involves a unique or unusual requirement not within the contemplation of the endorsed templates, specialist advice should be sought to ensure any specific legislation and policy is addressed. The endorsed Defence contracting templates may be found on the Commercial Division [Tools and Templates intranet page](#).

17. There are also many policy or support areas in Defence that can assist in relation to specific aspects of *procurement* or on legislation and policy that intersect with *procurement* (eg contracting, legal, finance, environment, work health and safety, security, technical regulatory frameworks etc). These resources can be found by the *procurement* support areas link on the Commercial Division [Help Desk Kiosk intranet page](#).

18. The Department of Finance's *Buying for the Australian Government* website provides further assistance on policies that interact with *procurement* (called 'Procurement-Connected Policies'). The Department of Finance also releases Resource Management Guides and Finance Circulars that provide additional guidance and interim policy updates. These resources may be found on the [Department of Finance webpage](#).

Resource management framework

19. The resource management framework is part of the broader Commonwealth legislative and policy environment, and consists of the legislation and policy (including the CPRs) governing the management of the Commonwealth's resources. The main elements of this framework are set out in Figure 3 of the CPRs.

20. The resource management framework is primarily comprised of the PGPA Act and associated *Public Governance Performance and Accountability Rule 2014* (PGPA Rule 2014). The PGPA Act authorises the Secretary, as Defence's *Accountable Authority*, to issue Accountable Authority Instructions (AAIs) (PGPA Act, section 20A; see also paragraph 2.5 of the CPRs). The Secretary has issued the Defence AAIs under this authorisation. The PGPA Act also contains provisions dealing with the commitment of *relevant money* and *officials* entering into arrangements such as *contracts* and *deeds* (PGPA Act, section 23). Section 60 of the PGPA Act governs the granting by the Commonwealth of indemnities, warranties and guarantees ('contingent liabilities'). Sections 23 and 60 of the PGPA Act are key provisions relating to *procurement*.

21. The PGPA Framework requires Defence officials to:

- a not be inconsistent with the policies of the Australian Government (PGPA Act, section 21);
- b use and manage *public resources* in an efficient, effective, economical and ethical manner (PGPA Act section 8 and 15);
- c exercise 'care and diligence' in performing their duties (PGPA Act, section 25);
- d exercise powers, perform functions and discharge duties "honestly, in good faith and for a proper purpose" (PGPA Act, section 26);
- e not improperly use their position in performing their duties (PGPA Act, section 27);
- f not improperly use information (PGPA Act, section 28); and
- g disclose interests in relation to the performance of their duties (PGPA Act, section 29).

22. Section 21 of the PGPA Act requires the Secretary to govern Defence in a way that is 'not inconsistent with the policies of the Australian Government'. The 'policies of the Australian Government' is not a defined term and should be interpreted broadly, applying its ordinary dictionary meaning. Among other things, the term will likely include things like Cabinet decisions, or other Government approvals relating to a commitment of *relevant money*, to the extent that the decision or approval establishes a course or line of action.

23. Accordingly, Defence *officials* exercising delegations (especially those for the purposes of section 23 of the PGPA Act) should ensure that they do so consistent with the terms of any Australian Government decisions or approvals relevant to the *procurement*.

24. For a Defence *official* (including a contractor who is prescribed as a Defence *official*) to exercise a power conferred on or delegated to the Secretary under the PGPA Act in relation to *procurement*, they are required to have the delegated authority. These delegations are described in the [Defence AAIs](#) and issued in Financial Delegations Manual ([FINMAN 2](#)).

25. For the purposes of section 23(3) of the PGPA Act, delegated Defence *officials* may approve the commitment of *relevant money* (Commitment Approval delegation). This delegation is required to be exercised before the Commonwealth enters into the arrangement that commits *relevant money*. For the purposes of section 23(1) of the PGPA Act, Defence *officials* may enter into an arrangement on behalf of the Commonwealth (Enter into an Arrangement delegation). The Defence *official* exercises this delegation by the physical act of entering into an arrangement, after the proposed commitment has been approved by a Commitment Approval delegate. These delegations are mentioned in Defence Procurement Policy Directive D5.³ Defence *officials* should be aware that the section 23 PGPA Act delegations apply to all kinds of *procurements*. For example, both delegations will be required for each order placed under a *standing offer* arrangement.⁴

26. Also, a change to a *contract* (whether called a *contract* change, amendment or variation or some other terminology) may itself technically constitute a *procurement*. In any event, both delegations will be required to be exercised for each *contract* change, if the change involves the

³ If a *procurement* includes a contingent liability, Defence Procurement Policy Directive D6 requires the relevant delegate to authorise the granting of the contingent liability for the purposes of section 60 PGPA Act. In Defence, the Commitment Approval delegate may do this as part of exercising this delegation

⁴ The [Establishing and Using Standing Offers Fact Sheet](#) provides further information regarding delegations required for the establishment and use of *standing offer* arrangements.

commitment of *relevant money*.⁵ If the *contract* change does not involve the commitment of *relevant money* (that is, it is a 'nil-cost' *contract* change), only the Enter into an Arrangement delegation is required.⁶ However, even in this situation, the delegate should be satisfied that the proposed change represents proper use and management of *public resources* and is not inconsistent with the policies of the Australian Government (see further paragraph 6.1 of the CPRs).

27. In addition to these delegations under the PGPA Act, and in accordance with AAI 3, Defence *officials* are also required to obtain an 'Endorsement to Proceed' before undertaking certain *procurements* (see Defence Procurement Policy Directive D9). An Endorsement to Proceed process is part of Defence's internal controls (which are required by section 16 of the PGPA Act) to better ensure the proper use and management of *public resources*. Having a Defence *official* provide an Endorsement to Proceed for *procurements* above a certain value provides additional internal scrutiny through which Defence can satisfy itself that proceeding with the *procurement* would be an efficient, effective, economical and ethical use of *public resources*, and that it will not be inconsistent with the policies of the Australian Government. An [Endorsement to Proceed Fact Sheet](#) and template have been developed to assist Defence *officials* to deal with all the matters they need to consider when exercising this function.⁷

28. Defence has also developed templates to assist and guide Commitment Approval and Enter into Arrangement delegates (as well as any separate delegate authorising the granting of a contingent liability under section 60 of the PGPA Act) through all the considerations they need to be aware of when exercising their delegations.

Compliance with the DPPM

29. The DPPM sits within the procurement policy framework as set out in Figure 1.

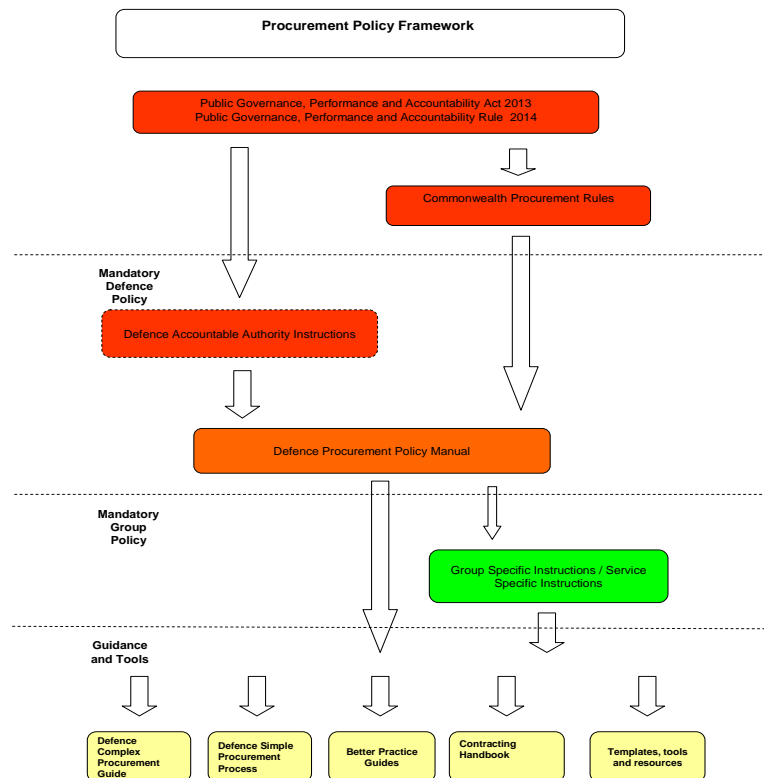


Figure 1

⁵ When calculating the value of a contract change for the purposes of exercising a delegation, Secretary's Direction 18 in FINMAN 2 Schedule 1 states that the limit of delegation is determined by adding the proposed additional commitment to the existing value of the commitment of *relevant money* (that is, the original value plus any amendments already approved).

⁶ While only the Enter into an Arrangement delegation is required, AAI 2.4.1.9(b) and FINMAN 2 Schedule 2 Note 5 have the effect that not all Defence *officials* have the delegated authority to agree to enter into arrangements that are nil-cost contract changes. Defence *officials* should refer to AAI 2.4.1.9 and FINMAN 2 Schedule 2 Note 5 to make sure that these contract changes are authorised at the right level.

⁷ For further guidance, see Chapter 4 of the Complex Procurement Guide.

30. If a Defence *official* departs from the DPPM in a way that results in a departure from the CPRs, (or the PGPA Act or PGPA Rule 2014), then the *official* will have contravened the law.

31. When considering a possible departure from a Defence Procurement Policy Directive contained in the DPPM, Defence *officials* should:

- a. consider whether a proposed departure from the policy requirement is reasonable and justified in the circumstances and would produce the same or better outcome for Defence;
- b. consult their supervisor, wherever practicable, about a proposed departure – a properly informed decision may involve consulting the policy owner; and
- c. be responsible and accountable for the consequences of departing from, or not adhering to, the content of a manual, including where such departure or non-adherence results in a breach of applicable laws or leads to adverse outcomes for Defence.

32. Officials are not permitted to depart from the mandatory requirements of the PGPA Act, PGPA rule, CPRs, AAls and FINMAN 2

33. Defence *officials* should consider whether contractors should be required to comply with the DPPM when undertaking *procurement* on behalf of Defence and communicate this requirement to the contractors, including the incorporation of appropriate provisions in *contracts*.⁸

Why do we have *procurement* rules?

34. The CPRs and Defence Procurement Policy Directives in the DPPM exist to assist Defence *officials* make proper use of *public resources* when undertaking *procurement* related activities for the Commonwealth. Defence *officials*, like *officials* from other Commonwealth agencies, are accountable for how they spend *relevant money* (also known as ‘public money’).

35. The DPPM provides a framework that promotes responsible and accountable spending by Defence *officials* when procuring *goods* and services for Defence. This framework supports the proactive management of the risks relating to *procurement*, as required by the CPRs.

Why are the CPRs and the DPPM drafted the way they are?

36. As noted at paragraph 2.15 of the CPRs, the CPRs give effect to Australia’s international treaty obligations. Access to overseas markets is secured through Free Trade Agreements (FTAs). Under FTAs, countries offer reciprocal access to their government *procurements*. The CPRs reflect Australia’s FTA commitments, and in particular are substantially based on the text of Chapter 15 of the Australia-USA FTA. The CPRs also align with the World Trade Organisation’s Agreement on Government Procurement (GPA). Accordingly, the CPRs include *procurement* related rules that give effect to Australia’s international obligations.

37. The CPRs also seek to ensure that Commonwealth agencies achieve value for money in their *procurement* activities, however they have not been specifically drafted to follow the logical order or timeline of the *procurement* life cycle, and it is very difficult to simply translate or allocate the CPR rules to the various parts of the life cycle. The Defence Procurement Policy Directives have been drafted to align with the structure of the CPRs, and therefore also do not follow the *procurement* life cycle. Chapter 2 of the DPPM provides an overview of the CPRs, including a discussion of the core principles underpinning Commonwealth *procurement*. Chapter 2 also provides an overview of how to plan and undertake a *procurement*.

38. By contrast, the [Simple Procurement Process Tool](#) and [Complex Procurement Guide](#), which accompany the DPPM, have been based on the *procurement* life cycle so that Defence *officials* have a more intuitive sequenced guidance document to follow when planning for and undertaking *procurements*. The documents do not contain mandatory policy requirements, rather, along with the practitioner level Better Practice Guides and Handbooks on specific *procurement* topics, they provide more detailed ‘how to’ guidance to undertake good *procurement*, whether for a low risk, low value (‘simple’) *procurement* or for the more highly complex *procurements* that are often undertaken in Defence, whether in the materiel or non-materiel environment.

⁸ For more information about when it might be appropriate to require contractors to comply with the DPPM, see paragraph 4.17 of the CPRs and the related Note.

What is the *procurement* life cycle?

39. The *procurement* life cycle is simply the breakdown of the end-to-end *procurement* process into logical phases and stages. If each stage of the life cycle is planned for and executed well, Defence *officials* are more likely to achieve good outcomes from their *procurement* activities. The *procurement* lifecycle separates *procurement* into three phases: planning, sourcing and managing. These phases are further divided into seven distinct, but interrelated stages, which are:

Planning

1. Plan the *procurement*
2. Request documentation

Sourcing

3. Approach the market
4. Evaluation
5. Negotiation and contract signature

Managing

6. Contract management⁹
7. Disposal.

40. The *procurement* life cycle is represented by the following 'procurement wheel' (see figure 2).



Figure 2

41. While the *procurement* life cycle includes a Disposal stage, the actual disposal of *goods* (for example, Defence materiel at the end of its life of type) is not a *procurement* within the meaning of the CPRs. This is so even though paragraph 2.10 of the CPRs mentions a 'consideration of disposal of *goods*' as being part of *procurement*. Hence, disposal of *goods* is neither subject to the CPRs nor the Defence Procurement Policy Directives in the DPPM. For example, if the disposal strategy for a ship involves selling the ship by tender (see paragraph 2.9c of the CPRs) or through an auction, that process would not be a *procurement* and hence not subject to the CPRs.

⁹ Defence Officials should refer to the [Defence Contract Management Framework](#) and the [Defence Contract Management Handbook](#) for guidance about the contract management stage of the procurement life cycle.

42. However, there may be occasions where Defence *officials* wish to engage services to assist with the planning or conduct of a disposal activity. The engagement of these services may constitute a *procurement* under the CPRs. For instance, in the example of a ship disposal, if the strategy involves engaging services to decommission and scrap the ship, then the *procurement* of these services would constitute a *procurement* for the purposes of the CPRs.

43. What paragraph 2.10 of the CPRs requires is that Defence *officials* undertaking a *procurement* of *goods* consider how the *goods* will be disposed of at the end of life (including any potential costs) as part of the decision about whether and how to proceed with the *procurement*¹⁰.

44. In Defence, the policy governing disposal of *goods* is set out in AAI 10.12, the Defence Logistics Manual (see [DEFLOGMAN, Part 2, Volume 5, Chapter 10](#)) and the [Electronic Supply Chain Manual](#) ('ESCM'). For guidance and templates on contracting processes for disposals, including sale by tender and gifting or transfer by deed, Defence *officials* should refer to [Materiel Logistics, Disposals and Sales Branch](#).

Guidance, tools, templates and resources

45. The [Complex Procurement Guide](#) has been developed to align with the *procurement* life cycle. Each section of the *procurement* life cycle is represented by a Chapter of the Complex Procurement Guide.

46. The [Simple Procurement Process Tool](#) also follows the *procurement* lifecycle and guides users undertaking a simple *procurement* activity through a step by step process. By following the process, Defence *officials* can rely on this as satisfying their obligations under the CPRs and DPPM.

47. The DPPM also refers to and contains links to further guidance, templates and tools to assist Defence *officials* to meet the requirements of the DPPM and to facilitate better *procurement* outcomes. These materials can be found on the Commercial Division [Commercial Policy Framework intranet page](#).

48. Collectively, the DPPM and the related guidance, templates, tools and other resources, provide a framework that supports accountability for spending, sound commercial practice and better outcomes for Defence, the Australian Government and the taxpayer.

¹⁰ The intention of paragraph 2.10 of the CPRs is to ensure disposal costs and related matters are adequately considered and understood (where predictable) to inform the acquiring of goods through the procurement process. For example, Defence may need to factor into the original procurement decision the need for additional funding to cover the costs of making the goods safe for disposal.

Chapter 2

An overview of the CPRs and the procurement life cycle

1. As noted in Chapter 1, the CPRs have not been specifically drafted to follow the logical order or timeline of the *procurement* life cycle. Paragraphs 2.7 and 2.10 of the CPRs describes the *procurement* life cycle as covering all aspects of acquiring and delivering *goods* and services - it starts with identifying the need for a *procurement* and finishes with either the end of the related services *contract* or the end of the useful life and disposal of the *goods* that were procured. While the CPRs do not follow the *procurement* life cycle, the CPRs include a number of core principles that underpin Commonwealth *procurement* across the life cycle.

2. This Chapter provides a brief overview of the CPRs and the *procurement* life cycle, and discusses these core principles in the context of Defence *procurement*. This Chapter is not intended to replicate the CPRs and does not attempt to discuss all the CPR rules. Also, even though this Chapter discusses the CPRs, the terms '**must**' and '**must not**' are not used in this Chapter to avoid any confusion about whether this Chapter gives rise to additional mandatory policy requirements. The CPR rules and Defence Procurement Policy Directives in Chapters 3-5 of the DPPM (and Defence Procurement Policy Directive D1 in Chapter 1) stand on their own and apply according to their terms.¹¹

CPRs – an overview

3. The CPRs provide all entities governed by the PGPA Act – which includes the Department of Defence - with the policy framework and associated rules for conducting *procurement* activities. The CPRs are a 'legislative instrument', which means that they are part of the law of the Commonwealth.

4. The CPRs are divided into an introductory section and two Divisions - which are set out in Chapters 3, 4 and 5 respectively of the DPPM - and two Appendices (which are included as the Appendices to the DPPM). Division 1 of the CPRs applies to all Commonwealth *procurements* and Division 2 sets out 'additional rules' which apply to *procurements* that are valued at or above the relevant *procurement threshold* - unless a *procurement* is exempted from having to comply with these additional rules. Many Defence *procurements* are exempt from Division 2. The main obligation of the additional rules is to require *officials* to undertake *procurements* by way of an *open tender* in most circumstances, as well as setting out particular requirements for how the tender is undertaken.

5. The introductory section of the CPRs (in Chapter 3 of the DPPM) covers the purpose, scope and legislative and policy framework of the CPRs.

6. Division 1 of the CPRs (in Chapter 4 of the DPPM) sets out rules that apply to all *procurements*. This means that all Defence *procurements* are required to comply with Division 1 (and the additional Defence Procurement Policy Directives in Chapter 4 of the DPPM). This Division establishes 'value for money' as the core requirement of Commonwealth *procurement*. Defence *officials* responsible for a *procurement* need to be satisfied, after reasonable inquiries, that the *procurement* achieves value for money.

Value for money framework

7. Division 1 provides a framework for determining 'value for money'.¹² Under this framework, *procurements* should:

- encourage competition and be non-discriminatory;
- use *public resources* in an efficient, effective, economical and ethical manner that is not inconsistent with the policies of the Commonwealth;
- facilitate accountable and transparent decision making;
- encourage appropriate engagement with risk; and
- be commensurate with the scale and scope of the business requirement.

¹¹ See also the section 'How do I read the DPPM' in Chapter 1 for more information.

¹² See section 4 of the CPRs (in Chapter 4 of the DPPM).

8. In addition to these considerations, for *procurements* valued above \$4 million, *officials* are also required to consider the economic benefit of the *procurement* to the Australian economy as part of the framework for determining value for money. Consideration of economic benefit occurs through the evaluation of the [Defence Policy for Industry Participation 2019](#) requirements of the procurement.¹³ In particular, *tenderers* are required to submit Australian Industry Capability (AIC) Schedule (for procurements valued between \$4 million and \$20 million (including GST)), an AIC Plan (for procurements valued over \$20 million (including GST)), or a Local Industry Capability Plan (for procurements of construction services valued over 7.5 million (including GST)). Such industry schedules and plans set out the benefits to Australian industry. For example, AIC Schedules and Plans set out the *tenderers'* Australian Industry Activities (AIAs) to meet the specified industry requirements of the *procurement*. In relation to AIC Plans *tenderers* are required to describe the benefits of their AIAs, including the significance of the work, the skills and knowledge that will be transferred, the training that will be provided, the new technologies or innovations that will be introduced, and the contribution to Australian company competitiveness, including access to global supply chains, technical data and intellectual property. Similarly, Local Industry Capability Plans require the provision of information such as an estimate of the employment numbers, work packages and trade types, and industry sectors involved in the delivery of the contract.

9. Price is not the sole factor when assessing value for money, value for money does not automatically mean the lowest price *goods* or services. When conducting a *procurement*, *officials* are required to consider the relevant financial and non-financial costs and benefits of each *submission*, including matters such as:¹⁴

- the quality of the *goods* and services;
- fitness for purpose of the proposal;
- the *potential supplier's* relevant experience and performance history;
- flexibility of the proposal (including innovation and adaptability over the lifecycle of the *procurement*);
- environmental sustainability of the proposed *goods* and services (such as energy efficiency, environmental impact and use of recycled products); and
- whole-of life costs.

Valuing a procurement – relevant procurement thresholds

10. The additional rules in Division 2 (and the Defence Procurement Policy Directives in Chapter 5 of the DPPM) apply only to *procurements* that are valued at or above a certain threshold (see paragraph 14 below). This means that Defence *officials* need to estimate the value of their *procurement* to know whether it has to comply with the additional rules.

11. The *procurement* value is the maximum anticipated value of the proposed *contract*, including options, extensions, renewals or other mechanisms that may be executed over the life of a *contract*. The estimated value includes:¹⁵

- all forms of remuneration, including any premiums, fees, commissions, interest, allowances and other revenue streams that may be provided for in the proposed *contract*;
- the total maximum value of the property or services being procured, including the value of any options in the proposed *contract*; and
- any taxes or charges (including GST).

12. If a *procurement* is being conducted in multiple parts with *contracts* awarded either at the same time or over a period of time, with one or more *suppliers* (for example, a *standing offer* panel arrangement), the expected value of the *goods* and services being procured has to include the maximum value of all of the *contracts*. Further, Defence *officials* cannot split a *procurement* into separate parts just to try and avoid the relevant *procurement threshold*.

¹³ See Defence Industry Policy Statement 2016 and Defence Industrial Capability Plan 2018 for materiel procurements above \$20 million. See Defence Procurement Policy Directive D16 and the related Note.

¹⁴ See paragraphs 4.5 and 4.6 of the CPRs.

¹⁵ Defence *officials* should be aware that the way in which they value a *procurement* for the purposes of the CPRs is different to the way they need to value it for the purposes of completing the AE643 form to record a contract in ROMAN. See Complex Procurement Guide, Chapter 6 Appendix A for further details.

13. In any case, where the maximum value of a *procurement* over its entire duration cannot be estimated (for example, a *standing offer* panel arrangement), Defence *officials* are required to treat the *procurement* as being valued above the relevant *procurement threshold*.

14. The value thresholds are:

- for *procurements* other than for *construction services* - \$80,000 (including GST);
- for *procurements of construction services* by *relevant entities* the *procurement threshold* is \$7.5 million (including GST).

15. The term 'covered procurement' is an additional term used to refer to a class of procurements which are subject to the *Government Procurement (Judicial Review) Act 2018*, see paragraphs 48 - 51 of the DPPM below.

Exemptions from the additional rules in Division 2

16. As noted above, some *procurements* may be exempt from having to comply with the additional rules in Division 2 of the CPRs. There are two ways in which a Defence *procurement* may be exempt:

- first, the *procurement* may be covered by one of the general exemptions listed in Appendix A of the CPRs (discussed further below); or
- second, a Defence specific exemption may apply as a result of a measure made by the Secretary under paragraph 2.6 of the CPRs. This is discussed further in Chapter 4 of the DPPM. These Defence specific exemptions relate mainly to the acquisition and sustainment of Defence materiel.

17. However, even if exempt from Division 2 of the CPRs, Defence *officials* still have to make sure that they undertake their *procurements* in accordance with Division 1 of the CPRs. Also, Defence *officials* still have to comply with all applicable Defence Procurement Policy Directives contained in this manual.

18. While the full list of general exemptions is set out in Appendix A to the CPRs (see Appendix A to the DPPM), some of the main exemptions relevant to Defence business include:

- leasing or purchase of real property or accommodation (noting that the *procurement of construction services* is not exempt);
- *procurement of goods* or services from another Commonwealth entity, or a 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, legal services which are tied to the Australian Government Solicitor);
- *procurement* for the direct purpose of providing foreign assistance;
- *procurement of research and development services*, but not the *procurement of inputs to research and development* undertaken by Defence;¹⁶
- the engagement of an expert or neutral person, including engaging counsel or barristers, for any current or anticipated litigation or dispute;
- *procurement of goods* or services (including construction) outside Australian territory, for consumption outside Australian territory;¹⁷
- *procurement of goods* or services by, or on behalf of, the Defence Intelligence Organisation, the Australian Signals Directorate, or the Australian Geospatial-Intelligence Organisation;
- *contracts for labour hire* (noting that this does not include the engagement of consultants);¹⁸

¹⁶ This exemption would be relevant mainly for Defence Science and Technology Group.

¹⁷ This exemption would cover *procurements of goods* or services by the Offices of the Counsellor Defence Materiel in Washington and London that are needed for the ongoing operation of those Offices.

¹⁸ A 'contract for labour hire' is a contract under which Defence engages an individual to provide labour, when the individual is engaged either directly or through a firm which primarily exists to provide the services of only that individual (that is, the individual's own company). This includes the appointment of an eminent individual to a special role by the Secretary, or the Secretary's appointment of individuals to a governance committee (for example, an audit committee, ethics committee or steering committee), but does not include the engagement of consultants.

- *procurement of goods or services from a business that primarily exists to provide the services of persons with a disability; and*
- *procurement of goods or services from a Small to Medium Enterprise with at least 50 per cent Indigenous ownership.*

Indigenous business exemption and the Indigenous Procurement Policy

19. The purpose of the Indigenous Procurement Policy (IPP) is to stimulate indigenous entrepreneurship and business development, providing indigenous Australians with more opportunities to participate in the economy through the awarding of Australian Government *contracts*.

20. Appendix A of the CPRs (item 16) permits Defence to procure *goods or services* directly from a small to medium enterprise with at least 50 per cent indigenous ownership ('indigenous enterprise'), without running an *open tender* process, if the proposed *procurement* represents value for money.

21. The IPP builds on the Appendix A exemption and has two components that apply to *procurement*.

- a mandatory 'set-aside' that applies to certain *procurements* conducted on or after 1 July 2015 and which may result in *contracts* being directly sourced to indigenous enterprises; and
- mandatory minimum requirements that apply to certain high value *procurements* aimed at enhancing indigenous participation for certain Commonwealth *contracts*.

22. [Supply Nation](#) maintains a non-exhaustive list of indigenous enterprises that meet this definition. If an enterprise states that it is an indigenous enterprise and is not listed with Supply Nation, Defence *officials* will need to make sufficient inquiries to satisfy themselves that the enterprise satisfies the IPP definition of an indigenous enterprise.

23. In general terms, the mandatory set-aside part of the IPP applies to *procurements* where the majority (by value) of the *goods or services* will be delivered in a Remote Area (except for transactions paid for by credit cards), and other domestic *procurements* where the estimated value is between \$80,000 and \$200,000 (GST inclusive). The set-aside requirement does not apply to Defence exempt *procurements* (under paragraph 2.6 of the CPRs) and some other specific *procurements*.¹⁹

24. If the set-aside requirement applies, Defence *officials* are required to first determine whether an indigenous enterprise could deliver the required *goods or services* on a value for money basis before making any approach to the market. If satisfied that value for money can be achieved, then the Defence *official* should procure the *goods or services* from the indigenous enterprise (as permitted by Appendix A of the CPRs, item 16). If not, then the Defence *official* may procure through non-indigenous enterprises.

25. In general terms, the mandatory minimum requirements apply to *procurements* (except Defence exempt *procurements*) where the *contract* will be performed in Australia and has an estimated value of \$7.5 million (GST inclusive) or more, and where more than half of the value of the *contract* is anticipated to be spent in one or more of the following industry sectors:

- Building, construction and maintenance services;
- Transportation, storage and mail services;
- Education and training services;
- Industrial cleaning services;
- Farming and fishing and forestry and wildlife contracting services;
- Editorial and design and graphic and fine art services;
- Travel and food and lodging and entertainment services;
- Politics and civic affairs services;
- Financial instruments, products, contracts and agreements;
- Mining and oil and gas services;

¹⁹ For more information about the kinds of *procurements* to which the IPP does not apply, refer to the IPP resources at the Commercial Division [Mandatory Set-Aside intranet page](#).

- Industrial production and manufacturing services;
- Environmental services;
- Management and business professionals and administrative services (sub-category exemptions apply);
- Engineering and research and technology-based services;
- Financial and insurance services (sub-category exemptions apply);
- Healthcare services;
- Personal and domestic services;
- National defence and public order and security and safety services (sub-category exemption applies);
- Organisations and clubs.

26. The policy requires that the *request documentation* for *procurements* that are subject to the 'mandatory minimum requirements' include clauses (in both the conditions of tender and *contract*) that meet the IPP requirements. Model clauses that meet these requirements are available on the Commercial Division [IPP Minimum Requirements intranet page](#).

27. Defence *officials* can find further information and resources, including links to IPP fact sheets and Remote Area maps, on the Commercial Division [Indigenous Procurement intranet page](#).

Disability business exemption

28. The Australian Government's National Disability Strategy 2010 - 2020 sets out a ten year national policy framework for improving the lives of Australians with disability, their families and carers, including by providing people with a disability with more opportunities to participate in the economy through the awarding of Australian Government *contracts*.

29. Appendix A of the CPRs (item 15) permits Defence to procure *goods* or services directly from a business that primarily exists to provide the services of persons with a disability ('disability business'), without running an *open tender* process, if the proposed *procurement* represents value for money.

30. Similar to the IPP, Defence *officials* should determine whether a disability business could deliver the required *goods* or services on a value for money basis before making any approach to the market. If satisfied that value for money can be achieved, then the Defence *official* should procure the *goods* or services from the disability business. If not, then the Defence *official* may procure through a non-disability enterprise. A list of Australian disability businesses can be found at the Australian Disability Enterprises website www.ade.org.au.

Procurement methods

31. Under the CPRs, there are two *procurement* methods:

- an *open tender* – where Defence approaches the open market and invites *submissions*; and
- a *limited tender* - where Defence approaches only **one or more potential suppliers** to make *submissions*.

32. Identifying the *procurement* method does no more than categorise the *procurement* for the purposes of the CPRs, with some different rules applying depending on whether the *procurement* is categorised as an *open tender* or *limited tender*. Under the CPRs, the default position is that *procurement* should be undertaken by way of *open tender*. If it is not an *open tender*, then by definition it will be categorised as a *limited tender*, even if the *procurement* is undertaken with only one *supplier* (often called a 'sole source'²⁰ *procurement*). Similarly, a *procurement* process undertaken between two or more (but not all) *potential suppliers* will be a *limited tender* process, even if Defence does not release a formal request for tender to approach the market and instead seeks a different form of response from industry. If Defence establishes a *standing offer* panel arrangement through an *open*

²⁰ When the term 'sole source' is used in the DPPM, it is not being used to indicate a *procurement* method, rather to indicate a situation where Defence is proposing to approach only one supplier for a *procurement*.

tender, then each *procurement* from the panel is categorised as an *open tender*, irrespective of whether the Defence *official* seeks quotes from one, some or all members of the panel.²¹

33. The categorisation of a *procurement* as an *open tender* or *limited tender* does not determine what *approach to market* Defence *officials* may wish to use (which could be done through a request for tender, request for proposal, request for quote under a *standing offer* panel, competitive evaluation, some other form of iterative engagement process, or other form of documentation), nor the project delivery model (for example, prime *contract*, managing contractor, design and construct *contract*, alliance *contract* and so on). Defence *officials* should determine the appropriate *approach to market* strategy and project delivery model during the planning stage of the *procurement*.

34. Also, and as discussed below, a *limited tender* will still be a competitive process as long as it involves more than one *supplier*.

35. While the CPRs generally require an *open tender* process for *procurements* valued at or above the relevant *procurement threshold*, many Defence *procurements* are exempt from this requirement.²² Accordingly, in circumstances where an *open tender* is not mandatory, the following factors are generally relevant to the selection of a *procurement* method:

- the nature and structure of the market;
- the extent of competition (that is, the number of genuinely competitive *suppliers*);
- schedule, cost or other constraints (for example, intellectual property, security etc).

36. Based on an assessment of these factors, Defence *officials* may still determine that an *open tender* process should be conducted as the best mechanism to deliver a value for money outcome.

Limited tenders

37. *Limited tenders* may only be undertaken in circumstances where the value of the *procurement*:

- is below the relevant *procurement threshold* – see Chapter 2 paragraph 4 above; ;
- is at or above the relevant *procurement threshold* but exempt from the additional rules in Division 2 of the CPRs (see Chapter 2 paragraphs 16 – 18); or
- is above the relevant *procurement threshold* and subject to the additional rules in Division 2 of the CPRs, but satisfies the Conditions for *limited tender* in paragraph 10.3 of the CPRs.

38. If a *procurement* is subject to the additional rules in Division 2 of the CPRs, Defence *officials* will normally be required to use an *open tender* for the *procurement*. There are only very limited circumstances in which a Defence *official* may decide to use a *limited tender*. These are set out in paragraph 10.3 of the CPRs. Of these, there are probably four main circumstances on which a Defence *official* may rely to conduct a *limited tender*.

39. First, there is the circumstance of ‘reasons of extreme urgency’ (paragraph 10.3b of the CPRs). A *limited tender* can be undertaken if there are reasons of extreme urgency that have been brought about by events unforeseen by Defence, such that the *goods* and services could not be obtained in time under *open tender*. A good example of where this provision might be used is where a natural disaster or other unexpected event has occurred and Government has directed Defence to procure *goods* or services in support of its emergency response.

40. However, paragraph 10.3b of the CPRs cannot validly be used in circumstances where Defence *officials* have not planned well enough in advance and now find themselves in a situation where they may not be able to undertake an *open tender* process in time to obtain the *goods* or services when they are needed. Defence *officials* cannot use poor *procurement* planning as a valid justification for running a *limited tender* process. The underlying principle is that the event giving rise to the need to undertake a *procurement* should have arisen at short notice and could not have reasonably been foreseen by Defence.

41. The second main circumstance is for ‘unsolicited innovative proposals’ where the *procurement* can be categorised as having been made under ‘exceptionally advantageous conditions that arise only in the very short term’ and which is not ‘routine *procurement* from regular *suppliers*’. (paragraph 10.3c

²¹ See CPRs, paragraph 9.13.

