

SENATE LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE  
ATTORNEY-GENERAL'S PORTFOLIO

**Question No. 89**

**Senator Murray asked the following question at the hearing on 31 October 2005:**

Has the department/agency revised its procurement guidelines to incorporate the new Commonwealth Procurement Guidelines that took effect from 1 January 2005, particularly with respect to the confidentiality elements contained in those guidelines? If so, when did this occur and can a copy be provided? If not, what is the cause of the delay and when will the revision occur?

**The answer to the honourable senator's question is as follows:**

**Attorney-General's Department**

Yes, the Department revised its procurement guidelines on 24 December 2004.

The guidance currently states the following in respect of confidentiality in contracts:

AGD operates within a governance and accountability framework established under legislation which requires it to ensure openness and transparency through public reporting processes. This includes the Senate Order relating to the listing of contracts of \$100,000 on the Internet with details of whether each contract contains provisions requiring the parties to maintain confidentiality. In the interests of open government and transparency it is important that appropriate use is made of confidentiality provisions and that only genuine confidential information is protected. The Department of Finance and Administration publication Guidance on Confidentiality of Contractors' Commercial Information, February 2003 provides further information on the use of confidentiality provisions in contracts. Contact the Small Agencies, Contracts and Delegations Section or seek legal advice if in doubt.

The Department's contract templates, which are included in guidance material, also contain guidance on confidentiality, for instance:

The decision about what is to be included in the Schedule/Item [Confidential Information of the Parties] should be made after:

(a) considering any requests from the Contractor or Customer personnel to treat the information as Confidential Information; and

(b) Confidential Information when used in this Item refers to information which is legally confidential, not confidential in the sense of information to be closely held. DOFA's "*Guidance on Confidentiality of Contractors' Commercial Information*" at <http://finance.gov.au/ctc/confidentiality%5Fof%5contractors.html> gives 4 tests:

i) must be identified in specific not global terms

- ii) must have the necessary quality of confidentiality (not already public and non-disclosure must have an ongoing commercial benefit)
- iii) disclosure would cause detriment to the owner or a 3rd party
- iv) provided on understanding it would remain confidential (ie the purpose of this schedule).

If you do not feel confident to make this decision, you should seek guidance from your Manager or Financial Services Group, Small Agencies, Contracts and Delegations Section.

### **Administrative Appeals Tribunal (AAT)**

The Tribunal is in the process of revising the Chief Executive Instructions relating to various aspects of procurement. The Tribunal was waiting to ensure that no further changes were forthcoming before finalising this process. The changes should be complete and the new CEI's available by January 2006.

### **Australian Crime Commission (ACC)**

Yes. Formal ACC requirements are contained in the ACC's Chief Executive's Instructions (CEIs), the latest version of which was issued on 22 September 2005. A copy of the CEIs can be provided if required.

### **Australian Customs Service (ACS)**

Customs revised its Chief Executive Instructions (CEIs) on procurement and contracting in December 2004. The revised CEIs have been amended to incorporate the requirements contained in the new *Commonwealth Procurement Guidelines* – January 2005 including the confidentiality elements. A copy of the CEIs is attached.

### **Australian Federal Police (AFP)**

The AFP has revised its procurement guidance as a result of the new Commonwealth Procurement Guidelines (CPGs). These revisions have focussed primarily on the changes to the procurement thresholds (now \$80,000 for open tendering) and Request For Tender documentation and contracts.

The AFP understands that the Department of Finance and Administration (DoFA) is expected to release revised CPGs in early 2006. Accordingly, the AFP proposes to revise its procurement guidance documentation in-line with the DoFA release, which will include, among other things, improved guidance on confidentiality elements contained in the CPGs.

### **Australian Security Intelligence Organisation (ASIO)**

ASIO's Chief Executive's Instructions were updated in 2005 to reflect the revised Commonwealth Procurement Guidelines that took effect from 1 January 2005. The Instructions refer to the Department of Finance publications, Financial Management Guidance No. 3: Guidance on Confidentiality of Contractors' Commercial Information (February 2003) and Financial Management Guidance No. 8: Guidance on the Listing of Contract Details on the Internet (Meeting the Senate Order on Departmental and Agency Contracts) (January 2004). A copy of the ASIO Chief Executive's Instructions can be provided on request.

## **Australian Transaction Reports and Analysis Centre (AUSTRAC)**

The agency's Chief Executive Instructions mandate that agency staff involved in the procurement of goods and services must have regard to the Commonwealth Procurement Guidelines (CPGs). The new CPGs that took effect from 1 January 2005 did not require a revision to AUSTRAC's CEIs.

## **CrimTrac**

CrimTrac's procurement policies and procedures document was updated and endorsed by the Chief Executive Officer in February 2005. This document requires compliance with the Commonwealth Procurement Guidelines.

A copy of the CrimTrac document is attached.

## **Commonwealth Director of Public Prosecutions (CDPP)**

The CDPP uses the Commonwealth Procurement Guidelines (CPG's) as its procurement guidelines.

## **Family Court of Australia**

The Family Court of Australia (the Court) revised internal policy and procedures to reflect the revised Commonwealth Procurement Guidelines in early 2005, and again in December 2005 for publishing in early 2006.

Specifically, the Court provides procedural guidance for the consideration of Commonwealth Policy, this identifies the requirements to report Contracts over \$100,000 and refers to additional guidance documents and policy. A copy can be provided upon request.

Tender documentation was updated in June 2005 to address these reporting requirements and to provide additional guidance to tenderers.

Copies are available and can be provided upon request.

## **Family Law Council**

The Family Law Council does not separately contract or purchase services. It is an advisory body that operates within the Department.

## **Office of Parliamentary Counsel (OPC)**

The Office of Parliamentary Counsel (OPC) has revised its procurement guidelines to ensure consistency with the new Commonwealth Procurement Guidelines. However, we have not emphasised the confidentiality elements contained in those guidelines because OPC has only a small number of contracts which are negotiated by members of the Senior Management Team. OPC's guidelines refer to the Commonwealth Procurement Guidelines where appropriate.

## **Office of the Privacy Commissioner**

The Office operates under the current *Commonwealth Procurement Guidelines and Policy Framework*.

As allowed under the Policy Framework, the processes and guidelines internally developed by the Office reflect the limited size and scope of the procurement activities within the organisation. OPC provides ready access to relevant guidelines which structure the procurement processes and are updated as required. With respect to the Office's policy concerning acceptance of supplier proposed confidentiality clauses, OPC policies and practices mirror the provisions set down in the procurement guidelines. In particular the Office's intranet contains a specific link to the procurement guideline on the *Confidentiality of Contractors Commercial Information*. However confidentiality clauses proposed on the part of a supplier would be an unusual event for OPC. In particular no proposals were requested or accepted in 2003-04 or 2004-05.

The intranet and references to procurement issues including confidentiality provisions have been updated over the course of the year.



## Chief Executive Instruction 4.2 Procurement of Property and Services

**APPLICATION:** *This CEI applies to all of those Officials involved in the procurement of property and services. The aim of the CEI is to ensure that all expenditure is in accordance with the policies and guidelines of the Commonwealth and will deliver value for money. This CEI must be read in conjunction with CEI 4.1 and CEI 4.3.*

### **Commonwealth Procurement Guidelines (CPGs) (FMA Reg 8)**

- (1) Officials performing duties in relation to the procurement of Property or services must have regard to the CPGs.
- (2) Officials who do not take action consistent with the CPG's must make a written record outlining the reasons for doing so.

### **Approvals**

- (3) Officials should ensure that all approvals and authorisations required under *CEI 4.1 Approving and Authorising Proposals to Spend Public Money* are obtained and documented before proceeding with any procurement activity.

### **Procurement Process**

#### **CPGs and CEI to be followed**

- (4) Customs Officials must follow the procurement processes outlined in the CPGs and this CEI. Any questions should be referred to the National Procurement and Contracting Unit (NPC).
- (5) This CEI provides Customs Officials with additional advice and guidance in relation to the procurement procedures to that in the CPGs. If any provision of this CEI does not conform with a provision in the CPGs, the CPGs prevail to the extent there is any inconsistency.
- (6) Most procurements valued at \$80,000 and above are defined as Covered Procurements for the purposes of the CPGs. Officials must comply with the Mandatory Procurement Procedures outlined in Division 2 of the CPGs for all covered procurement. In the case of construction services the procurement threshold is \$6,000,000. There are exemptions to the Mandatory Procurement Procedures listed at Appendix B of the CPGs.

## **Obligations of Officials involved with Procurement**

- (7) Officials should be aware of their statutory, international and general obligations as set out in:
- a. The *Financial Management and Accountability Act 1997* (FMA Act), FMA Regulations 1997 (available at [scaleplus.law.gov.au](http://scaleplus.law.gov.au)), FMA Orders and Finance Circulars (available at [www.finance.gov.au](http://www.finance.gov.au));
  - b. the *Public Service Act 1999*, APS Code of Conduct (available at [scaleplus.law.gov.au](http://scaleplus.law.gov.au), [www.apsc.gov.au](http://www.apsc.gov.au) and on the Customs intranet);
  - c. the CPGs (located on the Customs intranet and at [www.finance.gov.au](http://www.finance.gov.au)); and
  - d. the *Trade Practices Act 1974* (available at [scaleplus.law.gov.au](http://scaleplus.law.gov.au)).

## **Pre-existing Arrangements**

- (8) Where appropriate, Officials must use pre-existing arrangements including:
- a. The Endorsed Supplier Arrangement (a Multi-use list) for all purchases relating to information technology and major office machinery;
  - b. Any other Multi-use list Customs is entitled to use; and
  - c. Any national standing offer panels existing for the use of Customs at any given time.
- (9) NPC will enforce the use of these pre-existing arrangements. Officials who do not use the pre-existing arrangements must make a written record of their reasons for not doing so.

## **Consultancies**

- (10) Officials must identify consultancy services early in the procurement process as there is greater risk involved (see paragraph 41 and following below). Officials should consult closely with the NPC and assist them with reporting requirements as appropriate.

## **NPC Role**

- (11) The NPC have the qualifications and experience to provide advice and assistance on any type of procurement undertaken by Officials. The NPC is also responsible for undertaking reporting functions on behalf of Customs. Officials should consult with the NPC about their procurement requirements to ensure they are conducting procurement processes in accordance with best practice and to inform themselves of any reporting requirements.

## **Complaints**

- (12) Financial Services Division is responsible for the handling of complaints

arising from any procurement activity. The process outlined in this CEI should be followed wherever possible.

### **Entering Into Contracts (FMA Reg 13)**

- (13) An Official must not enter into a contract, agreement or arrangement under which public money is, or may become, payable (including a notional payment within the meaning of section 6 of the Act) unless a proposal to spend public money for the proposed contract, agreement or arrangement has been approved under regulation 9 and, if necessary, in accordance with regulation 10.

### **Reporting Requirements**

- (14) The NPC are responsible for Customs procurement reporting requirements. These requirements include:
- a. The Annual Procurement Plan – Customs proposed procurement for the coming financial year (advertised on Austender by 1 July each year);
  - b. The Gazettal Notice – details of all contracts and standing offers with an estimated value of \$10,000 or more (GST inclusive) within 6 weeks of entering into the contract/arrangement;
  - c. Senate Order on Departmental and Agency Contracts (formerly the 'Murray Motion') – Customs must publish on the Internet with access through its website a list of contracts entered into with a consideration of \$100,000 or more (GST inclusive) which have not been fully performed or which have been entered into during the previous twelve months (biannually);
  - d. The Annual Report – Customs is required to report the total amount of all consultancies entered into or current during the previous financial year that are valued at \$10,000 or more (GST inclusive) and the expenditure for those contracts; and
  - e. Business opportunities – Customs must report all publicly available business opportunities on AusTender in accordance with the CPGs (see [www.austender.gov.au](http://www.austender.gov.au)).

### **Overseas Procurement**

- (15) In making requests to overseas offices and diplomatic posts of the Commonwealth to purchase Property or services, Officials must ensure:
- a. that the purchase is approved by an Approver;
  - b. the terms and conditions of that approval are supplied to the overseas post; and
  - c. a complete description and number of the items required, the approved cost, and the arrangements for delivery and payment are supplied to the

post.

Officials must ensure that the procedures of the Department of Foreign Affairs and Trade are followed when using the payment facilities of their overseas offices.