²² See DPPM, Defence Procurement Policy Directive D2. Appendix A to the CPRs also provides for other exemptions.

of the CPRs). Sometimes industry will have an innovative idea that offers real value to Defence, even though it is not something that Defence has identified as a current need or priority. Paragraph 10.3c of the CPRs offers a mechanism for encouraging industry to put forward these ideas and, if Defence considers the idea of benefit, to procure directly from the relevant company without having to openly test the market.

42. However, Defence companies may sometimes seek to use this mechanism as a way of pitching their *goods* or services to Government without having to compete for a *contract*. If Defence *officials* act on these proposals without testing the market, then it may be unfair to other suppliers of similar *goods* or services, as well as being difficult to demonstrate value for money. Accordingly, Defence *officials* need to be cautious when using this circumstance to justify undertaking a *limited tender*. It is difficult to give definitive guidance about the kind of proposals that will meet this circumstance, however, as a general rule, it would cover most proposals that are unique or otherwise not readily obtainable in the market place. By contrast, the circumstance should not be used where the proposal is effectively an advance proposal for a requirement that Defence has already identified for *procurement* in the market. Defence *officials* should seek specialist contracting or legal advice before accepting an unsolicited proposal.

43. While Defence business units should be open to receiving and considering unsolicited innovative proposals from industry, Defence has also put in place a formal mechanism to manage these kinds of proposals from industry. This is the Centre for Defence Industry Capability (CDIC) which hosts the Defence Innovation Portal, the primary gateway for companies seeking to submit innovation proposals or ideas to the Defence Innovation Hub and Next Generation Technology Fund. For further information about the CDIC and the Defence Innovation Hub, Defence *officials* should refer to www.business.gov.au/cdic.

44. The third main circumstance is where there is no real alternative because of an 'absence of competition for technical reasons' (Paragraph 10.3d of the CPRs). Normally, this circumstance is used where only one *supplier* can provide the relevant *goods* or services because of intellectual property or other restrictions. This circumstance cannot validly be used by a Defence *official* based simply on the *official's* perceived overall knowledge of the market. An 'absence of competition for technical reasons' has to be something more than an *official's* mere assertion that there is only one *supplier* in the market who is capable of providing the *goods* or services. It requires objective, demonstrable evidence. An example could be a situation where Defence is seeking to procure specialised medical equipment, and there are only two manufacturers of the equipment in the world because of its specialised nature. Defence could defensibly undertake a *limited tender* between the two manufacturers because there would be an absence of competition for technical reasons.

45. The fourth main circumstance is for additional deliveries of *goods* and services by the original *supplier* or authorised representative that are for replacement parts or continuing services for existing equipment, software, services or installations, when a change of *supplier* would mean the *goods* or services would be incompatible with the existing equipment or services' (Paragraph 10.3e of the CPRs). This circumstance is often used in the context of ICT *procurements* where Defence needs spare parts for the installed ICT system, or wants to upgrade the system. The parts or upgrades may be available only from the original *supplier* of the system. The underlying matters giving rise to this circumstance will often also support the circumstance discussed above dealing with an absence of competition for technical reasons.

46. Defence *officials* may sometimes seek to use this circumstance to justify the extension or continuation of consultancy or other professional services, whether or not related to ICT systems, equipment, software or support services. As a general rule, this would normally not be a valid use of this circumstance to justify (as a *limited tender*) the extension or continuation of these kinds of services, and would be an example of where the relevant Defence *officials* have not planned their *procurement* well enough in advance. For instance, *officials* should have built into the original *approach to market* the necessary options to extend the service period, or for the contractor to provide additional services. As noted above, Defence *officials* cannot use poor *procurement* planning as a valid justification for running a *limited tender* process.

47. Justifications for using a *limited tender procurement* method will be reported on *AusTender*, and made publically available in accordance with Defence's *AusTender* reporting requirements. Consequently, Defence *officials* should ensure that the decision to use a *limited tender procurement*

method complies with the CPRs, is approved by an appropriate delegate, is defensible and the justification is recorded²³.

Government Procurement (Judicial Review) Act 2018

48. The *Government Procurement (Judicial Review) Act 2018* (JR Act) was introduced to address obligations under relevant free trade agreements and establishes a statutory framework for suppliers (being, under the JR Act, one or more persons who supplies or could supply, *goods* or services and would include *potential suppliers or tenderers*)²⁴ to make complaints to Defence about non-compliance with specific provisions of the CPRs. These complaints are managed through the Defence Procurement Complaints Scheme (DPCS). In broad terms, a valid complaint under the JR Act requires Defence to suspend the relevant *procurement* (except where a public interest certificate (PIC) has been issued) and to investigate and report on the complaint. If the complaint is not considered resolved or otherwise withdrawn by the *supplier*, the *supplier* may seek an injunction in the Federal Circuit Court or the Federal Court of Australia.

49. *Procurements* are subject to the JR Act if they are 'covered procurements'. A 'covered procurement', for the purposes of the JR Act, is a *procurement*:

- to which both Divisions 1 and 2 of the CPRs apply (ie, they are above the relevant *procurement thresholds*);
- to which no exemption has been applied; and
- not included in a class of *procurements* specified in a determination under s5(2) of the JR Act²⁵.

50. A complaint is a valid complaint under the JR Act if:

- it is made by a supplier as defined under the JR Act;
- it is in writing;
- it relates to a covered procurement;
- it relates to a contravention of the CPRs (Division 2 or nominated Division 1 requirement); and
- the supplier's interests have been affected by the contravention of the CPRs.

51. A list of CPRs which are subject to the JR Act is set out at Appendix A to this Chapter. Chapters 3 and 4 of the DPPM provide further information relating to the specific CPRs that are subject to the JR Act. The [Defence Procurement Complaints Scheme – Complaints Management Guide](#) and the Department of Finance's *Resource Management Guide 422 – Handling complaints under the Government Procurement (Judicial Review) Act 2018* contain additional information relating to the JR Act.

Defence Procurement Complaints Scheme

52. The DPCS has been established in Defence to manage the administration and investigation of all *procurement* complaints, including those submitted under the JR Act. The DPCS meets the requirement under the CPRs to apply timely, equitable and non-discriminatory complaint handling procedures²⁶. In accordance with Defence Procurement Policy Directive D21, all *procurement* complaints must be submitted to the [procurement complaints mailbox](#) which is managed by the Central Procurement Complaints Function. Further information on the DPCS can be obtained on the [DPCS intranet page](#).

The procurement life cycle - core principles

53. The CPRs have some core principles that Defence *officials* need to consider when planning and undertaking their *procurement* activities. These are discussed below.

²³ The choice to use a limited tender method may be subject to a complaint under the JR Act.

²⁴ The JR Act defines the term 'supplier' with a broader meaning than the definition provided in the CPRs.

²⁵ At this stage (20 April 2019), no determination has been made under s5(2) of the JR Act. This document will be updated if a determination is made.

²⁶ See paragraph 6.8 of the CPRs.

Value for money

54. As noted above, value for money does not necessarily mean the lowest price. In most Defence *procurements* of any complexity, determining value for money will mean assessing tenders against all the *evaluation criteria* stated in the *request documentation* and determining on the balance of all the assessments which one delivers best value for the Commonwealth. In undertaking this assessment, *officials* need to look at the total cost of ownership of the solutions. Value for money is about getting the best possible outcome over the whole-of-life of the *goods* or services.²⁷

55. The standard conditions of tender in the [endorsed Defence contracting templates](#) include *evaluation criteria* that meet the requirements of the CPRs for determining value for money, and in particular enable Defence *officials* to properly consider the relevant financial and non-financial costs and benefits of tenders. For example, in major Defence *procurements*, one of the criteria to be considered in determining value for money is Australian Industry Capability (AIC). This is an explicit criterion in ASDEFCON tendering and contracting templates. The ability for the Australian Government to maintain an AIC program is provided for under our free trade agreements as an express exception to the non-discrimination principle (which is discussed below). Indeed, even before Defence releases *request documentation*, Defence *officials* are required to consider at the early stages of the Defence Capability Life Cycle and during the planning stage of the *procurement* the requirement or potential for Australian industry involvement in the *procurement*, consistent with the Government's defence and industry policy²⁸.

56. During the evaluation stage of a *procurement*, Defence *officials* will evaluate tenders against the stated *evaluation criteria* in accordance with the process and methodology set out in the tender evaluation plan. If the assessment of tenders against the non-price *evaluation criteria* leaves little or no discrimination between the tenders, then it is likely that the lowest priced tender will be the best value for money. However, the assessment of value for money can become more difficult where, for example, one *tenderer* offers a high level of capability or performance at a higher price, than other tenders which meet the minimum requirements but offer a lower level of capability or performance at a lower price. Effectively, the question for Defence *officials* becomes whether the higher level of capability or performance at the higher price is 'worth' more or less to Defence than the lower level of capability or performance at the lower price. This is a subjective assessment and *officials* need to make sure that they can properly articulate the reasons for why they make their decision. As long as the reasons are sensible and logical and in accordance with the PGPA Act framework requirements and duties, then the decision itself will be defensible.

57. Defence *officials* also need to make sure that when making these decisions, they are comparing 'apples with apples'. *Officials* need to ensure that all omissions and risks relating to a tender have been properly understood, considered, and if necessary quantified and 'priced in' to that tender, so as to ensure that when comparing with another tender that does not have those omissions or risks, the comparison is being done on an equivalent basis. For more guidance about how to undertake tender evaluation, Defence *officials* should refer to the [Complex Procurement Guide](#)²⁹.

58. Selecting the most appropriate *procurement* process that is commensurate with the scope, scale and risk of the *procurement* will also help Defence *officials* achieve value for money. This will normally involve some form of competition.

Competition

59. As paragraph 5.1 of the CPRs notes, competition is a key element of the Australian Government's *procurement* framework. A competitive *procurement* process is normally the mechanism by which Defence ensures that it is receiving value for money. Competition is important because time and again it has been shown to be the most effective motivator for industry to reduce costs and improve performance. Whilst early contractor selection and sole source *procurement* can also be an effective and efficient execution strategy in appropriate cases, it should not be used solely to avoid the need for competitive tendering, especially when a viable competition can be held. Sound commercial judgment, not convenience, should determine the right approach.

²⁷ See paragraphs 4.5 and 4.6 of the CPRs.

²⁸ See Paragraph 8 of Chapter 2 for further information on the Defence Policy for Industry Participation which incorporates the AIC. See also DPPM Directive D16 and the related note following

²⁹ See Chapter 5 of the Guide.

60. However, competition does not necessarily mean an *open tender*. Any process involving more than one *supplier* will be competitive. Accordingly, if an open competition is not feasible, Defence *officials* should explore opportunities for a limited competition (known under the CPRs as a *limited tender*). However, as discussed earlier in this Chapter, for a *procurement* that is subject to Division 2 of the CPRs, unless it is exempt, there are only very limited grounds on which Defence *officials* are permitted to conduct a *limited tender* (whether sole source or competitive).³⁰

61. Competition is important as under competitive processes (whether *open tender* or *limited tender*), *suppliers* put forward their best solution and price. *Suppliers* know that if they don't do so then it is likely that one of their competitors will win the work instead. Effective competition creates the incentive for *suppliers* to deliver quality *goods* or services at more competitive prices. In other words, value for money is driven by the market.

62. This is so even when Defence *officials* are procuring from *standing offer* panel arrangements. If the *standing offer* is established through an *open tender* process, then Defence *officials* may procure from the panel by approaching one, some or all of the *suppliers* on the panel for a quote or proposal. It is often tempting for Defence *officials* to seek a quote from just one panellist, particularly if the panellist is known to them. However, it is also important to provide opportunities for all capable *suppliers*, particularly small to medium enterprises, as this helps maintain a strong Defence industrial base, as well as incentivising best value performance. Accordingly, the right approach to procuring from a panel will depend on the circumstances of each case. For more information about establishing and using *standing offer* panel arrangements, Defence *officials* should refer to the factsheet on the Commercial Division [Fact Sheets and Guidance intranet page](#).

63. Also, the Defence panel manager will usually have established the business rules for the panel to ensure that it is accessed and used appropriately, *suppliers* on the panel have a fair and equitable chance of being engaged through the arrangement, and Defence is able to demonstrate the panel is delivering value for money. Defence *officials* should make themselves aware of and comply with these business rules to ensure that Defence panels are used appropriately.

64. While awarding *contracts* through full and open competition is key to ensuring that the Government efficiently acquires *goods* and services to best meet its needs, there are certain circumstances when competition may not be practical. This can especially be the case given the nature of major Defence *procurement*, and particularly (but not exclusively) in complex materiel related *procurements*. For instance, a competitive process will be unable to be undertaken if Defence requires a unique product or service such that there is only one *supplier* that offers the required capability or solution. This will be the case where, for example, a *supplier* has the patent for a particular product, or because of other intellectual property rights a *supplier* is the only one that is able to install or maintain a particular system or network.

65. A sole source *procurement* may also arise because it is a follow-on *contract* and only the incumbent contractor can continue the work due to intellectual property restrictions or because the contractor is the only one with the necessary skills and expertise. This kind of '*supplier* lock in' may be able to be avoided if Defence has acquired sufficient technical data and associated intellectual property rights to enable a competition to be undertaken. Avoiding '*supplier* lock in' promotes value for money by establishing competitive tension across the lifecycle of the procured *goods* or services.

66. Accordingly, Defence *officials* should consider during the planning stage of the *procurement* how to maintain the competitive environment not only at the outset of the *procurement*, but over the life of the program or activity. Conducting market research to understand the market and the scope for competition is critical. In addition, early and ongoing engagement with industry around Defence's requirements is also important, particularly as this may allow new entrants to enter the market in time to meet those requirements. The importance of market research and ongoing industry engagement is discussed in the Complex Procurement Guide.³¹

67. For major Defence *procurements*, a key to being able to avoid *supplier* lock in of the kind mentioned above and to remove barriers to future competition, is for Defence *officials* to have an effective intellectual property and technical data strategy that covers the whole of the lifecycle of the *goods* being procured. For example, for a major ICT project or major materiel acquisition, securing the necessary technical data and associated intellectual property rights (in particular, the ability to licence to third parties) in the initial *procurement* process will maximise competitive alternatives across the

³⁰ See paragraph 10.3 of the CPRs.

³¹ See Chapter 2 of the Guide. See also the Early Industry Engagement Better Practice Guide.

whole of life of the capability, including future *procurement* of additional systems or spares, operation and training, maintenance and repair, integration with other systems, and future updates, upgrades or modifications.

68. If proposing to undertake a sole source *procurement*, Defence *officials* will need to justify this in their *procurement* plan or Endorsement to Proceed, noting that the Commitment Approval delegate (see section 23(3) of the PGPA Act) will also need to be satisfied as to the *procurement* method (which would be a *limited tender*). Defence *officials* should consider what mechanisms are available to drive value for money outcomes from their engagement with industry, especially if this is done in a non-competitive environment. In particular, in this context Defence *officials* will need to be able to demonstrate how the price has been determined to be fair and reasonable for the required *goods* or *services*, and should consider seeking [specialist financial advice](#) to determine this.

69. Achieving value for money in a non-competitive environment can be particularly challenging, and [specialist procurement advice](#) should be sought to develop appropriate sourcing strategies to achieve a value for money outcome across the life of the *goods* or *services* being procured.

Non-discrimination

70. Effective competition also requires non-discrimination.³² This principle means that Defence is normally unable to require in its *request documentation* that particular work be done in Australia, or done by Australian based *suppliers*, or that *suppliers* use Australian materials, and this is consistent with Australia's FTA obligations³³. The intent behind the principle is that the market will work out how best to meet the requirement being sought by Defence. In many cases, the work will need to be performed in Australia, and indeed at particular locations in Australia, however, this should not prevent foreign companies from being able to bid to undertake the work as long as they are able to meet Defence's service delivery requirements in those locations.

71. Specific exemptions can be sought from the non-discrimination principle in appropriate cases (for example, through a measure under paragraph 2.6 of the CPRs), or through other mechanisms such as the AIC policy (mentioned above), or other specific Government policy decisions. These exemptions are most likely to be found in major capital equipment acquisition decisions (for example, naval shipbuilding).³⁴ Defence Procurement Policy Directive D16 requires Defence *officials* to comply with the Defence Policy for Industry Participation including the AIC policy (see also the Note following paragraph 5.7 of the CPRs as extracted in Chapter 4 of the DPPM). Importantly, these exemptions have to be consistent with Australia's obligations under its FTAs.³⁵

Ethical behaviour – the balance between probity and industry engagement

72. Section 6 of the CPRs (see Chapter 4 of the DPPM) sets out the requirement for Defence *officials* to properly use and manage *public resources*. 'Proper' means efficient, effective, economical and ethical.³⁶

73. Attention to probity is integral to ensuring the defensibility, transparency and success of Defence *procurements*. Defence *procurements*, particularly those relating to major capital acquisitions, ICT projects and major facilities, are under increasing scrutiny by *tenderers*, the Australian National Audit Office, Senate Estimates and other Parliamentary Committees, and the media.

74. Probity is the evidence of ethical behaviour, and can be defined as complete and confirmed integrity, uprightness and honesty in a particular process. The [Department of Finance website](#) lists a number of principles which underpin ethics and probity in Australian Government *procurement*.

75. Defence *officials* need to put in place appropriate and sensible mechanisms to assure the probity of Defence *procurement* processes in line with the scope, scale, risk and sensitivity of the particular *procurement*. External legal process or probity advisers can be engaged when necessary. Occasionally, Defence may also wish to appoint an external probity auditor, either at the conclusion of the *procurement* process or at a key point during the process, to audit whether Defence *officials*

³² See paragraph 5.1 of the CPRs.

³³ Paragraph 5.4 of the CPRs is subject to the JR Act, For further information regarding the JR Act, Defence officials should refer to Chapter 2 paragraphs 48 – 51 of the DPPM.

³⁴ As noted in Chapter 1 of the DPPM, specific Government policy decisions may be found in Cabinet decisions, or other Government approvals relevant to a commitment of *relevant money*, to the extent that the decision or approval establishes a course or line of action.

³⁵ This is why paragraph 4.8 of the CPRs provides that the economic benefit requirement set out in paragraph 4.7 of the CPRs has to operate 'within the context of' (that is, subject to) Australia's FTAs.

³⁶ See paragraph 6.1 of the CPRs.

followed the process and probity requirements set out in the documentation governing the *procurement*.

76. However, it is very important that Defence *officials* do not use probity as a reason or excuse not to engage appropriately with the market or *tenderers* throughout a *procurement* process. As long as it is done fairly and consistently, there is no reason why a *procurement* process cannot build in mechanisms (in the *request documentation*) for ongoing engagement with industry and *tenderers* throughout a *procurement* process. This might include engagement before tender release around Defence's requirements or to understand the market's capacity or capability, or engagement during the tender process, such as through *tenderer* clarification activities or mechanisms to allow *tenderers* to update and improve their offers (sometimes called 'offer definition and improvement activities').

77. A key factor in delivering good *procurement* outcomes is early market engagement and continued open dialogue with *suppliers* throughout the *procurement* process. Understanding *suppliers* and the market is part of the planning necessary to develop the right *approach to market*. Defence *procurement* should be supported by robust *procurement* plans that have a level of detail commensurate with the scope, scale and risk of the *procurement*. This is the first stage of the *procurement* life cycle.³⁷ Good *procurement* also results from proactively managing *supplier* and other key stakeholder relationships throughout the *procurement* process and for the duration of the *contract*.

78. Defence *officials* may sometimes be approached by *tenderers* or contractors to sign a confidentiality agreement or deed (sometimes called a Non-Disclosure Agreement) either on behalf of the Commonwealth or in their personal capacity prior to receiving information from the *tenderer* or contractor. Defence *officials* are already subject to legal obligations to protect and not misuse information obtained as a result of their employment with Defence (for example, under the *Public Service Act 1999*; see also PGPA Act, section 28). Therefore, Defence *officials* are under no obligation to sign such agreements and should not do so without first seeking legal advice from Defence Legal. In particular, *officials* should be aware that confidentiality agreements will often contain an indemnity from the *official* (or Commonwealth) in favour of the person disclosing the information.

79. As part of Defence's probity framework for major *procurement* processes, Defence *officials* may be requested (for example, by the legal process or probity adviser) to sign a statement confirming that they are aware of their legislative and policy obligations to properly protect confidential information (and to declare any actual or perceived conflicts of interests). It is appropriate for Defence *officials* to sign such a confirmation in these circumstances, noting that the statement does not constitute a formal agreement.

80. There are some senior Defence officials who will have regular access to sensitive information related to Defence *procurements*, in particular the members of the Defence Committee, Investment Committee and Enterprise Business Committee. In addition, Defence's Contestability organisation may also be required to have access to this information to perform its function. As part of Defence's probity framework, members of these Committees and the Contestability organisation acknowledge under their respective business rules the legislative and policy obligations that apply in relation to confidential information and conflicts of interests. Accordingly, these Defence *officials* are not required to receive *procurement* specific probity briefings or sign individual probity statements.

81. The legislative and policy obligations related to probity include:

- the general duties of *officials* set out in sections 25 to 29 of the PGPA Act (dealing with due care, diligence, good faith, declaring interests etc);
- the APS Values and APS Code of Conduct (see *Public Service Act 1999*, sections 10 and 13);
- Defence Instruction (General) - PERS 25-4 - *Notification of Post Separation Employment*;
- Defence Instruction (General) - PERS 25-6 - *Conflicts of Interest and declarations of interests*; and
- Defence Instruction (General) - PERS 25-7 - *Gifts, Hospitality and Sponsorship* (see also AAI 10 - Managing Relevant Property).

³⁷ More guidance on industry engagement and *procurement* planning is set out in Chapter 2 of the Complex Procurement Guide and the Early Industry Engagement Better Practice Guide.

82. Legal process and probity advisers can be engaged to help ensure that the processes, procedures and documentation used in implementing a major Defence *procurement* are robust, transparent and capable of external audit. However, there is no requirement for Defence *officials* to engage an external probity or process adviser, or that they be independent of another adviser (for example, the legal adviser). Depending on the nature of the *procurement*, internal personnel (for example, contracting officers or Defence Legal officers) can potentially perform the role of a probity adviser for a Defence *procurement*.

83. In relation to 'high risk' *procurements*, the Australian National Audit Office takes the view that a probity adviser should not have any actual or perceived conflicts of interest that could compromise their duty to give candid advice about the probity aspects of the project. A perceived conflict could include simultaneously serving as both probity and legal adviser. The decision about whether to have an independent probity or legal process adviser should be made based on the individual circumstances of the case, and in particular, whether the *procurement* is likely to be high profile, high value, controversial or sensitive.

84. The main reason to have a 'legal process adviser' as opposed to a 'probity adviser' is to maintain legal professional privilege in relation to the 'probity' advice. Non-lawyers cannot provide legal advice, so no legal professional privilege would apply to their advice if there is a challenge to the *procurement* process. Advice from a lawyer in relation to probity/process would be covered by the same rules as other legal advice.³⁸

85. A template probity/legal process plan can be found on the Commercial Division [Tools and Templates intranet page](#).

Risk management

86. A key principle of the CPRs is risk management, and in particular that risks should be borne by the party best placed to manage them.³⁹ Depending on the nature of the *procurement*, the risks that may need to be considered could include technical, operational, industrial, managerial, work health and safety, financial, legal, commercial, or probity risks. These risks need to be considered across the *procurement* lifecycle. For instance, the Complex Procurement Guide discusses the importance of risk identification and management in the planning stage of the *procurement* life cycle, as well as risk assessment during the tender evaluation stage.⁴⁰

87. In the planning stage, Defence *officials* will consider the risks relating to the conduct of the *procurement* process itself and what is being procured, and how these can be addressed through the *procurement* strategy. During evaluation and *contract* negotiation, Defence *officials* will be more focussed on assessing and addressing the risks in relation to the requirements of the *contract*, and the allocation of commercial and other risk under the *contract*, and considering how these risks can best be managed through setting up the contract management arrangements for the *contract*.⁴¹

88. In relation to *procurements* that are required to be considered by the Defence Investment Committee (for example, Major Capital Equipment, and major ICT and infrastructure *procurements*), the '[Smart Buyer](#)' framework sets out various risk categories that should be considered when developing the Project Execution Strategy and the *procurement* and contracting strategies for the *procurement*.

89. Defence also has formalised policy and processes for the assessment and management of risk in the Defence environment. For instance, in relation to materiel *procurement*, Defence *officials* should follow the [Defence Materiel Manual \(PROJ\) \(DMM\(PROJ\)\) – 11-0-002- CASG Project Risk Management Manual](#) and [DMM\(LOG\)-04-0- 001- DMO Materiel Logistics Manual](#).

90. The endorsed Defence contracting templates set out the standard Defence approach to risk allocation between the Commonwealth and its contractors. The templates have been drafted in accordance with the above principle that risks should be borne by the party best placed to managed them. In many cases, this will be the contractor, noting that companies are able to take out insurance (or self-insure) for most *contract* related risks.

³⁸ For more information about legal professional privilege (LPP), Defence *officials* should refer to the [Defence Legal LPP Fact Sheet](#).

³⁹ See section 8 of the CPRs (in Chapter 3 of the DPPM).

⁴⁰ See Chapters 2 and 5 of the Complex Procurement Guide.

⁴¹ See the [Defence Contract Management Framework](#). For further guidance on the contract management stage of the procurement lifecycle, Defence *officials* should refer to Chapter 7 of the Complex Procurement Guide and the Defence Contract Management Handbook.

91. However, given the scope, scale, value and risk of many Defence *contracts*, it is not unusual for contractors to seek to limit their liability, particularly under ICT *contracts*, and *contracts* for the acquisition or sustainment of major capital equipment. In these circumstances, Defence *officials* need to undertake a risk assessment in relation to the proposed limitation of liability to understand the implications for the Commonwealth and to quantify any potential exposure. For instance, the limitation may mean that the Commonwealth will be unable to sue the contractor for its normal entitlement to damages for breach of *contract*. The Defence contracting templates make clear which categories of liability the Commonwealth may consider limiting and by contrast those categories in relation to which it will not consider limiting the contractor's liability (for example, personal injury or death).

92. Defence has developed tools and guidance to assist Defence *officials* with the conduct of [liability risk assessments](#).

93. The [endorsed Defence contracting templates](#) also contain provisions requiring contractors to take out necessary insurances to cover their work for Defence. Again, depending on the nature of the Defence *contract*, the contractor's insurance arrangements can be both complex and costly (noting that the costs will be passed on to Defence through the *contract* price). Defence has developed tools and guidance to assist Defence *officials* with determining and managing *contract* insurance requirements which can be found on the Commercial Division [Approved Contractor Insurance Program Initiative intranet page](#).

94. In relation to materiel *procurement*, Defence has established the Approved Contractor Insurance Program (ACIP) as a joint Defence and Industry *procurement* reform initiative that involves a periodic centralised review of participating Defence companies' global/group and local insurance programs. The purpose of the review is to pre-qualify a participating company's insurance program, if Defence is satisfied with the company's insurances. This helps to reduce the costs of tendering for both industry and Defence as well as improve risk management within Defence in respect of insurable risks that arise in connection with the performance of major Defence *contracts*. Companies granted ACIP status are taken to comply with insurance requirements in individual *contracts* and do not have to provide evidence about their insurances during tendering and *contract* management phases of a *procurement*. The ACIP initiative is open to the 'top' 6-7 major Defence companies and participation by the companies is voluntary. The ACIP Register lists those companies currently holding ACIP status. For more information see the Commercial Division [Risk Assessments and Liabilities intranet page](#).

Accountability and transparency

95. The Australian Government is committed to ensuring accountability and transparency in its *procurement* activities. Accountability involves Defence *officials* being responsible for their *procurement* actions and decisions and related outcomes, while transparency involves Defence enabling appropriate scrutiny of its *procurement* activities.⁴² Accordingly, the CPRs require Defence *officials* to meet certain record-keeping, reporting and other requirements before and after entering into a *contract* with a *supplier*, including documenting relevant approvals and other *procurement* related decisions and actions, and *AusTender* and other reporting requirements. *AusTender* is the Australian Government's *procurement* information system.

96. Complaints may be made by *suppliers* under the JR Act for breach of the CPR requirement regarding the level of documentation maintained for a covered *procurement*.⁴³ The [Complex Procurement Guide](#) provides guidance for Defence *officials* about how they can meet their accountability and transparency requirements as they progress through the *procurement* life cycle.

The procurement life cycle – overview of how to plan and undertake a procurement

Introduction

97. Good *procurement* practice is not about just mechanically applying the CPRs or the additional Defence Procurement Policy Directives in the DPPM. It is about developing a strong understanding of all aspects of the *procurement* lifecycle and using judgement to apply this understanding in each case to deliver the best outcomes. While Defence *officials* need to comply with the CPRs and the DPPM, *officials* should design each *procurement* process in a way that is commensurate with the scope, scale and risk of the relevant *procurement*. Application of sound judgement when applying the CPRs and

⁴² See section 7 of the CPRs (in Chapter 3 of the DPPM).

⁴³ Paragraph 7.2 of the CPRs is subject to the JR Act. For further information regarding the JR Act, Defence *officials* should refer to Chapter 2 paragraphs 48 – 51 of the DPPM.

designing a *procurement* process that complies with the CPRs is important for all *procurements*, and failure to do so for *procurements* subject to the JR Act has the potential for consequences such as suspension of a *procurement* process or the grant of an injunction or the award of compensation by the Federal Court.

98. So, for instance, *procurements* that are valued below the relevant *procurement threshold* will normally be low risk, routine *procurements* of goods or services. They are often called ‘simple *procurements*’ in Defence. However, many *procurements* valued at or above the relevant *procurement threshold* may also be simple in nature. For example, a *procurement* of more spare parts from an existing *supplier* may be valued at a lot higher than the *procurement threshold*, but would normally be a simple purchasing exercise. Accordingly, using a *procurement* process that involves significant cost, time and resources for both Defence and *suppliers* would not be sensible or represent value for money for these kinds of *procurements*. The concept of value for money is not limited to the *procurement* outcome, but is also a consideration when designing a *procurement* process.

99. By contrast, many Defence *procurements* are highly complex undertakings because of the nature of the goods, works or services being sought. The process for these *procurements* needs to be designed and undertaken in light of the scope, scale and risk of what is being procured.

100. The Complex Procurement Guide provides more in-depth guidance about how these kinds of *procurements* should be planned and executed across the life cycle. The following discussion provides an overview of the guidance for undertaking a *procurement* process.

Guidance overview

101. For more complex *procurements*, Defence *officials* will normally be required to prepare three main documents:

- a *procurement* plan;
- *request documentation*; and
- an evaluation plan.

102. The *procurement* plan details the process that will be undertaken. It differs from a business case in that the business case explains why a *procurement* is being undertaken, including its value proposition, while the *procurement* plan explains how the *procurement* is to be undertaken. However, for convenience, and depending on the scope, scale and risk of the particular *procurement*, Defence *officials* may sometimes include the *procurement* plan as part of, or as an attachment to, the business case.

103. The *procurement* plan will normally cover the following:

- a description of the *procurement*;
- consideration of how the *procurement* will comply with the CPRs including the selection and justification of the *procurement* method to be used (for example, *open tender*, *limited tender*);
- proposed probity arrangements;
- proposed governance arrangements, such as the need for a steering committee;
- the *procurement* risk assessment; and
- indicative time-lines and resources (including budgeting of funds to support the *procurement*).

104. The level of detail in the *procurement* plan should reflect the scope, scale and risk of the *procurement*. For less complex *procurements*, the Endorsement to Proceed document may be sufficient to serve as the *procurement* plan. For *procurements* that are required to be considered by the Defence Investment Committee (for example, Major Capital Equipment, and major ICT and infrastructure *procurements*), the *procurement* plan will be informed by the [Smart Buyer Project Execution Strategy](#).

105. The *request documentation* sets out the rules for the *procurement*. It describes to *potential suppliers*, the specifics of the *procurement*, the manner in which *submissions* are to be forwarded to Defence (for instance, through *AusTender*) and how *submissions* will be evaluated. If there is a possibility that other agencies will access the resulting *contract* (for example, a *standing offer*

arrangement), Defence *officials* need to ensure the *request documentation* includes a statement to that effect.

106. The *request documentation* will usually be the primary information source used by *potential suppliers* when developing a *submission*. After reviewing the *request documentation*, the *potential suppliers* should be able to understand Defence's requirements and how the *procurement* is to provide value for money. This is why the CPRs, in effect, require that *request documentation* include all information necessary to permit *suppliers* to prepare and lodge responsive *submissions*.⁴⁴

107. *Request documentation* will normally include:

- a description of the requirement (for example, the statement of work), including any essential requirements;
- any *conditions for participation* or *minimum content and format requirements*;
- *evaluation criteria* and methodology;
- the other rules of the process; and
- the draft *contract*.

108. The statement of work should describe:

- the nature, scope and, where known, quantity of the *goods*, works or services required;
- specific requirements to be fulfilled or provided, including certification, test and evaluation, plans, drawings and training materials;
- any applicable technical *specifications* (in which case, these should be described in terms of function and performance requirements, rather than specific designs, trademarks, or product descriptions) and the related standards on which the *specifications are based*;⁴⁵
- whether any of the requirements are 'essential requirements' (in which case, if *suppliers* are not able to meet the requirements, they will be excluded from consideration);
- the timeframes expected for the delivery of the required *goods*, works or services.

109. *Conditions for participation*⁴⁶ are mandatory requirements which describe minimum standards or essential characteristics that *potential suppliers* have to meet for their *submissions* to be considered. Defence *officials* should take great care when deciding whether to include *conditions for participation* and what these might be, as the CPRs require that where the *procurement* is subject to the additional rules in Division 2 of the CPRs, any *submission* that does not meet the *conditions for participation* be excluded from consideration by Defence. *Conditions for participation* are limited to those assuring the legal, financial, technical or commercial capabilities of the *supplier* to meet the particular requirements of the *procurement*.

110. Defence *officials* may also decide to set out minimum content and format requirements⁴⁷ in their request documentation, for example:

- in relation to minimum content – Defence may require the *tenderer* to provide a certificate of insurance or a particular licence to support the *submission*; or
- in relation to formatting – Defence may require *submissions* to be submitted electronically through *AusTender*.

111. If the *tenderer's submission* for a *procurement* which is subject to the additional rules in Division 2 of the CPRs does not meet the *minimum content and format requirements*, Defence *officials* will normally be required to exclude the *submission* from further consideration, unless the *officials* consider that the failure to meet the requirement has been due to an unintentional error of form in the *submission*. If so, Defence *officials* have the discretion to allow the *submission* to be corrected, subject to ensuring that all *tenderers* are treated fairly and equitably.

⁴⁴ While this discussion about *request documentation* applies to *procurements* to which the additional rules in Division 2 of the CPRs apply, it is also good practice for all *procurements*.

⁴⁵ In relation to specifications and standards, see paragraphs 7.26, 10.9, 10.10, 10.11, and 10.12 of the CPRs

⁴⁶ While this discussion about *conditions for participation* applies to *procurements* to which the additional rules in Division 2 of the CPRs apply, it is also good practice for all *procurements*.

⁴⁷ While this discussion about *minimum content and format requirements* applies to *procurements* to which the additional rules in Division 2 of the CPRs apply, it is also good practice for all *procurements*.

112. The *request documentation* will also set out the *evaluation criteria*. These set the foundation for a fair and equitable assessment of *submissions*. What the appropriate criteria are depends on the nature of the particular *procurement* and should flow from the planning stage.

113. Evaluation of *tenderers* should be based on a balance of all the criteria, or if a weighting methodology is used, on the relative importance of each criterion. If a weighting methodology is used, Defence *officials* should consider setting this out in the *request documentation* so that *potential suppliers* can appropriately focus their responses. This will make the process more transparent, which should limit misunderstandings that may result in complaints.

114. The *request documentation* should also set out the rules around lodgement of *submissions*, whether this is through *AusTender* or other means, including the closing time for *submissions*. Adherence to deadlines is important in maintaining the integrity and probity of the tender process. Therefore, Defence *officials* are not normally able to accept late *submissions*, unless there has clearly been a mishandling of the *submission* by Defence.

115. During the time that the tender process is open, Defence *officials* will need to be in a position to answer queries on the *procurement*. This needs to be done fairly and impartially in a manner that does not create an unfair advantage for any *potential supplier*. Therefore, the *request documentation* should explain the rules for answering questions and distributing responses.

116. At least in request for tender processes, Defence normally requires *tenderers* to indicate their compliance (or non-compliance) with a draft *contract* which contains the terms and conditions on which Defence is willing to enter into a *contract* for the requirement. Defence *officials* should assess the risk with the *tenderers'* non-compliances with the draft *contract* to enable *tenderers* to be evaluated against a common baseline.

117. The evaluation plan is an internal Defence document that sets out the methodology and processes to be followed by Defence when evaluating *submissions*. To reduce the risks of a perceived or actual bias in the *procurement* process, Defence *officials* should preferably develop and finalise the plan before an approach is made to the market, but in any event before *submissions* are opened.⁴⁸ The Complex Procurement Guide provides guidance about the contents of an evaluation plan.⁴⁹

118. The evaluation plan will normally identify the organisation that is responsible for the evaluation, and recommend a preferred *supplier* (or a shortlist of *potential suppliers*). Depending on the nature and complexity of the evaluation, the evaluation organisation may comprise a steering committee, an evaluation board or team and subordinate evaluation working groups. The evaluation organisation may also include internal or external advisers or experts to assist with elements of the evaluation, for example, the technical requirements, financial viability or price.

119. When receiving *submissions*, Defence *officials* need to use a mechanism that assures fairness and impartiality of the *procurement* process. *Submissions* should only be received into a secure environment. This can be through *AusTender* or other secure electronic system, or a physical tender box or tender room. Any *submissions* received after the closing time should be considered late and should generally not be accepted (see paragraph 114 above).

120. The evaluation committee should first check the *submissions* to make sure they satisfy any mandatory requirements, such as *minimum content and format requirements* and *conditions for participation*, and should then proceed to undertake the detailed evaluation of *submissions* against the *evaluation criteria*.

121. The evaluation of *submissions* is the most important aspect of determining value for money in a *procurement*. When evaluating *submissions*, the evaluation committee needs to make sure that it faithfully applies the *evaluation criteria*, methodology and procedures that have been set out in the *request documentation* and the evaluation plan. If the committee does not then this could compromise the evaluation outcome and give rise to a complaint or legal action by an affected *tenderer*, and require Defence to set aside the evaluation and possibly the whole *procurement* process, as well as incurring additional costs in dealing with the complaint.

122. The CPRs⁵⁰ require Defence *officials* to maintain appropriate documentation of the decision-making process for each *procurement*. Therefore, the evaluation committee should be accurate and

⁴⁸ See Defence Procurement Policy Directive D47.

⁴⁹ See Chapters 3 and 5 of the Guide.

⁵⁰ Paragraph 7.2 of the CPRs. This paragraph is subject to the JR Act, For further information regarding the JR Act, Defence *officials* should refer to Chapter 2 paragraphs 48 – 51 of the DPPM.

scrupulous in recording the evaluation and the reasons underlying its decisions. As a general rule, officials should ensure that there is sufficient documentation to provide an understanding of why the *procurement* was necessary, the process that was followed and all relevant decisions made, including approvals, and the basis of those decisions.

123. The evaluation committee should therefore prepare an evaluation report to document the evaluation process and the recommendation of a preferred *tenderer* (or shortlist of *tenderers*). The report can also assist in the future when providing feedback to *tenderers* through the debriefing process.

124. The evaluation report will normally contain:

- a summary of the evaluation process;
- a summary of the assessment of each *submission*;
- reasons for the exclusion of a *submission* from further consideration;
- recommendations concerning the preferred *tenderer(s)* based on value for money;⁵¹ and
- details of any issues which need resolution during subsequent *contract* negotiations.

125. The evaluation committee members will normally sign the report and submit this for endorsement by the relevant delegate.

126. The CPRs require Defence *officials* to notify affected *tenderers* promptly of the rejection of their *submission* or the award of a *contract*, and if requested, provide a debrief to the *tenderers* (both successful and unsuccessful *tenderers*).⁵² A debrief (whether verbal or written) should include, as appropriate:

- an explanation of why the *submission* was unsuccessful (or successful);
- areas of weakness or non-compliance in the offer;
- suggestions as to how future *submissions* can be improved; and
- in the case of unsuccessful *tenderers*, if the *contract* has already been successfully negotiated, the name of the successful *supplier* and total *contract* price (noting that this needs to be reported on *AusTender* in any event, if valued at or above \$10,000).

127. Defence *officials* should keep a written record of the debriefing.

128. The final stage in the *procurement* process itself relates to the negotiation and award of the *contract* with the preferred *tenderer*. During *contract* negotiations, Defence *officials* should seek to resolve any issues that were identified during the evaluation.

129. At any time during the *procurement* process, Defence can determine that awarding a *contract* is not in the public interest.⁵³ Public interest grounds generally arise in response to new information or unforeseen events which materially affect the objectives or reasons underlying the original *procurement* requirement as specified in the *request documentation*. Examples of situations in which it may not be in the public interest to award the *contract* could include:

- a Government decision to cancel or vary the program to which the *procurement* relates;
- unforeseen technological or environmental changes affecting the business case for the *procurement*;
- discovery of new information materially affecting the policy behind or operational effectiveness of the project or *procurement*.

130. However, termination of a *procurement* process is a serious step with potential legal and management risks that should be considered and addressed before any decision is made. At the least, it can harm Defence's credibility with *suppliers* that, in turn, may discourage *suppliers'* participation in future *procurements*. On the other hand, termination may be compelled in order to

⁵¹ For *procurements* to which the additional rules in Division 2 of the CPRs apply, Defence *officials* are required to award the *contract* to the *tenderer* that is assessed to provide the best value for money in accordance with the *request documentation*, including compliance with any *conditions for participation* and essential requirements. (See CPRs, paragraph 10.32 to 10.36).

⁵² CPRs, paragraph 7.17.

⁵³ For *procurements* to which the additional rules in Division 2 of the CPRs apply, this is the only ground on which a Defence *official* can decide not to award a *contract* in relation to the *procurement*. (See CPRs, paragraphs 10.35 and 10.36).

protect the integrity of the *procurement* process and avoid the awarding of a *contract* in a manner inconsistent with the stated evaluation process.

131. Defence *officials* cannot terminate a *procurement* process simply because they may be dissatisfied with the outcome of the evaluation conducted in accordance with the stated rules, conditions and criteria set out in the *request documentation* and evaluation plan.

132. If Defence cancels a *procurement* on the basis that it is not in the public interest to award a *contract*, it should normally provide *potential suppliers* with reasons. In any case, prior to cancelling a *procurement*, Defence *officials* should seek specialist legal or contracting advice.

133. Once Defence has entered into a *contract*, Defence *officials* need to ensure that they manage the *contract* effectively so that all parties to the *contract* (including Defence) fully meet their respective obligations as efficiently and effectively as possible, and to deliver the business and operation objectives required by the parties. Effective contract management is a key enabler to delivering value for money, as well as supporting proper governance and risk management across the life of the *contract*. Defence *officials* should refer to the Defence Contract Management Framework and the Defence Contract Management Handbook to support them achieving best practice contract management. The Framework brings together the underpinning principles, policies, tools, templates, guidance and competencies required to support more collaborative business relationships with industry and deliver more effective *contract* outcomes. Defence *officials* should apply the Framework and use the Handbook when undertaking contract management.

The procurement life cycle – procurement complaints

134. *Procurement* complaints can be made at any stage of the *procurement* life cycle, and will be categorised as either a general *procurement* complaint or a JR Act complaint. In Defence, all *procurement* complaints must be managed under the DPCS. Compliance with the processes set out in the CPRs and the DPPM will minimise the risks associated with *procurement* complaints. See paragraphs 48 to 52 above for further information.

Appendix A to Chapter 2

CPR Paragraphs subject to the Government Procurement (Judicial Review) Act 2018

Section	CPRs Paragraphs
Division 1	
4. Value for money	
Third-party procurement	4.18
5. Encouraging competition	
Non-discrimination	5.4
7. Accountability and transparency in procurement	
Records	7.2
Notifications to the market	7.10, 7.13 – 7.15
Providing information	7.16 – 7.17
Reporting arrangements	7.18, 7.20
9. Procurement method	
Requirement to estimate value of procurement	9.3 – 9.6
Division 2	
10. Additional Rules	
Additional Rules	10.1 – 10.2
Conditions of limited tender	10.3 – 10.5
Request documentation	10.6 – 10.8
Specifications	10.9 – 10.13
Modification of evaluation criteria or specifications	10.14
Conditions for participation	10.15 – 10.19
Minimum time limits	10.20 – 10.27
Late submissions	10.28 – 10.31
Receipt and opening of submissions	10.32 – 10.34
Awarding contracts	10.35 – 10.36

Chapter 3

The procurement framework

2. Procurement framework

CPR 2.1 – 2.6

Procurement framework

- 2.1 The Commonwealth *Procurement Rules* (CPRs) are issued by the Minister for Finance (Finance Minister) under section 105B(1) of the *Public Governance, Performance and Accountability Act 2013* (PGPA Act).
- 2.2 Officials from *non-corporate Commonwealth entities* and prescribed *corporate Commonwealth entities* listed in section 30 of the *Public Governance, Performance and Accountability Rule 2014* **must** comply with the CPRs when performing duties related to *procurement*. These entities will collectively be referred to as *relevant entities* throughout the CPRs.
- 2.3 Rules that **must** be complied with in undertaking *procurement* are denoted by the term '**must**'. *Non-corporate Commonwealth entities* **must** report non-compliance with the rules of the CPRs through the Commonwealth's compliance reporting process. The term 'should' indicates good practice.
- 2.4 The CPRs are the core of the *procurement* framework, which also includes:
 - a. [web-based guidance](#), developed by the Department of Finance (Finance) to assist entities to implement the *procurement* framework;
 - b. [Resource Management Guides](#), which advise of key changes and developments in the *procurement* framework; and
 - c. templates, such as the Commonwealth Contracting Suite, which simplify and streamline processes, creating uniformity across Commonwealth *contracts* to reduce the burden on businesses when contracting with the Commonwealth.
- 2.5 An *Accountable Authority* may use [Accountable Authority Instructions](#) to set out entity-specific operational rules to ensure compliance with the rules of the *procurement* framework.

Note: As the Defence *Accountable Authority*, the Secretary has issued Defence's AAs. The AAs set out specific operational rules dealing with *procurement*.

- 2.6 These CPRs do not apply to the extent that an *official* applies measures determined by their *Accountable Authority* to be necessary for the maintenance or restoration of international peace and security, to protect human health, for the protection of essential security interests, or to protect national treasures of artistic, historic or archaeological value.

Note: The CPRs state in a footnote to paragraph 2.6 that "Where such measures are applied, because Divisions 1 and 2 do not apply in full to the *procurement*, this has the effect that the *procurement* is not a 'covered procurement' under the *Government Procurement (Judicial Review) Act 2018*; see section 5".

Defence Procurement Policy Directives

- D2. For paragraph 2.6 of the CPRs, the Secretary has determined that the *procurement* of the goods and services listed in Table 1 below are exempt from the operation of Division 2 of the CPRs.
- D3. If a Defence *official* determines that an exemption given under paragraph 2.6 of the CPRs applies to a *procurement*, the *official* **must** ensure that the reasons supporting that determination are appropriately documented.
- D4. If a Defence *official* seeks to exempt a particular *procurement* (not otherwise covered by an

existing exemption) from all or part of the CPRs, the *official must* seek the Secretary's written approval.

Table 1

<p>Goods</p> <p>The <i>procurement</i> of goods that fall within the following US Federal Supply Codes (FSC):</p>	<ul style="list-style-type: none"> - FSC 10 Weapons; - FSC 12 Fire Control Equipment; - FSC 13 Ammunition and Explosives; - FSC 14 Guided Missiles; - FSC 15 Aircraft and Airframe Structural Components; - FSC 16 Aircraft Components and Accessories; - FSC 17 Aircraft Launching, Landing, and Ground Handling Equipment; - FSC 18 Space Vehicles; - FSC 19 Ships, Small Craft, Pontoons and Floating Docks; - FSC 20 Ships and Marine Equipment; - FSC 23 Ground Effect Vehicles, Motor Vehicles, Trailers and Cycles; - FSC 28 Engines, Turbines, and Components; - FSC 29 Engine Accessories; - FSC 31 Bearings; - FSC 46 Water Purification and Sewage Treatment Equipment; - FSC 48 Valves; - FSC 49 Maintenance and Repair Shop Equipment; - FSC 54 Prefabricated Structures and Scaffolding; - FSC 58 Communication, Detection, and Coherent Radiation Equipment; - FSC 59 Electrical and Electronic Equipment Components; - FSC 60 Fibre Optics Materials, Components, Assemblies, and Accessories; - FSC 61 Electric Wire, and Power and Distribution Equipment; - FSC 63 Alarm, Signal and Security Detection Systems; - FSC 66 Instruments and Laboratory Equipment; and - No code - Specialty Metals.
<p>Services</p> <p>The <i>procurement</i> of the following kinds of services:</p>	<ul style="list-style-type: none"> - design, development, integration, test, evaluation, maintenance, repair, modification, rebuilding and installation of military systems and equipment; - operation of Government-owned facilities; - space services; and - services in support of military forces overseas.

Notes: Paragraph 2.6 of the CPRs allows the Secretary to determine that specific *procurements* should not be subject to all or part of the CPRs. Usually, a measure made under this paragraph will exempt a *procurement* from the rules in Division 2 of the CPRs (in particular, the obligation to undertake an *open tender* process). This exemption mechanism is provided for in the Australia-US Free Trade Agreement (AUSFTA), and is consistent with the market access arrangements agreed by Australia in its other FTAs.

In the case of Defence, the AUSFTA (Chapter 15, Annex A) specifically provides for various Defence *procurements* to be exempt from the operation of the *procurement* rules in Chapter 15 of the AUSFTA (which rules are now mainly in Division 2 of the CPRs, and which are consistent with the *procurement* rules agreed by Australia in its other FTAs). This exemption is permitted on the grounds of 'essential security' (Article 22.2 of the AUSFTA). To give effect to this exemption, the Secretary has made a measure under paragraph 2.6 of the CPRs to determine that the *procurement* of the various *goods* or *services* listed in Table 1 above are exempt from the operation of Division 2 of the CPRs. The list in Table 1 replicates the list in Chapter 15, Annex A of the AUSFTA. Further details of the FSC codes mentioned in Table 1 can be found in the [Exemptions Fact Sheet](#) on the Commercial Division intranet site.

Even if a *procurement* is exempt from Division 2 of the CPRs, Defence *officials* are still required to undertake their *procurements* in accordance with Division 1 of the CPRs. In addition, Defence *officials* are still required to comply with all applicable Defence Procurement Policy Directives contained in this manual (see Defence Procurement Policy Directive D43).

CPR 2.7 – 2.10

Procurement

- 2.7 *Procurement* is the process of acquiring *goods* and *services*. It begins when a need has been identified and a decision has been made on the *procurement* requirement. *Procurement* continues through the processes of risk assessment, seeking and evaluating alternative solutions, and the awarding and reporting of a *contract*.
- 2.8 In addition to the acquisition of *goods* and *services* by a *relevant entity* for its own use, *procurement* includes the acquisition of *goods* and *services* on behalf of another *relevant entity* or a third party.
- 2.9 *Procurement* does not include:
 - a. grants (whether in the form of a *contract*, conditional gift or deed);
 - b. investments (or divestments);
 - c. sales by tender;
 - d. loans;
 - e. *procurement* of *goods* and *services* for resale or *procurement* of *goods* and *services* used in the production of *goods* for resale;
 - f. any property right not acquired through the expenditure of *relevant money* (for example, a right to pursue a legal claim for negligence);
 - g. statutory appointments;
 - h. appointments made by a Minister using the executive power (for example, the appointment of a person to an advisory board); or
 - i. the engagement of employees, such as under the *Public Service Act 1999*, the *Parliamentary Services Act 1999*, a *relevant entity's* enabling legislation or the common law concept of employment.
- 2.10 Following the awarding of the *contract*, the delivery of and payment for the *goods* and *services* and, where relevant, the ongoing management of the *contract* and consideration of disposal of *goods*, are important elements in achieving the objectives of the *procurement*.

Notes: Paragraph 2.9a of the CPRs makes clear that grants are not *procurements*. Defence manages a number of grant programs and therefore these programs, and the individual grants made under them, are not *procurements* for the CPRs. For example, to give effect to the Australian Government's defence and industry policy, Defence undertakes various grants programs under which Defence companies and other entities receive payments. In undertaking these programs, Defence *officials* are required to comply with the [Commonwealth Grant Rules and Guidelines](#), rather than the CPRs and the Defence Procurement Policy Directives in the DPPM. Defence grant programs also have their own rules that govern their operation.

For guidance on contracting processes for disposals, including sale by tender (see paragraph 2.9c of the CPRs) and gifting or transfer by deed, Defence *officials* should refer to the [Materiel Logistics, Disposals and Sales Branch intranet page](#).

CPR 2.11 – 2.14

Resource management framework

- 2.11 *Relevant entities* and *officials* operate in an environment of legislation and Commonwealth policy. Within that broad context, the resource management framework consists of the legislation and policy governing the management of the Commonwealth's resources.
- 2.12 The *procurement* framework is a subset of the resource management framework related to the *procurement* of goods and services.
- 2.13 Section 16 of the PGPA Act outlines an *Accountable Authority's* duty to establish appropriate internal control systems for their *relevant entity*. The CPRs provide the necessary framework for Accountable Authorities when issuing Accountable Authority Instructions and operational requirements in relation to *procurement*. In the area of *procurement*, an *Accountable Authority* should provide a mechanism to:
 - a. apply the principles and requirements of the resource management and *procurement* frameworks, focusing on the *relevant entity's* operations; and
 - b. provide primary operational instructions to *relevant entity officials* in carrying out their duties related to *procurement*, in a way that is tailored to a *relevant entity's* particular circumstances and needs.
- 2.14 Non-compliance with the requirements of the resource management framework, including in relation to *procurement*, may attract a range of criminal, civil or administrative remedies including under the *Public Service Act 1999* and the *Crimes Act 1914*.

Defence Procurement Policy Directives

- D5. When conducting a *procurement*, Defence *officials* **must** ensure that the following two delegations are exercised in the following order, unless the *procurement* does not involve the commitment of *relevant money* (for example, a 'nil-cost' contract change) in which case only the FINMAN 2 Schedule 2 -Enter into an Arrangement delegation is required:
 - FINMAN 2 Schedule 1 (Section 23(3) of the PGPA Act) – To Approve the Commitment of Relevant Money (Commitment Approval): a Defence *official* must exercise this delegation before the Commonwealth enters into the arrangement that commits *relevant money*; and
 - FINMAN 2 Schedule 2 (Section 23(1) of the PGPA Act) – To Enter into an Arrangement: a Defence *official* **must not** exercise this delegation (Enter into an Arrangement) unless a Commitment Approval delegation has been exercised for the *procurement* to which the arrangement relates.
- D6. Prior to agreeing to a contingent liability in favour of a third party (for example, granting an indemnity, guarantee or warranty), Defence *officials* **must**:
 - undertake a liability risk assessment in relation to the contingent liability, including considering the full potential cost of the liability to the Commonwealth; and
 - ensure that the relevant delegate (Under FINMAN 2 Schedule 1) (or the Finance Minister, if necessary) authorises the contingent liability under section 60 of the PGPA Act.

Notes: Chapter 1 of the DPPM discusses the resource management framework in more detail.

If a *procurement* includes a contingent liability, the effect of Defence Procurement Policy Directive D6 is that the relevant delegate must authorise the granting of the contingent liability for the purposes of section 60 PGPA Act. In Defence, the Commitment Approval delegate may do this as part of exercising this delegation.

If a *procurement* is being undertaken through the Foreign Military Sales (FMS) system, the standard FMS conditions require the Commonwealth to grant an indemnity to the US Government. Accordingly, Defence Procurement Policy Directive D6 dealing with contingent liabilities applies to each FMS case. For guidance on conducting liability risk assessments for FMS cases see the Commercial Division [Risk Assessments and Liabilities intranet page](#).

Agreeing to a contingent liability in favour of a third party is one kind of limitation of liability. The Commonwealth may also limit a third party's liability in other ways, for instance, by agreeing to one or more financial caps on different heads of loss or damage that a contractor may be exposed to under a *contract* (for example, for personal injury, property damage, delay or other contractual non-performance). Accordingly, in addition to the requirement under Defence Procurement Policy Directive D6 to undertake a liability risk assessment in relation to contingent liabilities, Defence Procurement Policy Directive D28 requires Defence *officials* to undertake a liability risk assessment prior to agreeing to any limitation on a third party's liability under a *contract*. Defence has developed [guidance and tools](#) to assist Defence *officials* with the conduct of liability risk assessments.

The Department of Finance's [Resource Management Guide \(RMG\) No 414](#), together with [Defence AAI 2.6](#) and [FINMAN 2](#), set out Commonwealth and Defence policy in relation to indemnities, guarantees and warranties that give rise to 'contingent liabilities'. Consistently with RMG 414 and AAI 2.6, Defence has developed streamlined processes for undertaking liability risk assessments for certain kinds of contingent liabilities, namely indemnities contained in FMS cases and venue hire agreements. Defence *officials* should refer to the liability risk assessment [guidance and tools](#) for these streamlined processes.

CPR 2.15

International obligations

- 2.15 Australia is party to a range of free trade arrangements. These arrangements are implemented domestically by legislation and/or Commonwealth policy. Relevant international obligations have been incorporated in these CPRs. Therefore, an official undertaking a *procurement* is not required to refer directly to international agreements.

Note: Paragraph 2.15 of the CPRs means that Defence *officials* can refer to the CPRs as the single source of Australia's international commitments on government *procurement* and do not need to refer directly to the various treaties and other agreements. See also the Notes following paragraph 2.6 of the CPRs.

3. How to use the Commonwealth Procurement Rules

CPR 3.1 – 3.4

How to use the Commonwealth Procurement Rules

- 3.1 The CPRs set out the rules that *officials* **must** comply with when they procure *goods* and services. The CPRs also indicate good practice. The CPRs have been designed to provide *officials* with flexibility in developing and implementing *procurement* processes that reflect their *relevant entity's* needs.
- 3.2 Achieving value for money is the core rule of the CPRs. This requires the consideration of the financial and non-financial costs and benefits associated with *procurement*.
- 3.3 Further information and guidance on applying the CPRs are available on Finance's *procurement* policy website at www.finance.gov.au/procurement.
- 3.4 *Relevant entities* may have additional rules, guidance, templates or tools that apply when conducting *procurements*.

Note: For paragraph 3.4 of the CPRs, the DPPM sets out 'additional rules' in relation to the conduct of Defence *procurement* that Defence *officials* **must** comply with when they procure *goods* and services for Defence. These additional rules are set out under the heading 'Defence Procurement Policy Directives' in the DPPM. The DPPM also refers to guidance, templates, tools and other resources to further assist Defence *officials* undertaking *procurement*. Defence *officials* should have regard to these resources when undertaking *procurement*.

CPR 3.5 – 3.8

Compliance with the two divisions of the CPRs

- 3.5 *Officials of non-corporate Commonwealth entities* **must** comply with the 'rules for all *procurements*' listed in Division 1, regardless of the *procurement* value. *Officials* **must** also comply with the 'additional rules' listed in Division 2 when the estimated value of the *procurement* is at or above the relevant *procurement threshold* and when an Appendix A exemption does not apply.
- 3.6 *Officials of corporate Commonwealth entities* prescribed in section 30 of the Public Governance, Performance and Accountability Rule 2014 (PGPA Rule) as having to comply with the CPRs **must** comply with the 'rules for all *procurements*' listed in Division 1 and the 'additional rules' listed in Division 2 when the expected value of the *procurement* is at or above the relevant *procurement threshold* and when an Appendix A exemption has not been utilised.
- 3.7 Despite being prescribed *corporate Commonwealth entities*, Australian Digital Health Agency, Australian Human Rights Commission, National Portrait Gallery of Australia, Old Parliament House and Regional Investment Corporation **must** apply a *procurement threshold* and *reporting threshold* of \$80,000 for *procurements* other than the *procurement of construction services*. They may opt-in to coordinated *procurements* and must only comply with those policies of the Commonwealth that specify compliance by *corporate Commonwealth entities*.
- 3.8 Despite being a *corporate Commonwealth entity*, paragraph 3.7 also applies to the Commonwealth Superannuation Corporation in regards to its administrative functions only.

Note: The Department of Defence ('Defence') is a *non-corporate Commonwealth entity*. Hence, paragraph 3.5 of the CPRs applies to Defence *officials* (including a contractor who is prescribed as a Defence *official*). In addition to an Appendix A exemption referred to in paragraph 3.5 of the CPRs, a Defence specific exemption may also be utilised (See Defence Procurement Policy Directives D2 and D4).

CPR 3.9

Using an Appendix A exemption

- 3.9 When an Appendix A exemption applies, the additional rules of Division 2 for *procurements* at or above the relevant *procurement threshold* do not apply to the *procurement*, but the *relevant entity* **must** still comply with the rules for all *procurements* (Division 1), excluding paragraphs 4.7, 4.8 and 7.26. This does not prevent a *relevant entity* from voluntarily conducting the *procurement* for *goods* or services covered by an Appendix A exemption in accordance with some or all of the processes and principles of Division 2.

Defence Procurement Policy Directive

- D7. If a Defence *official* determines that an exemption under Appendix A of the CPRs applies to a *procurement*, the *official* **must** ensure that the reasons supporting that determination are appropriately documented.

Notes: Items 15 and 16 of Appendix A permit Defence *officials* to procure directly from disability businesses and indigenous businesses, respectively. See further Chapter 2 of the DPPM, and Defence Procurement Policy Directive D14 (and the related Notes).

In addition to the exemptions provided for in Appendix A, various other kinds of Defence related *procurements* may be exempt from Division 2 of the CPRs. In particular, see Defence Procurement Policy Directives D2 and D4 (and the related Table 1 for a list of Defence *goods* and services that are exempt).

Chapter 4

Achieving value for money in procurement

Note: Chapter 4 of the DPPM incorporates all the rules from Division 1 of the CPRs.

4. Value for Money

CPR 4.1 – 4.3

Considering value for money

- 4.1 A thorough consideration of value for money begins by *officials* clearly understanding and expressing the goals and purpose of the *procurement*.
- 4.2 When a business requirement arises, *officials* should consider whether a *procurement* will deliver the best value for money. It is important to take into consideration:
 - a. stakeholder input;
 - b. the scale and scope of the business requirement;
 - c. the *relevant entity's* resourcing and budget;
 - d. obligations and opportunities under other existing arrangements;
 - e. relevant Commonwealth policies; and
 - f. the market's capacity to competitively respond to a *procurement*.

Notes: Defence officials should refer to Chapter 2 of the DPPM, and the Complex Procurement Guide, for more guidance about value for money.

Defence *officials* should be aware that 'Commonwealth policies' (paragraph 4.2e.) may include Cabinet decisions and other formal directions issued by the Government (whether through the Minister for Defence or otherwise).

- 4.3 When a *relevant entity* determines that *procurement* represents the best value for money, these considerations will inform the development and implementation of the *procurement*.

Defence Procurement Policy Directives

- D8. Defence *officials* undertaking *procurement* valued at or above \$200,000 (including GST) **must** develop a written *procurement* plan for the *procurement* commensurate with its scale, scope and risk, and which takes account of the *procurement* life cycle, including cost of ownership and disposal considerations.
- D9. Defence *officials* **must** obtain an 'Endorsement to Proceed' prior to:
 - approaching the market for *procurements* to establish a *standing offer* arrangement, and
 - all other *procurements* that are valued at or above \$200,000 (including GST)
- D10. When undertaking a process to procure a Contractor, Consultant or Outsourced Service Provider, Defence officials **must**:
 - obtain and document approval from a Defence official at the Senior Executive Service (SES) Band 1 / 1 Star level or above prior to or as part of the approval of the commitment of *relevant money* for the proposal; and
 - advise the Secretary when the daily rate of the Contractor, Consultant or Outsourced Service Provider is at or above \$4,500 (including GST).
- D11. Prior to approaching the market to establish a strategic *standing offer* panel, Defence officials **must**:
 - obtain written endorsement of the business need from First Assistant Secretary Procurement and Contracting; then
 - obtain written approval to establish the strategic *standing offer* panel from the Enterprise

Business Committee.

Notes: See paragraphs 102 to 104 in Chapter 2 of the DPPM for guidance about *procurement* plans, including that the Endorsement to Proceed document may be sufficient to serve as the *procurement* plan for less complex *procurements*. More detailed guidance is set out in Chapter 2 of the Complex Procurement Guide.

Defence *officials* should refer to paragraphs 9.2 – 9.6 of the CPRs in relation to estimating the value of a *procurement*.

It is best practice to seek approval to undertake a process to procure a Contractor, Consultant, or Outsourced Service Provider prior to approaching the market. Should approval be sought as part of the commitment of *relevant money*, and the approval is not given, this may be a breach of CPR 10.35, which limits the ability of Defence *officials* to cancel a *procurement* once the process has been undertaken.

Defence *officials* should refer to the Financial Delegations Manual (FINMAN 2) glossary for the definition of Contractors, Consultants and Outsourced Service Providers. Defence *officials* should refer to the [Engaging Contractors, Consultants and Outsourced Service Providers – Decision Making Governance Fact Sheet](#) for further guidance on the evidence required to justify the *procurement* of Contractors, Consultants or Outsourced Service Providers.

An Endorsement to Proceed may also be required to place an order under a *standing offer*. Defence *officials* should refer to the [Endorsement to Proceed Fact Sheet](#).

The [Establishing and Using Standing Offers Fact Sheet](#) contains further guidance on the establishment of strategic *standing offer* panels.

CPR 4.4 – 4.6

Achieving value for money

- 4.4 Achieving value for money is the core rule of the CPRs. *Officials* responsible for a *procurement* **must** be satisfied, after reasonable enquires, that the *procurement* achieves a value for money outcome. *Procurements* should:
 - a. encourage competition and be non-discriminatory;
 - b. use *public resources* in an efficient, effective, economical and ethical manner that is not inconsistent with the policies of the Commonwealth;
 - c. facilitate accountable and transparent decision making;
 - d. encourage appropriate engagement with risk; and
 - e. be commensurate with the scale and scope of the business requirement.
- 4.5 Price is not the sole factor when assessing value for money. When conducting a *procurement*, an *official* **must** consider the relevant financial and non-financial costs and benefits of each *submission* including, but not limited to:
 - a. the quality of the *goods* and services;
 - b. fitness for purpose of the proposal;
 - c. the *potential supplier's* relevant experience and performance history;
 - d. flexibility of the proposal (including innovation and adaptability over the lifecycle of the *procurement*);
 - e. environmental sustainability of the proposed *goods* and services (such as energy efficiency, environmental impact and use of recycled products); and
 - f. whole-of-life costs.
- 4.6 Whole-of-life costs could include:

- a. the initial purchase price of the *goods* and services;
- b. maintenance and operating costs;
- c. transition out costs;
- d. licensing costs (when applicable);
- e. the cost of additional features procured after the initial *procurement*;
- f. consumable costs; and
- g. disposal costs.

CPR 4.7 – 4.8

Broader benefits to the Australian economy

- 4.7 In addition to the value for money considerations at paragraphs 4.4 – 4.6, for *procurements* above \$4 million (or \$7.5 million for *construction services*) (except *procurements* covered by Appendix A and *procurements* from *standing offers*), *officials* are required to consider the economic benefit of the *procurement* to the Australian economy.
- 4.8 The policy operates within the context of relevant national and international agreements and *procurement* policies to which Australia is a signatory, including free trade agreements and the Australia and New Zealand Government Procurement Agreement.

Note: Defence *officials* should refer to paragraph 8 in Chapter 2 of the DPPM for guidance about the application of the ‘economic benefit’ requirement in relation to Defence *procurement*. The Department of Finance has also released guidance on the consideration of economic benefit on the [Department of Finance webpage](#).

CPR 4.9 – 4.10

Procurement-connected policies

- 4.9 *Procurement*-connected policies are policies of the Commonwealth for which *procurement* has been identified as a means of delivery. To assist *relevant entities* in complying with policies of the Commonwealth, Finance maintains a list of procurement-connected policies, which can be found at www.finance.gov.au/procurement.
- 4.10 Generally, procurement-connected policies are the responsibility of entities other than Finance. The relevant policy-owning entity is responsible for administering, reviewing and providing information on the policy as required.