## **Terminology / Definitions**

*For the purposes of this CEI:*

*'Agency agreement' means a contract, agreement or arrangement for the procurement of property and services under which an agency is obliged, or may become obliged, to make a payment of public money to another agency.*

*'Approach to the Market' is any notice inviting potential suppliers to participate in a procurement including a request for tender, request for quote, request for expression of interest, request for application for inclusion on a Multi-Use List, or invitation to tender.*

*'Approver' means, as outlined in FMA Regulation 3:*

- a. a Minister or Parliamentary Secretary; or*
- b. a Chief Executive; or*
- c. a person authorised by or under an Act to exercise a function of approving proposals to spend public money.*

*'Business Case' is an internal document that explains why a procurement is being undertaken and is used to obtain the relevant approvals.*

*'Commonwealth contract' means a contract, agreement or arrangement for the procurement of property and services under which the Commonwealth is obliged, or may become obliged, to make a payment of public money.*

*'Conditions for Participation' are the minimum conditions that potential suppliers must meet 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' relates to procurements for the construction of buildings and all procurements covered by the Public Works Committee Act 1969.*

*'Contract' means a legally binding promise or agreement.*

*'Covered Procurement' is a procurement, other than one that is specifically exempt, where the value of the property or services being procured exceeds the relevant Procurement Threshold.*

*'Direct Sourcing' is a procurement process, available only under certain defined circumstances, in which an agency may contact a single potential supplier or suppliers of its choice and for which only a limited set of mandatory procurement procedures apply.*

*'Expression of Interest' is a response to an open Approach to the Market requesting Submissions from businesses interested in participating in a procurement. The list of potential suppliers who have submitted expressions of interest, may be used as the basis for conducting a Select Tender process.*



*'FMA Act' is the Financial Management and Accountability Act 1997.*

*'FMA Orders' is the Financial Management and Accountability Orders 1997.*

*'FMA Regulation' is the Financial Management and Accountability Regulations 1997.*

*'Guidelines' means the procedural rules attached to the instructions of this CEI.*

*'Intellectual Property' includes all rights in copyright, registered and unregistered trademarks (including service marks), registered designs, all rights in relation to inventions (including patent rights), trade secrets, know how, rights in relation to circuit layouts and all other rights resulting from of intellectual activity in the industrial, scientific, literary or artistic fields or any rights to registration of such rights existing in Australia or elsewhere.*

*'Invitation to Tender' is an invitation issued to selected businesses inviting them to submit Tenders in response to a Select Tender process or Direct Sourcing process.*

*'Mandatory Procurement Procedures' means the set of rules and procedures that must be followed when conducting a Covered Procurement.*

*'Multi-Use List' is a list intended for use in more than one procurement process comprising of pre-qualified suppliers, including the Endorsed Supplier Arrangement, that have satisfied the Conditions for Participation for inclusion on the list.*

*'Official' means a person who is in an agency or part of an agency as defined in section 5 of the FMA Act.*

*'Open Tender' is a procurement process in which a Request for Tender is published inviting all suppliers that satisfy the Conditions for Participation to submit Tenders.*

*'Panel' is an arrangement established by an agency where panellists enter into Contracts or deeds of standing offer to provide identified property or services over a period of time.*

*'Property' means 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.*

*'Procurement Plan' is a document that details how the procurement process is to be undertaken (it does not include an Annual Procurement Plan).*

*'Procurement Threshold' a value under which a procurement, unless exempt, is considered to be a Covered Procurement. The threshold is \$80,000 (except for construction services where it is \$6,000,000). 'Request Documentation' is documentation provided to potential suppliers to enable them to understand and assess the requirements of an agency and to prepare appropriate and responsive Submissions.*

*'Request for Applications for a Multi-use List' is a published notice inviting businesses to apply for inclusion on a Multi-use List. The notice must be published on AusTender, either continuously or at least once per year.*

*'Request for Expressions of Interest' is a published notice inviting businesses to register an expression of interest in a procurement.*

*'Request for Tender' is a published notice inviting businesses who satisfy the Conditions for Participation to submit a Tender in accordance with requirements for the request for tender and other Request Documentation.*

*'Select Tender' is a procurement process in which the procuring agency selects and invites a number of potential suppliers to submit Submissions.*

*'Submission' is an official response from a potential supplier to an Approach to the Market.*

*'Submission Evaluation Committee' is the committee formed to evaluate Submissions received in response to Request Documentation.*

*'Submission Evaluation Plan' is an internal document that maps the processes to be followed when Submissions are evaluated and includes the evaluation criteria that is used to assess Submissions.*

*'Tender' is a submission from a potential supplier making an offer to perform a procurement in response to a Request for Tender or Invitation to Tender.*

*'Time Limit' is the minimum time that an agency must allow for potential suppliers to respond to an Approach to the Market.*

---

## **Delegations**

Delegations and authorisations are considered in *CEI 1.1 Delegations and Authorisations*. A current list of delegations and authorisations is available from the Intranet under CEI's on the Financial Services Division intranet site (referred to in the guidelines below as 'Customs' Delegations').

An Official must neither approve a proposal to spend public money above their delegation, nor approve a proposal unless authorised to do so by a Minister or Chief Executive, or by or under an Act.

---

## Commentary

The procurement of Property and services requires due diligence and care to ensure that legal requirements are met, public money is used in an efficient and effective manner and the resources acquired by Customs are appropriate for Customs needs. Value for money is the core principle governing Commonwealth procurement.

Procurement processes should encourage competition, be non-discriminatory and promote open and effective competition to the fullest extent practicable. The cost of the Approach to the Market also needs to be appropriate with the value and circumstances of the proposed procurement. The largest number of potential suppliers should be selected that is consistent with an efficient procurement process.

All tender processes conducted and contracts executed should be undertaken in consultation with the National Procurement and Contracting (NPC) Unit, Central Office. A public invitation, such as a Request for Tender, is to be used for complex procurements and those valued at \$80,000 or more, unless the requirement is exempt from Mandatory Procurement Procedures.

The following Guidelines are aimed at assisting Officials who are involved in procuring Property and services. In the case of any ambiguity or the need for further information Officials should contact the NPC.

---

## Guidelines

### Preliminary Concerns for Officials

1. These guidelines are based upon and are consistent with the Commonwealth Procurement Guidelines (CPG's) issued under regulation 7 of the FMA Regulations and other obligations of Officials under the FMA Act and Regulations. With this comes the responsibility for Officials to achieve improved outcomes through better efficiency, effectiveness and accountability. Importantly, specialist advice and resources are available if a matter requires explanation. These guidelines aim to promote:
  - (a) awareness of available tools and resources; and
  - (b) best practice processes.
2. Officials should equip themselves with the knowledge, skills and tools to undertake a particular procurement process, in order to achieve efficient, effective and accountable outcomes. Complex or high value procurement requires appropriate skills and / or qualifications.
3. Officials should consult the NPC for information and advice concerning the procurement of Property and services. The NPC has a range of documentation and tools for use and are available to assist Officials in ensuring any procurement complies with legislative and policy requirements.

### CPGs - Value for Money

4. Value for money, in a competitive procurement process, requires a comparative analysis of all relevant costs and benefits of each compliant Submission throughout the whole procurement cycle (whole-of-life costing). The factors that influence value for money are specified at paragraphs 4.1 to 4.5 of the CPGs.

### **CPGs - Encouraging Competition**

5. Competition is a key element of the Australian Government's procurement policy framework. Effective competition requires non-discrimination in procurement and the use of competitive procurement processes. Procurement officials should ensure that procurement methods do not unfairly discriminate against Small and Medium Enterprises (SMEs) (refer paragraph 5.3 of the CPGs).

### **CPGs - Efficient, effective and ethical use of resources**

6. To achieve best Value for Money, a procurement process must ensure the proper use of Commonwealth resources. That is, it must be an efficient and effective and ethical use of Commonwealth resources.

- **Efficiency and Effectiveness**

7. Efficiency relates to how well outcomes meet objectives and effectiveness can be achieved by ensuring that the property or services being sought will make the maximum possible contribution to the relevant outcome.
8. Efficiency and effectiveness in Government procurement is supported by contestability and competitive neutrality requirements (refer the *Financial Management Guidance Number 9: Australian Government Competitive Neutrality Guidelines for Managers, February 2004.*), and whole of government supplier pre-qualification arrangements.

- **Ethics**

9. Officials must ensure procurement is conducted ethically to enable purchasers and suppliers to:
  - (a) deal with each other on a basis of mutual trust and respect; and
  - (b) conduct business fairly, reasonably and with integrity.
10. Ethical behaviour also enables procurement to be conducted in a manner that allows all participating suppliers to compete as equally as possible. The procurement process rules should be clear, open, well understood and applied equally to all parties to the process.
11. An Official should not accept gifts or hospitality unless it is disclosed in accordance with the Customs *Policy for the Acceptance of Gifts and/or Benefits* and the *APS Values and Code of Conduct*.
12. Further information can be found at paragraphs 6.20 to 6.25 of the CPGs.

### **CPGs - Accountability and Transparency**

13. Accountability and transparency encourage the efficient, effective and ethical use of Commonwealth resources.

14. Accountability means that officials are responsible for the actions and decisions that they take in relation to procurement and for the resulting outcomes.
15. Transparency involves agencies taking steps to support appropriate scrutiny of their procurement activity. This provides assurances that procurement processes undertaken by agencies are appropriate and that policy and legislative obligations are being met.

### **CPGs - Policy and Legislative Obligations**

16. Officials undertaking procurement are accountable for complying with relevant Government policies and legislative requirements. This includes, but is not limited to, the CPGs, the FMA Act and the FMA Regulations (refer also the *Guidance on Complying with Legislation and Government Policy in Procurement* issued by the Department of Finance and Administration).

### **Approvals for procurement processes**

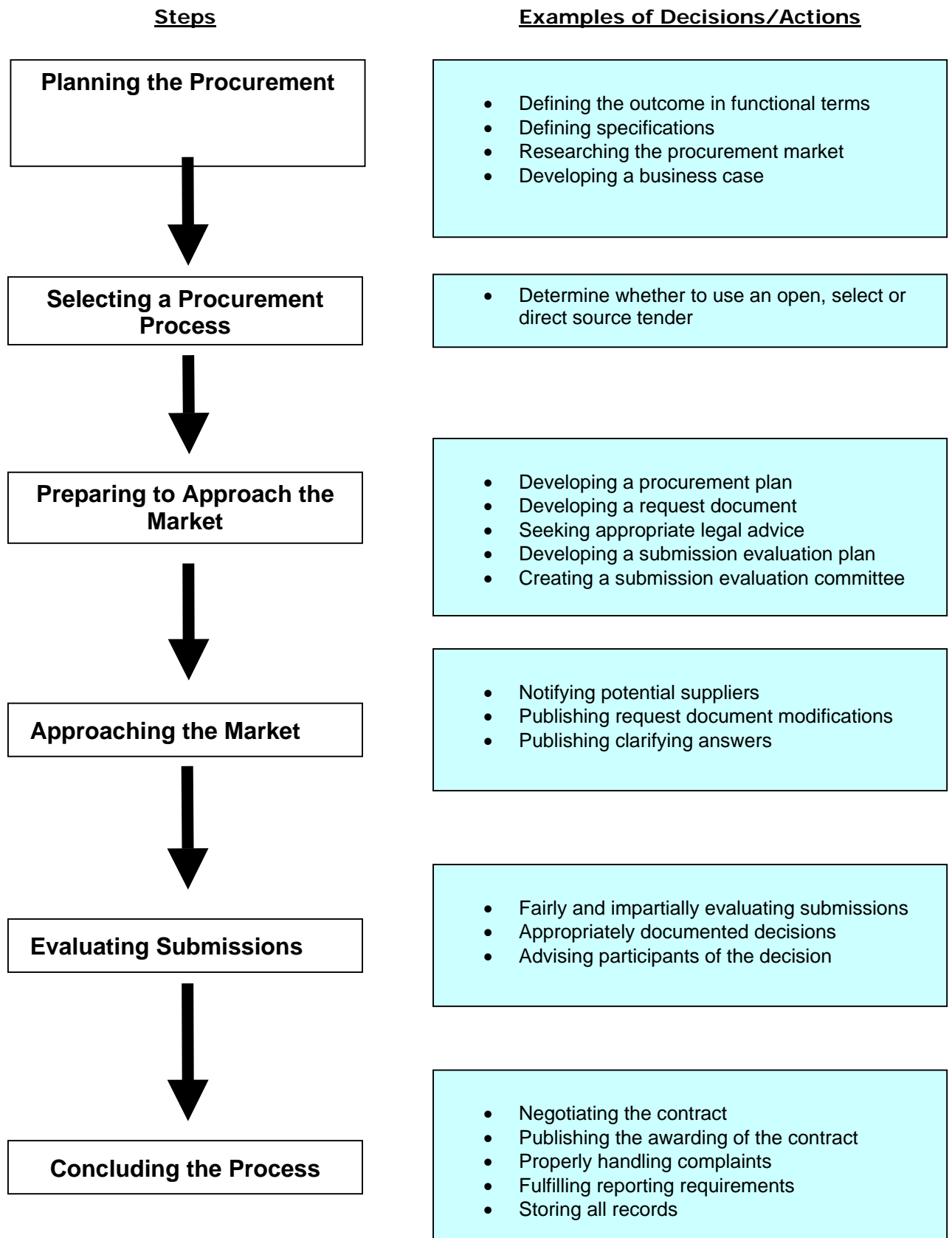
17. To facilitate compliance with CEI 4.1, FMA Regulation 9, and where necessary, FMA Regulation 10, Customs Officials should:
  - a. prepare a Minute within the area for values under \$80,000;
  - b. develop a Business Case document to be considered by an Approver, when the requirement falls into the category of a Covered procurement;
  - c. prepare a Minute based upon the Minute template to be considered by the FMA Regulation 10 delegate where applicable; and
  - d. recording the approval properly in QSP, or otherwise electronically, of approvals for expenditure.
18. If the approval of a proposal to spend public money is not given in writing, FMA Regulation 12 will be satisfied if a record of the approval is made as described above.
19. NPC facilitate the approval process for Covered Procurement and retain copies of these approvals for reporting and archival purposes. Copies of all procurement documentation should be forwarded to the NPC for archival purposes.