Notes: Defence contracting templates are drafted and regularly updated to give effect to applicable Commonwealth legislation and policy (including the CPRs), and applicable Defence policy. If using an endorsed Defence contracting template (for example, ASDEFCON, the Defence Facilities and Infrastructure Suite of Contracts or the Commonwealth Contracting Suite) for a *procurement* for which the template is intended, Defence *officials* may rely on the template as meeting applicable legislation and policy requirements. The endorsed Defence contracting templates may be found on the Commercial Division [Tools and Templates intranet page](#).

Defence has numerous business policy owners that are responsible for ensuring Defence complies with applicable Commonwealth legislation and policy requirements, as well as with particular State and Territory legislation that may also apply to Defence activities. This legislation and policy often interacts with Defence *procurement* and in many cases is given effect to through *contracts*. There are many policy or support areas in Defence that that can assist in relation to this legislation and policy that intersects with *procurement* (eg contracting, legal, finance, environment, work health and safety, security, technical regulatory frameworks etc). These resources can be found on the *procurement* support areas link on the Commercial Division [Help Desk Kiosk intranet page](#).

Defence Procurement Policy Directives

Black Economy

D12. Defence *officials* undertaking an *open tender procurement* which is subject to the CPRs and with an estimated value of over \$4 million (including GST) **must** exclude, from consideration, *submissions* from *tenderers* that do not comply with the Black Economy Policy.

Note: Black Economy is a procurement connected policy.

The ASDEFCON contracting templates incorporate provisions that give effect to the Black Economy. Further information on the Black Economy Procurement Connected Policy can be found at the [Department of Finance website](#).

Trade sanctions

D13. Defence *officials* undertaking a *procurement* **must** ensure that the *procurement* does not breach any current [Australian Government trade sanctions](#).

Indigenous Procurement Policy

D14. Prior to approaching the market, Defence *officials* must determine whether the Indigenous Procurement Policy (IPP) applies to the *procurement* and if so comply with the IPP (see also Appendix A, item 16 of the CPRs).

Notes: The IPP is a procurement connected policy.

In addition, while not a Defence Procurement Policy Directive, Defence *officials* should also determine whether a disability business could deliver the required *goods* or services on a value for money basis before making any *approach to market*. If satisfied that value for money can be achieved, then the Defence *official* should procure the *goods* or services from the disability business (as permitted by Appendix A of the CPRs, item 15). If not, then the Defence *official* may procure through normal means. A list of Australian disability businesses can be found at the Australian Disability Enterprises website www.ade.org.au.

See Chapter 2 of the DPPM for more information about the IPP and the disability business exemption.

Workplace gender equality

D15. Defence *officials* undertaking a *procurement* at or above the relevant *procurement threshold* **must not** purchase *goods* or services from [contractors that do not comply](#) with the *Workplace Gender Equality Act 2012*.

Note: Workplace gender equality is a procurement connected policy.

Defence Policy for Industry Participation

D16. Defence *officials* **must** comply with the [Defence Policy for Industry Participation 2019](#) for all *procurements* valued at or above \$4 million (including GST) with the exception of the *procurement* of construction services to which it applies to *procurements* valued at or above \$7.5 million (including GST). In particular Defence *officials* must ensure that the successful *supplier* in the *procurement* implements the appropriate Australian Industry Capability (AIC) Schedule, AIC Plan, or Local Industry Capability Plan.

Note: When considering the value of the procurement for the purposes of applying the Defence Policy for Industry Participation Defence *officials* are to exercise judgement in determining the threshold and requirements for either a schedule or plan

Currently, only the ASDEFCON or DEQMS contracting templates incorporate provisions that give effect to the Defence Policy for Industry Participation, including requiring *tenderers* to submit AIC Schedules, AIC Plans or Local Industry Capability Plans as part of the tender process. The particular type of industry schedule or plan required will depend on the type and value of the procurement being undertaken. The successful *tenderer* is required to give effect to the agreed schedule or plan under the *contract*. For further information about the Defence Policy for Industry Participation, Defence *officials* should refer to the [Defence Industry Policy Division intranet page](#).

The Defence Policy for Industry Participation addresses the requirements of the Australian Industry

Participation Policy which is administered by the Department of Industry, Innovation and Science. Under the Australian Industry Participation Policy successful tenderers for certain non-materiel Commonwealth procurements valued as or above \$20 million are required to prepare and implement an Australian Industry Participation Plan. Potential defence suppliers therefore do not need to prepare a separate Australian Industry Participation Plan.

For materiel procurements above \$20 million also see Defence Industry Policy Statement 2016 and Defence Industrial Capability Plan 2018.

Code for the Tendering and Performance of Building Work 2016

D17. Defence *officials must* comply with the Code for the Tendering and Performance of Building Work 2016 (Building Work Code) when undertaking *procurements* for building work to which the Building Work Code applies.

Note: The Building Work Code is a procurement connected policy. In summary, the Building Work Code prevents Commonwealth agencies such as Defence from permitting companies to tender or enter into *contracts* for Commonwealth funded building work, unless the companies meet the requirements of the Building Work Code. In Defence, *procurements* for building work are normally managed by the Defence Estate and Infrastructure Group. The Defence Facilities and Infrastructure Suite of Contracts include provisions to ensure that Defence complies with the Building Work Code.

Public-private partnerships (PPP) policy

D18. Defence *officials must*:

- consider using a public-private partnership (PPP) for all project proposals having an estimated capital cost over \$50 million where there is an opportunity to enter into a long term *contract* (for example, 15-30 years) with a focus on the delivery of services to government (for example, making materiel or facilities available for use by Defence); and
- comply with the [National PPP Policy and Guidelines](#) (December 2008), and complete a [PPP Suitability Checklist](#).

Note: More guidance on PPPs is set out in the [Procurement Delivery Models Better Practice Guide](#). PPPs (or Private Finance Initiatives or 'PFIs') involve the creation of an asset through financing and ownership control by a private party and private sector delivery of related services that may normally have been provided by the Commonwealth. The Commonwealth may contribute to establishing the infrastructure, for example through land, capital works or risk sharing. The service delivered may be paid for by the Commonwealth or directly by the end user. Defence *officials* should consult with the [Public Private Partnership Centre of Expertise](#), and engage the Resource Assurance and Analysis Branch, in Chief Finance Officer Group (CFOG) for an independent review of financial and budgetary impact. Building work that involves a PPP or PFI for the delivery of functions or services of the Commonwealth is also subject to the Building Work Code (see Defence Procurement Policy Directive D17).

CPR 4.11 – 4.12

Coordinated procurement

- 4.11 Coordinated *procurement* refers to whole-of-government arrangements for procuring *goods* and services. A list of coordinated *procurements* can be found at www.finance.gov.au/procurement.
- 4.12 *Non-corporate Commonwealth entities must* use coordinated *procurements*. Exemptions from coordinated *procurements* can only be granted jointly by the requesting *non-corporate Commonwealth entity's* Portfolio Minister and the Finance Minister when a *non-corporate Commonwealth entity* can demonstrate a special need for an alternative arrangement. Prescribed *Corporate Commonwealth entities* may opt-in to coordinated *procurements*.

Defence Procurement Policy Directives

- D19. Prior to selecting a *procurement* method, Defence *officials* **must** determine whether a coordinated *procurement* arrangement has been established for the *goods* or services to be procured.
- D20. If a coordinated *procurement* arrangement has been established for *goods* or services, Defence *officials* **must** use the arrangement when procuring relevant *goods* or services unless an exemption is in place.

Notes: The Department of Finance has established several whole of government coordinated *procurement* arrangements for various *goods* and services, for example, ICT, telecommunications, stationery and office supplies, and airline travel. Defence *officials* can find more details at www.finance.gov.au/procurement.

Specialised military and classified telecommunications products and services (for military or intelligence agencies) fall outside the operation of the telecommunications coordinated *procurement* arrangements. For information about these exemptions Defence *officials* should refer to [Non Materiel Procurement - ICT](#).

CPR 4.13 – 4.15

Cooperative procurement

- 4.13 Cooperative *procurements* involve more than one *relevant entity* as the buyer. *Relevant entities* can procure cooperatively by approaching the market together or by joining an existing *contract* of another *relevant entity*.
- 4.14 If a *relevant entity* intends to join an existing *contract* of another *relevant entity*, the initial *request documentation* and the *contract* **must** have already specified potential use by other *relevant entities*.
- 4.15 *Relevant entities* joining an existing *contract* **must** ensure that:
- value for money is achieved;
 - the *goods* and services being procured are the same as provided for within the *contract*; and
 - the terms and conditions of the *contract* are not being materially altered.

Notes: The Defence Support Services panel (DSS Panel) is an example of a cooperative *procurement*. The panel was established so as to be able to be accessed by other Commonwealth agencies, and as a result many agencies have used and continue to use this panel for a range of support services.

Defence *officials* who are planning to establish a new *standing offer* arrangement with multiple *suppliers* should consider whether it would be appropriate for other Commonwealth agencies to be able to use the proposed panel for their needs. If so, the *approach to market* for the panel (and the panel deed) will need to expressly advise the *potential suppliers* that the panel may be used not only by Defence, but also by other agencies. However, in such circumstances, Defence *officials* will also need to consider the administrative arrangements for how the panel may be used, the extent to which this will impose an additional resource burden on Defence, and whether there will be any administrative fee charged to other agencies to cover Defence's costs of managing the panel.

CPR 4.16 – 4.18

Contract end dates

- 4.16 When a *contract* does not specify an *End date* it **must** allow for periodic review and subsequent termination of the *contract* by the *relevant entity*, if the *relevant entity* determines that it does not continue to represent value for money.

Third-party procurement

- 4.17 *Procurement* by third parties on behalf of a *relevant entity* can be a valid way to procure *goods* and services, provided it achieves value for money.

- 4.18 *Relevant entities* **must** not use third-party arrangements to avoid the rules in the CPRs when procuring *goods* and services.

Note: Under Defence *contracts*, it is not unusual for contractors to be required to undertake *procurements* on behalf of Defence. In many cases, this is simply part of the contractor's overall contracted responsibility to deliver a particular capability or outcome to Defence. In these cases, Defence does not usually intervene to specify that the contractors comply with CPR requirements, although Defence may wish to approve or specify under the *contract* the key subcontractors that the contractor will use, and further impose obligations on the contractor to ensure value for money is obtained, for example, by requiring the contractor to undertake competitive *procurements*. In other cases, the Commonwealth may task a contractor to undertake *procurement* activity that Defence *officials* might normally undertake themselves; that is, Defence is outsourcing the *procurement* function itself. In these cases, it may be appropriate to require the contractor to comply with the CPRs as if they were bound by them. If not, it could be argued that Defence was outsourcing the *procurement* function simply to avoid the operation of the CPRs. Defence is always under an obligation to ensure that its *procurement* activities (whether outsourced or not) deliver value for money to the Commonwealth.

5. Encouraging Competition

CPR 5.1 – 5.2

Encouraging competition

- 5.1 Competition is a key element of the Australian Government's *procurement* framework. Effective competition requires non-discrimination and the use of competitive *procurement* processes.
- 5.2 Participation in *procurement* imposes costs on *relevant entities* and *potential suppliers*. Those costs should be considered when designing a process that is commensurate with the scale, scope and risk of the proposed *procurement*.

Note: Chapter 2 of the DPPM discusses the importance of competition and selecting an appropriate *procurement* process to achieve value for money outcomes.

CPR 5.3 – 5.4

Non-discrimination

- 5.3 The Australian Government's *procurement* framework is non-discriminatory.
- 5.4 All *potential suppliers* to government **must**, subject to these CPRs, be treated equitably based on their commercial, legal, technical and financial abilities and not be discriminated against due to their size, degree of foreign affiliation or ownership, location, or the origin of their *goods* and services.

Note: See Chapter 2 of the DPPM for more information about the non-discrimination principle.

CPR 5.5 – 5.7

Small and Medium Enterprises

- 5.5 To ensure that *Small and Medium Enterprises* (SMEs) can engage in fair competition for Australian Government business, *officials* should apply *procurement* practices that do not unfairly discriminate against SMEs and provide appropriate opportunities for SMEs to compete. *Officials* should consider, in the context of value for money:
 - a. the benefits of doing business with competitive SMEs when specifying requirements and evaluating value for money;
 - b. barriers to entry, such as costly preparation of *submissions*, that may prevent SMEs from competing;
 - c. SMEs' capabilities and their commitment to local or regional markets; and
 - d. the potential benefits of having a larger, more competitive *supplier* base.
- 5.6 The Australian Government is committed to *non-corporate Commonwealth entities* sourcing at least 10 per cent of *procurement* by value from SMEs.
- 5.7 In addition, the Government has a target of *non-corporate Commonwealth entities* procuring 35 per cent of *contracts* by volume, with a value of up to \$20 million, from SMEs.

Notes: In the Defence context, the Australian Government's policy relating to *small to medium enterprises* (SMEs) is given effect to through the Defence Industry Policy 2016, and in particular, the Defence Policy for Industry Participation 2019 which includes the Australian Industry Capability program. As noted in Chapter 2 of the DPPM, the AIC program is identified as a specific exemption from the 'non-discrimination' principle (reflected in paragraph 5.3 of the CPRs) in the Australia-US Free Trade Agreement (AUSFTA), and other FTAs to which Australia is a party. The AUSFTA (Chapter 15, Annex A) provides that 'the Australian Government reserves the right to maintain the Australian Industry Involvement program and its successor programs and policies.' The AIC program is a successor to the previous Australian Industry Involvement (AII) program.

The ASDEFCON templates incorporate provisions that give effect to the AIC program, including requiring *tenderers* to submit AIC Schedule or Plan as part of the tender process. The successful *tenderer* is required to give effect to the agreed AIC Schedule or Plan under the *contract*. See also Defence Procurement Policy Directive D16 and the related note following.

6. Efficient, effective, economical and ethical procurement

CPR 6.1 – 6.9

Efficient, effective, economical and ethical procurement

- 6.1 The Australian Government promotes the proper use and management of *public resources*. Proper means efficient, effective, economical and ethical. For *non-corporate Commonwealth entities*, this would also include being not inconsistent with the policies of the Commonwealth.
- 6.2 Efficient relates to the achievement of the maximum value for the resources used. In *procurement*, it includes the selection of a *procurement* method that is the most appropriate for the *procurement* activity, given the scale, scope and risk of the *procurement*.
- 6.3 Effective relates to the extent to which intended outcomes or results are achieved. It concerns the immediate characteristics, especially price, quality and quantity, and the degree to which these contribute to specified outcomes.
- 6.4 Economical relates to minimising cost. It emphasises the requirement to avoid waste and sharpens the focus on the level of resources that the Commonwealth applies to achieve outcomes.
- 6.5 Ethical relates to honesty, integrity, probity, diligence, fairness and consistency. Ethical behaviour identifies and manages conflicts of interests, and does not make improper use of an individual's position.

Note: Chapter 2 of the DPPM, the Complex Procurement Guide, and the Early Industry Engagement Better Practice Guide provide more guidance about probity and effective industry engagement.

Ethical behaviour

- 6.6 In particular, *officials* undertaking *procurement* **must** act ethically throughout the *procurement*. Ethical behaviour includes:
 - a. recognising and dealing with actual, potential and perceived conflicts of interest;
 - b. dealing with *potential suppliers*, *tenderers* and *suppliers* equitably, including by:
 - i. seeking appropriate internal or external advice when probity issues arise, and
 - ii. not accepting inappropriate gifts or hospitality;
 - c. carefully considering the use of *public resources*; and
 - d. complying with all directions, including *relevant entity* requirements, in relation to gifts or hospitality, the Australian Privacy Principles of the *Privacy Act 1988* and the security provisions of the *Crimes Act 1914*.
- 6.7 *Relevant entities* **must** not seek to benefit from *supplier* practices that may be dishonest, unethical or unsafe. This includes not entering into *contracts* with *tenderers* who have had a judicial decision against them (not including decisions under appeal) relating to employee entitlements and who have not satisfied any resulting order. *Officials* should seek declarations from all *tenderers* confirming that they have no such unsettled orders against them.

Note: The [endorsed Defence contracting templates](#) contain the necessary provisions and form of statutory declaration to give effect to paragraph 6.7 of the CPRs.

- 6.8 If a complaint about *procurement* is received, *relevant entities* **must** apply timely, equitable and non-discriminatory complaint-handling procedures, including providing acknowledgment soon after the complaint has been received. *Relevant entities* should aim to manage the complaint process internally, when possible, through communication and conciliation.

Judicial Review

- 6.9 For the purposes of paragraph (a) of the definition of relevant Commonwealth Procurement Rules in section 4 of the *Government Procurement (Judicial Review) Act 2018*, the following paragraphs of Division 1 of these CPRs are declared to be relevant provisions: paragraphs 4.18, 5.4, 7.2, 7.10, 7.13 – 7.18, 7.20, and 9.3 – 9.6.

Defence Procurement Policy Directive

- D21. If a Defence *official* receives a *procurement* complaint from a *supplier* in relation to a Defence *procurement*, the *official* **must** direct the complaint to the [procurement complaints mailbox](mailto:procurement.complaints@defence.gov.au) (procurement.complaints@defence.gov.au).
- D22. Defence *officials* must comply with a notice from a *Government Procurement (Judicial Review) Act 2018* Section 19 Delegate to investigate a *procurement* complaint, and prepare a report on the investigation.
- D23. Defence *officials* must comply with a notice to suspend a relevant *procurement* from a *Government Procurement (Judicial Review) Act 2018* Section 20 Delegate.
- D24. PIC delegates must obtain legal advice from Defence Legal and commercial advice from the Commercial Division within CASG prior to issuing a Public Interest Certificate (PIC) under Section 22 of the *Government Procurement (Judicial Review) Act 2018*.⁵⁴ PIC delegates must ensure that the PIC and the supporting *submission* are registered on the PIC Register.

Note: In Defence all *procurement* complaints including those made under the *Government Procurement (Judicial Review) Act 2018* (JR Act) are managed through the Defence Procurement Complaints Scheme. [JR Act delegations](#) have been issued by the Secretary to certain Defence officials to receive and investigate complaints, suspend *procurements* and issue Public Interest Certificates (PICs). The JR Act delegations can be found on the Commercial Division Defence Procurement Complaints Scheme intranet page.

The [procurement complaints mailbox](mailto:procurement.complaints@defence.gov.au) (procurement.complaints@defence.gov.au) is managed by the Central Procurement Complaints Function which is part of the Defence Procurement Complaints Scheme.

A PIC is a document issued by a PIC delegate that states that it is not in the public interest for a 'covered procurement' process to be suspended while complaints made under the JR Act are investigated or applications for injunctions are being considered. The PIC Register and a template *submission* for a PIC (including the applicable considerations) can be found on the Commercial Function Defence Procurement Complaints Scheme intranet page.

A 'covered procurement' under the JR Act is a *procurement* to which the rules in Divisions 1 and 2 of the CPRs apply, and which is not included in a class of *procurements* specified by the Minister for Finance in a determination under section 5(2) of the JR Act. As at the date of this version of the DPPM, the Minister for Finance has not issued any determinations under section 5(2) of the JR Act.

Information regarding the Defence Procurement Complaints Scheme can be found on the Commercial Function [Defence Procurement Complaints Scheme intranet page](#).

7. Accountability and transparency

CPR 7.1 – 7.5

Accountability and transparency

- 7.1 The Australian Government is committed to ensuring accountability and transparency 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. Transparency involves *relevant entities* taking steps to enable appropriate

⁵⁴ This is set out in the [Instrument of Delegation](#) as a mandatory precondition to exercising the delegation in respect of section 22 of the JR Act

scrutiny of their *procurement* activity. The fundamental elements of accountability and transparency in *procurement* are outlined in this section.

Records

- 7.2 *Officials must* maintain a level of documentation commensurate with the scope, scale and risk for each *procurement*.
- 7.3 Documentation should provide accurate and concise information on:
 - a. the requirement for the *procurement*;
 - b. the process that was followed;
 - c. how value for money was considered and achieved;
 - d. relevant approvals; and
 - e. relevant decisions and the basis of those decisions.
- 7.4 *Relevant entities must* have access to evidence of agreements with *suppliers*, in the form of one or a combination of the following documents: a written *contract*, a purchase order, an invoice or a receipt.
- 7.5 Documentation **must** be retained in accordance with the *Archives Act 1983*.

Note: For Defence policy in relation to record keeping, Defence *officials* should refer to the [Defence Records Management Manual](#) (RECMAN). RECMAN takes a principles based approach to records management and does not include information about practices and procedures – which are proposed to be set out in a Records Management Operations Guide (under development). For further information, Defence *officials* should contact Directorate of Records Management Policy at DRMP.Policy@defence.gov.au.

CPR 7.6 – 7.9

AusTender

- 7.6 *AusTender*, the Australian Government's *procurement* information system, is a centralised web-based facility that publishes a range of information, including *relevant entities'* planned *procurements*, *open tenders* and *contracts* awarded. It also supports secure electronic tendering to deliver integrity and efficiency for *relevant entities* and *potential suppliers*.
- 7.7 *AusTender* is the system used to enable *relevant entities* to meet their publishing obligations under the CPRs. It also enables *relevant entities* to monitor and review their *AusTender*-based *procurements*, including *approaches to market*, publication of *contracts*, and amendments to *contracts*.

Annual procurement plans

- 7.8 In order to draw the market's early attention to potential *procurement* opportunities, each *relevant entity must* maintain on *AusTender* a current *procurement* plan containing a short strategic *procurement* outlook.
- 7.9 The *annual procurement plan* should include the subject matter of any significant planned *procurement* and the estimated publication date of the *approach to market*. *Relevant entities* should update their plans regularly throughout the year.

Notes: The *Annual Procurement Plan* (APP) is a tool that facilitates early *procurement* planning and notifies *potential suppliers* to the planned Defence *procurements*. The APP includes a short strategic *procurement* outlook for Defence supported by details of any planned *procurements*. The APP includes only those opportunities that are planned as *open tender* as there are linkages between the APP and subsequent *approaches to market*.

For practical reasons (given the volume of Defence *procurement*), Defence includes in its APP only those *procurements* valued at or above \$1,000,000 (GST inclusive). *Procurements* of a lesser value can be included if advance notice to industry is desired, but this is not mandatory.

Details regarding the coordination and publication of Defence's APP can be found on the [AusTender Publishing intranet page](#). Defence *officials* should refer to the intranet page for more information about the APP process.

CPR 7.10 – 7.15

Notifications to the market

- 7.10 *Relevant entities must use AusTender to publish open tenders and, to the extent practicable, to make relevant request documentation available.*
- 7.11 *Relevant entities may use AusTender to publish limited tender approaches to market and make relevant request documentation available.*

Note: All *open approaches to market (open tenders)* from Capability Acquisition and Sustainment Group (CASG) to be published on AusTender are managed centrally through the [CASG e-tendering service](#). Defence *officials* from other Groups and Services can submit requests for AusTender publication for *open approaches to market* to defence.procurement@defence.gov.au. For further information about AusTender publication, Defence *officials* should refer to the Commercial Division [AusTender intranet page](#).

- 7.12 *Relevant entities 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.*

Defence Procurement Policy Directive

D25. Defence *officials* undertaking a *procurement* must ensure that the *evaluation criteria* advertised in the *request documentation* are the criteria used for the evaluation of *submissions*.

- 7.13 In any additional notification through other avenues, such as printed media, the details selected for inclusion in the notification **must** be the same as those published on AusTender.

Note: The [Department of Finance's Resource Management Guide No 407](#) sets out Commonwealth policy in relation to advertising *open approaches to market* in the media. As a general rule, such advertising is not permitted, although exemptions from the policy may be granted on a case by case basis.

- 7.14 When a *relevant entity* provides *request documentation* or any other document, already published on AusTender in any other form (for example, a printed version) that documentation **must** be the same as that published on AusTender.
- 7.15 The initial *approach to market* for a *multi-stage procurement* must include, for every stage, the criteria that will be used to select *potential suppliers*, and if applicable, any limitation on the number of *potential suppliers* that will be invited to make *submissions*.

CPR 7.16 – 7.17

Providing information

- 7.16 *Officials must, on request, promptly provide, to eligible potential suppliers, request documentation that includes all information necessary to permit the potential supplier to prepare and lodge submissions.*
- 7.17 Following the rejection of a *submission* or the award of a *contract*, *officials must* promptly inform affected *tenderers* of the decision. Debriefings **must** be made available, on request, to unsuccessful *tenderers* outlining the reasons the *submission* was unsuccessful. Debriefings **must** also be made available, on request, to the successful *supplier(s)*.

Note: Defence *officials* should refer to Chapter 5 of the Complex Procurement Guide for guidance about when to inform an affected *tenderer* of a decision in relation to a *procurement* process.

CPR 7.18 – 7.20

Reporting arrangements

- 7.18 *Relevant entities must report contracts and amendments on AusTender within 42 days of entering into (or amending) a contract if they are valued at or above the reporting threshold.*
- 7.19 The reporting thresholds (including GST) are:
- \$10,000 for non-corporate Commonwealth entities; and
 - for prescribed corporate Commonwealth entities ,
 - \$400,000 for procurements other than procurement of construction services, or
 - \$7.5 million for procurement of construction services.
- 7.20 Regardless of value, *standing offers* must be reported on AusTender within 42 days of the *relevant entity* entering into or amending such arrangements. Relevant details in the *standing offer* notice, such as *supplier* details and the names of other *relevant entities* participating in the arrangement, must be reported and kept current.

Defence Procurement Policy Directive

D26. To enable Defence to meet its accountability and transparency requirements (including AusTender reporting), for all new *contracts* and *contract* amendments that meet the *AusTender reporting thresholds*, Defence officials **must** complete the AE643 Defence Purchasing form.

Notes: The *reporting threshold* in paragraph 7.19a of the CPRs applies to the Department of Defence as a *non-corporate Commonwealth entity*.

The CPR reporting requirements apply equally to *contract* changes (whether called a *contract* change, amendment or variation or some other terminology) that are valued at or above the relevant *reporting threshold* as they do to the original *contracts*. However, the reporting requirements do not apply to *contracts* or *contract* changes for goods or services procured outside Australia to be used completely outside of Australia.

To assist Defence to meet its *AusTender* reporting requirements, Defence has developed the [AE643 form](#) and related *AusTender* reporting procedure. The form and procedure covers the proper recording of *contracts* and amendments that may be undertaken or processed through ROMAN, MILIS and the CMS financial management system. Defence officials should refer to the Commercial Division [AusTender intranet page](#) for more information about *AusTender* reporting requirements, including in relation to *standing offer* notices.

For *procurement* of Contractors, Consultants or Outsourced Service Providers, the AE643 records that a Senior Executive Service (SES) Band 1 or a 1 Star Officer or above has endorsed the requirement in accordance with Defence Procurement Policy Directive D10.

CPR 7.21

Subcontractors

- 7.21 *Relevant entities must make available on request, the names of any subcontractor(s) engaged by a contractor in respect of a contract.*
- Relevant entities must* require contractors to agree to the public disclosure of the names of any subcontractors engaged to perform services in relation to a *contract*.
 - Contractors **must** be required to inform relevant subcontractors that the subcontractor's participation in fulfilling a *contract* may be publicly disclosed.

Note: The [endorsed Defence contracting templates](#) contain the necessary provisions to give effect to paragraph 7.21 of the CPRs.

CPR 7.22 – 7.25

Treatment of confidential information

- 7.22 When conducting a *procurement* and awarding a *contract*, *relevant entities* should take appropriate steps to protect the Commonwealth's confidential information. This includes

observing legal obligations, such as those under the *Privacy Act 1988*, and statutory secrecy provisions.

- 7.23 *Submissions must* be treated as confidential before and after the award of a *contract*. Once a *contract* has been awarded the terms of the *contract*, including parts of the *contract* drawn from the *supplier's submission*, are not confidential unless the *relevant entity* has determined and identified in the *contract* that specific information is to be kept confidential in accordance with the 'confidentiality test' set out in the guidance on *Confidentiality Throughout the Procurement Cycle* at www.finance.gov.au/procurement.
- 7.24 The need to maintain the confidentiality of information should always be balanced against the public accountability and transparency requirements of the Australian Government. It is therefore important for *officials* to plan for, and facilitate, appropriate disclosure of *procurement* information. In particular, *officials* should:
- include provisions in *request documentation* and *contracts* that alert *potential suppliers* to the public accountability requirements of the Australian Government, including disclosure to the Parliament and its committees;
 - when relevant, include a provision in *contracts* to enable the Australian National Audit Office to access contractors' records and premises to carry out appropriate audits; and
 - consider, on a case-by-case basis, any request by a *supplier* for material to be treated confidentially after the award of a *contract*, and enter into commitments to maintain confidentiality only when such commitments are appropriate.
- 7.25 When confidential information is required to be disclosed, for example following a request from a parliamentary committee, reasonable notice in writing **must** be given to the party from whom the information originated.

Note: The [endorsed Defence contracting templates](#) contain the necessary provisions to give effect to the CPR requirements on treatment of confidential information. Defence *officials* should refer to the Commercial Division [Fact Sheets and Guidance intranet page](#) for more guidance on how to determine what information is actually 'confidential' and the use of confidentiality provisions in Defence *contracts*.

CPR 7.26

Contract management/Standard verification

- 7.26 For *procurements* valued at or above the relevant *procurement threshold*, where applying a *standard* for *goods* or *services*, *relevant entities must* make reasonable enquiries to determine compliance with that *standard*:
- this includes gathering evidence of relevant certifications; and
 - periodic auditing of compliance by an independent assessor.

CPR 7.27

Other obligations

- 7.27 Other reporting and disclosure obligations apply to *officials* undertaking *procurement*, including:
- disclosure of *procurement* information for *relevant entity* annual reporting purposes;
 - disclosure of non-compliance with the CPRs through the Commonwealth's compliance reporting process;
 - disclosure to the Parliament and its committees, as appropriate, in line with the Government Guidelines for *Officials Witnesses before Parliamentary Committees and Related Matters*;
 - disclosure of information consistent with the *Freedom of Information Act 1982*; and
 - disclosure of discoverable information that is relevant to a case before a court.

8. Procurement risk

CPR 8.1 – 8.4

Procurement risk

- 8.1 Risk management comprises the activities and actions taken by a *relevant entity* to ensure that it is mindful of the risks it faces, that it makes informed decisions in managing these risks, and identifies and harnesses potential opportunities.
- 8.2 *Relevant entities must* establish processes for the identification, analysis, allocation and treatment of risk when conducting a *procurement*. The effort directed to risk assessment and management should be commensurate with the scale, scope and risk of the *procurement*. *Relevant entities* should consider risks and their potential impact when making decisions relating to value for money assessments, approvals of proposals to spend *relevant money* and the terms of the *contract*.
- 8.3 *Relevant entities* should consider and manage their *procurement* security risk in accordance with the *Australian Government's Protective Security Policy Framework*.
- 8.4 As a general principle, risks should be borne by the party best placed to manage them; that is, *relevant entities* should generally not accept risk which another party is better placed to manage. Similarly, when a *relevant entity* is best placed to manage a particular risk, it should not seek to inappropriately transfer that risk to the *supplier*.

Defence Procurement Policy Directives

D27. For all *procurements* at or above the relevant *procurement threshold*, Defence officials **must**:

- undertake a risk assessment so that they are properly informed about the risks associated with the *procurement*; and
- subject to the risk assessment, develop and implement a risk management plan to manage the risks.

D28. Defence officials **must** undertake a liability risk assessment prior to agreeing to limit a third party's liability under a *contract*.

Notes: Chapter 2 of the DPPM provides guidance on risk management. The endorsed Defence contracting templates enable Defence officials to allocate risks to the parties best placed to manage them.

The Commonwealth may limit a third party's (including a contractor's) liability in various ways, for instance, by agreeing to one or more financial caps on different heads of loss or damage that a contractor may be exposed to under a *contract* (for example, for personal injury, property damage, delay or other contractual non-performance). Defence has developed tools and guidance to assist Defence officials with undertaking [liability risk assessments](#). See also Defence Procurement Policy Directive D6 which requires Defence officials to undertake a liability risk assessment in relation to contingent liabilities.

9. Procurement method

CPR 9.1

Procurement method

- 9.1 Australian Government *procurement* is conducted by *open tender* or *limited tender*. These methods are detailed in this section.

Defence Procurement Policy Directives

- D29. In deciding on the *procurement* method for a *procurement*, Defence officials **must** ensure that the method is commensurate with the scope, scale, and risk of the *procurement* and is consistent with value for money.
- D30. Defence officials **must** ensure that all *procurement* method decisions are appropriately documented.

Note: For *procurements* valued at or above \$200,000 (GST inclusive), the Endorsement to Proceed template is normally the mechanism by which *procurement* method decisions are documented. The Commitment Approval delegate (see section 23(3) of the PGPA Act) would also confirm the *procurement* method decision as part of the exercise of their delegation.

CPR 9.2 – 9.7**Requirement to estimate value of procurement**

- 9.2 The expected value of a *procurement* **must** be estimated before a decision on the *procurement* method is made. The expected value is the maximum value (including GST) of the proposed *contract*, including options, extensions, renewals or other mechanisms that may be executed over the life of the *contract*.
- 9.3 The maximum value of the *goods* and services being procured **must** include:
- all forms of remuneration, including any premiums, fees, commissions, interest, allowances and other revenue streams that may be provided for in the proposed *contract*;
 - the value of the *goods* and services being procured, including the value of any options in the proposed *contract*; and
 - any taxes or charges.
- 9.4 When a *procurement* is to be conducted in multiple parts with *contracts* awarded either at the same time or over a period of time, with one or more *suppliers*, the expected value of the *goods* and services being procured **must** include the maximum value of all of the *contracts*.
- 9.5 A *procurement* **must** not be divided into separate parts solely for the purpose of avoiding a relevant *procurement threshold*.
- 9.6 When the maximum value of a *procurement* over its entire duration cannot be estimated the *procurement* **must** be treated as being valued above the relevant *procurement threshold*.

Procurement thresholds

- 9.7 When the expected value of a *procurement* is at or above the relevant *procurement threshold* and an exemption in Appendix A is not utilised, the rules in Division 2 **must** also be followed. The *procurement thresholds* (including GST) are:
- for *non-corporate Commonwealth entities*, other than for *procurements of construction services*, the *procurement threshold* is \$80,000;
 - for prescribed *corporate Commonwealth entities*, other than for *procurements of construction services*, the *procurement threshold* is \$400,000; or
 - for *procurements of construction services by relevant entities*, the *procurement threshold* is \$7.5 million.

Defence Procurement Policy Directives

Procurements under \$10,000 (GST inclusive) - Defence Purchasing Card

- D31. For *procurements* valued under \$10,000 (GST inclusive), Defence *officials* **must** use the Defence Purchasing Card (DPC), unless there are valid reasons for not doing so.
- D32. Defence *officials* **must** not use the DPC for *procurements* made through MILIS (the core logistics management system in Defence).

Procurements under \$200,000 (GST inclusive) - Commonwealth Contracting Suite

- D33. For *procurements* valued under \$200,000 (GST inclusive), Defence *officials* **must** use the Department of Finance's Commonwealth Contracting Suite (CCS), unless the *procurement* has been assessed as exempt from this requirement by applying the Defence specific CCS Decision Tree.
- D34. If the *procurement* is exempt from using the CCS, the *official* **must** use an endorsed Defence contracting template.

Procurements valued at or above \$200,000 (GST inclusive)

- D35. For *procurements* valued between \$200,000 and \$1 million (GST inclusive), officials **must** consider using the CCS as the basis for the *procurement*. If the CCS is unsuitable or the *procurement* is valued at or above \$1 million (GST inclusive), if an endorsed Defence contracting template exists for the type of *procurement* being undertaken, Defence *officials* **must** use that template as the basis for the *procurement*.
- D36. If a Defence *official* intends to use a form of *contract* other than an endorsed Defence contracting template, the *official* **must** ensure the *contract* is appropriate for the requirement, and capable of achieving an appropriate risk allocation consistent with the Commonwealth resource management framework.

Procurements through the US Foreign Military Sales (FMS) system

- D37. If a Defence *official* is undertaking a *procurement* through the FMS system, the *official* **must** consult with the Office of the Counsellor Defence Materiel (Washington) (DEFMAT (W)) prior to establishing or amending the FMS case.

Notes: Defence *officials* should follow the [Simple Procurement Process Tool](#) when undertaking low risk, low value (or 'simple') *procurements*.

For Defence Procurement Policy Directive D35, the Department of Finance's Commonwealth Contracting Suite (CCS) and the Defence specific CCS Decision Tree can be found at the Department of Finance's [Commonwealth Contracting Suite webpage](#).

The endorsed Defence contracting templates and guidance on appropriate template selection can be found on the Commercial Policy [Tools and Templates intranet page](#)

The US Foreign Military Sales (FMS) program is a form of security assistance authorised by the US Arms Export Control Act (AECA) and is part of US foreign policy. Under Section 3, of the AECA, the US may sell defence articles and services to foreign countries like Australia when to do so will strengthen the security of the US and promote world peace. For more information about the FMS system see the [Support Office Foreign Military Sales intranet page](#).

The Capability Acquisition and Sustainment Group has a Washington office (CASG-W) which is the focal point for Defence materiel related activity in North America, providing acquisition and sustainment support to Defence and other Australian government agencies. DEFMAT (W) provides acquisition advice to the Head of Australian Defence Staff (Washington) (HADS(W)) and is the representative of Deputy Secretary CASG in North America. The office supports a range of activities, including FMS and direct commercial *procurements*. For more information and contact details see the [Support Office Foreign Military Sales intranet page](#).

CPR 9.8**Procurement methods**Method 1 – Open tender

- 9.8 *Open tender* involves publishing an *open approach to market* and inviting *submissions*. This includes *multi-stage procurements*, provided that the first stage is an *open approach to market*.

Defence Procurement Policy Directive

D38. Defence officials **must** use an *open tender* process for all *procurements* at or above the relevant *procurement threshold*, unless the conditions for a *limited tender* can be satisfied, or the *procurement* is otherwise exempt from this requirement.

Note: See Defence Procurement Policy Directive D2 (and the related Table 1) for Defence *procurements* that are exempt from the *open tender* requirement. Appendix A of the CPRs also sets out various kinds of *procurements* that do not require *open tender* processes.

See paragraphs 30 to 36 in Chapter 2 of the DPPM for guidance about *procurement* methods.

CPR 9.9 – 9.11Method 2 – Limited tender

- 9.9 *Limited tender* involves a *relevant entity* approaching one or more *potential suppliers* to make *submissions*, when the process does not meet the rules for *open tender*.
- 9.10 For *procurements* at or above the relevant *procurement threshold*, *limited tender* can only be conducted in accordance with paragraph 10.3, or when a *procurement* is exempt as detailed in Appendix A.
- 9.11 When conducting a *limited tender* in accordance with paragraph 9.10, the relevant exemption or *limited tender* condition **must** be reported on *AusTender*.

Defence Procurement Policy Directive

- D39. For *procurements* at or above the relevant *procurement threshold*, a Defence official **must not** use a *limited tender* process unless a circumstance in paragraph 10.3 of the CPRs applies, or the *procurement* is otherwise exempt from this requirement.
- D40. In undertaking a *limited tender*, Defence officials **must** ensure that, where practicable, the number of *potential suppliers* invited to participate in the process is sufficient to ensure a value for money outcome.

Notes: Many *procurements* related to the acquisition or sustainment of Defence major capital equipment are undertaken through *limited tender* processes, despite not meeting the requirements of paragraph 10.3 of the CPRs. Usually, this is because they are exempt *procurements* of goods or services (see Defence Procurement Policy Directives D2-D4).

A particular *procurement* may be categorised as a *limited tender*, irrespective whether or not a request for tender or similar *request documentation* is used to undertake the *procurement*. Further, a 'sole source' arrangement with a contractor constitutes a *limited tender* for the purposes of the CPRs. Similarly, each FMS case with the US Government constitutes a *limited tender*.

See paragraphs 37 to 47 in Chapter 2 of the DPPM for guidance about how the circumstances set out in paragraph 10.3 of the CPRs may apply so as to justify using a *limited tender* process.

Where a *limited tender procurement* method has been utilised for a *procurement* valued at or above the relevant *procurement threshold*, the Contract Notice published on *AusTender* will include either:

- the exemption from Division 2 of the CPRs; or
- the condition from paragraph 10.3 of the CPRs.

CPR 9.12 – 9.13

Procurement from existing arrangements

Procurements from standing offers

- 9.12 *Procurements* from an existing *standing offer* are not subject to the rules in Division 2 of these CPRs. However, these *procurements* **must** comply with the rules in Division 1.
- 9.13 *Officials* should report the original *procurement* method used to establish the *standing offer* when they report *procurements* from *standing offers*.

Defence Procurement Policy Directive

- D41. If a *standing offer* panel is established in Defence for *goods* or *services*, Defence *officials* **must** use the *standing offer* when procuring relevant *goods* or *services*, unless a Group Head has approved not doing so.
- D42. Defence *officials* **must not** use a *standing offer* panel to order *goods* or *services* that were not specified in the *request documentation* used to establish the arrangement, even if the relevant *supplier* may be able to provide the *goods* or *services*.

Notes: *Standing offer* panels provide an efficient and effective mechanism to enable Defence *officials* to procure relevant *goods* and *services* from industry. The benefit of these arrangements is eroded if *officials* seek to procure outside the panel, noting that panel members also have the reasonable expectation that Defence will use the panel rather than procure outside it. Nevertheless, there may be occasions when Defence *officials* may need to procure *goods* or *services* outside the panel, for example, where particular knowledge or expertise is required that is only available outside the panel. A valid reason could also include where a *standing offer* panel arrangement has been established by another Commonwealth agency which is able to be used by Defence and which offers better value for money than the corresponding Defence panel. For further information on *standing offers* and current Defence *standing offer* panel arrangements, Defence *officials* should refer to the factsheet on the Commercial Division [Fact Sheets and Guidance intranet page](#) and the Commercial Division [Defence Goods and Services Procurement Directory intranet page](#).

The Department of Finance has established several whole of government coordinated *procurement* arrangements for various *goods* and *services*, for example, ICT, telecommunications, stationery and office supplies, and airline travel. Defence *officials* are required to use these arrangements unless specific exemptions apply (see paragraphs 4.9 and 4.10 of the CPRs and Defence Procurement Policy Directives D19 and D20 and related Notes). Defence *officials* can find more details at www.finance.gov.au/procurement

Chapter 5

Procurements valued at or above the procurement thresholds

Note: Chapter 5 of the DPPM incorporates all the rules from Division 2 of the CPRs.

Defence Procurement Policy Directive

D43. Defence *officials* **must** comply with the Defence Procurement Policy Directives in Chapter 5 of the DPPM (in addition to those in Chapters 1, 3 and 4) when undertaking *procurements* in Defence, if the *procurement* is valued at or above the relevant *procurement threshold* (unless otherwise specified in the relevant Defence Procurement Policy Directive).

Note: Defence Procurement Policy Directive D43 means that, even though Defence *officials* may be exempt from having to comply with the additional rules in Division 2 of the CPRs in relation to their *procurement*, Defence *officials* are still required to comply with the Defence Procurement Policy Directives that are set out in Chapter 5 of the DPPM, unless stated otherwise. This is because these Defence Procurement Policy Directives are of general application and compliance with them will help to ensure that Defence undertakes its *procurements* in an efficient, effective, economical and ethical manner as required by the PGPA Act.

10. Additional rules

CPR 10.1 – 10.8

Additional rules

- 10.1 The rules set out in Division 2 are additional to those in Division 1 and **must** not be interpreted or applied in a manner that diminishes or negates Division 1.
- 10.2 A *procurement*, except a *procurement* that is specifically exempt in accordance with Appendix A, is subject to the rules contained in Division 2 if the expected value of the *procurement* is at, or above, the relevant *procurement threshold*.

Conditions for limited tender

- 10.3 A *relevant entity* **must** only conduct a *procurement* at or above the relevant *procurement threshold* through *limited tender* in the following circumstances:
 - a. when, in response to an *open approach to market*:
 - 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 *relevant entity* does not substantially modify the essential requirements of the *procurement*; or
 - b. when, for reasons of extreme urgency brought about by events unforeseen by the *relevant entity*, the *goods* and *services* could not be obtained in time under *open tender*; or
 - c. for *procurements* made under exceptionally advantageous conditions that arise only 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*; or
 - d. when 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
 - 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; or
- e. 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, when a change of *supplier* would compel the *relevant entity* to procure *goods* and services that do not meet requirements for compatibility with existing equipment or services; or
- f. for *procurements* in a *commodity market*; or
- g. when a *relevant entity* procures a prototype or a first *good* or service that is intended for limited trial or that is developed at the *relevant entity's* request in the course of, and for, a particular *contract* for research, experiment, study, or original development; or
- h. in the case of a *contract* awarded to the winner of a design contest, provided that
 - 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.

Note: See paragraphs 37 to 45 in Chapter 2 of the DPPM for guidance about how the circumstances set out in paragraph 10.3 of the CPRs may apply so as to justify using a *limited tender* process.

- 10.4 A *procurement* at or above the relevant *procurement threshold* conducted by *limited tender* is not required to meet the rules in paragraphs 10.6 -10.8 (*Request documentation*), 10.20-10.31 (Minimum time limits), or 10.35 (*Awarding contracts*).
- 10.5 In accordance with the general rules for accountability set out in these CPRs, for each *contract* awarded through *limited tender*, an **official must** prepare and appropriately file within the *relevant entity's* records management system a written report that includes:
 - a. the value and type of *goods* and services procured;
 - b. a statement indicating the circumstances and conditions that justified the use of *limited tender*; and
 - c. a record demonstrating how the *procurement* represented value for money in the circumstances.

Request documentation

- 10.6 *Request documentation must* include a complete description of:
 - a. the *procurement*, including the nature, scope and the quantity of the *goods* and services to be procured or, where the quantity is not known, the estimated quantity, and any requirements to be fulfilled, including any technical *specifications*, conformity certification, plans, drawings, or instructional materials;
 - b. any *conditions for participation*, including any financial guarantees, information and documents that *potential suppliers* are required to submit;
 - c. any *minimum content and format requirements*;
 - d. *evaluation criteria* to be considered in assessing *submissions* and, if applicable to the evaluation, the relative importance of those criteria;
 - e. any dates for the delivery of *goods* or supply of services, taking into account the complexity of the *procurement*; and
 - f. any other terms or conditions relevant to the evaluation of *submissions*.
- 10.7 However, *relevant entities* are not obligated to release confidential information, information sensitive to essential security or information that may impede competition.
- 10.8 *Relevant entities must* ensure that *potential suppliers* and *tenderers* are dealt with fairly and in a non-discriminatory manner when providing information leading to, or following,

an approach to market. *Relevant entities must* promptly reply to any reasonable request from a *potential supplier* for relevant information about a *procurement*, and when responding to such enquiries *must* avoid a *potential supplier*, or group of *potential suppliers*, gaining an unfair advantage in a competitive *procurement* process.

Defence Procurement Policy Directives

- D44. Defence *officials must* ensure that the *request documentation* for a *procurement* is consistent with the approved *procurement* plan and includes all of the information necessary to enable *potential suppliers* to properly prepare and lodge *submissions*.
- D45. Defence *officials must* ensure that all *potential suppliers* are provided with the same information in the *request documentation*, including any amendments to the *request documentation*.
- D46. For all competitive *procurement* processes, Defence *officials must* prepare a tender evaluation plan that is commensurate with the scale, scope and risk of the *procurement*.
- D47. Defence *officials must* ensure that the tender evaluation plan for a *procurement* is approved by the relevant *official* no later than the opening of *submissions*.

Note: Defence officials should refer to Chapter 5 of the Complex Procurement Guide for more information about how to undertake a tender evaluation for a complex *procurement*.

CPR 10.9 – 10.13

Specifications

- 10.9 A *relevant entity must* not use *specifications* or prescribe any conformity assessment procedure in order to create an unnecessary obstacle to trade.
- 10.10 In prescribing *specifications* for *goods* and *services*, a *relevant entity must*, where appropriate:
- set out the *specifications* in terms of performance and functional requirements; and
 - base technical *specifications* on international *standards*, when they exist and apply to the relevant *procurement*, except when the use of international standards would fail to meet the *relevant entity's* requirements.
- 10.11 Where an Australian *standard* is applicable for *goods* or *services* being procured, tender responses *must* demonstrate the capability to meet the Australian *standard*, and *contracts must* contain evidence of the applicable standards (see paragraph 7.26).
- 10.12 A *specification must* not require or refer to a particular trademark or trade name, patent, copyright, design or type, specific origin, producer, or *supplier*, unless there is no other sufficiently precise or intelligible way of describing the requirement. In an exceptional circumstance when this type of *specification* is used, words such as 'or equivalent' *must* be included in the *specification*.
- 10.13 A *relevant entity* may conduct market research and other activities in developing *specifications* for a particular *procurement* and allow a *supplier* that has been engaged to provide those services to participate in *procurements* related to those services. *Relevant entities must* ensure that such a *supplier* will not have an unfair advantage over other *potential suppliers*.

Defence Procurement Policy Directive

- D48. If essential requirements are specified in *request documentation*, Defence *officials must* exclude a *tenderer* from further consideration in the *procurement* process, if the *official* considers that the *tenderer* has not met those requirements (unless the *procurement* is exempt from Division 2 of the CPRs).

Notes: Defence *officials* should refer to Chapter 3 of the Complex Procurement Guide for more information about the use of standards, *specifications* and essential requirements in *request documentation*. For *procurements* that are exempt from Division 2 of the CPRs, Defence Procurement Policy Directive D48 should be followed as good practice.

CPR 10.14 – 10.19

Modification of evaluation criteria or specifications

10.14 When, during the course of a *procurement*, a *relevant entity* modifies the *evaluation criteria* or *specifications* set out in an *approach to market* or in *request documentation*, or amends or reissues an *approach to market* or *request documentation*, it **must** transmit all modifications or amended or reissued documents:

- a. to all the *potential suppliers* that are participating at the time the information is amended, if known, and, in all other cases, in the same manner as the original information; and
- b. in adequate time to allow *potential suppliers* to modify and re-lodge their *submissions*, if required.

Conditions for participation

10.15 *Relevant entities* may specify *conditions for participation* that *potential suppliers* **must** be able to demonstrate compliance with in order to participate in a *procurement* or, if applicable, class of *procurement*. *Conditions for participation* **must** be limited to those that will ensure that a *potential supplier* has the legal, commercial, technical and financial abilities to fulfil the requirements of the *procurement*.

10.16 *Conditions for participation* may require relevant prior experience when that experience is essential to meet the requirements of the *procurement* but **must** not specify, as a requirement, that *potential suppliers* have previous experience with the *relevant entity* or with the Australian Government or in a particular location.

10.17 In assessing whether a *tenderer* satisfies the *conditions for participation*, a *relevant entity* **must**:

- a. evaluate financial, commercial, and technical abilities on the basis of the *tenderer's* business activities, wherever they have occurred; and
- b. base its determination solely on the *conditions for participation* that the *relevant entity* has specified in either the *approach to market* or the *request documentation*.

10.18 A *relevant entity* may exclude a *tenderer* on grounds such as bankruptcy, insolvency, false declarations, or significant deficiencies in performance of any substantive requirement or obligation under a prior *contract*.

10.19 *Officials* **must** make reasonable enquiries that the *procurement* is carried out considering relevant regulations and/or regulatory frameworks, including but not limited to *tenderers'* practices regarding:

- a. labour regulations, including ethical employment practices;
- b. workplace health and safety; and
- c. environmental impacts.

Note: See the Notes following paragraph 4.10 of the CPRs as extracted in Chapter 4 of the DPPM.

Defence Procurement Policy Directive

D49. If *conditions for participation* are specified in *request documentation*, Defence *officials* **must** exclude a *tenderer* from further consideration in the *procurement* process, if the *official* considers that the *tenderer* has not met those conditions (unless the *procurement* is exempt from Division 2 of the CPRs).

Note: Defence officials should refer to Chapters 3 and 5 of the Complex Procurement Guide for more information about *conditions for participation*.

CPR 10.20 – 10.27

Minimum time limits

- 10.20 *Potential suppliers must* be required to lodge *submissions* in accordance with a common deadline.
- 10.21 *Relevant entities must* provide sufficient time for *potential suppliers* to prepare and lodge *submissions* in response to an *approach to market*. Time limits discussed in this section represent minimum time limits to lodge *submissions* and should not be treated as default time limits.
- 10.22 The time limit for *potential suppliers* to lodge a *submission must* be at least 25 days from the date and time that a *relevant entity* publishes an *approach to market* for an *open tender*.
- 10.23 The 25 day period referred to in paragraph 10.22 **must** be extended by five days for each of the following circumstances:
- when a *relevant entity* does not make *request documentation* available electronically from the date that a *relevant entity* published an *approach to market*; and/or
 - when a *relevant entity* does not accept *submissions* electronically.
- 10.24 A *relevant entity* may establish a time limit that is less than 25 days but no less than 10 days under the following circumstances:
- when the *relevant entity* has published details of the *procurement* in an *annual procurement plan* on *AusTender*, at least 40 days and not more than 12 months in advance, and those details include a description of the *procurement*, the timing of the *approach to market* and the procedure to obtain *request documentation*;
 - when the *relevant entity* procures *commercial goods and services* (unless the *relevant entity* does not accept the *submissions* electronically, in which case the minimum time limit **must** be no less than 13 days); or
 - when a genuine state of urgency renders the normal time limit impracticable.
- 10.25 In the case of a *multi-stage procurement* each *approach to market must* comply with the time limits stated in paragraph 10.22 – 10.24.
- 10.26 When a *relevant entity* intends to specify *conditions for participation* that require *potential suppliers* to undertake a separate registration procedure, the *relevant entity must* state the time limit for responding to the registration in the *approach to market*. Any such *conditions for participation must* be published in sufficient time to enable all *potential suppliers* to complete the registration procedures within the time limit for the *procurement*.
- 10.27 When a *relevant entity* extends the time limit for registration or *submission*, or when negotiations are terminated and *potential suppliers* are permitted to lodge new *submissions*, the new time limit **must** apply equitably.

Defence Procurement Policy Directive

D50. Defence officials **must** not grant an extension to a deadline for registration or lodgement of *submissions* once the closing date for registration or *submissions* has passed.

CPR 10.28 – 10.31

Late submissions

- 10.28 Late *submissions must* not be accepted unless the *submission* is late as a consequence of mishandling by the *relevant entity*. A *relevant entity must* not penalise any *potential supplier* whose *submission* is received after the specified deadline if the delay is due solely to mishandling by the *relevant entity*.

10.29 *Relevant entity* mishandling does not include mishandling by a courier or mail service provider engaged by a *potential supplier* to deliver a *submission*. It is the responsibility of the *potential supplier* to ensure that the *submission* is dispatched in sufficient time for it to be received by the *relevant entity* by the deadline.

10.30 Late *submissions* should be returned unopened to the *potential supplier* who submitted them, to:

- a. ensure that they are not evaluated or compared with *submissions* which were submitted by the due time and date;
- b. demonstrate to other *tenderers* that the process for receiving *submissions* is fair and impartial; and
- c. eliminate scope for any suggestion that the *submission* was rejected for any reason other than because it was late.

10.31 It may be necessary to open a late *submission* if there is no return address or any indication of which *approach to market* the *submission* relates. When a *submission* has been opened under such circumstances the *potential supplier* should be advised that the *submission* was rejected due to lateness and advised of the reason it was opened.

Defence Procurement Policy Directives

D51. Defence *officials* **must** decide whether to accept a late *submission* before the relevant *submission* is opened.

D52. For *procurements* not covered by Division 2 of the CPRs, Defence *officials* may accept a late *submission* if this is consistent with probity in the circumstances of the case.

Notes: Before accepting a late *submission*, Defence *officials* should seek specialist contracting or legal advice. Defence *officials* should refer to Chapters 4 and 5 of the Complex Procurement Guide for more information about the probity risks relating to the acceptance of late tenders.

There are three ways through which Division 2 of the CPRs will not apply to a *procurement*: First, the *procurement* is below the relevant *procurement threshold* (see paragraph 9.7 of the CPRs); second, the *procurement* is exempt through the application of the general exemptions listed in Appendix A to the CPRs (see Appendix A to the DPPM); and third, the *procurement* is exempt through the application of a Defence specific exemption as a result of a measure made by the Secretary under paragraph 2.6 of the CPRs (see Defence Procurement Policy Directives D2 - D4).

CPR 10.32 – 10.34

Receipt and opening of submissions

10.32 Procedures to receive and open *submissions* **must** guarantee fairness and impartiality and **must** ensure that *submissions* are treated in confidence.

10.33 When a *relevant entity* provides *tenderers* with opportunities to correct unintentional errors of form between the opening of *submissions* and any decision, the *relevant entity* **must** provide the opportunity equitably to all *tenderers*.

10.34 Further consideration **must** be given only to *submissions* that meet *minimum content and format requirements*.

Defence Procurement Policy Directive

D53. If *minimum content and format requirements* are specified in *request documentation*, Defence *officials* **must** exclude a *tenderer* from further consideration in the *procurement* process, if the *official* considers that the *tenderer* has not met those requirements, unless the *official* considers that there has been an unintentional error of form (or unless the *procurement* is exempt from Division 2 of the CPRs).

Note: Defence *officials* should refer to Chapters 3 and 5 of the Complex Procurement Guide for more information about *minimum content and format requirements* and unintentional errors of form.

CPR 10.35 – 10.36

Awarding contracts

10.35 Unless a *relevant entity* determines that it is not in the public interest to award a *contract*, it **must** award a *contract* to the *tenderer* that the *relevant entity* has determined:

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

10.36 A *relevant entity* **must** not use options, cancel a *procurement*, or terminate or modify an awarded *contract*, so as to avoid the rules of Division 2 of these CPRs.

Notes: The CPRs state that public interest grounds generally arise in response to unforeseen events or new information that materially affects the objectives or reasons underlying the original *procurement* requirement as specified in the request document.

Defence *officials* should typically not make any public announcement regarding the selection of a preferred *tenderer* or *tenderers* until *contract* negotiations are completed, all necessary approvals have been obtained, the *contract* signed and unsuccessful *tenderers* have been notified. Defence's experience is that public announcements of preferred *tenderers* can significantly lengthen the time needed to finalise the negotiation of the *contract*.

Defence Procurement Policy Directives

Contract negotiations and management

- D54. Prior to entering into *contract* negotiations, Defence *officials* **must** document their negotiation strategy commensurately with the scale, scope and risk of the *procurement* to which the *contract* relates.
- D55. If *contract* negotiations result in a significant change to a *tenderer's* offer (including its technical solution, pricing, or commercial terms), Defence *officials* **must** consider whether the amended offer continues to represent best value for money.
- D56. Defence *officials* **must** not change the scope of a *contract* to obtain additional or different *goods* or services that fall outside the terms of the original *contract* approval, unless that change is approved by the relevant delegate as a *limited tender* and is otherwise consistent with the CPRs and the Defence Procurement Policy Directives in the DPPM.

Notes: For more complex *procurements*, the negotiation strategy will typically be documented in a *contract* negotiation directive that is endorsed by the relevant delegate for the *procurement*.

To exercise an option in an existing *contract* to procure additional quantities of *goods*, services or optional extras, Defence *officials* should follow the mechanism set out in the relevant *contract*.

Defence *officials* should refer to Chapters 6 of the Complex Procurement Guide for more information about how to undertake *contract* negotiations.

Defence *officials* should refer to the Defence Contract Management Framework to support them achieving best practice contract management. The Framework brings together the underpinning principles, policies, tools, templates, guidance and competencies required to support more collaborative business relationships with industry and deliver more effective contract outcomes. Defence *officials* should refer to Chapter 7 of the Complex Procurement Guide and the Defence Contract Management Handbook for guidance about how to undertake *contract* management.

Appendices

CPR Appendix A – Appendix B

Appendix A: Exemptions from Division 2 of the CPRs

Procurements of the following kinds of *goods* and services are exempt from the rules of Division 2 of the CPRs, and from paragraphs 4.7, 4.8 and 7.26 of Division 1:

1. *procurement* (including leasing) of land, existing buildings or other immovable property or any associated rights (note: the *procurement* of *construction services* is not exempt);
2. *procurement* of *goods* and services from another *Commonwealth entity*, or a state, territory or local government entity;
3. *procurements* funded by international grants, loans or other assistance, when 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*;
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* 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;
11. *procurement* of blood plasma products or plasma fractionation services;
12. *procurement* of government advertising services;
13. *procurement* of *goods* and services by, or on behalf of, the Defence Intelligence Organisation, the Australian Signals Directorate, or the Australian Geospatial Intelligence Organisation;
14. *contracts for labour hire*;
15. *procurement* of *goods* and services from a business that primarily exists to provide the services of persons with a disability; and
16. *procurement* of *goods* and services from an SME with at least 50 per cent Indigenous ownership.

Appendix B: Definitions

The following definitions apply for the purposes of the CPRs:

Accountable Authority – as defined in section 8 of the PGPA Act.

Annual procurement plan – a document published on *AusTender* through which *relevant entities* provide a short summary of their strategic *procurement* outlook for the coming year and information on significant *procurements* they plan to undertake.

Approach to market – 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 information or request for proposal.

Note: the acronym 'ATM' is used on *AusTender* and other *procurement* documents to reference an *approach to market*.

AusTender – the central web-based facility for the publication of Australian Government *procurement* information, including business opportunities, *annual procurement plans* and *contracts* awarded.

Commercial goods and services – commercial *goods* and services are of a type that are offered for sale to, and routinely purchased by, non-government buyers for non-government purposes, including any modifications common in the commercial marketplace and any minor modifications not common in the commercial marketplace.

Commodity market – a recognised exchange dealing in generic, largely unprocessed, *goods* that can be processed and resold.

Commonwealth entity – as defined in section 8 of the PGPA Act.

Conditions for participation – minimum conditions that *potential suppliers* must demonstrate compliance with, in order to participate in a *procurement* process or for *submissions* to be considered. This may include a requirement to undertake an accreditation or validation procedure.

Construction services – *procurements* related to the construction of buildings and *procurements* of works as defined by the *Public Works Committee Act 1969*.

Contract – an arrangement, as defined by s23(2) of the PGPA Act, for the *procurement* of *goods* and/or services under which *relevant money* is payable or may become payable. Note: this includes *standing offers* and panels.

Contracts for labour hire – a *contract* under which a *relevant entity* engages an individual to provide labour, when the individual is engaged either directly or through a firm which primarily exists to provide the services of only that individual. This includes the appointment of an eminent individual to a special role by an *Accountable Authority*, or the appointment of a person or persons by an *Accountable Authority* to a governance committee (for example, an audit committee, ethics committee or steering committee), but does not include the engagement of consultants.

Corporate Commonwealth entities – as defined in section 8 of the PGPA Act.

Days – means calendar *days*.

End date (in a contract) – can be defined by reference to a specific date or by reference to a specific event.

Evaluation criteria – the criteria that are used to evaluate the compliance and/or relative ranking of *submissions*. *Evaluation criteria* must be clearly stated in the *request documentation*.

Goods – every type of right, interest or thing which is legally capable of being owned. This includes, but is not restricted to, physical *goods* and real property as well as intangibles such as intellectual property, *contract* options and goodwill.

GST – The Goods and Services Tax, as defined by the A New Tax Systems (Goods and Services Tax) Act 1999.

Limited tender – involves a *relevant entity* approaching one or more *potential suppliers* to make *submissions*, when the process does not meet the rules for *open tender*.

Minimum content and format requirements – criteria that a *tenderer's submission* is required to meet, when responding to an *approach to market*, to be eligible for further consideration in a *procurement* process.

Multi-stage procurement – involves an initial *approach to market* followed by one or more subsequent *approaches to market* (for example, inviting expressions of interest followed by a request for tender).

Non-corporate Commonwealth entities – as defined in section 8 of PGPA Act.

Officials – as defined in section 8 of the PGPA Act.

Open approach to market – 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 information and request for proposal.

Open tender – involves publishing an *open approach to market* and inviting *submissions*. This includes *multi-stage procurements*, provided the first stage is an *open approach to market*.

Potential supplier – an entity or person who may respond to an *approach to market*.

Procurement – refer to paragraphs 2.7 to 2.9 of the CPRs

Procurement thresholds – refer to paragraph 9.7 of the CPRs

Public resources – as defined in section 8 of the PGPA Act.

Relevant money – as defined in section 8 of the PGPA Act.

Relevant entity – *non-corporate Commonwealth entities* and prescribed *corporate Commonwealth entities* (listed at Appendix B) that must comply with the CPRs when performing duties related to *procurement*.

Reporting thresholds – refer to paragraph 7.19 of the CPRs.

Request documentation – documentation provided to *potential suppliers* to enable them to understand and assess the requirements of the procuring *relevant entity* and to prepare appropriate and responsive *submissions*. This general term includes documentation for expressions of interest, *open tender* and *limited tender*.

Research and development – research is described as systematic enquiry or investigation into a subject in order to discover facts or principles. Research includes surveys, market research, scientific research and educational research. Development applies to the function of creating/producing new and improved products, devices, processes or services. Development also extends to design, proof of concept and the production of prototypes.

Small and Medium Enterprises (SMEs) – an Australian or New Zealand firm with fewer than 200 full-time equivalent employees.

Specification – a description of the features of the *goods* and services to be procured.

Standing offer – an arrangement setting out the terms and conditions, including a basis for pricing, under which a *supplier* agrees to supply specified *goods* and services to a *relevant entity* for a specified period.

Submission – any formally submitted response from a *potential supplier* to an *approach to market*. *Submissions* may include tenders, responses to expressions of interest or responses to request for quote.

Supplier – an entity or person who has entered into a *contract* with the Commonwealth.

Tenderer – an entity or person who has responded with a *submission* to an *approach to market*.

Defence Procurement Policy Directive

D57. Terms that are defined in Appendix B of the CPRs and which are used in the DPPM, have the same meaning in the DPPM as they do in the CPRs, unless the contrary intention appears.

Note: Terms that are defined in Appendix B and which are used in the DPPM are generally identified through the use of italics text.



Australian Government
Department of Defence
Capability Acquisition and
Sustainment Group

Tender Evaluation in Complex Procurement Better Practice Guide

Version 1.0
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Tender Evaluation in Complex Procurement Better Practice Guide

Defence Scope

This publication should be considered better practice guidance for Defence staff undertaking tender evaluation in complex procurement.

Authority

Procurement Better Practice Guides do not create new mandatory procurement policy. All Defence mandatory procurement policy is contained in the Defence Procurement Policy Manual. Any mandatory procurement guidance referred to in this Better Practice Guide is sourced from appropriate legislation and mandatory Commonwealth and Defence policy.

Monitor and Review

This BPG will be reviewed whenever relevant sections of any of the identified references are updated or amended.

All feedback and suggestions for improvement should be sent to: procurement.policy@defence.gov.au

Note to External Agencies

External agencies intending to use this publication will need to tailor it in order to meet their specific procurement requirements (including relevant internal guidance) and should seek appropriate professional guidance as required.

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This publication should be attributed as the Better Practice Guide – Procurement Delivery Models.

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Chapter 1

Introduction

Overview

- 1 This Guide should be read in conjunction with the Defence Procurement Policy Manual (DPPM) and Complex Procurement Guide (CPG) and provides practical guidance to assist those conducting tender evaluations for complex procurements. The primary purpose of this Guide is to assist users to understand some of the key issues to consider when conducting tender evaluations in complex Defence procurements. It is important to note that it is rarely the case that any two procurements are the same and there is no 'one size fits all' approach when conducting tender evaluations. Tender evaluations should therefore, be appropriately tailored to reflect the specific characteristics of the particular procurement at hand.
- 2 Tender evaluation represents a critical stage in complex procurements and, as noted in the Complex Procurement Guide (CPG), it will be more likely to be successful where earlier activities in the procurement lifecycle have been conducted appropriately - such as the development of the procurement strategy, the request documentation and the tender evaluation plan (TEP).
- 3 While this Guide principally addresses tender evaluation in the context of a request for tender for a major capital acquisition project (using an ASDEFCON template), the principles outlined in this Guide also apply to other forms of request documentation (such as an invitation to register interest, or a request for proposal) as well as other kinds of Defence procurements. Defence officials need to consider and apply the principles appropriately in light of the nature of the procurement and the request documentation being used.
- 4 For further advice regarding the conduct of tender evaluation, Defence officials should refer to the [Commercial Help Desk Kiosk](#).