### **Procurement Process**

#### ***CPGs and Finance Guidance***

20. The following table outlines the steps that must be taken when undertaking a procurement. The process to be followed for all procurement is that outlined in the CPGs.
21. To the extent that it is consistent with any Customs specific policy and these CEIs, *Financial Management Guidance Number 13: Guidance on the Mandatory Procurement Procedures*, January 2005 should be followed for Covered Procurements. This document is available from the intranet under Financial Services Division and at [www.finance.gov.au](http://www.finance.gov.au).

## Steps in a Procurement Process



### ***Customs Specific Aspects of the Procurement Process***

22. A Business Case for a Covered Procurement and consultancies of \$10,000 or more may only be approved by the Chief Financial Officer, the Deputy Chief Executive Officers or the Chief Executive Officer. Approvals of a Business Case for values of \$10,000,000 or more may only be given by the Chief Executive Officer. The procurement process selected must be justified in the Business Case for approval.
23. Purchases that do not fall into the category of Covered Procurement require approval by the appropriate delegate and the creation of appropriate records. If Officials require any clarification they should contact the NPC.
24. Customs has established a template Business Case, Procurement Plan, Submission Evaluation Plan and a number of Request Document and Contract templates for use. Officials should contact the NPC for a reference number to be allocated and information about the best type of documents to use and to obtain the necessary templates. Officials should contact NPC each time they conduct a procurement to obtain the most up-to-date template.
25. NPC are available to assist Officials with all aspects of the procurement including evaluation, preparation of documents and questions relating to probity and best practice.
26. In the event that a complaint is made by a participant in the procurement process, Customs should aim to manage this process through communication and conciliation with the aggrieved party. All complaints should be dealt with in writing.
27. Request Documentation will state a complaints handling process to inform suppliers and will be in line with the following:
28. If a Supplier has a complaint they must contact the contact officer listed in the Request Documentation;
29. The contact officer must take the contact details of the supplier and immediately contact the Director, Commercial Services Group; and
30. The Director, Commercial Services Group will contact the supplier to determine the extent of the complaint and request the complaint be submitted in writing.
31. External review options are available if independent review of a complaint is necessary. An external review mechanism should be included in the procurement documentation for high risk and/or high value procurements.
32. The primary external complaint mechanism is the civil legal system, which can be used to settle disputes through a formal judicial process. The Commonwealth Ombudsman also has limited powers to investigate procurement complaints. The Ombudsman cannot override agency decisions, but aims to resolve disputes by negotiation and persuasion, and if necessary, by making formal recommendations to the most senior levels of Government.

### ***Pre-existing Arrangements***

33. The CPGs and Finance Guidance outline how to establish and use Multi-Use lists and Panels of Providers. These arrangements can save Officials time and resources while still maintaining value for money, transparency and accountability.
34. Where a Multi-use list or Panel is in place Customs Officials are required to use the arrangement. Failure to do so will require documentation of the reasons for not doing so.
35. Currently the following Multi-use list is in operation:
36. The Endorsed Supplier Arrangement for all purchases relating to information technology and major office machinery.
37. Currently the following Panels have been set up by Customs:
  - Stationery supplies;
  - Travel services;
  - Training providers
  - Legal services; and
  - Car Hire services.
38. NPC are required to enforce the use of the pre-existing arrangements.

#### ***The role of the NPC***

39. The NPC are available for advice and assistance for all procurement projects. It is best practice to involve the NPC in all procurement involving an Approach to the Market and/or a Contract.
40. Appropriate templates can be provided as well as ensuring the NPC are provided with the relevant information for Customs reporting requirements as detailed below.

#### ***Is the Procurement a Consultancy?***

41. Officials must determine if a procurement is a consultancy.
42. A consultancy can be identified by a number of characteristics, and as there are a number of variables, each requirement will need to be assessed on a case by case basis. The following is a list of some of those characteristics:
  - (a) The Nature of the Services:
    - i. involves specialist professional knowledge and/or expertise that may not be maintained in-house;
    - ii. involves development of an intellectual output – eg research, evaluation, survey, advice, and recommendations – to assist with decision making; and
    - iii. involves a one-off task, a set of tasks or irregular tasks (making employment of permanent staff impractical or undesirable).

- (b) Direction and Control:



- i. performance of the services is left largely up to the discretion and professional expertise of the consultant;
  - ii. performance is without the agency's direct supervision;
  - iii. the output reflects the independent views of and/or findings of the individual or organisation;
  - iv. unless otherwise specified in the contract, the consultant may subcontract the services; and
  - v. services may be provided to others.
43. After taking the characteristics into consideration, Officials should then ask two key questions. If the answer to both these questions is 'yes', then it would suggest that a consultancy arrangement has been formed.
  - (a) Do the services involve the development of an intellectual output that assists with agency decision-making?
  - (b) Will the output reflect the independent views of the service provider?
44. Consultancies over \$10,000 require the completion of a Business Case.
45. Consultancy contracts must be entered into for all proposed arrangements that are determined to be a consultancy in accordance with paragraph 43.
46. For further guidance on what constitutes a consultancy, Officials should refer to the *Financial Management Guidance No. 12: Guidance on Identifying Consultancies for Annual Reporting Purposes, July 2004*, or contact the NPC for assistance.

### **Entering Into Contracts (FMA Reg 13)**

47. Officials must not enter into a contract, agreement or arrangement under which public money is, or may become, payable unless a proposal to spend public money for the proposed contract, agreement or arrangement has been approved under regulation 9 and, if necessary, in accordance with regulation 10.
48. Officials must ensure that in all cases either a Business Case or some other written document is created before the approval of the spending proposal under FMA Reg 9 and that this document is considered as part of the approval process by an appropriate delegate under the Customs' Delegations.
49. Officials must ensure, where applicable, that a Reg 10 minute is developed and approved by an appropriate delegate under the Customs' Delegations.
50. Officials must ensure before entering into a contract, agreement or arrangement that both Reg 9 and Reg 10 have been satisfied and approved and that the Official who will sign the contract on behalf of Customs has the appropriate delegation under the Customs' Delegations.

### **Reporting Requirements**

- **Annual Procurement Plan**

51. Officials are required to plan their forthcoming annual procurement, and must arrange to have published on AusTender by 1 July each year, the details in an Annual Procurement Plan (APP).

52. Officials must submit their APP to Budgets, Management and Reporting (BRT) at the time of submitting their section's NRA [insert in full] bid, where BRT will compile a report of all procurements planned for a given financial year.
53. An APP should contain a short strategic procurement outlook and be supported by details of any planned procurement, include the subject matter and the estimated date of the publication of the Request for Tender. Further information can be obtained from the Guidance on Annual Procurement Plans.

- **Publication**

54. Customs must publish details of all Commonwealth contracts and standing offers with a value of \$10,000 or more, GST inclusive, on AusTender, within six weeks of the procurement.
55. 'Gazettal Forms' should be completed and forwarded to the NPC to arrange for publishing. These forms are available on the intranet.
56. In the event that an Official fails to report within the prescribed timeframe, the Official must remedy that failure immediately by submitting a 'Gazettal Form' to the NPC for their action.
57. Details that are required to be published can be found in the *Guidance on Procurement Publishing Obligations*. Any exemptions from publishing a procurement on AusTender can only be made at the written direction of the Chief Executive Officer.
58. Published gazettal notices can be accessed on the AusTender website at <http://www.contracts.gov.au/> [www.austender.gov.au](http://www.austender.gov.au).

- **Senate Order on Departmental and Agency Contracts (Senate Order)**

59. The NPC coordinates the information to be published on the Customs internet site in relation to the Senate Order. This is a list of Commonwealth contracts entered into with a consideration of \$100,000 or more, GST inclusive, which have not been fully performed or which have been entered into during the previous 12 months, together with any confidentiality provisions.
60. Information to be included, the timeframes for reporting and the terms of compliance, are set out in the *Guidance on the Listing of Contract Details on the Internet (Meeting the Senate Order on Departmental and Agency Contracts)*.
61. The Chief Executive is required to advise the Minister of any sensitivity in relation to disclosure, before publishing information on contracts entered into.

- **Annual Report**

62. The NPC coordinates procurement reporting for the Customs Annual Report. This is to report the total amount of all consultancies entered into during the previous financial year that are valued at \$10,000 or more, inclusive of GST, together with the expenditure for those contract.
63. *Requirements for Departmental Annual Reports* (available from [www.pmc.gov.au](http://www.pmc.gov.au)) provides a framework for the major aspects of annual reports.

- **Business Opportunities**

64. Customs must publish all open approaches to the market on AusTender ([www.austender.gov.au](http://www.austender.gov.au)) (refer the *Guidance on Procurement Publishing Obligations*).

## **Documentation**

65. Documentation relating to a procurement process must be retained for a minimum of three years from the award of a contract or from the date that it is decided the procurement process is to be terminated. Copies of all procurement documentation should be forwarded to the NPC for their records.

## **Overseas Procurements**

66. In making requests to overseas offices and diplomatic posts of the Commonwealth to purchase Property and services, Officials must ensure:

- a. that the purchase is approved by an Approver;
- b. the terms and conditions of that approval are supplied to the overseas post; and
- c. a complete description and number of the items required, the approved cost and the arrangements for delivery and payment is supplied to the post.

67. Officials must ensure that the procedures of the Department of Foreign Affairs and Trade are followed when using the payment facilities of their overseas offices.

## **Resources, information and toolkits**

68. The following resource points will be useful to Officials seeking more information about purchasing issues:

- National Procurement and Contracting Unit, Central Office, is part of the Financial Services Division. Contact the Manager on (42) 6711 for a range of advice and assistance on:
  - a. purchasing procedures
  - b. templates
  - c. advertising
  - d. policy awareness sessions;
  - e. procurement training
  - f. planning procurement and developing Business Cases and Procurement Plans;
  - g. deciding an appropriate Approach to the Market;
  - h. drafting request for offer documentation;
  - i. closing and registering tenders and quotations;
  - j. evaluating offers;

- k. contract negotiation and
- l. debriefing suppliers.
- Department of Finance and Administration on the Internet at [www.finance.gov.au](http://www.finance.gov.au), for access to the:
  - a. Commonwealth Procurement Guidelines;
  - b. Endorsed Supplier Arrangements (ESA);
  - c. GST information;
  - d. CTC and Risk Management publications; and
  - e. Purchasing Advisory and Complaints Service (PACS) on 1800 650 531.
- Financial Systems Management Section, Customs, Central Office, part of the Financial Services Division. Contact the QSP Helpdesk on (42) 6008, for help with:
  - a. Purchase Order Processing (POP Module) in QSP;
  - b. Problems in QSP; and
  - c. QSP training.
- Risk Management Coordination Unit (RMCU) , Central Office. Contact the Director on (42) 6143, for:
  - a. Assistance with risk management issues.

---

## References

- |   |                             |
|---|-----------------------------|
| <i>Financial Management and Accountability Act 1997</i>   | Sections: 14, 44, 52        |
| <i>Financial Management and Accountability Regulations</i>  | Regulations: 3, 7-10, 12-13 |
| <i>Constitution of Australia</i>  | Sections: 61, 64            |
| <i>A New Tax System (Goods and Services Tax) Act 1999</i>   |                             |
| <i>Freedom of Information Act 1982</i>  |                             |
| <i>Occupational Health and Safety (Commonwealth Employment) Act 1991</i>  |                             |
| <i>Public Service Act 1999</i>  |                             |
| Australian Procurement and Construction Council: Government Framework for National Cooperation on Electronic Procurement, 2001. |                             |
| Commonwealth Procurement Guidelines, January 2005   |                             |
| Commonwealth Government Information Technology and Communications Framework, (GITC v4) August 2001                              |                             |
| Commonwealth Tendering and Contracting and Best Practice Advice, October 2001   |                             |

---

## Related Guidance

- Commonwealth Guidance on the Mandatory Procurement Procedures, January 2005  
 Attorney-General's Department, *Protective Security Manual*.  
 Department of Finance and Administration, *Guidance on Annual Procurement Plans*.  
 Australian and New Zealand Standard AS/NZS 4360/1999 *Risk Management*.  
 Department of Finance and Administration, *Guidance on Confidentiality of Contractors' Commercial Information*.  
 Department of Finance and Administration. *Guidance on Complying with Legislation and Government Policy in Procurement*.