Key principles

- 5 Defence officials should plan and conduct tender evaluations to reflect the nature, risk and complexity of the particular procurement, and so that Defence can be confident that it achieved the best value for money for the Commonwealth, the process is publicly defensible and is able to withstand challenge and scrutiny.
- 6 The CPRs require Defence officials to undertake their tender evaluations having regard to key principles such as value for money, probity, confidentiality, ethics and fair dealing, accountability and transparency. Adoption of the steps described in this Guide will assist those conducting complex procurements to adhere to these principles.
- 7 These principles can be summarised as follows:
 - **Value for money** - The key objective of Defence procurement is to obtain value for money. The tender that offers best value for money will not necessarily be the tender which offers the lowest price. Defence officials need to assess which tender offers the best value for money having regard to an assessment against each of the evaluation criteria - including price - and the risks associated with the tender and tenderer.
 - **Fairness** - Defence officials should not unfairly advantage or disadvantage any tenderer. All tenderers should be given the same information about the tender process and afforded an equal opportunity to participate in it.
 - **Confidentiality** - The CPRs require that tenders are treated as confidential before and after the award of a contract (see CPRs, paragraph 7.21). Defence officials should therefore take appropriate measures to protect the confidentiality of tenders. Tenders and evaluation information should be kept secure and confidential, with distribution of information being undertaken on a need to know basis.
 - **Probity** - When undertaking tender evaluation, Defence officials should exercise the highest standards of probity and fair dealing. This includes ensuring there is no bias or favouritism throughout the process, and promptly declaring and managing any conflicts of interest.
 - **Accountability and transparency** - Defence officials should maintain a clear audit trail for all procurements. All key steps taken and decisions made should be promptly and

accurately documented in a logical sequence and using clear and concise language to ensure the process is able to withstand challenge and scrutiny. The level of detail of documentation should be commensurate with the scale, scope and risk of the procurement.

Example: In a particular tender process, Defence selected a preferred tenderer on the basis that it offered the best technical solution and one of the lowest overall prices, and hence assessed that it offered significantly better value for money than the other tenders. The incumbent contractor was unsuccessful and challenged the outcome of the tender process.

Because the tender evaluation team was subject to significant time pressures, it did not document the evaluation process and the outcome in sufficient detail in the evaluation report. In addition, the evaluation report did not fully address the compliance issues and risks which were identified and considered in making the source selection decision. As a result, while the actual outcome of the tender evaluation was fair and defensible, the poor documentation of the evaluation made it more difficult for Defence to justify and defend the outcome in response to the challenge by the incumbent contractor.

Chapter 2

Preparing for tender evaluation

Key considerations arising from the request documentation

- 1 Defence officials need to fully understand what is being sought through the request documentation to be able to properly plan and prepare for tender evaluation. While the TEP is the manifestation of this planning and preparation, the content of the TEP will in large part be driven by how Defence officials have drafted the request documentation, and in particular what the request documentation says about the evaluation criteria, information deliverables and requirements prioritisation.
- 2 The following discussion expands on the guidance on these matters provided by Chapters 3 and 5 of the CPG.

Evaluation criteria

- 3 As required by the DPPM, the evaluation team is required to evaluate tenders against the evaluation criteria contained in the request documentation. These criteria will also be set out in the TEP. The evaluation criteria are used to assist the evaluation team to objectively assess tenders and identify which tender offers the best value for money. The TEP should provide the clear and defensible basis for how the evaluation team will evaluate tenders against all of the evaluation criteria, and should ensure that the evaluation team does not introduce any additional criteria during the evaluation.
- 4 Given the wide range of Defence procurements, the evaluation criteria can vary between them, however, in the context of procuring defence materiel, the evaluation criteria detailed in the ASDEFCON templates are comprehensive and typically will not require amendment. Nevertheless, template evaluation criteria should always be reviewed to ensure that they are appropriate for the relevant procurement. Where amendments are justified, specialist contracting and/or legal advice should be obtained to ensure that the amendments do not preclude Defence from assessing key aspects of each tender and that the consequences of amending the evaluation criteria are clearly understood. It is important to ensure that the evaluation criteria allow Defence to assess all relevant aspects of a tender to enable an effective procurement outcome.
- 5 As noted in the CPG, Defence templates do not typically weight evaluation criteria or put them into any order of priority or importance. This allows the evaluation team to undertake its evaluation and determination of best value for money on a balance of its assessment of tenders against all the criteria.
- 6 The CPG provides general guidance about the merits of weighting evaluation criteria – which may be done qualitatively (for example, Important, Very Important etc) or quantitatively (for example, 10%, 20% etc). As noted in the CPG, Defence officials need to ensure that the weightings are appropriate and accurately reflect Defence's requirements. Otherwise, it can result in Defence being unable to place appropriate significance on key issues and risks identified as part of the tender evaluations (for example, if a significant issue or risk is identified but the evaluation criterion to which it relates has been given a very low weighting). Specialist contracting and/or legal advice should be obtained before weighting evaluation criteria in order to ensure that the potential effects are appraised and understood.
- 7 Evaluation criteria are communicated to tenderers but the relative importance of each evaluation criteria is not normally provided to tenderers. Evaluation criteria should be objective, measurable, clear and transparent.

Example: The evaluation criteria for a Defence procurement were weighted in the request documentation. A weighting of 5% was given to the evaluation criterion relating to the tenderer's compliance with the terms of the contract and a weighting of 5% was given to the evaluation criterion relating to the financial standing of the tenderer. A tenderer proposed a technically superior solution at a competitive price, however, the tenderer had a poor financial standing and proposed significant changes to the risk allocation in the contract.

The poor financial standing and the proposed changes to the contract risk allocation were such that Defence could not accept the tender. However, because the relevant evaluation criteria were given such a low weighting of 5%, it meant that it was difficult for Defence to exclude the tender or rate it below other tenders in the assessment against the evaluation criteria.

In the end, and after seeking probity advice, Defence was able to take these matters into further consideration as part of assessing the overall risk associated with each tender and hence in the assessment of overall value for money. However, the weighting of the criteria did complicate the evaluation process. The CPG and Chapter 3 of this Guide discuss quantitative scoring based evaluation methodologies further.

Tender information deliverables

8 Defence officials should ensure that tenderers are required to submit only that information which is necessary to enable Defence to properly assess each tender against each of the evaluation criteria and to make an overall value for money assessment. In addition to increasing the costs of tendering, requiring tenderers to submit unnecessary information can make tender evaluation more difficult due to the volume of information to be assessed and increase the tender evaluation period unnecessarily. In addition, Defence needs to be careful that it does not unnecessarily request the same information in multiple formats.

9 In ASDEFCON templates, the information which tenderers are required to submit as part of their tender is set out in Tender Data Requirements (TDRs) which are attached to the conditions of tender. The ASDEFCON TDRs are comprehensive and each TDR has been mapped to evaluation criteria in the conditions of tender. Nevertheless, in preparing the request documentation for a particular procurement, Defence officials should confirm that the TDRs capture appropriate information requirements in relation to the relevant evaluation criteria. This mapping exercise will assist to identify any gaps in the TDRs or evaluation criteria.

Example: Defence conducted a procurement for the provision of transportation services. Due to the specific nature of the services and the requirements of the procurement, the evaluation criteria in the applicable ASDEFCON template were modified to meet the requirements of the procurement. During tender evaluation, the evaluation team identified two issues. First, the amendments to the evaluation criteria had not been carefully thought through and because a number of the criteria were quite narrow, this made it difficult for the evaluation team to assess a number of issues which it had identified during evaluation. Second, Defence had not made the appropriate corresponding amendments to the TDRs (by mapping the TDRs against the evaluation criteria) and, as a result, tenderers were not required to submit all of the information which Defence required in order to make an assessment against the relevant evaluation criteria.

While the evaluation team was able to complete the tender evaluation and identify a tenderer which represented best value for money, many issues that should have been able to have been addressed during the evaluation needed to be explored and resolved during contract negotiations with the preferred tenderer.

Requirements prioritisation

10 Defence officials will often prioritise Statement of Work (SOW) and specification requirements in request documentation. Requirements prioritisation can be an effective tool for communicating to tenderers the relative importance of individual requirements in the SOW or specification, and can therefore assist in the correct technical evaluation of tenders albeit also adding complexity.

11 Where Defence prioritises its requirements, this is usually done by reference to one of the four following categories:

- a. Essential: Indicates a requirement that has the highest level of consideration without which the achievement of the capability would not be possible;
- b. Very Important: Indicates a requirement that has a high level of consideration and without which the achievement of the capability may not be possible;
- c. Important: Indicates a requirement that has a moderate level of consideration and which is necessary to achieve an intended functionality and/or level of performance, however there is some latitude regarding meeting the intended functionality and/or level of performance; and
- d. Desirable: Indicates a low level of consideration, that is, not a key factor in the achievement of any intended functionality and/or level of performance, but which is perceived as beneficial.

12 As noted in the DPPM and the CPG, it is important that Defence officials do not unnecessarily categorise requirements as being 'Essential'. This is particularly the case for those tenders where the

additional rules in Division 2 of the CPRs apply concerning the exclusion of tenders that do not achieve 'Essential' requirements. The key reasons why the use of 'Essential' requirements should be minimised are:

- a. where the procurement is above the relevant procurement threshold under the CPRs and is not otherwise exempt from Division 2 of the CPRs, the failure to comply with an 'Essential' requirement means that the tender must be excluded as part of the initial screening and shortlisting of tenders;
- b. even if the procurement is exempt from Division 2 of the CPRs, tenderers would normally expect that a failure to comply with an 'Essential' requirement should lead to exclusion of a tender; and
- c. prescribing too many 'Essential' requirements will reduce the ability of tenderers to offer innovative or value for money technical solutions, including proposing capability trade-offs.

Example: In a particular procurement, Defence included a large number of 'essential' requirements in the technical specification. The procurement was above the relevant procurement threshold and was not exempt from Division 2 of the CPRs. Only three tenders were submitted (and one supplier decided not to submit a tender because of the level of non-recurrent engineering that would have been involved in meeting an 'essential' requirement). One of the three submitted tenders had to be set aside as part of the initial screening and short listing of tenders as the tenderer failed to meet a number of the essential requirements.

While the remaining two tenderers satisfied all of the essential requirements, in order to meet them they were required to significantly modify what was otherwise substantially commercial/military off the shelf equipment. This resulted in a significant increase in cost and risk for Defence given the scope and nature of the modifications

Evaluation against a tender evaluation baseline

13 The 'tender evaluation baseline' comprises the totality of Defence's requirements for the procurement as contained in the request documentation. The tender evaluation baseline is the common foundation against which the evaluation team will assess and compare all tenders so as to establish a basis for making informed value for money judgements. If the request documentation includes a Commonwealth initiated option, Defence will need to consider whether the Commonwealth initiated option is to be treated as part of the tender evaluation baseline.

14 Where Defence prioritises its requirements, Defence will need to also consider whether some or all of the 'Desirable' requirements should be included in the tender evaluation baseline. Depending on the nature of the procurement, many of Defence's 'Desirable' requirements can significantly add to the cost, risk and schedule of delivering a capability, particularly where they are aspirational or not already part of a military off the shelf solution. Defence officials should advise tenderers in the request documentation if 'Desirable' requirements are not considered part of the evaluation baseline so that tenderers are not misled about what is important to Defence for the purposes of the procurement decision.

15 During evaluation, the evaluation team will assess the extent to which a tender departs from the tender evaluation baseline. Depending on the evaluation methodology being used (refer to Chapter 3 of this Guide), the departure (or 'non-compliance') may be evaluated qualitatively (for example, through a rating of 'deficient', or similar), quantitatively (for example, through a price adjustment to the tendered price), or through a combination of the two. The tender evaluation methodology to be used will need to be outlined in the TEP.

Example: Examples of departures from the tender evaluation baseline which may result in a price adjustment include where a tenderer proposes:

- (a) a different delivery schedule or milestone payment arrangement. In these circumstances it may be necessary to assess tenders by calculating the net present value of the payments to be made (i.e. assessing the payments in base date dollars to the extent that they have not been expressed in base date dollars);
- (b) a different warranty period;
- (c) alternative indices for the adjustment/indexation of the contract price; or

(d) an alternative risk allocation (i.e. to allocate risk to the Commonwealth which was allocated to the contractor under the draft contract issued as part of the request documentation).

16 The basis and methodology for making price adjustments, and the amount of any price adjustments, should be set out in the evaluation report. To the extent that assumptions are made in making a price adjustment, the assumptions should also be set out. The evaluation team should also consider whether it should carry out any sensitivity analysis in relation to the assumptions made having regard to the nature of the assumptions.

Timeframe for the conduct of tender evaluation

17 The timeframe for the conduct of the tender evaluation should be sufficient to enable the evaluation team to properly assess all of the tenders in accordance with the evaluation criteria and to make a value for money assessment. Given the complexity of many Defence procurements, tender evaluations can take a significant period of time, although political and capability requirements can sometimes put pressure on evaluation teams to carry out tender evaluations within tight timeframes.

18 Early planning will assist Defence to carry out evaluations in a timely manner. Planning considerations should include the governance arrangements for the evaluation, membership and availability of the tender evaluation board and tender evaluation working groups (if applicable), the logistics of where the evaluation will be conducted and associated administrative arrangements.

19 Not allowing sufficient time to conduct a tender evaluation is often the cause of poor evaluation outcomes. Failure to properly evaluate tenders (including not properly identifying and understanding key issues and risks or clarifying uncertainties or ambiguities with tenderers) due to time constraints or poor planning can result in delay to the procurement timetable through significantly extended negotiations and subsequent contractor non-performance.

20 Defence officials should determine the appropriate time allowed for the conduct of tender evaluation having regard to the expected number of tenders to be received. The more tenders that are submitted the longer tender evaluation is likely to take. There needs to be sufficient flexibility to extend the evaluation where more tenders than originally expected are submitted. Alternatively, if timeframes are limited, Defence should have considered this as part of the procurement plan and structured the procurement process accordingly. For instance, Defence could conduct an invitation to register interest to shortlist tenderers to participate in a subsequent request for tender process, or short list tenderers during the request for tender process to participate in offer definition and improvement activities.

21 Better practice is that the timeframe allocated to the conduct of tender evaluation and selection of the preferred tenderer (excluding any offer definition and improvement activities) should be no longer than the time allocated for the tender response period.

The Tender Evaluation Plan

22 Chapter 3 of the CPG provides a good overview of the purpose, structure and content of a TEP as the key document for the management and conduct of tender evaluations for complex procurements.

23 The aim of a TEP is to detail the process for the evaluation of submissions received by Defence in response to request documentation. The TEP should provide for:

- a. a clear and defensible basis for the evaluation process to occur in accordance with the request documentation;
- b. the application of a 'best value for money' assessment; and
- c. an evaluation process that meets the requirements of Commonwealth and Defence procurement policy and good practice.

24 The TEP should be consistent with the request documentation, and the TEP will usually provide that in the event of any inconsistency between the conditions of tender and the TEP, the conditions of tender take precedence.

25 In particular, the evaluation criteria set out in the TEP should be the same as set out in the request documentation. In some cases, to facilitate the conduct of the evaluation against the criteria, the TEP may contain an evaluation breakdown structure that breaks out the evaluation criteria into subordinate sub-criteria or lower level elements. These may or may not be included in the request

documentation. If they are not, then the evaluation team needs to ensure that the sub-criteria or elements are consistent with the higher level evaluation criteria.

26 The TEP will usually provide that all members of the evaluation team are provided with a copy of (or have easy access to) the TEP, and are briefed on the content of the TEP prior to commencing tender evaluation. The evaluation team should have appropriate procedures to ensure continued compliance with the TEP. For example, members of the tender evaluation board and, where applicable, tender evaluation working group leaders, should be given responsibility for ensuring continued compliance with the TEP with the assistance of the legal process and probity adviser (if one is appointed).

27 While Chapter 3 of the CPG provides guidance about the structure and content of a typical Defence TEP, the content of a TEP should be tailored to reflect the particular procurement. For example, if it is intended that the procurement will be divided into a series of stages (for example, shortlisting of tenderers followed by offer definition and improvement activities or parallel negotiations), Defence officials should consider including details of each stage in the TEP.

28 In more complex tender evaluations, best practice is to include in the TEP a description of or guidance as to how the detailed evaluation will be conducted by the evaluation team in assessing each of the evaluation criteria. For example, in relation to the evaluation of the tendered prices, Defence should include details of how it will evaluate the whole of life costs and any model which it will use in doing so. This could include details as to how the evaluation team proposes to evaluate the rates tendered for Task Priced Services, including details of any assumptions made and sensitivity analysis to be conducted. The key benefit of such an approach is that the methodology can be planned and clearly established prior to the commencement of tender evaluation. In adopting such an approach, however, Defence officials need to ensure that the detailed evaluation methodology included in the TEP is appropriate and enables the evaluation team to effectively assess the relevant evaluation criteria.

29 Defence officials should ensure that the TEP does not unnecessarily constrain Defence from exercising the rights it has under the request documentation.

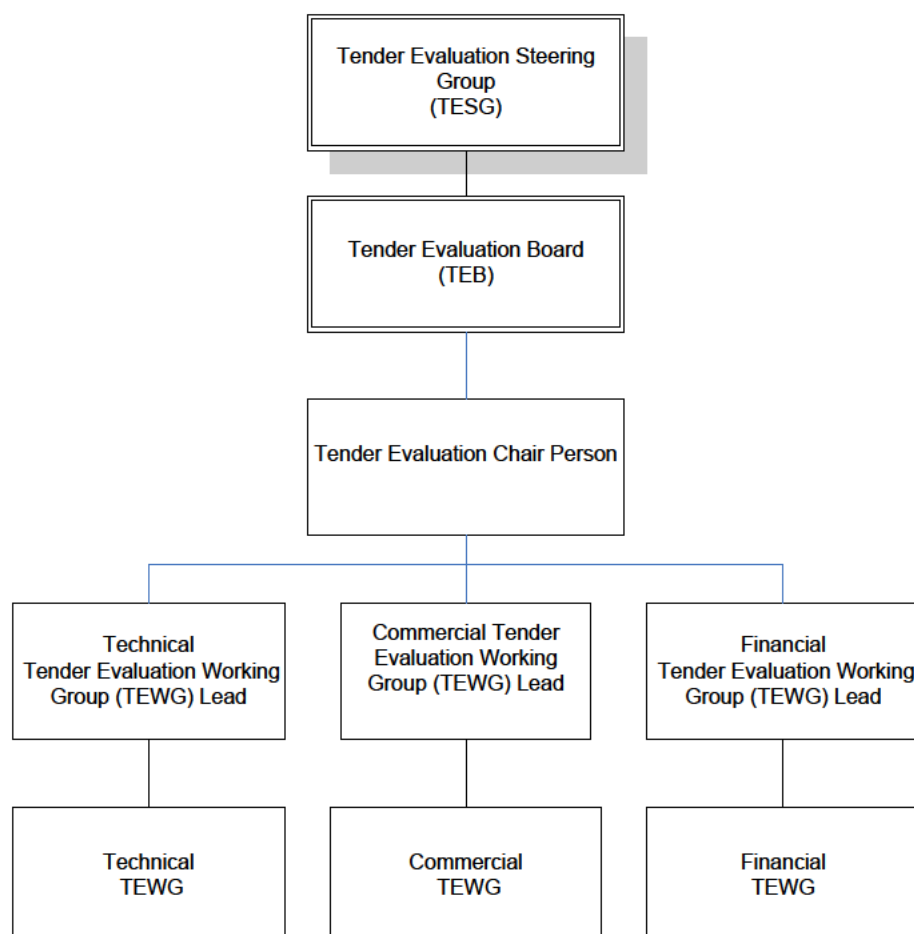
30 A template TEP is available on the [Commercial Division Tools and Templates Intranet page](#).

Tender evaluation organisation (TEO)

Overview

31 A key element of the TEP is to set out the governance arrangements that will be established for the evaluation, and the various roles and responsibilities of the constituent elements of the evaluation team. In major Defence procurements, the evaluation team is often called the Tender Evaluation Organisation (TEO). In some cases, the TEO may simply be a single evaluation committee or tender evaluation board (TEB), which may include the delegate for the procurement. In other cases, the TEO may be a delegate, a tender evaluation team (TET) (or TEB) and TEWG. In the more complex cases, the delegate may be supported by a tender evaluation steering group (TESG), TEB and tender evaluation working groups (TEWGs). The delegate or the TESG will normally be given responsibility for overseeing the evaluation process and providing guidance to the evaluation team on the conduct of the evaluation and approving the evaluation report. The TET or TEB will usually be responsible for managing the evaluation and ensuring that correct process and probity is adhered to during the evaluation period. The TET or TEB will normally comprise a chair and each of the TEWG leaders will have administrative support, as well as support from relevant advisers (for example, financial, legal, probity etc). For many complex procurements, one or more TEWGs will be formed to undertake the evaluation of specific elements of tenders (for example, Technical TEWG, Commercial TEWG, Financial TEWG etc).

Example Tender Evaluation Organisation
(TEO)



Key considerations

32 Defence officials should structure the evaluation team (or TEO) having regard to the size and scale of the tender evaluation, and the nature and complexity of the issues and risks which may need to be considered during the evaluation. As noted above, in more complex procurements, the TEO is often organised into three tiers comprising the TESS, the TEB and the TEWGs. In less complex procurements, the TEO may comprise two tiers (the TET/TEB and the TEWGs) or even one tier (the TET/TEB). Chapter 5 of the CPG discusses how a standard 'one tier' evaluation committee or board might be set up. However, the following discussion focusses on a more complex procurement process (for example, a major capital acquisition) where a 'three tier' TEO would normally be used.

33 The TESS is usually chaired by a member of the Senior Executive Service or a Star Rank Officer who has strong complex procurement experience. The role of the TESS is to provide high level input from stakeholders, such as the sponsor/end user, and management input from outside the TEB. The responsibilities of the TESS will typically include the following:

- a. ensuring the evaluation is conducted in accordance with Commonwealth and Defence procurement policy, the request documentation and the TEP;
- b. ensuring the appropriate actions and procedures are instituted to support the highest standards of probity and official conduct;
- c. providing advice and direction to the TEB throughout the tender evaluations;

- d. reviewing and finalising the evaluation report prepared by the TEB;
- e. approving the evaluation report, or endorsing the evaluation report for forwarding to Section 23 Delegate Approval (depending on the approval requirements outlined in the TEP); and
- f. providing advice to the Chair of the TESC.

34 All tender evaluations require a TEB (sometimes called a TET). The TEB is typically chaired by the Project Director for the procurement and is made up of the TEWG leaders. The responsibilities of the TEB will usually include the following:

- a. the overall leadership and management of the evaluation process;
- b. ensuring that the evaluation is conducted in a manner which is fair and equitable;
- c. receipt and registration of tenders;
- d. conduct of the initial screening and any shortlisting of tenders;
- e. ensuring the TEWGs conduct their evaluations in accordance with Commonwealth and Defence procurement policy, the request documentation and the TEP;
- f. ensuring the reasons for setting aside any tenders that are clearly not competitive are clearly stated and substantiated;
- g. conducting a comparative assessment of the tenders and the value for money assessment based upon the TEWG reports;
- h. providing guidance to the TEWGs on the preparation of the TEWG reports;
- i. reviewing the TEWG reports to ensure that all information has been taken into consideration in the evaluation report;
- j. reviewing clarification questions proposed by the TEWGs; and
- k. preparing the evaluation report based upon the TEWG reports, and presenting the report to the TESC and delegate.

35 The TEB chair will play a key role in managing the overall conduct of the evaluation, including managing the TEWGs, timetable for the evaluation, and issues which arise during the evaluation.

36 TEWGs are not required for all tender evaluations but are used in more complex evaluations. TEWGs are typically used where the volume of work required in order to carry out the tender evaluation is significant and there is a need to create teams with appropriate specialist expertise and experience. For less complex tender evaluations, the detailed evaluation is typically undertaken by the TET/TEB rather than the TEWGs.

37 The number of TEWGs and the focus of each TEWG will vary depending on the nature of the relevant procurement and the issues which will need to be evaluated, however, may include at least the following TEWGs:

- a. Technical (including operations/project management, and capability) TEWG ; and
- b. Commercial/Contracting/Financial TEWG (includes legal, intellectual property, technical data and other detailed contract matters) .

38 The responsibilities of a TEWG will usually include the following:

- a. assessing each tender against the evaluation criteria allocated to that TEWG (noting that some evaluation criteria may be allocated to more than one TEWG);
- b. conducting a comparative assessment of the tenders in respect of the evaluation criteria allocated to that TEWG;
- c. identifying any risks associated with each tender;
- d. preparing clarification questions; and
- e. preparing a report detailing the TEWG's findings.

39 Each TEWG should have a Defence official that is designated as TEWG leader and the members of the TEWG should be appropriately qualified, skilled and experienced having regard to the focus of the TEWG. Where contractors are proposed to be used as part of a TEWG, this should be

detailed in the TEP, In addition, the probity adviser be consulted to ensure that the required level of care is taken to ensure that probity is appropriately considered and applied.

40 It is important to match the size, skills and structure of the evaluation team / TEO to the complexity and level of risk of the procurement. Defence will need to ensure that it has a sufficient number of appropriately skilled and experienced personnel and appropriate subject matter and/or domain knowledge experts available to conduct the evaluation. This may require Defence to engage consultants with specific industry knowledge or other skills relevant to the evaluation. For particularly large or complex evaluations, Defence should identify potential back up or replacement evaluation team members if evaluation team personnel become unavailable.

41 Evaluation team members should have a detailed understanding of the procurement (including the proposed risk allocation under the draft contract) in order to facilitate the identification of issues and risks during tender evaluation. This can be a significant risk as Defence officials are often brought in to assist in carrying out a tender evaluation that have not been involved in preparing the request documentation and therefore do not have a detailed understanding of the procurement. In these circumstances it is necessary to ensure that these persons are comprehensively briefed on the material.

42 Tender evaluations for complex procurements are typically lengthy and time consuming. Accordingly, it is preferable if evaluation team members work full time on the evaluation rather than seeking to participate in the evaluation while also continuing to perform their usual work activities.

Regular communication within the evaluation team

43 Although each of the TEWG's have their own distinct area of focus, it is important that each TEWG advises other TEWG's of issues which may impact on the evaluation being conducted by the other TEWG. For example, it is often the case that statements contained throughout a tender will indicate that the tenderer is not in fact compliant with a provision of the draft contract notwithstanding the fact that the tenderer has indicated in its Statement of Compliance that it is compliant. These statements can be found in sections of a tender where they would not normally be expected. It is important that TEWG's which identify any such non-compliances or risks advise other relevant TEWG's to ensure non-compliances or risks are not missed. Often these issues require clarification with the relevant tenderer.

44 Accordingly, the evaluation team should encourage regular formal and informal meetings/discussions between TEWG leaders. TEWG leaders will summarise the information and meet with the TEB Chair and Deputy Chair (if there is one). If arrangements are not put in place to facilitate communication between TEWG's, there is a risk that issues will be missed, or their significance not fully appreciated.

Example: In relation to Defence procurement for the provision of training services, Task-Priced Services formed a significant proportion of the overall scope of work under the proposed contract (with each Task-Priced Service comprising the delivery of a training course). The contract did not guarantee any particular volume of Task-Priced Services and allocated the risk of the volume of Task-Priced Services to the contractor. The preferred tenderer indicated in its statement of compliance that it was compliant with Defence's proposed risk allocation in relation to the volume of Task-Priced Services.

During contract negotiations, the preferred tenderer advised that it would not accept the risk of the volume of Task-Priced Services and that if the volume of Task-Priced Services fell below the maximum rate of effort specified in the contract it would need to renegotiate its prices for Task-Priced Services. The tenderer's position was that this non-compliance was included in its tender as it was included as a footnote to the pricing table for Task-Priced Services (notwithstanding that the tenderer had indicated compliance with the relevant contract provisions in the statement of compliance). The financial TEWG was the only TEWG which had access to the pricing tables during tender evaluations. While the financial TEWG had seen the notes, they had not informed the TEO generally or the other TEWG's of the content of the notes.

Although Defence was able to negotiate an acceptable position in relation to the issue, the lack of communication between TEWG's complicated the negotiations and required Defence to re-assess whether the tenderer still represented best value for money.

45 It is beneficial to have the TEO geographically co-located as far as practicable, however if this is not practicable and members of the TEWG's or the TEB are geographically dispersed, the evaluation team will also need to have appropriate arrangements to allow all team members to actively participate as required in relevant meetings and receive relevant information. This may require

establishing secure Information and Communications Technology (ICT) systems to facilitate the required information access and sharing of information.

Evaluation logistics

46 As noted in Chapter 5 of the CPG, the TEP should set out the logistical arrangements for the evaluation. These can be significant for large procurements, and include issues relating to the safe custody of tenders, evaluation facilities, ICT requirements and travel arrangements for evaluation team members.

47 Tender evaluation rooms assist in maintaining the confidentiality and security of tenders and minimise the risk that tenders will be discussed in an open work environment shared by staff members who are not involved in the evaluation. While Defence has a number of on-site tender evaluation rooms, given the number of evaluations that are conducted by Defence, the demand for these facilities can be high and it may be necessary for the evaluation team to arrange alternative facilities (which in some cases could be off Defence premises).

48 The evaluation team should establish rules and processes for the storage of and access to electronic copies of tenders and evaluation material. This may include establishing and using a database or tender evaluation tool, electronic folders and naming conventions. Appropriate security (for example, password protected folders) should also be established. These requirements may also be addressed as part of the Legal Process and Probity Plan (if a separate plan is developed). Legal Process and Probity Plans are discussed in Chapter 3 of the CPG.

Planning, briefing and training

49 Defence officials will usually need to address a number of practical issues prior to commencing tender evaluation, including:

- a. identifying the documents or reports (and their format) relevant to the conduct of the tender evaluation which the evaluation team will need to have in place (for example, tender receipt and registration log, facility entry and exit log and report, communications officer log and report etc);
- b. identifying the manner in which each TEWG will assess each of the evaluation criteria allocated to it and the documentation or tender evaluation tools required, and whether any training is required. This should be set out in the TEP;
- c. identifying the required outputs of the tender evaluation (for example, screening and/or shortlisting report, TEWG reports and the evaluation report etc) and the format of those reports;
- d. identifying key project issues and potential risks that need to be considered during tender evaluation; and
- e. preparing the tender evaluation schedule.

50 For major tender evaluations, evaluation team members will usually participate in a project briefing at the start of the evaluation to inform members about the evaluation process. This briefing would usually cover some or all of the following matters:

- a. an overview of the project;
- b. accountability, probity, ethics and fair dealing, including confidentiality and conflict of interest requirements (this part of the briefing may be given by the legal process or probity adviser, if one is appointed);
- c. security requirements and arrangements;
- d. evaluation organisation structure, membership, roles and responsibilities;
- e. tender evaluation schedule and administrative arrangements (for example, distribution of tender volumes, the tender room, the use of tender evaluation tools or databases etc);
- f. evaluation methodology and process, including a review of the TEP, areas of responsibility for evaluation, evaluation stages and required outputs;
- g. the tender clarification process; and
- h. where a tender evaluation tool or database is being used, guidance on how to use the tender evaluation tool or database.

51 Prior to the commencement of the evaluation, evaluation team members should be provided with copies of (or have electronic access to) all relevant documents, including the request documentation, TEP and any related guidance, Legal Process and Probity Plan, draft report formats (for example, TEWG report/evaluation report), tender evaluation schedule, and any other documents which may assist the tender evaluation members in understanding the project or the issues which need to be considered in carrying out the tender evaluation (which might include the Project Execution Strategy, a more detailed Acquisition or Procurement and Contracting Strategy, Support Procurement Strategy, the Delegate Submission and any Liability Risk Assessment).

52 Members of the TEB and the TEWG leaders should also ensure that all evaluation team members (particularly external advisers) are aware of Commonwealth and Defence procurement policy applicable to the conduct of tender evaluation.

Chapter 3

How to conduct a complex tender evaluation

Overview of evaluation stages

1 Subject to the terms of the request documentation and the content of the approved TEP, the evaluation process for complex Defence procurements typically comprises the following sequential stages (see Annex A to this Guide for a diagrammatic representation of the evaluation process):

Receipt and registration of tenders

2 Procedures to receive and register tenders should be conducted in accordance with the TEP and ensure fairness and impartiality with submissions being kept secure and treated in confidence.

3 Defence officials should identify and record any late tenders. Subject to the terms of the request documentation, a late tender should not be opened and accepted into tender evaluation, unless there has been mishandling by Defence.

4 Defence officials will usually prepare a Tender Receipt and Registration Report for approval by the delegate.

Initial screening

5 The aim of the initial screening is to exclude tenders from further consideration where they are incomplete or do not meet minimum content and format requirements, conditions for participation, or 'Essential' requirements specified in the request documentation. The initial screening process should be set out in and conducted in accordance with the TEP.

6 Any tender that does not meet the screening requirements should be excluded from further consideration unless Defence considers that there has been an unintentional error of form (usually relevant only in the case of minimum content and format requirements). Any decision by the TEB to exclude a tenderer at the initial screening stage should be endorsed by the TESSG and probity adviser (if one is appointed)

7 The evaluation team should identify any alternative tenders and assess whether the alternative tender should be evaluated. Alternative tenders should be documented in the initial screening report together with an explanation as to whether the alternative tender will be evaluated and the reasons for the decision.

8 Depending on the terms of the request documentation, an incomplete tender may also be excluded from further consideration during the initial screening process. This should only be the case where the tender is so incomplete that it would not be capable of a meaningful evaluation.

9 At this stage, Defence officials will usually identify all pricing information in a tender and quarantine this for evaluation by the financial TEWG.

10 During the initial screening stage, any tenders from a tender associated with a current Project of Concern should be identified and referred to the delegate, including the detail of the role that the tenderer has in the Project of Concern. The information provided should be endorsed by the relevant Project of Concern Project Manager. This is because some of the ASDEFCON conditions of tender provide Defence with a discretion to exclude a tender from a tenderer who is involved in a current Project of Concern.

11 An initial screening report should be prepared and approved by the delegate prior to conducting detailed tender evaluation. The purpose of the initial screening process is to undertake a brief initial review of tenders. If any tenders are to be excluded from further consideration as a result of the initial screening, this should be clearly documented in the initial screening report. The reasons should be clearly stated and substantiated as any decision to exclude a tenderer must be justified and defensible.

12 Tenderers who are excluded should be advised as soon as possible that their tenders have been declined after the delegate has approved the recommendation.

Detailed tender evaluation

13 During detailed tender evaluation, the tenderers are assessed against each of the evaluation criteria set out in the request documentation and the TEP. The manner in which the evaluation team will undertake the detailed tender evaluation will depend on the tender evaluation methodology set out

in the request documentation and the TEP. During detailed evaluation, tenders may be progressively shortlisted out of the tender process. Shortlisting is used to identify and exclude tenders which are clearly non-competitive and have no reasonable prospect of exhibiting the best value for money (or where it subsequently becomes apparent during detailed evaluation that the tender does not meet a condition for participation or 'Essential' requirement). The degree of analysis applied to shortlisting must be of sufficient rigour to ensure that excluded tenderers, under further detailed evaluation, stand no reasonable chance of providing the best value for money. Shortlisting (or setting aside) tenderers during detailed evaluation reduces the costs for both Defence and industry. Tenderers who are set aside on this basis should be advised as soon as practicable that their tenders have been declined after the delegate has approved the recommendation, normally based on a shortlisting report. If a tender is set aside late in the process, this recommendation may be included in the evaluation report, rather than a separate shortlisting report.

14 Where the comparative assessment and ranking tender evaluation methodology is adopted, detailed tender evaluations are typically broken into two stages:

- a. First, the evaluation team assesses each of the tenders individually against each of the elements in the evaluation breakdown structure (which might be undertaken at the evaluation sub-criterion or a lower level), on the basis of compliance and/or risk (depending on the criterion), and identifies any risks and potential issues for negotiation. This assessment is then usually rolled up and presented at either the evaluation sub-criterion or more usually at the evaluation criterion level; and
- b. Second, the evaluation team undertakes a comparative assessment of tenders across each of the evaluation criteria (or sub-criteria). Comparative assessment involves the ranking of tenderers in relative order of merit against each evaluation criterion / sub-criterion, including in relation to risk. The comparative assessment should draw out the major differences between tenderers as they relate to the evaluation criteria / sub-criteria. This provides the basis for determining value for money. The ranking of tenders in respect of each of the evaluation criteria / sub-criteria needs to be substantiated and supported by the assessments in the individual TEWG reports.

15 The TEWGs should document the outcomes of their respective evaluations in TEWG reports, with the TEB then recording the outcomes at a higher level in the evaluation report. The evaluation report needs to contain sufficient detail to reflect the outcomes of the evaluation and the key points of differentiation between tenders.

16 As noted above, if it becomes evident during the detailed evaluation that a tender is clearly not competitive, a decision may be made to set aside the tender from further evaluation. A decision to set aside a tender must be justified and defensible. The reasons for setting aside a tenderer should be clearly stated and substantiated in the evaluation report.

Initial value for money assessment

17 Following detailed evaluation, the TEB should conduct an initial value for money assessment and ranking of tenderers. The value for money assessment should be based on the outcomes of the detailed evaluation, including the assessments of tendered prices and risk which are detailed later in this chapter.

18 Following the initial value for money assessment, the evaluation team may recommend:

- a. appointing a preferred tenderer and entering into contract negotiations with that tenderer; or
- b. shortlisting two or more tenderers to participate in further tenderer engagement activities, such as offer definition and improvement activities or parallel negotiations.

Final value for money assessment

19 Following the completion of any further tenderer engagement activities with the shortlisted tenderers (where applicable), the TEB should reassess the tenders in light of the outcome of the engagement activities. This will not be a full re-evaluation of the tenders, but rather an assessment of whether, and if so, how the initial evaluation and value for money assessment needs to be updated in light of the outcomes of the tenderer engagement activities. The evaluation team should record the final value for money assessment in the updated evaluation report (or in some cases, a separate final source evaluation report).

Tender evaluation methodologies

20 Tender evaluation methodologies are the processes set out in the TEP that an evaluation team will apply to conduct the detailed evaluation of tenders in accordance with the evaluation criteria in the request documentation. There is no single tender evaluation methodology that is appropriate in every case, and Defence officials should consider and apply the appropriate methodology for the nature and scope of the particular procurement. Tender evaluation methodologies will typically comprise a mix of qualitative and quantitative assessments.

21 As noted in the CPG and earlier in this Guide, a tender evaluation methodology commonly used for complex Defence procurements is the comparative assessment and ranking method. An overview of the comparative assessment and ranking method is included in Annex B of this Guide. Annex B also includes an example of a simpler evaluation methodology.

22 If the evaluation team is using a software based evaluation tool to facilitate tender evaluations (including the scoring functionality associated with some tender evaluation tools), the evaluation team needs to ensure that the tool is consistent with the tender evaluation methodology detailed in the TEP and the request documentation.

23 As discussed in the CPG, Defence officials should be careful in adopting quantitative based tender evaluation methodologies which are heavily reliant on weighted scoring methodologies. These methodologies are often used as part of software based tender evaluation tools. The risk with a weighting or scoring based methodology is that if it is not carefully designed, it may result in Defence being unable to place appropriate weight on key issues identified as part of the tender evaluations. For example, while a key issue may result in a low score for a particular aspect of the tender evaluation, that score may represent only a small part of the overall score and not be truly reflected in the overall evaluation outcome of the tender. Accordingly, Defence usually prefers to use a tender evaluation methodology that allows key issues to be captured qualitatively outside of a narrow scoring methodology.

Risk

24 The CPRs require that Defence 'should consider risks and their potential impact when making decisions relating to value for money assessments' (CPRs paragraph 8.2). Accordingly, evaluation teams need to ensure that the tender evaluation includes an assessment of the level of risk associated with each tender.

25 The evaluation team should assess risk in accordance with the risk ratings and methodology set out in the TEP. The CASG Project Risk Management Manual (PRMM) should be used as the prime source of reference for risk assessment in tender evaluations (An example of a risk assessment methodology is included in Annex B to this Guide).

26 Risk assessments in tender evaluations are informed judgments of the risk associated with all aspects of a tender. The kinds of risks that should be considered include those associated with the achievement of the performance of a system/equipment, alignment of the Contract Work Breakdown Structure (CWBS) with the Statement of Work (SOW), schedule, cost, project management, work health and safety, Australian Industry Capability, through life support, corporate structure and the financial viability of the tenderer. These risks need to be taken into account not only in the context of the tenderer itself, but also the contribution that key members of its team (for example, key subcontractors) make to these risks.

27 Some requirements in request documentation will be more demanding or difficult to satisfy than others, and therefore inherently more 'risky', requiring particular attention in the assessment of the risk of a tender. For example, claims by a tenderer that it complies with the performance requirements of a system/equipment will typically warrant further investigation by Defence to ensure that the claim can be substantiated (See the helicopter evaluation example given in Chapter 5 of the CPG). In addition, requirements which are relatively less demanding or difficult to satisfy might be made inherently more risky by the manner in which a tenderer proposes to satisfy them and may therefore also be deserving of particular attention in the assessment of risk of a tender.

28 Insufficient information or lack of clarity in a tender will have an impact on the assessment of risk and, as a consequence, the robustness of the evaluation. Accordingly, the evaluation team should seek to clarify relevant aspects of a tender to ensure it is properly able to assess the risk with the tender. If, despite rigorous clarification, the evaluation team concludes that the tenderer has provided insufficient information in relation to a stated requirement, the evaluation team should assess and record the risk associated with that element of the tenderer's response.

29 Wherever practicable, the evaluation team should further investigate risks as part of the detailed evaluation process (for example, through clarification or offer definition and improvement activities) so that risks can be addressed with greater certainty in the value for money assessment and hence the selection of the preferred tenderer. By investigating the risk, Defence may be able to downgrade its severity in light of a better understanding of the risk, its likelihood or consequences or any risk mitigation strategies which are in place or may be available. During tender negotiations, Defence may then seek to negotiate the appropriate strategies with the tenderer in order to mitigate the risk.

30 While an initial assessment of risk associated with tenders commences at the level of compliance assessments, overall judgments on the collective implications of risk generally do not become apparent until they are aggregated and an overall assessment of risk is made for each tenderer; typically at the level of discussion in the evaluation report. The assessment of risk in the evaluation report should provide an explanation of the nature of risk, its likelihood and its probable consequences for each tenderer, particularly where the nature of such risks are a major factor in establishing a basis for ranking tenderers. Comparative assessments should contrast relative risks between tenderers and be factored into the value for money assessment leading to the ranking of tenderers.

31 The TEP should outline the process for the assessment of risk (consistently with the PRMM), which should involve:

- a. identifying the risks associated with the tender;
- b. analysing the identified risks to determine:
 - likelihood rating - that is, the likelihood (or probability) of the risk event occurring; and
 - consequence rating - that is, the seriousness of the consequences (or impacts) should the risk event occur.
- c. A single risk rating is then calculated for each risk by assessing the likelihood and consequence of that risk, using the standard risk analysis criteria in the PRMM (see PRMM, Annex D);
- d. evaluating the risks. Each of the identified risks needs to be evaluated in order to determine whether they are acceptable or unacceptable. Unacceptable risks need to be treated; and
- e. treating the risks. This involves identifying options for the treatment of risks and selecting the most appropriate treatment strategy.

Financial evaluation

32 Under Defence templates, the financial evaluation criteria generally address the total tendered price, financial and corporate viability of the tenderer, payment structure and the suitability of foreign currencies and price escalation indices and formulas.

Disclosure of pricing information

33 Chapter 5 of the CPG notes that, in conducting tender evaluations for more complex procurements, it is usual for the pricing information in relation to each tender to be provided only to the financial TEWG and not more broadly within the evaluation team (including the other TEWGs). The reason for this is to ensure that the other TEWGs carry out tender evaluations without being influenced by knowledge of the respective prices tendered.

34 As part of the tender opening process, Defence officials will remove the pricing section of each tender (whether hard copy or electronic) and provide this to the financial TEWG. As part of the tender administrative arrangements, the evaluation team needs to put in place appropriate mechanisms to ensure that other evaluation team members do not have access to the pricing information. In addition, financial TEWG members will need to ensure that they do not openly discuss pricing information in front of other evaluation team members.

35 However, as noted in the CPG, the principle that pricing information should not be disclosed more broadly needs to be applied in a sensible manner. There may be circumstances where it is entirely appropriate to disclose pricing information to other members of the evaluation team to enable those members to properly carry out their own part of the tender evaluation. These circumstances need to be assessed on a case by case basis and any disclosure should be on a need to know basis and restricted to the relevant parts of the pricing information in consultation with the TEB Chair and probity advisor.

Example: As part of its tender, a tenderer sought to cap its liability under the contract by reference to the contract price. The liability provisions and liability caps were being evaluated by the commercial/contracting TEWG. As the commercial/contracting TEWG did not have access to the pricing information, the commercial/contracting TEWG was not able to properly evaluate the proposed liability cap without understanding the amount of the contract price for that tenderer.

The overall contract price in respect of that tenderer was disclosed to the relevant individual in the commercial/contracting TEWG to enable it to complete the evaluation of the liability provisions in respect of that tenderer. The pricing information was disclosed late in the tender evaluation to minimise any potential adverse impact of the disclosure of the information and on the basis that the individual to whom it was disclosed would not communicate the information to anyone else during tender evaluations.

Financial evaluation issues

36 As discussed in the CPG, the financial evaluation team will need to establish the extent to which tendered prices should be normalised between tenderers to ensure that a like for like comparison of each tendered price can be undertaken. The financial evaluation team may also be required to evaluate the impact of any financial arrangements proposed in the tender, including the level of risk assumed by the tenderer in its proposed pricing structure.

37 In evaluating the tendered price, the team will often need to make various assumptions, for example, where the team is evaluating prices which vary depending on volume and the volume is not certain at the commencement of the contract. This may be the case for:

- a. Survey and Quote (S&Q) services where the price payable typically varies based on the number of hours and the mix of labour to be used (as usually there is a mix of labour categories for which different rates are used); or
- b. Task-priced services where the price payable typically varies based on the nature and number of taskings requested by Defence.

38 In order to evaluate the tendered prices for S&Q services and task-priced services, Defence needs to assess the volume of hours/taskings which are expected to occur during the course of the contract term and the mix of labour for S&Q services. This assessment should ideally be based on historical data to the extent that historical data is available and relevant to the procurement (for example, if there is an existing contract which the new contract will replace, the evaluation team could use the volume of hours/mix of labour/taskings which occurred under that previous contract). If, however, relevant historical data is not available, Defence will need to assess the volume of hours/mix of labour/taskings based on its expectations and having regard to any similar contracts which may provide guidance.

39 The basis for determining the volume of hours/mix of labour/taskings for S&Q services and task-priced services should be logical and clearly documented (including in the evaluation report) so it is capable of withstanding challenge and scrutiny. This is particularly important where the expected volume of S&Q services/task-priced services forms a significant part of the overall scope of work under the contract.

40 In addition, where the volume of S&Q services/task-priced services is significant relative to the overall scope of work under the contract, Defence should consider whether it should provide tenderers with an indication of the anticipated volume of such services, or at least provide information which tenderers can use to make their own assessment of the volume of such services. In either case, the request documentation should make it clear that Defence is not promising any particular volume of such services, and tenderers need to rely on their own assessment. In addition, Defence officials should consider the extent to which it sets out in the request documentation its proposed methodology for assessing tenderer pricing for S&Q services/task-priced services, including assumptions about volume of hours/mix of labour/ taskings.

41 In assessing the mix of labour for S&Q services and applying that mix to a particular tender, Defence officials should carefully consider the categories of labour proposed by the relevant tenderer, as often as each tenderer will propose their own unique categories of labour. The evaluation team needs to ensure a 'like for like' comparison during evaluation, and if it is not clear how each of the categories of labour apply under a particular tender, the evaluation team may need to clarify this with the relevant tenderer.

42 Given that the volume of hours/taskings and the mix of labour for S&Q services/task-priced services used for the purpose of carrying out the evaluations will often be an estimate, the evaluation team should also consider whether to conduct sensitivity analysis in order to understand the impact on

the overall price evaluation of a change (increase or decrease) in the volume of hours/mix of labour/taskings. Where the outcome of the sensitivity analysis demonstrates that the outcome is sensitive to the volume of hours/mix of labour/taskings, the evaluation team will need to consider how this affects its evaluation and the value for money assessment.

Example: In the tender process for the support of an existing Defence capability, the overall scope of work under the contract comprised both Recurring Services and S&Q Services, of which the S&Q Services constituted a significant proportion. Of the two tenderers which were shortlisted to participate in parallel negotiations, Tenderer A had a lower price for Recurring Services but on average more expensive rates for S&Q Services across each category of labour than Tenderer B.

Given the significance of S&Q Services relative to the overall scope of work, Defence determined an estimate of the likely number of hours of S&Q Services over the term of the contract. Given that the contract was replacing an existing contract with a similar scope of work, the estimate was determined having regard to the volume of S&Q hours under the existing contract and then adjusted for any differences in the scope of work between the two contracts and other relevant factors. The methodology for determining the estimate and the detailed calculations and adjustments made to historical data were documented in the evaluation report. The request documentation required tenderers to provide rates for a number of different categories of labour. The categories of labour used would depend on the nature of the S&Q Services being performed. Based on the nature of the S&Q Services to be performed, Defence made an assessment of the likely mix of labour.

The effect of incorporating the evaluation of S&Q Services into the overall price evaluation was that Tenderer A was determined to offer a higher overall price, as the anticipated price for S&Q Services based on the estimate of hours for the S&Q Services for Tenderer A was significantly higher than the anticipated price for Tenderer B. Defence also conducted extensive sensitivity analysis to determine the extent to which the outcome of the overall price evaluation was sensitive to both the volume of hours estimated and the mix of labour used. The sensitivity analysis included determining at what volume of S&Q Services Tenderer A had an overall cheaper price (based on Recurring Services and S&Q Services) than Tenderer B. This volume of services was well below the expected volume of S&Q Services. In light of the sensitivity analysis conducted, the evaluation team concluded that the outcome of the evaluation of S&Q Services was not sensitive to either the volume of hours estimated or the mix of labour used. Details of the sensitivity analysis and the outcomes were recorded in the evaluation report.

Evaluating whole of life costs

43 For most complex Defence procurements relating to goods or works, the tendered price is seldom the only relevant cost and the evaluation of whole of life costs is a critical aspect of the tender evaluation. In making a value for money assessment, a comparison of the relevant benefits and costs on a whole of life basis should be undertaken. Whole of life costs are the total costs arising from a decision to purchase and are incurred in respect of the purchased item over its life cycle from acquisition to disposal.

44 The assessment of whole of life costs seeks to take into account the full potential financial implications of a purchase. A 'whole of life' cost assessment for the procurement of Defence materiel will typically include the initial purchase price, installation costs (including, for example, modification of existing platforms), operating and support costs, cost of spares, licence fees, and disposal costs. It may also take into account (where relevant) the timing of replacement of a product or systems within a product at the end of their life of type.

45 For example, a tendered item may have an initial cheaper price but thereafter require more extensive (or expensive) maintenance or more frequent replacement of components as compared to other tendered items. Some items may impose costs on Defence outside the project itself, such as modification of platforms or other equipment. In these circumstances, to ensure the selection of the tender which represents best value for money, all relevant costs associated with a purchase should be factored into the financial evaluation.

46 In some cases, the assessment of whole of life costs will be a simple process as the total costs and benefits of ownership will be readily apparent. In respect of more complex procurement, evaluating whole of life costs may require the development of a detailed methodology to ensure that all relevant costs are identified and quantified where appropriate. Financial advisers may need to be engaged to assist in the evaluation of whole of life costs for more complex procurements especially where life cycle cost modelling is required.

47 There is no simple formula for assessing whole of life costs. Assessing whole of life costs will require some judgement about options and future events. To the extent that assumptions are made in

evaluating whole of life costs, the evaluation team will need to assess whether it should carry out sensitivity analysis in relation to the assumptions.

48 The TEP should outline the methodology to be adopted in assessing whole of life costs. The evaluation report should provide an overview of the methodology adopted and details of any assumptions made and sensitivity analysis conducted.

Example: As part of the evaluation of tenders for the acquisition of a new aircraft, the evaluation team assessed the whole of life costs of the purchase. Modifications were required to ships and existing facilities and the extent and nature of the modifications required were dependent on the aircraft acquired. In addition, the weapons to be acquired varied depending on the successful solution. The price evaluation factored in the anticipated cost of the modification to the existing ships and facilities and the cost of acquiring the relevant weapons for each of the solutions. As part of the assessment, the evaluation team made independent investigations of the anticipated costs including, in the case of the cost of acquiring the weapons, obtaining tender quality pricing from prospective suppliers.

Value for money assessment

49 'Achieving value for money is the core rule of the CPRs. Officials responsible for a procurement are required to be satisfied, after reasonable inquiries, that the procurement achieves a value for money outcome' (see CPRs, paragraph 4.4). The application of this rule requires consideration of the financial and non-financial costs and benefits associated with the procurement, for example, the achievement of qualitative outcomes such as improved or innovative design and service standards, as well as quantitative outcomes such as an overall reduced cost of delivering capability and related services.

50 As noted in Chapter 1 of this Guide, the price of the goods, works or services being acquired is not the sole determining factor in assessing value for money. Defence officials need to assess which tender offers the best value for money having regard to the outcome of the assessment against each of the evaluation criteria, including price, and any risks associated with the tender. Accordingly, the value for money assessment should take a holistic view of the tenderer and its offer against the evaluation criteria. The assessment should be based on:

- a. the evaluation of each tender against the evaluation criteria (or sub-criteria), including relative ranking of tenders against each criterion and across all criteria;
- b. the identification and assessment of the key areas of discrimination between each tender in relation to the criteria or sub-criteria (for example, the relative strengths and weaknesses);
- c. whole of life costs (including tendered prices) and an explanation of cost risk attributable to each tender;
- d. an assessment of the risks associated with each tender and an indication of the strategies that are necessary to manage the risks; and
- e. an explanation of the actions that would be necessary to enter into a contract, for example, the extent of negotiation required in relation to contractual non-compliances (which would normally take the form of a draft Contract Negotiation Directive).

51 If further tenderer engagement activities and/or negotiations are conducted following the initial evaluation outcome, Defence officials should confirm at the conclusion of those activities or negotiations that the preferred tenderer's offer continues to represent value for money. This is because if the preferred tenderer's offer changes significantly during negotiations, there is a risk that that tender may no longer represent value for money.

Example: In a tender process, the two leading tenderers were assessed to be very close with little distinguishing the two. The tenderer who was assessed as offering the best value for money was appointed as the preferred tenderer and contract negotiations with the preferred tenderer commenced. During contract negotiations, the preferred tenderer raised a number of issues and non-compliances which were not included in its original tender submission. While the Defence negotiation team made a number of minor concessions in relation to some of the new issues and non-compliances (primarily in relation to the wording of the contract), the team advised the tenderer that it was not in a position to make any additional amendments of a more significant nature given the closeness of the two tenders. Following completion of contract negotiations, Defence confirmed that the negotiated contract continued to represent best value for money.

52 To support the assessment of value for money in the evaluation report, the TEP may provide for the use of a 'value' descriptor to describe the overall value of a particular tender, before price is considered. This is another mechanism that can be used to assist in the ranking of tenderers. In this context, 'value' is a judgement based on the combined influences of the compliance and risk assessments. Value is considered in isolation of price. An example of a value rating table is set out in Annex B to this Guide.

53 Annex C identifies some of the key issues which can arise during tender evaluations and identifies possible steps which can be adopted to assist in preventing or mitigating those issues.

Offer Definition and Improvement Activities

54 In the most complex of Defence procurement processes, the request documentation and the TEP may provide for the conduct of offer definition and improvement activities (ODIA) as a further stage in the detailed evaluation process. ODIA is usually undertaken with two tenders that have been shortlisted following the initial detailed evaluation.

55 For more information about ODIA, Defence officials should refer to Chapter 5 of the CPG and the ODIA Better Practice Guide which is currently under development.

Negotiation issues

56 A key part of the work of evaluation teams during evaluation is to identify those issues and risks that it will be imperative to successfully address should Defence undertake contract negotiations (or ODIA) with the relevant tenderer. When recording their assessment of tenders against the evaluation criteria, the TEP will usually require evaluation team members to record negotiation issues (and/or issues for ODIA), as well as an indicator as to how essential it is to successfully negotiate the issue.

57 The following indicators are sometimes used in TEPs to support the identification of negotiation issues:

Classification	Description
Must obtain	Any contract which does not achieve the acceptable resolution of the issue is likely to be unacceptable. Additional cost may need to be incurred by the Commonwealth to achieve resolution, but may affect value for money assessment.
Should obtain at cost.	The negotiation team should attempt to hold the Commonwealth's desired position in relation to this issue, but a reasonably negotiated compromise would be acceptable. Additional cost may need to be incurred by the Commonwealth to achieve resolution, but may affect value for money assessment.
Should obtain at no cost.	An inconsequential issue which may be traded off to reduce cost to improve negotiated outcome in another area.

Chapter 4

Products of the tender evaluation process

Overview

1 This Chapter provides an overview of the documents which will be required by Defence in relation to its tender evaluations. While the documents which will be produced as a result of the conduct of tender evaluation will vary from procurement to procurement, it is imperative that the process followed and the tender evaluation itself is clearly documented to ensure that the process delivers good outcomes which are defensible, particularly if an unsuccessful tenderer challenges the outcome of the process. The level of detail in each of the documents should be commensurate with the nature and complexity of the procurement.

2 As discussed in the CPG, prior to commencement of the tender evaluation for a complex procurement, Defence officials will have developed and approved the key procurement documentation, including the procurement plan, request documentation, TEP and, for the more complex or sensitive procurements, a Legal Process and Probity Plan and/or associated probity documentation (for example, conflict of interest declarations and confidentiality agreements etc).

3 The following documents will typically be produced as a result of conducting tender evaluations. The range of documents necessary for a particular evaluation will depend on the nature and complexity of the procurement and the activities which are conducted as part of the tender evaluations (and in particular, the scope of tenderer engagement activities):

- a. Tender Receipt and Registration Log – to record the receipt and registration of tenders;
- b. Communications Officer Log and Report - to record all communications with tenderers;
- c. Initial Screening and/or Shortlisting Report – to record the outcome of the initial screening and any shortlisting of tenders;
- d. TEWG reports which records the findings from the detailed evaluation conducted by each TEWG;
- e. Source Evaluation Report (SER) or tender evaluation report - to record the findings and outcomes of the tender evaluation;
- f. If ODIA is undertaken, any additional process documentation to support those activities;
- g. The updated or final TEWG reports and SER (following the outcomes of the ODIA). The updated or final TEWG reports can often be incorporated into the updated or final SER rather than separate standalone reports being prepared;
- h. Contract Negotiation Strategy and Contract Negotiation Directive – to set out the Commonwealth's negotiation strategy with the preferred tenderer/s, and the issues to be negotiated and Defence's positions on the issues, respectively;
- i. Contract Negotiation Report – to set out the outcome of the negotiations;
- j. Legal Process and Probity Report – to set out the probity report and sign off provided by the legal process and probity advisor;
- k. Other adviser's reports – to set out the reports and sign offs from other advisers, for example, the legal adviser in relation to the negotiated contract, the financial adviser in relation to matters such as the financial evaluation, financial viability assessment, or the final pricing and payment schedule;
- l. Debriefing Reports - to set out the content of each proposed debriefing to tenderers; and
- m. Delegate Submission - to seek formal approval of the SER and for Defence to enter into the contract negotiations.

Source Evaluation Report

4 Defence officials should prepare an evaluation report for all complex procurements. The SER should clearly outline the considerations and justifications that led to the source selection recommendation(s). If Defence proposes to shortlist tenderers to participate in further tenderer engagement activities, the evaluation team may prepare an interim SER which clearly outlines the considerations leading to the shortlisting of tenderers. The relevant delegate should approve the

interim SER before the team proceeds with the further activities. Following completion of the further activities, the evaluation team should either update the interim SER or prepare a final SER which documents the decision to select a preferred tenderer.

5 The SER (and the TEWG reports) should contain sufficient detail to ensure the source selection recommendation and each of the findings/conclusions are substantiated, defensible and able to withstand challenge and scrutiny. The level of detail included in the SER (and the TEWG reports) should be commensurate with the nature and complexity of the procurement. The level of detail in the documentation will also be determined by the nature and range of issues which arise during the tender evaluations and the need to clearly articulate the key points of differentiation between tenders.

6 The evaluation team needs to ensure that all material issues and risks identified in the TEWG reports are captured in the SER and that the findings/conclusions contained in the SER are consistent with the findings/ conclusions in the TEWG reports.

7 Preparing the SER can be resource intensive and the evaluation team therefore needs to ensure that it allocates sufficient resources to this activity so that it is done properly.

8 The SER should contain sufficient detail on each of the following:

- a. the outcome of the initial screening and any shortlisting;
- b. details of the evaluation process and methodology used, including details of any tenderer engagement activities conducted;
- c. the justification for setting aside any tenders that are clearly not competitive;
- d. the outcome of the evaluation in relation to each of the evaluation criteria;
- e. the outcome of the comparative assessment of tenders against each of the evaluation criteria;
- f. a clear statement of the risks in relation to each of the tenders;
- g. the value for money assessment and recommendations; and
- h. details of further actions to be taken.

9 An SER (Medium to High Risk Acquisitions) template can be found on the [Commercial Division Tools and Template Intranet Page](#). The SER template assumes the preparation of separate TEWG reports. As with all templates, the SER template should be tailored as appropriate in the context of the particular evaluation.

Chapter 5

Evaluating Foreign Military Sales (FMS) vs commercial procurement

1 For some materiel related procurements, Defence may issue request documentation for a commercial procurement and a letter of request for a Foreign Military Sale (FMS) case in parallel to meet the capability requirement. This raises a number of unique evaluation issues which need to be carefully considered and addressed as part of planning the procurement and in conducting the evaluation. Given the terms under the FMS system are significantly different to the ASDEFCON contract terms for a commercial procurement, there is no common commercial tender evaluation baseline against which the respective responses can be evaluated. Accordingly, the evaluation methodology needs to address how a 'like for like' evaluation can be undertaken between the commercial responses and the FMS response.

2 As discussed in the DPPM, an FMS case involves a direct government-to-government arrangement between Defence and the US Government under the FMS program. The procurement officer in Australia forwards a complete statement of requirement to Defence Materiel Washington (DEFMAT (W)) using a request for a Letter of Request (LOR). The LOR is sent to the US Government by the Director Foreign Military Sales within DEFMAT (W). After considering the LOR, the US Government responds to Defence with a Letter of Offer and Acceptance (LOA) which, following the signature of both parties, forms the FMS contract.

3 As noted above, the terms of an FMS contract are significantly different to the standard contract provisions and risk allocation in the ASDEFCON templates, generally adopting an approach which is less favourable to Defence. Some of the key issues and risks arising from conducting a procurement under FMS compared to a commercial procurement include:

- a. the US Government procures the items on terms and conditions that conform to US Department of Defense regulations and procedures. There can be a disparity between the acceptance procedures applied by the US Government and those used by Defence to satisfy itself as to the condition of the goods or services being procured. Accordingly, it is important to identify in the LOR any specific requirements regarding the condition of the goods or services;
- b. FMS contracts require the purchasing government to pay all costs that may be associated with the sale as the US Arms Export Control Act 1976 (US) requires that the FMS program be conducted at no cost to the US Department of Defense. As a result, the total price of items procured is billed to Defence even if that cost exceeds the amount estimated in the LOA;
- c. Defence assumes the risk of delay, with the US Government only being required to use its best efforts to advise Defence where the delays may substantially affect delivery dates;
- d. the indemnity, liability and warranty provisions in an FMS arrangement are far less favourable to Defence than the ASDEFCON provisions, and in fact require the Commonwealth to indemnify the US Government against loss or liability;
- e. the scope of intellectual property rights and access to technical data are less favourable to Defence; and
- f. the US Government has no liability for infringement or violation of intellectual property or technical data rights.

4 In order to facilitate the tender evaluation, Defence could seek to reduce the 'gap' between the FMS case and the commercial procurement by attempting to more closely align the terms of the FMS contract in the LOR to the terms of the contract used for the commercial procurement. However, Defence's ability to do this is usually limited as it depends on the willingness of the relevant US Government contracting officer to agree to the additional terms included in the LOR. Alternatively, Defence officials can seek to negotiate separate agreements with the relevant FMS contractors, for example, to ensure the necessary technical data and IP rights are given to Defence (which may not otherwise be available through the FMS provisions). The cost of these separate agreements can then be factored into the evaluation.

5 Given that there is no common tender evaluation baseline, the tender evaluations of the commercial responses and FMS response need to include an assessment of the key areas of difference between the LOA for the FMS case and the tender for the commercial procurement. Typically, the assessment of the difference between the LOA and the tender will identify the areas of difference which have a cost or risk impact on Defence or would otherwise provide a benefit to Defence. These differences are either evaluated quantitatively through a price adjustment to the tendered price or qualitatively (or through a combination of the two).

Example: Defence conducted a procurement process that competed an FMS case against a commercial procurement. As part of planning the procurement, Defence considered its proposed tender evaluation methodology and its approach to evaluating the differences between the LOA and the tender. In drafting the LOR, Defence included a number of additional terms to more closely align the terms of the FMS contract to the terms of the contract used for the commercial procurement, for example, by seeking more extensive warranties, intellectual property rights and access to technical data. In addition, Defence sought more information than is typically requested under an FMS case to more closely align the LOR with the information requested in respect of the commercial procurement (i.e. in the Tender Data Requirements). Defence was aware that given the manner in which the FMS program operated, there was no guarantee that the US Government would agree to the additional terms or provide the additional information, but ultimately was able to narrow the gap in some respects.

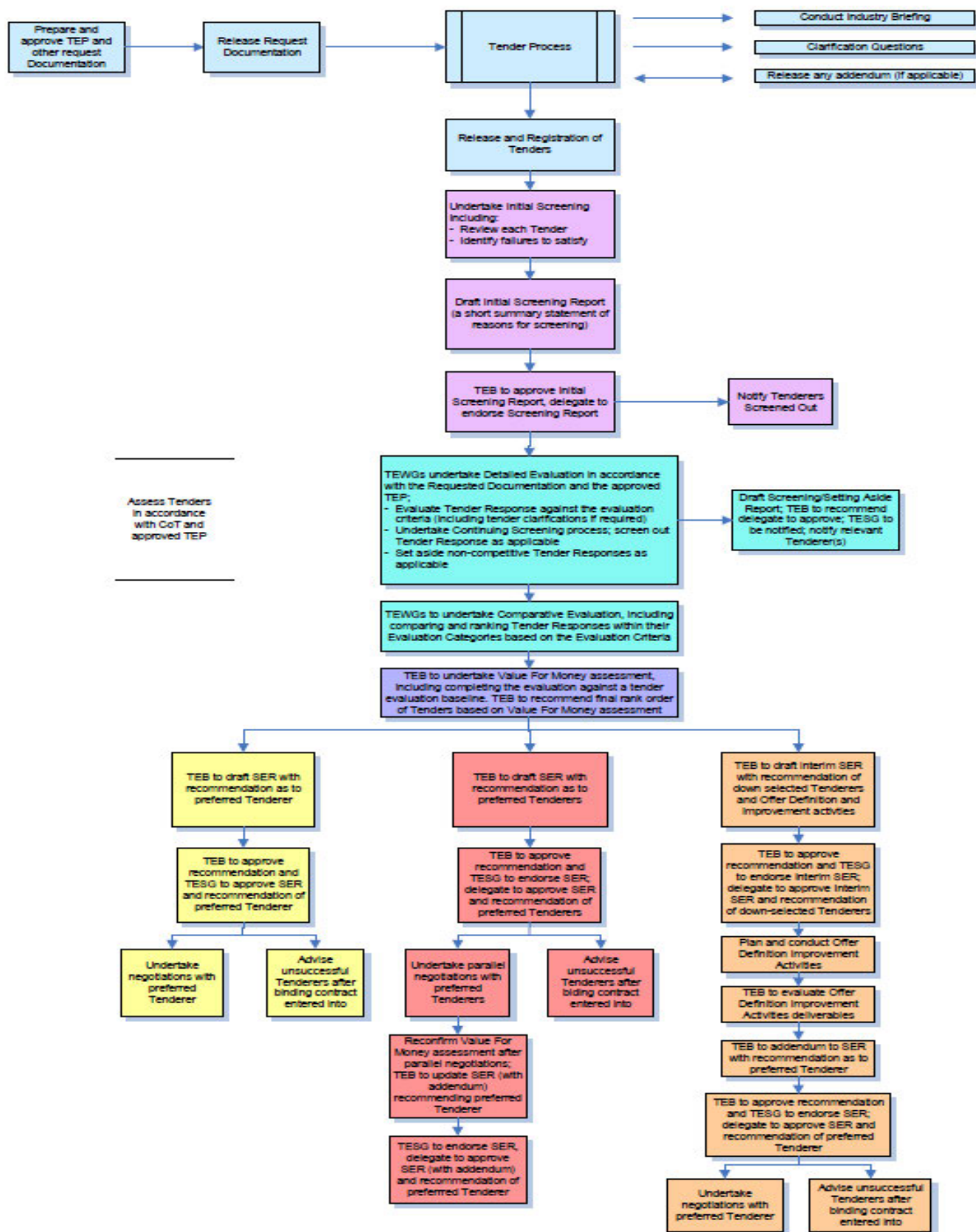
In conducting the evaluation, the key areas of difference between the LOA for the FMS case and the tender for the commercial procurement which had a cost or risk impact on Defence or would otherwise provide a benefit to Defence were identified and evaluated. Examples of the key areas of difference which were evaluated included:

- (a) warranties - the assessment involved a price adjustment and a qualitative assessment;
- (b) intellectual property rights and access to technical data - the assessment involved a qualitative assessment;
- (c) indemnity and liability provisions - the assessment involved a price adjustment;
- (d) Australian Industry Capability - the assessment involved a price adjustment and a qualitative assessment; and
- (e) differences in the allocation of other key risks - the assessment involved a combination of price adjustments and qualitative assessments depending on the particular risk and the extent to which it was capable of being costed.