Department of Finance and Administration. *Guidance on Issuing and Managing Indemnities, Guarantees, Warranties and Letters of Comfort.*  
Department of Finance and Administration, *Guidance on Procurement Publication Obligations.*  
Agency Annual Reports.  
Department of Finance and Administration, *Guidance on Ethics and Probity in Government Procurement.*  
Department of Finance and Administration, *Guidance on the Listing of Contract Details on the Internet (Meeting the Senate Order on Departmental and Agency Contracts)*  
Commonwealth Contracts and Agency Agreements (including Standing Offers)  
*Archives Act 1983.*

---

---

## **Related CEIs**

- 4.1: [Approving Proposals to Spend Public Money](#)
  - 4.3: [Entering into and Managing Contracts](#)
  - 4.7: Purchasing Cards
  
  - 7.1 Risk Management
  - 7.6 Contingent Liabilities
- 

## **Penalties**

*Financial Management and Accountability Act 1997*      Section 14

Misapplication, improper use or disposal of public money

Maximum Penalty: Imprisonment for 7 years.

*Criminal Code Act 1995*

141.1(3) *Obtaining benefits in the course of carrying out official duties*

Maximum penalty: Imprisonment for 10 years.

142.1 *Corrupting benefits received by a public official*

Maximum penalty: Imprisonment for 5 years.

---

Last updated 21 December 2004



## Chief Executive Instruction 4.3

### Contract Management and Variations

**APPLICATION:** *This CEI applies to officials who are involved in the management of contracts, agreements and arrangements for the procurement of Property and services on behalf of Customs. This CEI must be read in conjunction with CEI 4.1 and CEI 4.2.*

#### **Contract Management**

##### **Protection of Commonwealth Interests**

- (1) Officials must ensure that measures are in place to protect the Commonwealth's interests and to effectively manage the contract or agreement so as to achieve the planned outcomes.
- (2) Contracts must meet the mandatory minimum requirements of the *Commonwealth Protective Security Manual 2000* and Customs security procedures in relation to protecting official information and other valuable resources.

##### **Privacy and Confidentiality**

- (3) When entering into a Contract with an external service provider, officials must ensure that:
  - a. the Contract does not authorise the external service provider, while fulfilling their contractual obligations, to perform an act or engage in a practice that would breach an Information Privacy Principle (as defined in the *Privacy Act 1988*); and
  - b. any subcontract entered into by an external service provider does not authorise the performance of an act or engaging in a practice that would breach an Information Privacy Principle; and
  - c. there are provisions covering compliance with all other Commonwealth legislative requirements.
- (4) Information within all contracts and agreements shall be publicly available unless Customs has given a specific undertaking that the information would not be disclosed.

- (5) Any Commercial-In-Confidence provisions must be considered only on a case-by-case basis. The Chief Financial Officer is the Official who may classify a contract, clause or provision as Commercial-In-Confidence.
- (6) Officials must have regard to *Financial Management Guidance Number 3: Guidance on Confidentiality of Contractors' Commercial Information*, February 2003.

### **Purchase/Period Orders**

- (7) Purchase orders must be raised in the financial management information system for all procurements exceeding \$2,000 (inclusive of GST where applicable). Orders must be raised for Property or services procured under a Deed of Standing Offer arrangement.
- (8) Period orders are raised in the financial management information system for procurements that require multiple payments of varying amounts over a period of time within any one financial year.

### **Reporting Requirements**

- (9) An official, who enters into a Contract or Agreement under which Customs is obliged or may become obliged to make a payment of public money with a value of \$10,000 or above (inclusive of GST where applicable), must ensure its notification on AusTender, within six weeks of the date of entering into that Commonwealth contract or Agency agreement.
- (10) Customs is required to publish on the Internet with access through its website, an up-to-date list of all Commonwealth contracts exceeding \$100,000 in value which have not been fully performed or which have been entered into during the previous 12 months. This publishing requirement is to be completed by the National Procurement and Contracting (NPC) Unit.

### **Variation of Procurements**

- (11) Proposed extensions of Commonwealth contracts or Agency agreements must be examined to determine what further documentation and reporting is required. For the purposes of extensions officials should approach the procurement as if it were a new procurement process and have regard to the thresholds. Approvals and reporting requirements are contained in this CEI, CEI 4.1 and CEI 4.2.

### **Disposal of Public Property**

- (12) If during the management of a Contract, an Official becomes aware that the public Property of that Contract has become surplus, obsolete or unserviceable, the Official is required to forward a written proposal to the relevant Approver in order that disposal of the Property might be considered. Further information is contained in CEI 5.3.

## Terminology / Definitions

For the purposes of this CEI:

*'Agency agreement' means an agreement for the procurement of Property and services under which an Agency is obliged, or may become obliged, to make a payment of public money to another Agency.*

*'Approach to the Market' is any notice inviting potential suppliers to participate in a procurement including a request for tender, request for expression of interest, request for application for inclusion on a Multi-Use List, or invitation to tender.*

*'Approver' has the same meaning as outlined in FMA Regulation 3:*

- a. a Minister or Parliamentary Secretary; or*
- b. a Chief Executive; or*
- c. a person authorised by or under an Act to exercise a function of approving proposals to spend public money.*

*'Commercial-in-Confidence' means confidential information that if compromised could cause limited damage to the Commonwealth, the Government, commercial entities or members of the public.*

*'Commonwealth contract' means an agreement for the procurement of goods and services under which the Commonwealth is obliged, or may become obliged, to make a payment of public money.*

*'Contract' means a legally binding promise or agreement.*

*'Official' means a person who is in an agency or part of an agency as defined in section 5 of the FMA Act.*

*'Open Tender Process' is a procurement process in which a request for tender is published to the public, inviting suppliers who satisfy the Conditions for Participation, to submit tenders.*

*'Property' means 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.*

*'Request Documentation' is documentation provided to businesses to enable them to understand and assess the requirements of the procuring agency and to prepare appropriate and responsive submissions. This general term includes documentation for expressions of interest, multi-use lists, open and select tender processes, and direct sourcing.*

## Commentary

The objectives of good Contract management are to ensure:



- Property or services are delivered under Contract according to the time, cost, quantity and/or quality standards specified in the Contract; and
- Customs has sufficient information to enable it to make a decision regarding succession arrangements at the conclusion of the term of the Contract.

Contract management is an integral part of a well-planned procurement process. It involves monitoring performance and ensuring that both parties meet the commitments made in a Contract and that the Commonwealth obtains value for money through satisfactory performance of the Contract. Contract management will also entail processing price variation applications and evaluating any proposed Contract amendments. Remedial action should be prompt in the event of unsatisfactory performance or default.

Sound Contract management should achieve a balance between outcomes, processes and controls, so that no one factor is compromised for the benefit of the others. At an early stage, or at least before a Contract is signed, officials responsible for Contract management need to address the following critical success elements outlined below:

- (a) risk management;
- (b) performance assessment and monitoring;
- (c) ethical working relationship with contractor;
- (d) documentation and accountability;
- (e) dispute resolution; and
- (f) succession planning.

---

## Guidelines

### Introduction

1. Contract management involves the implementation and monitoring of the terms of the Contract, risk management, and continued maintenance of the relationship between the contractual parties.

### Implementation of a Contract

2. The process for the procurement of Property and services is outlined in CEI 4.2 *Procurement of Property and Services*. This CEI deals with the steps after a Contract for the procurement of Property and services has been signed.
3. Clauses in the Contract will set out the responsibilities of both parties. The officials involved in Contract management should understand the basic requirements of each clause and schedule.
4. The Official is responsible for ensuring that the terms and conditions of the Contract are followed. These terms and conditions include but are not limited to:
  - the confidentiality obligations of each party (guidance provided in this CEI);
  - the privacy obligations of each party (guidance provided in this CEI);
  - ensuring appropriate insurance is maintained;
  - contractor security obligations;

- the procedures for engaging subcontractors;
  - statutory compliance (ie. ensuring OH&S standards are maintained);
  - Commonwealth rights and responsibilities if an audit of the company in relation to the Contract is required;
  - how communication should be conducted;
  - what to do if the services aren't being performed;
  - processes to resolve a dispute;
  - ensuring payments are processed as outlined in the Contract; and
  - awareness of Customs requirements for complying with Commonwealth policies and posting Contract details in the public domain.
5. All consultancy and some service Contracts will be required to include a "Specified Personnel" annexe to the Contract to ensure that the people offered by the contractor in the tender process perform the consultancy work.
6. Officials involved in Contract management are responsible for the following critical success elements:
- risk management
  - performance assessment and monitoring
  - ethical working relationship with contractor
  - documentation and accountability
  - dispute resolution
  - succession planning (including variations)

### **Risk Management**

7. Risk is identified as the chance of something happening, that will have an impact upon objectives. It is measured in terms of consequence and likelihood.
8. The approach of Customs to risk management is based on Australian / New Zealand Standard *AS/NZS 4360:2004 – Risk Management*. Officials involved in the management of Contracts should consult the Risk Management Coordination Unit for assistance and also Customs Risk Management Policy at [http://cww.customs.gov.au/site/Risk\\_Management.htm](http://cww.customs.gov.au/site/Risk_Management.htm).
9. Officials involved in the management of Contracts or any variations are responsible for managing risks associated with the subject matter of the Contract. Potential risks should be identified, assessed, treated and monitored. Strategies should be developed to contain the risk.

### **Performance Assessment and Monitoring**

10. An enforceable Contract is one in which the Property or service required is properly specified, the relationship between the parties clearly defined and mechanisms have been included for monitoring performance, including damages and incentives. Performance indicators must identify measurable outcomes.
11. For simple purchases, possible performance indicators that make assessing the supplier's performance fairly straightforward, are:
- (a) delivery on time;
  - (b) correct invoicing in line with quote/contract; and

- (c) providing exactly what was agreed to.
12. Performance indicators need to be defined within the contract, specified in a schedule of the contract. An example would be to include a contract-reporting requirement for regular reports, eg monthly. This would allow for evaluation of the contractor's timeliness and the quality of information feedback.
  13. The nature of service industries and consultancies can make performance measurement difficult. Difficulties should be identified as risks, understanding the potential inability for their expectations to be realised. Possible service performance indicators include:
    - (a) timeliness;
    - (b) quality of service compared to the specified service level; and
    - (c) client satisfaction levels.
  14. Clauses that provide Commonwealth access to a contractor's accounts and records are included in the contract, to provide an indication of the contractor's performance. However this information may only be of value, if some pre-determined level of service could be identified from the information that would be obtained.
  15. There are specific requirements under Section 16 (4) of the *Occupational Health and Safety (Commonwealth Employment) Act 1991* for agencies to monitor and supervise the activities of contractors with regard to the health and safety aspects of their contracted work. This is achieved by regular workplace inspections, reviewing contractor documentation and reviewing relevant reports.
  16. The Commonwealth is committed to upholding its contractual and commercial obligations. Performance indicators are used to monitor the quality of service delivery and also assess the appropriateness of the internal processes of Contract management.
  17. Throughout the term of the Contract, Officials should seek to examine performance levels and measures, where Customs can improve the outcomes. This can also be achieved when conducting 'exit' meetings upon Contract expiration or early termination.

### **Ethical Working Relationship with Contractor**

18. Good Contract management requires the establishing and maintaining of a good working relationship between the contracting parties. The working relationship requires communication and the build up of trust in the form of adherence to the terms and conditions as outlined in the Contract, in particular to confidentiality and privacy provisions.

#### **18.1. Communication**

- (a) Good communication is a key element in a successful contractual relationship. Communication should be regular and clear. Copies of all correspondence (post, email) and records of verbal discussions should be maintained by officials.

- (b) Good communication between the parties can help in avoiding possible conflicts or disputes and may assist the agency to respecify its requirements through a greater knowledge of the contractor's business.

#### 18.2. Confidentiality

- (a) Contracts that have imposed confidentiality provisions must have been agreed to in accordance with the *Confidentiality of Contractors' Commercial Information* guidance provided by the Department of Finance and outlined in CEI 4.2.
- (b) The Senate Order for Department and Agency Contracts requires FMA Agencies to meet a number of specific disclosure provisions including:
- the contractor details and the subject matter of each Contract;
  - the estimated total cost of the Contract;
  - the duration of the Contract;
  - whether the Contract includes confidentiality provisions; and
  - the reason for confidentiality.
- (c) Agencies will not disclose information if disclosure would be contrary to the *Privacy Act 1988*, or to other statutory secrecy provisions, or if the Commonwealth has given an undertaking to another party that the information will not be disclosed.
- (d) Section 16 of the *Customs Administration Act 1985* is a statutory secrecy provision that must be complied with by Customs officers. Where a Customs officer is in any doubt about whether they can disclose specific information, they should contact the Customs Legal Panel or Customs Freedom of Information Officer.

#### 18.3. Privacy

- (a) Customs is required to comply with the *Privacy Act 1988* as amended.
- (b) Customs is required to comply with the *Information Privacy Principles*, some *National Privacy Principles* and section 16F of the *Privacy Act 1988*. Agencies cannot avoid their obligations by contracting out of them.
- (c) The legislation requires Customs to take contractual measures to ensure any contractor (and if applicable, any sub-contractor) complies with the relevant privacy principles. The primary source of privacy obligations will come from the Contract.
- (d) The privacy requirements extend to foreign contractors and continue after expiry of the Contract.
- (e) Privacy, and compliance with privacy legislation, is an important part of Contract management. Officials should refer to CEI 8.3 *Privacy* and contact the NPC if they have any concerns.