6 In light of the difficulties associated with evaluating an FMS case against a commercial procurement, it is important that Defence officials set out the agreed evaluation methodology in the TEP, and in particular the approach to evaluating the differences between the LOA and the commercial tenders. It is also important that the outcomes of the evaluation (and in particular the outcome of the assessment of the differences between the LOA and the tenders) are set out in the SER to ensure the outcome of the evaluation is defensible and able to withstand challenge and scrutiny.

Annex A

Overview of Tender Evaluation Process



Comparative Assessment and Ranking Method

Introduction

- 1 Comparative assessment involves ranking tenders in their relative order of merit against the requirements of the request documentation by evaluating tenders (including their associated risks) against each evaluation criterion, to arrive at a recommendation of the overall merit of the tenders against the requirements.
- 2 The three key steps in the comparative assessment and ranking method are:
 - a. evaluating each tender against each of the evaluation criteria;
 - b. conducting a comparative assessment of tenders in respect of each of the evaluation criteria; and
 - c. conducting a value for money assessment.
- 3 These steps are discussed in turn below.

Evaluating against each of the evaluation criteria

The 'Technical' evaluation

- 4 Each tender will normally be assessed against an evaluation criterion that relates to the extent to which the tender meets the Statement of Requirements and related specifications of the request documentation. This assessment is often described the 'technical' evaluation. The Technical TEWG will normally undertake its evaluation by reference to a detailed evaluation breakdown structure of the requirements, with the compliance and risk assessments being done at the lowest level of the breakdown structure (which might be at the evaluation element or sub-sub-criterion level). These individual assessments are then 'rolled up' and presented in the TEWG report (and SER) at the evaluation criterion or sub-criterion level.
- 5 The TEP should define the 'compliance' ratings to be used during the technical evaluation to assist in differentiating between tenders. As noted in Chapter 5 of the CPG, ratings that are commonly used include:
 - a. **Exceeds:** the tendered solution exceeds the requirement specified in the request documentation in a manner which offers significant additional benefits to Defence;
 - b. **Compliant:** the tendered solution meets the requirement specified in the request documentation or, where it exceeds the requirement, there is no significant additional benefits to Defence; and
 - c. **Deficient:** the tendered solution does not meet the requirement specified in the request documentation.
- 6 Deficiencies are often further classified as:
 - a. **Critical:** a deficiency that cannot be readily remedied and which is of such significance that it may seriously prevent the principal project objectives from being achieved;
 - b. **Significant:** a deficiency that has the potential to prevent an element of the principal project objectives from being achieved; and
 - c. **Minor:** a deficiency that has no substantial implications for the project objectives and, subject to negotiations with the tenderer, may be acceptable without remedial action.
- 7 In applying the deficiency ratings, the evaluation team (which may be a Technical TEWG) needs to judge each deficiency on its merits as presented, irrespective of the case or cost of rectification. Having made this judgement, the evaluation team then assesses how readily the deficiency might be overcome and whether or not such deficiencies should be rectified or identified as a shortcoming in the response.
- 8 'Critical' deficiencies will typically only be relevant to 'Essential' (if any) or 'Very Important' requirements. All 'Critical' deficiencies should be highlighted and explained in the SER in terms of why the deficiency was assessed as 'Critical' and why the deficiency cannot be readily remedied. If a tender is assessed as having a 'Critical' deficiency, the evaluation team will need to assess whether the tender should be set aside.

9 As well as assessing the tenderers' compliance against the technical requirements, the evaluation team needs to assess the risk that the tenderers' solution will perform to the level of compliance offered against the requirements. In the context of the technical evaluation criterion, risk is assessed in terms of the probability of the tenderer's solution not achieving the stated level of compliance, and the consequence of the risk event based on the risk categories identified in the TEP (which, for example, might be the risk to performance, schedule, cost or supportability). Risk assessment is discussed further below in this Annex.

Other non-price evaluation criteria

10 The evaluation of tenders against other non-price evaluation criteria may use a similar assessment approach as with the technical evaluation, or may adopt a modified methodology, as appropriate for the particular criterion. Evaluation criteria may be broken down into sub-criteria or lower level evaluation elements to assist with the evaluation of tenders against the particular criterion.

11 In the case of the evaluation of compliance with the draft conditions of contract, this usually involves an assessment of the 'risk' to Defence (that is, the Commonwealth) of the non-compliances. This risk assessment may involve a qualitative assessment of the implications of the changed risk allocation that arises as result of the non-compliance. This assessment may also use standard risk descriptors (see the risk assessment methodology below). In addition, the evaluation will also usually involve the evaluation team undertaking a quantitative assessment of the 'cost' to the Commonwealth of the changed risk allocation, which will then need to be 'priced in' (that is, added on) to the tendered price.

12 The evaluation of compliance with the draft conditions of contract often takes the form of a table, an example of which is at Annex D to this Guide. This table can also be used for any offer definition and improvement activities or negotiations (for example, as an attachment to the Contract Negotiation Directive), and can be further updated with the outcomes of those activities or negotiations, as the case requires.

13 The assessment against the non-price criteria should generally be in the form of a qualitative statement that addresses the key strengths and weaknesses of the tender together with the risks identified. Quantitative methods may be used to support the qualitative statement where appropriate.

Financial (price) evaluation

14 Some considerations relating to the financial evaluation (including the evaluation of the tendered price, and whole of life costs) are discussed in Chapter 3 of this Guide.

Comparative assessment of tenders

15 Following the assessment of each of the tenders against each of the evaluation criteria, a comparative assessment is undertaken of all tenders on a qualitative basis in respect of each of the evaluation criteria. Comparative assessment involves the ranking of tenderers in relative order of merit against each of the evaluation criteria, including risk. The comparative assessment should draw out the major differences and identifies discriminators between the tenders as they relate to the evaluation criteria.

16 Where the TEO involves TEWG's, the comparative assessment will be conducted firstly at the TEWG level in respect of those evaluation criteria for which each TEWG is responsible and then at the TEB level in respect of all evaluation criteria.

17 In relation to the technical evaluation, the evaluation team may decide to record the compliance and risk assessments of the technical requirements in a table, as follows:

	Tenderer A		Tenderer B		Tenderer C	
Requirement (from SoW or specification)	Compliance	Risk	Compliance	Risk	Compliance	Risk
1.1.1	Deficient minor	Medium	Deficient significant	Low	Meets	Very High
1.1.2	etc					
1.1.3 etc	etc					

18 Recording the evaluation in this kind of format may allow the evaluation team to more easily identify and draw out the key areas of discrimination across the relevant evaluation criteria.

Value for money assessment

19 Following the completion of the comparative assessment of tenders, the evaluation team conducts a value for money assessment to determine which tender offers best value for money.

20 It should be noted that the tender which receives the highest overall ranking as part of the comparative assessment (for example, is ranked first against the most number of evaluation criteria) will not necessarily be the tenderer which offers the best value for money. This is because the value for money assessment involves a more holistic assessment of each of the tenders, including an aggregates assessment of overall risk, and in particular allows the evaluation team to consider price in the context of the 'value' of the tenders against the non-price criteria.

Value rating table

21 As noted in Chapter 3 of this Guide, the TEP may provide for the use of a 'value' descriptor to describe the overall value of a particular tender, before price is considered, with 'value' being a judgement based on the combined influences of the compliance and risk assessments against the non-price evaluation criteria.

Value Rating	Value Rating Guidance
Very Strong	Corresponds to compliance levels of Exceeds or Compliant with Negligible or Low risk magnitude.
Strong	Corresponds to compliance levels of Exceeds or Compliant with Moderate risk magnitude, or Deficient – Minor with Negligible or Low risk magnitude.
Fair	Corresponds to compliance levels of Exceeds or Compliant with High risk magnitude, Deficient – Minor with Moderate risk magnitude, or Deficient – Significant with Negligible or Low risk magnitude.
Marginal	Corresponds to compliance levels of Exceeds or Compliant with a Very High risk magnitude, Deficient – Minor with High or Very High risk magnitude, or Deficient – Significant with Moderate risk magnitude.
Unacceptable	Corresponds to compliance levels of Deficient – Significant with High or Very High risk magnitude, or Deficient – Critical with any risk magnitude.

Risk assessment methodology

22 This section sets out a basic risk assessment methodology. Defence officials need to consider and tailor the consequence and probability descriptors by reference to the particular procurement they are undertaking.

23 In the more complex procurements, the TEP may set out separate Consequence tables for specific evaluation criteria. For example, for the technical evaluation, the Consequence table may have descriptors that are focussed on the performance of the platform, equipment or system being procured. Whereas for the financial evaluation, the Consequence table may have descriptors focused on potential cost increases of increasing magnitudes. Alternatively, the TEP may set out Consequence tables by risk category that are able to be applied across all evaluation criteria, where relevant. For example, the TEP could set out individual Consequence tables for Performance, Schedule, Cost and Supportability.

24 Identification of risks during assessment is made at the lowest level of assessment. Assessment encompasses consideration of the Consequence or Impact of risk on the function under consideration, and the Probability or Likelihood of the risk arising. The consequence and probability are then combined to determine an overall Risk Rating.

25 The determination of the consequence of risk on each function forming part of the requirements is influenced by various factors. Consequence can be considered by identifying the overall outcomes

to be delivered across the contract and considering the likely consequences of risk as a result of the identified factors.

Risk Consequence Example 1 (Major Capital Acquisition)

Consequence	Consequence Description
Extreme	<p>Critical increase in acquisition cost – eg project unaffordable</p> <p>Critical increase in Through Life Costs. – eg support unaffordable</p> <p>Critical schedule slip. [eg > 3 years – consider project cancellation]</p> <p>Critical reduction in operational performance. – eg project will not deliver a capability usable by Capability Manager</p> <p>Critical reduction in supportability – eg platform unable to be supported</p> <p>Critical reduction in technical integrity. – eg platform unable to be safely or reliably operated</p> <p>Critical failure of equipment leading to death/serious injury of personnel eg platform unsafe to use</p>
High	<p>Significant increase in acquisition cost [insert range, eg \$20-50m].</p> <p>Significant increase in Through Life Costs. [insert range, eg \$20m pa]</p> <p>Significant schedule slip. [insert range, eg 2-3 years]</p> <p>Significant reduction in operational performance.</p> <p>Significant reduction in supportability.</p> <p>Significant reduction in technical integrity.</p> <p>Significant failure of equipment leading to injury of personnel.</p>
Medium	<p>Moderate increase in acquisition cost. [insert range]</p> <p>Moderate increase in Through Life Costs. [insert range]</p> <p>Moderate schedule slip. [insert range]</p> <p>Moderate reduction in operational performance.</p> <p>Moderate reduction in supportability.</p> <p>Moderate reduction in technical integrity.</p> <p>Failure of equipment leading to damage to platform.</p>
Low	<p>Minor increase in acquisition cost. [insert range]</p> <p>Minor increase in Through Life Costs. [insert range]</p> <p>Minor schedule slip. [insert range]</p> <p>Minor reduction in operational performance.</p> <p>Minor reduction in supportability.</p> <p>Minor reduction in technical integrity.</p> <p>Minor failure of equipment.</p>
Negligible	The consequences would be dealt with through routine management and operations.

Risk Consequence Example 2 (Services based procurement)

Consequence	Consequence Description
Extreme	<p>Would threaten the survival of not only the program or project, but also Defence's operations; or</p> <p>Has extreme political and/or community sensitivity</p>
High	<p>Would threaten the survival or continued effective function of the program or project;</p> <p>Could significantly impact on Defence's strategic/operational objectives; or</p> <p>Has significant political and/or community sensitivity</p>

Medium	Would not threaten the program or project, but would mean that the program or project could be subject to significant review or changed ways of operating. Has moderate impact on Defence's strategic and/or operational objectives; or Has moderate political and / or community sensitivity.
Low	Would threaten the efficiency or effectiveness of some aspect of the program or project, but would be dealt with internally, or Has minimal impact on Defence's strategic/operational objectives, or Has low political and/or community sensitivity
Negligible	The consequences would be dealt with through routine operations.

26 An assessment of probability of the risk occurring is also required. The assessment is made on occurrence, that is, it is not a constant like impact, but is an individual assessment in each case. The assessment will be based upon the likelihood that the risk will occur in light of the response provided by the tenderer. Probability will be assessed as follows:

Risk Probability

Likelihood	Frequency Description
Almost Certain	Almost certain to occur
Likely	Likely to occur
Moderate	Could occur
Unlikely	Unlikely to occur
Remote	Would only occur in extreme circumstances

27 This assessment will result in the allocation of a Risk Rating, which is a function of the assessment of the Consequence and Probability of these two factors as follows:

Risk Assessment Table

Consequence/ Impact	Likelihood				
	Almost Certain	Likely	Moderate	Unlikely	Remote
Extreme	Significant	Very High	High	Medium	Low
High	Very High	High	Medium	Low	Very Low
Medium	High	Medium	Low	Very Low	Nil
Low	Medium	Low	Very Low	Nil	Nil
Negligible	Low	Very Low	Nil	Nil	Nil

Less complex evaluation methodology

28 As noted in Chapter 5 of the CPG, evaluation methodologies can take various forms depending on the nature and risk of the relevant procurement. The following is an example of a less complex scoring system which includes both quantitative and qualitative aspects. Under this methodology, the scoring of tenders determines the extent of compliance and quality of each tendered response against the requirements set out in the request documentation. Note that the scoring system combines the risk assessment with the qualitative rating to determine the score.

29 This kind of approach could be used for most non-price evaluation criteria, and may be suitable for services based contracts.

Descriptor	Definition	Risk Level	Score
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Descriptor	Definition	Risk Level	Score
Excellent	<ul style="list-style-type: none"> - The tendered offer meets the requirement in all respects. - The evaluator has complete certainty and without reservation that the Tenderer will be able to meet the required standard at the highest level. - The Tenderer's claims are fully supported by the information provided. - The supporting information is comprehensive and complete. - Where consulted, all reference sites confirmed the superior nature of the Tenderer's performance. 	Nil risk	10
Very Good	<ul style="list-style-type: none"> - The tendered offer meets the requirement in most but not all respects. - The evaluator has no reason to believe that the Tenderer will not meet the required standard. - The Tenderer's claims are well supported by the information provided. - Supporting information is comprehensive and complete. - Where consulted, the majority of reference sites generally confirmed the high quality of the Tenderer's performance. 	Very low risk	9 - 8
Good	<ul style="list-style-type: none"> - The tendered offer generally meets the requirement but not in all respects. - The evaluator has no reason to believe that the Tenderer will not meet the required standard. - Supporting information is complete. - Where consulted, the majority of reference sites generally confirmed a good level of service 	Low risk	7 - 6
Satisfactory	<ul style="list-style-type: none"> - The tendered offer just satisfies the requirements but there are some deficiencies and shortcomings in the scope and detail of the supporting information. - The evaluator has some reservations regarding the satisfaction of the required standard. - Where consulted, the reference sites generally confirmed a level of service that was satisfactory without being exceptional. 	Medium risk	5 - 4
Poor	<ul style="list-style-type: none"> - There are major deficiencies in the scope and detail of the tendered offer and/or supporting information and the evaluator has significant reservations regarding the Tenderer's ability to meet the requirement. - Where consulted, the reference sites had reservations about the quality of the service provided. 	High risk	3 – 2
Unsatisfactory	<ul style="list-style-type: none"> - The supporting information is insufficient to allow any judgment. 	Very High - Significant risk	1
Nil Response	<ul style="list-style-type: none"> - There is no response. 	N/A	0

Common tender evaluation issues

This Annex identifies some of the key issues which can arise during tender evaluations and identifies possible steps which can be adopted to assist in preventing or mitigating those issues.

Issue	Potential steps to prevent issue arising
<ul style="list-style-type: none"> Insufficient time, resources or skills to carry out the tender evaluations effectively. 	<ul style="list-style-type: none"> Ensure that the request documentation is released early. Plan the tender evaluation upfront so the TEO is aware of how it will go about assessing each of the evaluation criteria, what information it will require to assess each of the evaluation criteria and what key issues are anticipated. Ensure the TEO is adequately resourced and has the necessary skills, training and knowledge/subject matter experts. For large evaluations, identify potential back up or replacement team members. Ensure that tenderers are required to submit all information which Defence requires in order to assess tenders against the evaluation criteria.
<ul style="list-style-type: none"> Failure to effectively plan for and resource tender evaluation. 	<ul style="list-style-type: none"> Ensure logistics support is planned well in advance of receipt and opening of tenders. Ensure tender rooms are available for the duration of the tender evaluation. Ensure members of the TEB and TEWG are appropriately skilled, experienced and available to conduct the tender evaluation.
<ul style="list-style-type: none"> Failure to justify findings/conclusions contained in the SER, the TEWG reports do not adequately differentiate between tenders, or the SER or the TEWG reports otherwise do not include sufficient detail. 	<ul style="list-style-type: none"> Include sufficient detail in the SER and the TEWG reports to justify the source selection recommendation and the various findings / conclusions. Articulate in the SER and TEWG reports the key points of differentiation between the tenders. Include sufficient detail in the TEWG reports about the outcome of the evaluation in relation to each of the evaluation criteria. Include sufficient detail in the SER about each of the following: <ul style="list-style-type: none"> the outcome of the evaluation in relation to each of the evaluation criteria; the outcome of the comparative assessment of tenders against each of the evaluation criteria; the risks in relation to each of the tenders; and the value for money assessment and recommendations. Clearly state in the SER details of the evaluation process and methodology used. Ensure that the level of detail included in the SER and the TEWG reports is commensurate with the nature and complexity of the procurement. Cite all supporting information sources from the tenders.
<ul style="list-style-type: none"> Incomplete or poorly drafted SER due to insufficient time being devoted to the preparation of the SER following completion of the TEWG reports. 	<ul style="list-style-type: none"> Ensure that sufficient time and resources are devoted to the preparation of the SER. Plan the format and structure of the SER as part of preparing for and planning the tender evaluation. Obtain specialist commercial contracting advice and input on the draft SER.

Issue	Potential steps to prevent issue arising
<ul style="list-style-type: none"> Failure to ensure consistency between the various reports resulting from tender evaluation. 	<ul style="list-style-type: none"> Ensure that all material issues and risks identified in the TEWG reports are captured in the SER. Ensure that the findings / conclusions contained in the SER are consistent with the findings / conclusions in the TEWG reports and use cross-referencing where appropriate in the SER.
<ul style="list-style-type: none"> Failure to properly understand an aspect of a tender. 	<ul style="list-style-type: none"> Where an aspect of a tender is unclear or ambiguous, clarify the matter with the tenderer. If a material matter which is unclear or ambiguous is not clarified, outline the reasons for not doing so in the relevant TEWG report and the SER.
<ul style="list-style-type: none"> Inability to consider certain information as part of the tender evaluation due to the limited scope of the evaluation criteria. 	<ul style="list-style-type: none"> Ensure that the evaluation criteria are sufficiently broad. Except where justified in the circumstances, avoid using narrow evaluation criteria. Do not introduce additional evaluation criteria as part of tender evaluation to compensate for narrowly drafted evaluation criteria.
<ul style="list-style-type: none"> Failure to require tenderers to submit all information which is required by Defence in order to assess each of the evaluation criteria and to make a value for money assessment. 	<ul style="list-style-type: none"> In preparing the request documentation, map each of the Tender Data Requirements against the evaluation criteria to identify any gaps and to ensure that the TDRs are comprehensive and capture all of Defence's information requirements.
<ul style="list-style-type: none"> Failure to properly identify and assess risk treatments for risks associated with a tender. 	<ul style="list-style-type: none"> Ensure that as part of the tender evaluation risks are identified and recorded in respect of each tender. Each of the risks can then be assessed and appropriate risk treatments identified. Risks associated with each tender must be taken into consideration as part of the value for money assessment. If required, clarify the identified risks with tenderers.
<ul style="list-style-type: none"> Failure of the TEO members to fully understand the key aspects of a tender. 	<ul style="list-style-type: none"> Ensure that each of the TEO members have a good understanding of the key aspects of each tender. For example, often pricing information (even at a more general level) is not disclosed to any members of the TEWGs outside the Finance TEWG. This can result in a failure by other TEWGs to identify issues or risks in conducting their own evaluation as they do not have an understanding of the basis on which each tenderer has priced the tender. Hold regular meetings of the TEO to assist with communication between TEO members on key issues associated with each tender. Ensure that all TEO members can participate in relevant meetings including those who are working remotely.
<ul style="list-style-type: none"> Failure to properly consider all relevant information included in a tender which is relevant to the procurement. 	<ul style="list-style-type: none"> Implement arrangements to ensure that all relevant information is considered as part of the tender evaluations. For example, often information relating to a legal or commercial issue may be included in that part of a tender submission relating to technical matters. In such circumstances the Technical TEWG should advise the Commercial/Contracting/Financial TEWG about the information. Hold regular meetings of the TEO to assist with communication between TEO members.

Issue	Potential steps to prevent issue arising
<ul style="list-style-type: none"> Failure to effectively evaluate tendered prices. 	<ul style="list-style-type: none"> Ensure the evaluation of the tendered prices considers all pricing aspects. For example, if the tendered prices include S&Q Services or Task-Priced Services, these need to be considered as part of the price evaluation. Similarly, ensure that 'whole of life' costs are properly assessed on a consistent basis across all tenders. Ensure that any pricing assumptions are plausible, tested and clearly stated in the TEWG reports and the SER. Where appropriate, conduct sensitivity analysis to test the outcomes of the price evaluation. Where appropriate, prices should be 'normalised' or adjusted to ensure a complete and 'like for like' cost comparison of all tenders. Where an aspect of the tenderer's pricing is unclear or ambiguous, clarify the matter with the tenderer – do not make assumptions about a tenderer's pricing if it is not clear.
<ul style="list-style-type: none"> Failure to comply with any processes, requirements or criteria detailed in the request documentation or the TEP. 	<ul style="list-style-type: none"> Ensure the TEP is consistent with the request documentation. Implement safeguards to ensure that the tender evaluation is conducted in accordance with the TEP. Ensure that all members of the TEO understand the request documentation and the TEP and are briefed appropriately. Hold regular meetings of the TEO to facilitate identification of possible non-compliances. Ensure that the TEP is drafted so that the TEO can comprehensively evaluate tenders and does not unnecessarily restrict Defence's flexibility in relation to the conduct of tender evaluation.
<ul style="list-style-type: none"> Failure to evaluate tenders consistently. 	<ul style="list-style-type: none"> Review the outcomes of the tender evaluation to ensure that tenderers have been treated consistently. Ensure that the advantages and disadvantages of each tender are identified. Ensure that where a benefit, issue or risk in respect of one tenderer has been identified, it is also identified in respect of other tenderers where that benefit, issue or risk exists in respect of the other tenderer.
<ul style="list-style-type: none"> Failure to treat tenderers equally or to give tenderers equal opportunity. 	<ul style="list-style-type: none"> Ensure that where an opportunity is given to one tenderer that it is given to all tenderers (where applicable).
<ul style="list-style-type: none"> Focussing on scoring tenders and failure to adequately capture key issues and risks through qualitative assessments. 	<ul style="list-style-type: none"> Ensure that any key issues and risks are captured and appropriately addressed through qualitative statements. Consider the qualitative statements as part of the overall value for money assessment.
<ul style="list-style-type: none"> Failure to maintain confidentiality. 	<ul style="list-style-type: none"> Ensure that the TEP and the Legal Process and Probity Plan adequately set out clear requirements in relation to confidentiality. Ensure members of the TEO are briefed, understand and are regularly reminded of their obligations of confidentiality. Ensure appropriate security of tenders and documentation relating to the conduct of tender evaluations.
<ul style="list-style-type: none"> Changing evaluation criteria. 	<ul style="list-style-type: none"> Evaluate tenders in accordance with the evaluation criteria set out in the request documentation. Ensure that the evaluation criteria set out in the TEP are consistent

Issue	Potential steps to prevent issue arising
	<p>with the evaluation criteria set out in the request documentation.</p> <ul style="list-style-type: none"> Do not introduce additional evaluation criteria during the evaluation. Ensure that the evaluation criteria are sufficiently broad. Except where justified in the circumstances, avoid using narrow evaluation criteria.
<ul style="list-style-type: none"> Failure to comply with process documents governing the conduct of offer definition and improvement activities. 	<ul style="list-style-type: none"> Where Defence proposes to conduct offer definition and improvement activities ensure that any supporting process documents are prepared and provided to tenderers which clearly outline the process to be followed and the rules governing the proposed activities. Ensure that Defence complies with the process documents.
<ul style="list-style-type: none"> Failure to make a proper value for money assessment. 	<ul style="list-style-type: none"> Understand that the tenderer whose tender offers the best value for money will not necessarily be the tenderer which offers the lowest price. Assess which tender offers the best value for money having regard to the assessment against all the evaluation criteria, including price, and any risks associated with the tender. Consider both quantitative and qualitative issues identified from the conduct of the tender evaluation.
<ul style="list-style-type: none"> Dominant personalities amongst members of the TEO exert undue influence on other members. 	<ul style="list-style-type: none"> The Chair of the TEB needs to take steps to ensure that any member of the TEO, particularly those with a leadership role such as TEWG leaders, does not exert undue influence on other members of the TEO during the course of the tender evaluations.
<ul style="list-style-type: none"> Failure to appoint a legal process and probity adviser or a failure to consult the legal process and probity adviser when probity issues arise. 	<ul style="list-style-type: none"> Ensure that a legal process and probity adviser is appointed where appropriate to do so (see DPPM and CPG for more information). Ensure that appropriate arrangements are established within the TEO to identify legal process and probity issues (for example, ensure that probity is an agenda item at all TEWG and TEB meetings) and that the legal process and probity adviser is consulted in relation to issues which have been identified.
<ul style="list-style-type: none"> Operational bias amongst members of the TEO (for example, understating technical issues and risks of the solution with the best perceived capabilities). 	<ul style="list-style-type: none"> Ensure that the risk assessment of tenderers' ability to achieve capability requirements is rigorous and realistic. Ensure that developmental solutions (including integration of COTS/MOTS items) are not described in the SER as COTS/MOTS. The Chair of the TEB needs to ensure that the operational view does not exert undue influence during the course of the tender evaluations.

CONTRACT COMPLIANCE – [INSERT NAME OF TENDERER]

CoC Reference	Details of clause and tenderer's response	Compliance (Complies / Does not comply)	Evaluation (risk assessment) of any non-compliance	Assessment rating of any non-compliance (Critical / Significant / Minor)	Price Adjustment (if any)	Negotiation Issues and Comments	Indicator of criticality for negotiations (Must obtain / Should obtain at cost / Should obtain at no cost / desirable at no cost)
1.1.1	<p>[INSERT DETAILS OF CLAUSE]</p> <p>[INSERT TENDERER'S PROPOSED MARK UP (IF ANY)]</p>	[Example: Does Not Comply]	<p>[INSERT NARRATIVE ASSESSMENT OF THE NON-COMPLIANCE, FOR EXAMPLE:</p> <ul style="list-style-type: none"> - WHAT IS THE NON-COMPLIANCE - WHAT IS THE ISSUE OR RISK FOR THE COMMONWEALTH AS A RESULT OF THE NON-COMPLIANCE - IS THERE A REASON OR JUSTIFICATION FOR THE NON-COMPLIANCE. - IS THERE A RISK TRANSFER TO THE COMMONWEALTH AS A RESULT OF THE NON-COMPLIANCE - CAN THE RISK TRANSFER BE QUANTIFIED - IS THE RISK TRANSFER UNACCEPTABLE - ARE THERE MITIGATIONS - ANY OTHER OBSERVATIONS ABOUT THE NON-COMPLIANCE - CAN AN ACCEPTABLE SOLUTION BE NEGOTIATED - ETC] 	[Example: Significant]	[Example: \$30m]	[IDENTIFY RELEVANT ISSUES FOR NEGOTIATION AND SUPPORTING COMMENTS]	Must obtain

CoC Reference	Details of clause and tenderer's response	Compliance (Complies / Does not comply)	Evaluation (risk assessment) of any non-compliance	Assessment rating of any non-compliance (Critical / Significant / Minor)	Price Adjustment (if any)	Negotiation Issues and Comments	Indicator of criticality for negotiations (Must obtain / Should obtain at cost / Should obtain at no cost / desirable at no cost)
1.1.2							
1.1.3							
...							

WORKED EXAMPLE

CoC Reference	Details of clause and tenderer's response	Compliance (Complies / Does not comply)	Evaluation (risk assessment) of any non-compliance	Assessment rating of any non-compliance (Critical / Significant / Minor)	Price Adjustment (if any)	Negotiation Issues and Comments	Indicator of criticality for negotiations (Must obtain / Should obtain at cost / Should obtain at no cost / desirable at no cost)
3.3.2	Authorisations	Complies	N/A	N/A	N/A	Nil	N/A
5.3.2b	<p>Intellectual Property Licence</p> <p>Tenderer requires restrictions on ability of Platform Integration Contractor (PIC) to sub-licence and transfer licence granted.</p> <p>Proposed mark up: Without limiting clause 5.3.1 and subject to clause 5.3.3, unless the Contractor has specified otherwise in the IP Plan: a. ... b. subject to clause 5.3.2c, in respect of all Third Party IP the</p>	Does Not Comply	<p>Tenderer proposes to prevent a PIC from being able to issue a third party (ie a subcontractor) with a sub-licence to use Third Party IP. This could significantly hinder the PICs ability to use and maintain the platform. Accordingly, tenderer's proposed changes at 5.3.2b(i) and (ii) present a high risk to Defence. The self-sufficiency of the PICs would be undermined if the proposed changes were accepted, which could lead to a greater reliance on the Commonwealth to engage and arrange maintenance/support activities.</p> <p>If tenderer holds to this position, there is a serious possibility that the deficiency cannot be remedied or mitigated. This would mean the principal requirements of the project could be prevented from being achieved.</p>	Critical	Cannot be quantified at this stage (to be reassessed after negotiation, eg if tenderer requires additional licence fee)	<p>The proposed restrictions will need to be negotiated with tenderer.</p> <p>The Commonwealth's preferred position is to retain the provisions as written in the draft Conditions of Contract.</p> <p>Defence could consider whether suitable protections can be agreed with tenderer, eg a restricted list of contractors, confidentiality deeds etc.</p> <p>Tenderer may demand additional fee to agree to licence, which may affect VFM of the tender.</p>	Must obtain

	Contractor shall ensure that the PIC is either: (i) entitled to be granted a <u>non-transferable</u> sublicense from the Commonwealth in accordance with clause 5.3.1b(i); or (ii) is granted a Licence in respect of all Third Party IP to use, maintain and dispose of the Supplies.						
9.2.1 (new clause)	<p>Warranty Tenderer proposes addition of 'industry standard' provisions relating to warranties applying to the Supplies.</p> <p>Proposed mark up: <u>Contractor's liability under this clause 9.2.1 shall not extend to:</u> <u>a. remedial work arising after the Supplies have, temporarily or otherwise, ceased to be operated other than in accordance with this Contract;</u> <u>b. remedial work necessitated, by any act, omission or neglect of the Commonwealth and/or a PIC, its servants or agents, or where defects arise or are</u></p>	Does not comply	<p>The risk of agreeing to this clause is that the Commonwealth will be unable to successfully rely on the warranty under the contract. The clause is very broad and will prevent warranty claims arising from normal usage.</p> <p>Proposed para (a) limits the ability of the PICs to use the platform without voiding warranty.</p> <p>Proposed para (b) will leave open to argument any warranty claim where it could be argued the Commonwealth/ PIC has attempted repair work and increase the burden on the Commonwealth as many warranty claims will likely be disputed.</p> <p>Proposed para (c) is extremely broad and would cover many legitimate warranty claims – something that is subject to fair wear and tear yet still breaks during the warranty period should not be an exception from the warranty.</p> <p>Proposed para (d) is not on the subject of warranty and should not be located in the warranty clause.</p> <p>In general, the proposed provisions do not appreciate how the platforms are to be operated and may prevent warranty claims where the defect arises from normal usage.</p>	Significant	\$10m (estimated warranty claims that would be foregone - based on remedial work undertaken on platform under previous contract)	<p>Proposed para (a) is potentially acceptable in principle (defects arising from use outside the scope of the contract) but the proposal fails to provide any scope/limitation to the clause. For example, need a clear statement as to what 'operated in accordance with the contract' means (eg reference to FPS, OCD, potentially reference to other plans/operational documentation). Further, the proposed wording excludes all defects occurring <i>after</i> use outside the contract, not defects <i>caused</i> by such use.</p> <p>Proposed para (b) can probably also be accepted with amendment – if Defects are caused by the willful negligence or willful damage of the Cth or the PICs. Current wording is unacceptable – the proposal to exclude 'any' act, omission etc. of the Commonwealth causing remedial work is extremely broad. Similarly, the principle</p>	Should obtain at no cost.

	<p><u>aggravated by repair work or attempts to repair by the Commonwealth and/or a PIC, their servants, agents and contractors not approved by the Contractor;</u></p> <p><u>c. remedial work arising out of the normal wear and tear and use of the Supplies and any of their components;</u></p> <p><u>d. any claim by any person or party howsoever arising including, but not limited to injury, loss, loss of profits or damage caused by or sustained by the Supplies, the Commonwealth and PICs.</u></p>		<p>It is possible an acceptable outcome can be negotiated but will require extensive redrafting.</p>			<p>behind 'caused by or aggravated by' repair work may also be acceptable if it is limited in scope, for example, only to the extent that such work was not in accordance with any repair manuals/TD provided by the contractor. The contractor does not get the right to approve all repairers and this suggestion indicates that the tenderer does not understand the nature of the contract and how the PICs will be maintaining the platform.</p> <p>Proposed para (c) is extremely broad and would cover many legitimate warranty claims. This should not be agreed.</p> <p>Proposed para (d) is not on the subject of warranty and should not be located in the warranty clause.</p>	
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