### **Documentation and Accountability**

19. Records of all relevant communications, actions and decisions relating to the Contracts should be maintained for all procurement activities. It is essential for good Contract management to properly maintain the records for the procurement. Good, comprehensive records management supports accountability and provides an appropriate level of probity.
20. CEI 4.2 *Procurement of Property and Services* provides instructions relating to the retaining of Contract/procurement related documentation that is to be held on the procurement file up until the Contract is signed. After Contract execution a file should be created for the management of the Contract and include documents that cover the following aspects:
  - (a) records of meetings and conversations;
  - (b) all Contracts, schedules and any variations;
  - (c) Contract management records;
  - (d) details of all payments;
  - (e) dispute resolution records;
  - (f) assessments of contractors performance; and
  - (g) succession planning details.
21. Purchase orders or period orders must be used to process payments relating to a Contract. The use of orders will:
  - (a) assist in the documentation of a procurement;
  - (b) provide a record of payment and approval;
  - (c) generate the commitment in the Financial Management Information System (QSP);
  - (d) facilitate reporting to government.
22. Officials should in all cases:
  - (a) create an order in QSP;
  - (b) check that there is supporting documentation for each tax invoice that details what the charge relates to;
  - (c) follow the procedures in CEI 4.4 to process the payment;
  - (d) keep records of all documentation and tax invoices for reference and audit trails.

## **Dispute Resolution**

23. Dispute prevention is better than resolution. To avoid disputes, Contracts need to be very clear in their statements about purpose, deliverables, timeframes, payments and contingencies.
24. Customs Contracts include clauses outlining the agreed means by which the parties are to resolve disputes. This measure aims to avoid resorting to legal action. A dispute that involves litigation is rarely in the interests of either party.
25. As a first step, all parties to a Contract should attempt to agree on what exactly is in dispute. It is possible that the problem is a simple misunderstanding. If so, a straightforward variation to the Contract, agreed by all the parties, will resolve the matter. If the matter is more involved, it may be necessary to escalate it to senior management level, and provided the issues have been clearly identified, the resolution will be greatly assisted.

26. If any aspect of unsatisfactory performance is detected then it should be resolved following the dispute resolution Contract clauses. Good communication should help to prevent problems from escalating.
27. If unsatisfactory performance continues or the contractor fails to comply with some other important term or condition of the Contract then it is likely that a breach of the Contract has occurred. The official in this circumstance should inform the NPC. The unit can inform of the necessary processes if a dispute is ongoing, affects the Contract or appears to be a breach of the contract.
28. If the official has any queries, they should contact NPC. In the circumstances of breach, the official should be aware of the need for documentation of the actions that have led to the breach of Contract and the efforts to advise the contractor and amend the problem.

### **Succession Planning**

29. Contract succession is required when a Contract expires or is terminated and the deliverables or a service is still required by the agency. If it is known at the drafting of the Request Documentation stage that the requirements are ongoing, then succession planning must be undertaken at that stage. In some cases succession planning may occur during the term of the Contract.
30. In these instances, succession planning aims to:
  - a. evaluate and assess the contractor's performance and delivery of services;
  - b. evaluate and assess any changes to the agency requirements, government policies, or community expectations; and
  - c. determine whether the contractual arrangement is providing value for money.
31. Specific examples of Contracts requiring succession planning include Contracts for continued requirements and one-off Contracts that lead to follow up Contracts for replacement or maintenance programs. In both cases it is necessary for Customs to obtain and retain market knowledge and the ability to purchase at best value for money. There should be regular market testing and discussions with stakeholders.
32. Some Contracts may provide for extensions. It will be necessary in those cases to establish that the current contractor has performed in accordance with contractual terms and can continue to do so at best value for money. If the contractor cannot provide this service then NPC should be contacted to either negotiate with the contractor or to conduct fresh competitive tendering.
33. In the event of fresh competitive tendering officials should refer to the requirements as outlined in CEI 4.2 *Procurement of Property and Services*. In some cases an extension will require approval under FMA Regulations 9 and 10 and Officials should be aware of this possibility.
34. The NPC should be contacted at least two months prior to the Contract end date. Officials must keep NPC informed of all Contract extensions and decisions to commence fresh Approach to the Market processes. The unit can assist with all appropriate documentation and advice to ensure that relevant guidelines and reporting requirements are complied with.

### **Variations**

35. A variation occurs whenever a material aspect of the Contract changes. A variation can be an extension of the Contract, a change to any of the terms of the Contract,

an increase or reduction in the amount or services/deliverables provided, or a change in identity of a party to the Contract.

36. Any variation to the Contract amount, requires a Mandatory Reporting form (Gazettal form) to be completed and forward to the NPC for updating on AusTender.
37. Whenever an official has a question about a variation they should contact the NPC.
38. Extensions of the Contract were largely dealt with under Succession Planning. Extensions may attract some of the obligations involved in procurement as outlined in CEI 4.2 *Procurement of Property and Services*. Officials should contact NPC to make sure value for money is being achieved and that all documentation is properly completed.
39. Simple mistakes can often be corrected by the parties if agreement can be reached. Generally, increases or decreases in services provided should be reflected in an increase or decrease in payment by the agency.
40. A contractor who has entered into a Contract with the agency can subsequently change their name by either registered change of name with the relevant government authorities, or through a takeover of the contractor by another private company. If this occurs the official responsible should contact the NPC to ensure the correct documentation is completed. If the official has any concerns with the new entities' ability to provide the contracted service the NPC should be contacted.

### **Disposal of Public Property**

41. If during the management of a Contract, an Official becomes aware that the public Property of that Contract has become surplus, obsolete or unserviceable, the Official is required to forward a written proposal to the relevant Approver in order that disposal of the Property might be considered.
42. Approvers must ensure the efficient and effective management of public Property, including timely disposal of surplus and obsolete Property in the control and custody of the area. Further information is contained in CEI 5.3.

### **Resources and further information**

43. The particular Contract will be the primary source of information needed to manage the Contract. The following resource points will be useful to officials seeking more information about Contracts and Contract management issues:
  - (a) National Procurement and Contracting unit  
Australian Customs Service  
Financial Management Division, Central Office  
Contact the Manager on (42) 6711
  - (b) Australian National Audit Office (ANAO)  
Internet at [www.anao.gov.au](http://www.anao.gov.au)  
Selecting Suppliers: Managing the Risk;
  - (c) Contract Management Better Practice Guide, February 2001.
  - (d) Department of Finance and Administration (Finance)  
Internet at [www.finance.gov.au](http://www.finance.gov.au); or

Under the '[Training and Awareness](#)' menu on the Procurement and Contracting intranet site under the Financial Services Branch

- (e) National Archives of Australia  
Internet at [www.naa.gov.au](http://www.naa.gov.au)  
Records Issues for Outsourcing Including General Disposal Authority 25.

---

## References

*Financial Management and Accountability Act 1997* Sections: 14, 44  
*Financial Management and Accountability Regulations* Regulations: 3, 7, 9 - 13  
*Constitution of Australia* Sections: 61, 64  
*Public Service Act 1999*  
*A New Tax System (Goods and Services Tax) Act 1999*  
*Freedom of Information Act 1982*  
*Occupational Health and Safety (Commonwealth Employment) Act 1991*  
Commonwealth Procurement Guidelines, January 2005  
Commonwealth Tendering and Contracting and Best Practice Advice, October 2001  
National Security Instruction 2001/09  
Commonwealth Protective Security Manual Part F 2000  
Security Requirements for Competitive Tendering and Contracting

---

## Related CEIs

- 4.1: [Approving Proposals to Spend Public Money](#)  
4.2: [Procurement of Goods and Services](#)  
4.4: [Payment of Accounts](#)
- 5.3: Write Off and/or Disposal of Public Property
- 7.1: Risk Management
- 

## Penalties

*Financial Management and Accountability Act 1997* Section 14

Misapplication, improper use or disposal of public money

Maximum Penalty: Imprisonment for 7 years.

*Criminal Code Act 1995*

141.1(3) *Obtaining benefits in the course of carrying out official duties*

Maximum penalty: Imprisonment for 10 years.

142.1 *Corrupting benefits received by a public official*



Maximum penalty: Imprisonment for 5 years.

---



---

Last updated 21 December 2004



**Guidance on the Mandatory  
Procurement Procedures  
January 2005**

FINANCIAL MANAGEMENT GUIDANCE NO.13

© Commonwealth of Australia 2005

ISBN 0-9752394-7-3

Department of Finance and Administration

Financial Management Group

Cover Photo courtesy of Canadian High Commission.

This work is copyright. Apart from any use as permitted under the *Copyright Act 1968*, no part may be reproduced by any process without prior written permission from the Australian Government, available from the Department of Communications, Information Technology and the Arts.

Requests and inquiries concerning reproduction and rights should be addressed to the Commonwealth Copyright Administration, Intellectual Property Branch, Department of Communications, Information Technology and the Arts, GPO Box 2154, Canberra ACT 2601 or posted at <http://www.dcita.gov.au/cca>.

## The Financial Management Guidance series of publications

- No. 1 Commonwealth Procurement Guidelines, January 2005.
- No. 2 Guidelines for the Management of Foreign Exchange Risk, November 2002.
- No. 3 Guidance on Confidentiality of Contractors' Commercial Information, February 2003.
- No. 4 Commonwealth Cost Recovery Guidelines for Information and Regulatory Agencies, March 2003.
- No. 5 Guidelines for Implementation of Administrative Arrangements Orders and Other Machinery of Government Changes, September 2003.
- No. 6 Guidelines for Issuing and Managing Indemnities, Guarantees, Warranties and Letters of Comfort, September 2003.
- No. 7 Guidelines for the Management of Special Accounts, October 2003.
- No. 8 Guidance on the Listing of Contract Details on the Internet (Meeting the Senate Order on Department and Agency Contracts), January 2004.
- No. 9 Australian Government Competitive Neutrality Guidelines for Managers, February 2004.
- No. 10 Guidance on Complying with Legislation and Government Policy in Procurement, January 2005.
- No. 11 The Role of the CFO – Guidance for Commonwealth Agencies, April 2003.
- No. 12 Guidance on Identifying Consultancies for Annual Reporting Purposes, July 2004.
- No. 13 Guidance on the Mandatory Procurement Procedures, January 2005.
- No. 14 Guidance on Ethics and Probity in Government Procurement, January 2005.
- No. 15 Guidance on Procurement Publishing Obligations, January 2005.



# Contents

<b>1. The Purpose</b>	<b>1</b>
<b>2. The Background and Context</b>	<b>3</b>
<b>3. The Steps in a Procurement</b>	<b>7</b>
<b>4. Planning the Procurement</b>	<b>9</b>
4.1 Defining the Outcome	10
4.2 Defining Specifications	10
4.3 Researching the Market	11
4.4 Identifying Risks	12
4.5 Time-Lines	15
4.6 Internal Due Diligence	16
4.7 Delivery Options	16
4.8 Identifying Alternative Opportunities	17
4.9 Identifying Industry Regulation and Licensing Requirements	17
4.10 Policies that Interact With Procurement	18
4.11 The Business Case	18
4.12 Resources	19
<b>5. Selecting a Procurement Process</b>	<b>21</b>
5.1 General Issues	22
5.2 Open Tendering	23
5.3 Select Tendering	24
5.4 Direct Sourcing	25
5.5 Resources	26
<b>6. Preparing to Approach the Market</b>	<b>29</b>
6.1 The Procurement Plan	30
6.2 Request Document	31
6.3 Submission Evaluation Plan	37
6.4 The Submission Evaluation Committee	38
6.5 Resources	39
<b>7. Approaching the Market</b>	<b>41</b>
7.1 Notifying the Market About the Procurement	42
7.2 Modifying the Request Document and Clarifying Matters	43
7.3 Resources	43

# Contents

<b>8. Evaluating Submissions</b>	<b>45</b>
8.1 Receiving Submissions	46
8.2 Submission Evaluation	46
8.3 Submission Evaluation Report	47
8.4 Debrief	47
8.5 Resources	48
<b>9. Concluding the Process</b>	<b>49</b>
9.1 Negotiating the Contract	50
9.2 Publishing the Awarding of the Contract	50
9.3 Cancelling a Procurement	51
9.4 Dealing With Complaints	52
9.5 Reporting	53
9.6 Storing Records	53
9.7 Resources	54
<b>Appendices</b>	<b>55</b>
<b>Appendix A: Multi-Use Lists</b>	<b>56</b>
Checklist for Establishing a Multi Use List	59
<b>Appendix B: Panels</b>	<b>60</b>
Checklist for Establishing a Panel	63
<b>Appendix C: Definitions</b>	<b>66</b>



The Purpose



# 1 Purpose

The purpose of the *Guidance on the Mandatory Procurement Procedures* is to assist Australian Government departments and agencies (agencies) in implementing the requirements of the *Commonwealth Procurement Guidelines* (CPGs) and specifically the Mandatory Procurement Procedures.

Value for money is the core principle underpinning Australian Government procurement. This means that Australian Government officials need to be satisfied that the best possible outcome has been achieved taking into account all relevant costs and benefits over the whole of the procurement cycle<sup>1</sup>.

This operational guide promotes the achievement of value for money by providing practical information on managing procurement processes that lead to agencies entering into a purchasing agreement with a supplier or suppliers. This information meets the requirements of the Government's procurement framework while also facilitating the delivery of good business outcomes. Therefore, this guide is an adjunct to the CPGs and will best serve the reader if they are familiar with the CPGs.

## Advisory

2

This guide is designed to assist officials with a detailed knowledge of procurement processes who need an occasional reference source, as well as those officials only occasionally involved in a procurement process who need a step-by-step guide. As this document is only a guide it, therefore, primarily focuses on general situations.

When dealing with a circumstance that is not directly addressed by the guidance, the officials will need to use judgement, and if necessary, seek advice from an appropriate source.

Some agencies maintain their own operational guidance. In cases where agency guidance and this guide provide different advice, the official should follow the agency's guidance as long as it complies with the CPGs. If an agency adapts this guide to its own procurement protocols, it should make clear that the adapted guide **does not** carry the authority of the Department of Finance and Administration (Finance).

<sup>1</sup> Depending on the property or service being procured, agencies may also include environmental, social and other costs in their calculations of the whole of procurement cycle. For further information refer to the *Guidance on Complying with Legislation and Government Policy in Procurement*.

The Background and Context

## 2 Background and Context

The operations discussed in this guide are primarily directed at covered procurements. Covered procurements are defined in the CPGs as “a procurement, other than one that is specifically exempt, where the value of the property or services being procured exceeds the relevant procurement threshold.”

The covered procurement thresholds are as follows:

- \$80,000<sup>2</sup> for procurements for *Financial Management and Accountability Act 1997* agencies (FMA agencies);
- \$400,000 for procurements, other than procurements of construction services for relevant *Commonwealth Authorities and Companies Act 1997* (CAC) bodies; and
- \$6 million for procurements of construction services.

The estimated value of the procurement needs to be determined according to the CPGs, and must include any taxes or charges (including Goods and Services Tax (GST)).

All *Financial Management and Accountability Act 1997* (FMA Act) agencies and their officials are subject to the CPGs when performing duties in relation to procurement. Relevant bodies subject to the *Commonwealth Authorities and Companies Act 1997* (CAC Act) are bound in their procurements by the *Finance Minister’s (CAC Act Procurement) Directions 2004*.

Where a procurement is not a covered procurement, an agency does have more discretion in its procurement procedures. However, the agency must still comply with the requirements of the procurement policy framework and other Government policies that interact with procurement. It can be to an agency’s advantage to use this guide for a non-covered procurement as the operations described here are better practice.

As stated above, this guide describes general situations and officials may be required to exercise their own judgement in certain situations. If so, such decisions should be taken in line with the principles articulated in the CPGs. Officials should also consider early in the process whether they will need legal advice and at what stage of the procurement process advice should be sought. Such assistance may be prudent, for example, if an official is required to write a contract.<sup>3</sup>

A record of the procurement process should be created in order to facilitate scrutiny of the factors and principles that informed certain decisions. Documentation of decisions can play a particularly helpful role in this regard. The appropriate mix and level of documentation depends on the nature and risk profile of the procurement being undertaken.

<sup>2</sup> Unless otherwise stated, all amounts in this guide are in Australian dollars and are GST-inclusive.

<sup>3</sup> Note that many agencies have specific requirements and procedures for seeking legal advice.

## Background and Context 2

In all cases, the agency should ensure that there is sufficient documentation to provide an understanding of:

- the reasons for the procurement;
- why a particular procurement method was used;
- the process that was followed;
- all resulting decisions, including the basis of those decisions; and
- any associated authorisations.

Documentation relating to a procurement process must be retained for a minimum period of three years after the award of a contract, or from the date that it is decided the procurement process is to be terminated. The *Archives Act 1983* also sets out other minimum retention period requirements in relation to Commonwealth records, including procurement documentation. Contact your agency's records management area for advice on retention periods for particular issues under consideration.

Officials must be aware of and comply with *Financial Management and Accountability Regulations* (FMA regulations) that have a bearing on the procurement process. Regulations which specifically support the spending of public money are:

- *FMA Regulation 8(2)* requires that any official who takes an action that is not consistent with the CPGs must make a written record of his or her reasons for doing so;
- *FMA Regulation 9(1)* requires that an approver<sup>4</sup> of a proposal to spend public money must be satisfied that the proposed expenditure is in accordance with the policies of the Commonwealth, will make efficient and effective use of the money and, if the proposal is one to spend special public money, is consistent with the terms under which the money is held; and
- *FMA Regulation 12* specifies that, where approval of a proposal to spend public money is not given in writing, the approver must make a record of the terms of the approval in a document as soon as possible after giving the approval.

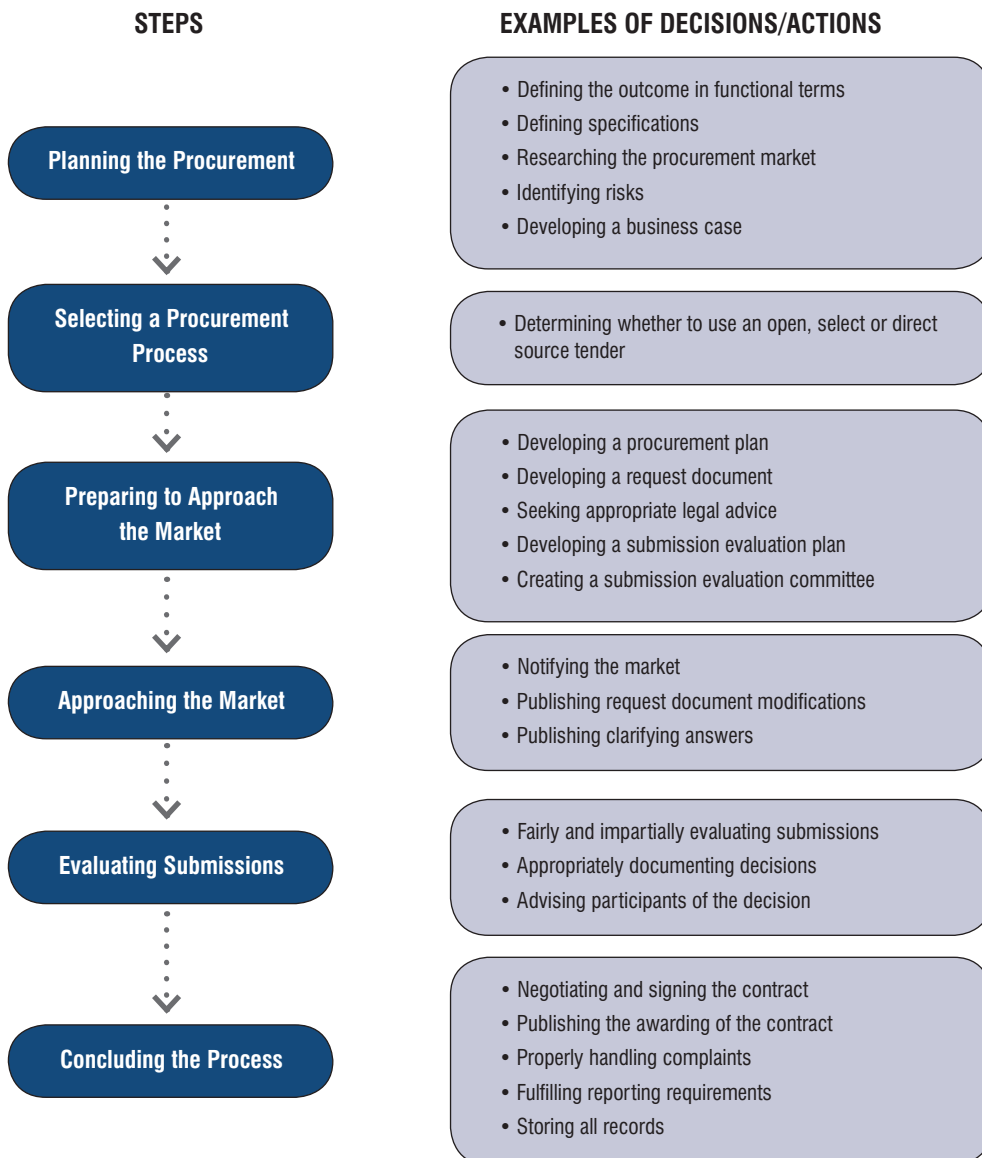
<sup>4</sup> FMA regulation 3 defines an approver as a Minister, a Chief Executive, or a person authorized by legislation to approve proposals to spend public money.



The Steps in a Procurement

### 3 Steps in a Procurement

There are six major steps that are generally followed when procuring a property or service. Within each of these steps there are also a number of decisions or actions that are usually taken. These are outlined in the following diagram.



The remainder of this document is structured as a step-by-step operational guide for the reader with each chapter of this guide representing a step.

The chapters describe both the step to be taken at that particular stage of the procurement process as well as the information needed to support the associated decisions and actions.

Planning the Procurement



## 4 Planning the Procurement

While all procurements require some planning, the degree of planning is dependent on the complexity and size of the procurement. Simple procurements do not generally require detailed planning; whereas, by virtue of their size, covered procurements will generally require a more detailed planning process. In the case of large and complicated procurements, the agency may even consider forming a steering committee and bringing in a variety of expertise from across the agency.

Effective planning may include, where appropriate, researching whether similar procurements are being undertaken in other agencies, thereby increasing the potential for agencies to share procurement costs.

A planning process can assist the agency in deciding whether a procurement is feasible and should be undertaken; thereby allowing for the development of a business case.

This chapter, therefore, outlines various issues an agency should consider when planning a covered procurement that will achieve value for money; and how this should culminate in the development of a business case.

### 4.1 Defining the Outcome

The development of a clear and precise description of the outcome is an important first step in every procurement. By defining the outcome, the agency will be describing what need is to be satisfied and how it is to be satisfied.

This description will then allow the agency to describe the property or service required, quantities required and how the property or service is to be delivered.

### 4.2 Defining Specifications

Developing specifications for the procurement of property or services is sometimes a complex activity requiring expertise. For example, in the case of highly technical communications procurement it can take more than a year to develop specifications.

The agency should involve the users of the property or services in defining the requirements together with appropriate project officials and technical officials (eg communications, finance). Consideration should also be given to liaison with other agencies that may have procured the same or similar property or services.

Any specifications must be in terms of the performance and functional requirements, rather than design or descriptive characteristics. For example, if a mail service is being sought it should not be specified as a pre-set schedule of routes unless there is a rigid business need to do so; rather it should be specified as “a mail service to 1,000 staff over two sites”.

Similarly, procurements which are technical in nature, should be prescribed by the technical specifications, rather than be prescribed by a particular property or service.

## Planning the Procurement 4

If an agency is procuring printers, for example, it should specify “a printer capable of printing 20 pages per minute” instead of requesting “a Brand X printer”.

Specifications must be based on existing international standards that apply to the procurement except where:

- the use of Australian standards are required by law;
- international standards fail to meet the agency’s requirements; or
- international standard would impose greater burdens than the use of the Australian standard.

It should be noted that many Australian standards are based on international standards and may in some cases be identical.

A good specification will state the requirement clearly, concisely and logically in functional and performance terms unless specific technical requirements are needed. As specifications limit the scope of responses that may be accepted, care should be taken to avoid specifications that discourage suppliers from providing the best solution, which in some cases may be a solution based on an innovative idea and/or technology.

### 4.3 Researching the Market

Researching the market assists the procurement official to understand how the market works, competition within the market, recent developments, supply issues and innovation opportunities. It should also reveal key potential suppliers and whether the market contains sufficient expertise to deliver the property or service in a form that accords with the prescribed outcome.<sup>5</sup>

Market research can occur through a number of methods including contact with other Australian Government agencies via formal networks, such as the Procurement Discussion Forum<sup>6</sup>, or via informal networks.

<sup>5</sup> If a consultant is hired to research the market on behalf of the agency, this may in itself be a separate procurement exercise subject to the CPGs.

<sup>6</sup> The Forums are hosted by Finance and held periodically throughout the year.

## 4 Planning the Procurement

The agency's level of confidence in being able to successfully procure within a reasonable time to a reasonable cost and standard will depend on several factors such as:

- the complexity of the proposed procurement;
- a mix of property or services not being available from a single supplier, thereby requiring a consortium to be formed;
- the maturity of the market;
  - a new industry may be largely comprised of suppliers, which do not have a long record of on-time delivery.
- the size of the market;
  - a very small market of suppliers may not be able to guarantee a competitive procurement environment.
- the availability of alternative products and services; and
- the presence of any statutory planning requirements.

At the end of this process, the agency should have a good knowledge of the current market and use this information, *inter alia*, to determine the type of approach to the market that is most appropriate to the particular circumstances (see the following chapter).

In addition, as explained in the following section, this process will also assist the agency to identify risks associated with the procurement.

### 4.4 Identifying Risks

Risk is the chance of something happening that will have an impact upon objectives and outcomes. Risk management involves the systematic identification, analysis, treatment and, where appropriate, acceptance of risks. Risk management is integral to efficiency and effectiveness, enabling agencies to proactively identify, evaluate and manage risks, opportunities and issues arising out of procurement-related activities. As a general principle, risks should be borne by the party best placed to manage them.

Most procurements contain some sort of risk and, while risk cannot be eliminated, in most cases it can be managed. The various planning activities that the agency undertakes, as outlined in this chapter, will identify risks and strategies to mitigate some of these risks. Risks can relate to a number of factors including the immaturity of the market, highly specialised products, experimental stage of product development, limited suppliers, dependence on specific personnel or supply chain issues. As well, there can be risks associated with internal agency matters. The level of attention given to mitigating any particular risk will depend on its potential impact on the procurement. These risks need to be assessed and mitigating strategies identified where possible. If the risk cannot be controlled then, at the least, awareness can be used to inform a strategy.

## Planning the Procurement 4

In the procurement context, there are risks associated with the procurement process itself and risks associated with the property or service once it has been procured.

Risks associated with the procurement process relate to events, issues or features of a property or service that could jeopardise the successful delivery of the procurement outcome. Throughout all stages of the procurement process agencies need to be cognisant of risks and their potential impacts. In the case of risk associated with the property or service after it has been procured, agencies need to be aware of any liabilities that the property or service may carry.

The main elements of the risk management process are described in the Australian and New Zealand Standard AS/NZS 4360/2004 *Risk Management*. These elements generally deal with ensuring that there is adequate communication and consultation at each stage of the risk management process, where risks are identified, assessed and evaluated. After risk management processes are implemented, risks are continually monitored and reviewed to ensure the effectiveness of risk treatment measures. Taking these steps will assist the agency to assess the relative priority of each identified risk and provide options for reducing potential for the risk crystallising.

The consideration given to each of these steps will depend on the size and complexity of the procurement. For example, there may be limited sources of supply for a highly technical product that is critical to an agency's service delivery. The purchasing objective, therefore, may be to seek to secure a continuous supply of that product. An example of a key strategy may be to work with suppliers that have capability in the area to develop alternative products that will meet the agency's needs.

Where assessment and evaluation processes identify procurement risks that are not acceptable, the agency must implement risk treatment strategies. For each unacceptable risk the agency should investigate:

- reducing the likelihood of the risk occurring;
- reducing the severity of the consequences should the risk eventuate;
- transferring the risk to another party in part or full; or
- avoiding the risk.

As stated above, risks should be borne by the party best placed to manage them. That is, the Australian Government should generally not accept risks, and therefore potential liabilities, which another party is better placed to manage. This policy is articulated in Finance Circular 2003/02 and the accompanying guidelines for Issuing and Managing Indemnities, Guarantees, Warranties and Letters of Comfort.

Where, after due consideration, an agency has made the decision to accept a risk which would otherwise reside with a supplier, it should be recognised that the Australian Government is also accepting additional costs. These may be direct costs associated with purchasing insurance to cover the risk and/or indirect costs through carrying additional

## 4 Planning the Procurement

contingent liabilities. The supplier's direct and indirect costs are correspondingly reduced. Therefore, the decision to accept a limitation of a supplier's liability should be reflected in a commensurate adjustment in the contract terms in favour of the Australian Government. Prior to accepting any such risk, the agency should check whether they have sufficient insurance coverage.

Mechanisms should also be established to ensure that the agency is able to monitor contract performance and the management of those risks it has accepted. In these circumstances, agencies should assess whether they should seek more direct involvement in the administration of the contract in order to ensure that the Australian Government's interests are adequately protected.

An agency may consider limiting a supplier's liability to the Commonwealth. Forms of limiting the supplier's liability include the use of indemnities and liability caps. Agreements that include specific statements in relation to the capping of supplier's liability to the Commonwealth or a Commonwealth indemnity require consideration under the FMA regulations.<sup>7</sup> Where it is apparent that market conditions will require some form of limitation of a supplier's liability to the Commonwealth, agencies must include an assessment of the limitations as part of its value for money consideration.

More generally, it may only become apparent that there are issues with a supplier's liability when potential contractors respond to the draft contract in the tender process. For this reason, agencies may consider including an evaluation of proposed liability arrangements within the evaluation criteria and a statement in the request document that any request for additional limitations of liability during contract negotiations will be expected to be accompanied by a commensurate adjustment in the contract terms.

Further information on risk management can be found in the publication Australian and New Zealand Standard AS/NZS 4360/2004 *Risk Management*.

### ***Security Considerations in Procurement***

The consideration of security risk is a vital component of risk management in all aspects of a procurement. The unauthorised use of resources, including official information, for the profit, personal or political interest of individuals is an unacceptable security risk to the Commonwealth.

Where an agency engages an external service provider, there is potential for unauthorised access to security classified information by parties other than Australian Public Service employees.

When an agency adopts an outsourcing approach to service provision, accountability for the performance of the service or function and responsibility for outcomes remains with the agency.

<sup>7</sup> Finance Circular 2004/10, *Using the Financial Management and Accountability Regulation 10 Delegation*.

Agency management is expected to ensure that:

- the services provided by service provider(s) on behalf of the agency are delivered at the required standard; and
- official resources, especially security classified information, are secured from unacceptable risk.<sup>8</sup>

Agencies must develop an agency security plan, which identifies security and service delivery risk and how to manage these risks.<sup>9</sup>

Consideration of security issues associated with outsourcing/procurement should take place during the planning phase of the procurement. The necessary security requirements must be determined and published in the request document and will also form the basis of contract clauses and ongoing contract management of the service provider and their employees. The Attorney-General's Department's Protective Security Manual provides guidance on identifying, assessing and treating security risk, which will assist agencies in developing strategies for managing security risks in procurement.<sup>10</sup>

While the responsibility to perform certain government functions or services can be transferred to the service provider, accountability for the results cannot. An agency will remain accountable to its Minister, and through the Minister to the Parliament, for the efficient and secure performance of the functions devolved to it by the Government. This agency responsibility includes the management of security risk in procurement when utilising external service providers.

### 4.5 Time-Lines

In developing the procurement time-line it is important to allow adequate time to undertake the various tasks necessary to perform the procurement. The agency will need to determine which tasks are dependent on, or interdependent of, others and if the tasks can be conducted concurrently. The agency will also need to consider the minimum and maximum timeframe available within which to conduct the procurement and the existence of any time constraints. The agency also needs to be aware of whether some of these issues have already been addressed during the development of the Annual Procurement Plan.<sup>11</sup>

If possible, it is prudent to incorporate a time buffer in the time-line in order to cope with unforeseen delays or circumstances. Cyclical or seasonal considerations may also be relevant for some procurements. However if there is a strict deadline, it will be necessary to ensure that all steps of the procurement process can be conducted within that timeframe.

Suppliers may also require minimum delivery lead times that the agency should be aware of. As a general rule, the more complex the procurement, the longer the time that potential suppliers will require to develop adequate responses.

<sup>8</sup> For some procurements an agency may receive material from a third party which is to be subsequently provided to a contractor. The agency must ensure that it protects any associated personal and commercial confidential information during the transfer of the material.

<sup>9</sup> This is a requirement of the Australian Government's security policy as articulated in the *Protective Security Manual*.

<sup>10</sup> The *Protective Security Manual* is available at <http://www.ag.gov.au>.

<sup>11</sup> For further information see the Finance document *Guidance on Procurement Publishing Obligations*, available from <http://www.finance.gov.au> (under the *Government Finances* menu).

## 4 Planning the Procurement

### 4.6 Internal Due Diligence

The agency should review the current legal, policy and operational arrangements that impact on the procurement. Therefore, internal due diligence is an essential component in managing risk in the procurement process. Accordingly, an agency will need to research all appropriate internal documents and material to ensure sufficient information is available to inform the procurement process and deliver the required outcome.

This research could include:

- identifying contracts which may be part of the property or service;
  - eg outsourcing information technology (IT) may include novating existing contracts to the new provider.
- identifying licences, intellectual property or other obligations which may be affected;
  - eg will licences for software need to be changed to enable access by a provider or need to be novated?
- providing statistics on property or service requirements.
  - eg potential payroll service providers will need to know the number of staff, number of transactions and types of transactions.

### 4.7 Delivery Options

The agency needs to consider the most suitable means of acquisition and delivery of its property or service. The usual acquisition options are buy, hire or lease.<sup>12</sup>

When buying, the agency has the advantage of ownership but bears the risk of maintenance, obsolescence and eventual disposal. Purchases can also require regular deliveries on a monthly basis, or as needed, in lieu of keeping stock in the workplace.

Hiring involves renting equipment where there is not a fixed term and the agency has no expectation of ownership or residual value. The agency is billed for time used on a regular basis.

Leasing involves the renting of equipment for a fixed term (as decided by the agency) with regular monthly, quarterly or yearly payments. Computers, network hardware, end user cabling and installation costs are examples of property and services which are leased. At the end of the lease, there is usually the option to continue leasing (often at a reduced rate), return the property, or offer to purchase the property at fair market value. When leasing property the agency does not own the property and may be more easily able to keep pace with the latest developments.

When considering hiring or leasing arrangements, expert input will usually be required. Therefore, in these circumstances the agency should seek the advice of its Chief Finance Officer.

<sup>12</sup> When valuing a leasing arrangement, this should be done on a “whole of life” basis.

### 4.8 Identifying Alternative Opportunities

After the outcome has been defined, agencies should also research the procurement plans of other agencies to identify whether there are opportunities to improve on either the procurement's outcome or value for money prospects.

The agency should also be aware of whole of government arrangements and endorsed suppliers. For similar procurement needs, costs and duplication can be reduced through cost sharing between agencies. This will require an agency to research the forthcoming or realised procurements of other agencies. In all cases, however, agencies remain responsible for their procurement and its outcome.

Networking is also a powerful strategy for identifying the potential for sharing costs.

There are several possible ways this can be conducted:

- agencies are to post their Annual Procurement Plans on AusTender, therefore it can be examined for upcoming procurements that share common characteristics with your agency's procurement;
- an agency may have already done an open tender for a similar procurement and developed a multi-use list which allows other agencies to "piggyback". This may permit your agency to save costs by conducting a select tender (see the section on multi-use lists in the following chapter);
- similarly, it is possible that another agency may have already gone to market and signed a contract with a supplier to provide a property or service that your agency is interested in. It may be possible to piggyback off that agency's contract to supply the same property or service<sup>13</sup>; and
  - in these circumstances, both agencies' needs should be in strict alignment if value for money is to be achieved.
- your agency may join a whole of government arrangement or cluster.
  - clusters are formed where several agencies go to the market with a single procurement request. For example, a number of agencies have formed a cluster for air travel contracts. As all agencies abide by the same terms in their contracts it is important that there be no difference between agencies in the nature of the property or service being procured.

### 4.9 Identifying Industry Regulation and Licensing Requirements

Delivery of legal, financial and some technical services requires licences and/or professional recognition. For example if an agency is seeking legal representation or advice, it is vital that the supplier has the appropriate legal and professional qualifications. It is the agency's responsibility to determine whether there are licensing considerations associated with the procurement.

<sup>13</sup> This is an option only if the original request document alerted potential suppliers that this could be an outcome of the procurement and if the contract specifies that other agencies can back onto the contract.



## 4 Planning the Procurement

Officials need to consider whether industry regulations and licensing requirements should be “conditions for participation” (see Chapter 6).

### 4.10 Policies that Interact With Procurement

There are many other policies and laws that may impact on the procurement that is being undertaken, including those relating to privacy, environmental and occupational health and safety matters.

These can either impact on all procurements or impact on particular types of procurement. The agency, and in particular the procurement approver as part of their FMA regulation 9 responsibilities, must be cognisant of these policies and laws (see *Guidance on Complying with Legislation and Government Policy in Procurement*<sup>14</sup>).

For example, the checklists in the Department of Environment and Heritage *Environmental Purchasing Guide* contain specific advice concerning purchases of key products and services that are of environmental significance to the Australian Government. One of the checklists provides advice on environmental criteria agencies should use when purchasing fax machines. Therefore, when procuring fax machines the agency should be aware of this advice and consider its application when developing specifications and evaluation criteria (see Chapter 6).

### 4.11 The Business Case

Once all of the above issues have been researched and considered, the agency will have sufficient information to determine whether the procurement is feasible, the specification requirements, attendant risks and whether there are any viable alternative opportunities which can deliver better value for money.

These issues should then form the basis of a business case explaining why the procurement should be undertaken and how it delivers value for money.

The business case should also set out resourcing requirements, a list of stakeholders and a cost-benefit analysis (which can be calculated from the information which has been collected to this point).

Once completed, the business case should be sent to the appropriate official for approval. In approving the business case, the approving official should also take into consideration FMA regulations 9, 10 and 12.

<sup>14</sup> Available from <http://www.finance.gov.au> (under the *Government Finances* menu).

## 4.12 Resources

Attorney-General's Department, *Protective Security Manual*.

Australian and New Zealand Standard AS/NZS 4360/2004 *Risk Management*.

Department of Environment and Heritage, *Environmental Purchasing Guide*.

Department of Finance and Administration, Finance Circular 2004/10, *Using the Financial Management and Accountability Regulation 10 Delegation*.

Department of Finance and Administration.

Department of Finance and Administration, *Guidance on Procurement Publishing Obligations*.

Department of Finance and Administration, *Guidance on Complying with Legislation and Government Policy in Procurement*.

### **Chapter 4 Checklist**

- Has the outcome been defined?
- Have the specifications been defined?
- Has the market been researched?
- Have the risks been identified?
- Has a time-line been developed?
- Has an internal due diligence process been carried out?
- Have delivery options been considered?
- Have alternative opportunities been identified?
- Have industry regulations and licensing requirements been identified?
- Have any special conditions been identified?
- Has a business case been developed?



Selecting a Procurement Process

## 5 Selecting a Procurement Process

The core principle in the CPGs of value for money applies not only to the outcome of a procurement process but also to the process itself. To achieve value for money the process should be well planned and conducted efficiently and in accordance with relevant government policy. One of the features of a well-managed procurement is that it is supported by a structured and documented process for considering and deciding the procurement methods to be applied. The procurement process supports, at both a general and detailed level, the selection of a property or service and describes the issues that should be considered when selecting the process.

This chapter describes the three types of procurement processes that are available for covered procurements and the conditions under which a particular process is appropriate.

### 5.1 General Issues

Any procurement process represents an investment with costs arising from the process itself and benefits in terms of the outcomes achieved. In this context consideration must be given to more than a narrow focus on the final deal achieved with a supplier. Rather, consideration should also incorporate features of the procurement process itself. For example, a highly attractive contract that is only achievable through a process that entails unreasonable risk or poor transparency would, in most circumstances, not represent value for money. In this regard one important role of the CPGs is setting out the Government's expectations of agencies when performing duties in relation to procurement.

When deciding which procurement procedures to apply agencies should:

- encourage competition to deliver the most favourable submissions;
- ensure that rules and procedures adopted do not operate to limit competition by discriminating against particular classes of suppliers, particularly in regard to small and medium enterprises, new entrants to the market or foreign suppliers;
- adopt procedures consistent with the complexity of the procurement while also enabling suppliers to develop reliable, informed and competitive proposals;
- consider options for reducing costs to industry in contesting a procurement;
  - this particularly applies to multi-stage approaches that allow suppliers to come forward for consideration without requiring investment in a fully developed tender;
- be aware of general industry practices and expectations that should be incorporated into any process to encourage effective competition; and
- recognise any industry regulation and licensing requirements and how they affect the availability of suppliers.

Where a procurement is not a covered procurement, the procurement process does not have to comply with the mandatory procurement procedures in the CPGs. However, in undertaking that procurement, officials must still have regard to the other Divisions of the CPGs and must still comply with their obligations under FMA Regulations 8 and 9.

## Selecting a Procurement Process 5

For covered procurements the tender processes available are limited to open, select and direct sourcing tendering, with specific rules governing when each must be applied. Within open and select tendering processes there are options for the establishment of multi-use lists and panels. These tender processes are discussed in the following sections. Multi-use lists and panels are briefly discussed at the end of this chapter and discussed in detail in the Appendices.

Officials should be aware that the CPGs stipulate that a procurement must be treated as a covered procurement where:

- the total maximum value of a contract over its entire duration is unknown; or
- the estimated total value of a property or service that is being procured through multiple parts exceeds the covered procurement threshold, notwithstanding that each of the multiple parts are under the threshold.<sup>15</sup>

### 5.2 Open Tendering

In the absence of mitigating conditions for a covered procurement, agencies must use open tendering for their procurements.<sup>16</sup>

Operating an open tender involves publishing a notice on AusTender and, if desired, in other appropriate web-based or print media. The notice must include, at a minimum, the following:

- the name of the procuring entity and other information necessary to contact the procuring entity and obtain all relevant documents relating to the procurement;
- a description of the procurement and any conditions for participation;
- the address for the submission of responses;
- the closing date for the submission of responses; and
- the timeframe for the delivery of goods or services.

Prior to the above step, however, it is permissible for an “exposure draft” of the request document to be distributed to the market. The benefit of the exposure draft is that it allows industry to provide feedback, thereby providing an opportunity to refine the specifications.

All properly drafted submissions which are received before the close of tender date must be accepted for consideration.

An agency may publish a notice on AusTender requesting interested suppliers to express their interest in a procurement. The resulting list of suppliers can then be used as the basis for inviting suppliers to put forward submissions. However, the notice must state that the agency will create a shortlist from the responses received, (this is explained further in the following section).

<sup>15</sup> For further information on valuing procurements see Chapter 8 of the CPGs.

<sup>16</sup> The mitigating conditions are explained in the sections on select and direct source tenders.

## 5 Selecting a Procurement Process

In most cases an open tender process will be a single stage tender process in which a preferred supplier is selected directly from submissions responding to an open approach to the market. However, multi-stage open tendering is permissible.

### 5.2.1 Multi-Stage Open Tendering

Multi-stage tender processes can have, as their first stage, an open tender process.<sup>17</sup> This would then be followed by a select tender process. For example, agencies can publish a notice that seeks submissions which are then evaluated through a select tender process.

Multi-stage tendering may be used when an agency is looking for innovative options or the entire procurement specifications are not known at the start of the process. For example if an agency wishes to hire an architect to design a building, the first round could request the submission of innovative architectural ideas. In the second round, a select number of tenderers would be requested to provide a refinement of their submissions according to more closely specified criteria. In contrast with a single stage open tender process, a multi-stage tender process allows some flexibility for agencies to develop and refine procurement specifications.

The main disadvantage of a multi-stage tender process is the additional time required for multiple (sequential) approaches to the market. However, it has advantages in terms of satisfying requirements for open competition and access for suppliers. Its main advantage, though, is in containing costs and risks for both suppliers and government by limiting the scope of initial submissions to the information required to identify eligible and competitive bidders. Relative to a single-stage open tender process, suppliers remaining in contention have a sharpened incentive to invest in developing reliable and competitive submissions.

Further guidance on use of *Expressions of Interest* under the CPGs is provided in the guidance on select tender processes below.

### 5.3 Select Tendering

In the case of a select tender process, invitations to tender are issued only to those suppliers nominated by the agency (this can be done in AusTender). A select tender process is allowed where the agency has, through an open approach to the market, identified all interested (or potentially interested) eligible suppliers from which the field of participating suppliers is to be selected.

Alternatively, a select tender process may be conducted in situations where an agency has access to a list from an independent accrediting or regulatory authority of all suppliers legally registered or licensed to undertake the procurement (where the procurement is of a type that can be undertaken only by appropriately licensed or registered suppliers). In such cases, all registered and/or licensed suppliers must be invited to tender.

<sup>17</sup> The submissions sought in the first round are defined as *Expressions of Interest* in the CPGs.

## Selecting a Procurement Process 5

The flexibility to conduct a select tender process does not set aside obligations to encourage competition and avoid discrimination. This is reinforced by the *Mandatory Procurement Procedures* of the CPGs that require agencies using select tender processes to select the largest number of suppliers consistent with an efficient procurement process. This is a positive obligation to ensure that a select tender procedure provides a high level of assurance that competitive tension will be maintained through all stages of the procurement process by involving a sufficient number of the most competitive and motivated suppliers in any field.

Agencies should seek to ensure they invite an adequate number of suppliers to participate to ensure competitive tension, making allowance for potential non-response from some suppliers, or other events, limiting the response received in the procurement process.

As stated earlier, documentation provides a record of the procurement and how it was conducted. In the case of a select tender process, agencies must document the decision and supporting reasons for applying a select tender process. This record should also address the basis for selection of suppliers and specifically confirm that select tendering is not being used to avoid competition, protect domestic suppliers or discriminate against any particular class or type of supplier.

In addition to basing a select tender process on a multi-use list (as described below) select tenders can be used where:

- an agency publishes a request for expressions of interest and uses the list of suppliers who lodge a compliant submission as the basis for inviting suppliers to submit tenders; and
  - in this case, the notice or documentation requesting expressions of interest must make clear that there will be a limit to the number of suppliers invited to tender and the criteria upon which suppliers will be selected. For example, the expression of interest may state that the top ranked suppliers will then be invited to tender.
- agencies conduct a select tender from a list of *all* suppliers that have been granted a licence, or comply with specific legal requirements, as determined by an appropriate authority.
  - an example of this type of tender is the Australian Government's transactional banking arrangements where there are a limited number of licensed market players.

### 5.4 Direct Sourcing

Direct source tendering is a more flexible form of select tendering only available in a very restricted set of circumstances (set out in the *Mandatory Procurement Procedures* of the CPGs). It involves a procuring entity directly approaching a supplier or limited number of suppliers. Typically, but not always, the circumstances prescribed are such that direct sourcing is the only practical alternative available to the agency. An agency applying a direct sourcing process need not apply other requirements of the *Mandatory Procurement Procedures* of the CPGs in respect of time limits, request document and limitations applying to the awarding of a contract.



## 5 Selecting a Procurement Process

However, agencies are specifically cautioned against adopting a minimalist approach to the conduct of a direct sourcing process and should note that the general requirements of the CPGs, such as achieving value for money, still apply.

Some examples of situations where a direct sourcing process is allowed and appropriate under the CPGs are as follows<sup>18</sup>:

- a state of emergency caused by an event beyond the control of the procuring entity – for example, a natural disaster;
  - use of direct sourcing in cases of such urgency allows the use of processes quicker than would otherwise be possible. This procedure can only be used where competition is clearly inconsistent with the time imperative.
- an unsolicited and highly advantageous time-limited offer which does not relate to a routine purchase from a regular supplier and represents an unusual value for money opportunity for the procuring agency;
  - examples include unusual disposals, unsolicited innovative proposals, liquidation and insolvency. Such offers should clearly be unsolicited and should not be accepted if the effect would be to pre-empt the outcome of a procurement process already underway. That is, a supplier should not be able to circumvent an established procurement process through such an offer.
- the property or service can be supplied only by a particular supplier and no reasonable alternative property or service exists; and
  - examples are for a work of art or for a product or service for which only a limited number of suppliers have the required intellectual property.
- the procurement is for property or services that can only be met by one supplier because of the need to integrate with existing facilities and/or systems, and no practical alternative exists.
  - an example is replacement parts.

### 5.5 Resources

Department of Finance and Administration, *Commonwealth Procurement Guidelines*.

Department of Finance and Administration, *Guidance on Procurement Publishing Obligations*.

#### **Chapter 5 Checklist**

- Has an appropriate tender process been determined?
- Has the use of a select or direct source tender been justified?

<sup>18</sup> Chapter 8 of the CPGs lists the conditions under which a direct source tender can be undertaken.

### *Multi-Use Lists*

A multi-use list is a list of pre-qualified potential suppliers who have satisfied the conditions for participation as detailed in the first stage of a multi-stage open tender process. Since potential suppliers must be pre-qualified a multi-use list is not, of itself, a full procurement assessment. That is, potential suppliers who are included on a multi-use list must still go through a select tender process when a property or service is being procured.

A list would typically be developed only for property or services that an agency frequently procures. An agency must publish a request for application for a multi-use list on AusTender either continuously or annually.

Agencies may need to balance the benefits that may be achieved through running a select tender process from a multi-use list against alternative methods of procurement such as establishing a panel, (panels are explained later in this chapter).

Inclusion in a multi-use list provides certainty for potential suppliers that they have been recognised as meeting conditions for participation. It does not, however, guarantee a potential supplier that an agency will include them in a select tender process.

Further guidance on multi-use lists is provided in Appendix A.

### *An Example of a Multi-Use List: Endorsed Supplier Arrangement*

The Department of Finance and Administration maintains an Endorsed Supplier Arrangement (ESA) which is a multi-use list that pre-qualifies businesses in the IT, major office machines, commercial office furniture and auctioneering industries to sell to the Australian Government. It is mandatory for FMA Act agencies to use the ESA for any procurement of IT and major office machines. CAC Act bodies may elect to use the ESA for their covered and non-covered procurements.

Businesses may apply to Finance for endorsement at any time, however, a business must meet the following three conditions (as well as a number of sub-conditions) for participation:

- financial viability;
  - potential suppliers are rated according to a number of financial criteria.
- insurance; and
  - proof of insurance must be provided.
- service performance.
  - favourable referee reports are required as evidence of the potential supplier's satisfactory record of property or service delivery.

For full endorsement conditions, the reader is referred to <http://www.esa.finance.gov.au>.

## 5 Selecting a Procurement Process

### *Panels*

A panel may be established by an agency by entering into contracts or deeds of standing offer (*panel arrangements*) for the provision of identified property or services. A panel is defined as an arrangement under which a number of suppliers, usually selected through a single procurement process, may each supply property or services to an agency as specified in the panel arrangements. The respective panel arrangements must contain minimum requirements, including a set rate or indicative price, as appropriate, for the property or services to be procured in the period of the panel arrangement.

The procurement policy framework permits panels to be established and used by agencies, provided that the panels are established in accordance with the CPGs, noting that the rules under which panel arrangements are established in the CPGs are now significantly more prescriptive than those existing previously. Panels must be established in order to achieve, and subsequent orders from a panel member must achieve, value for money, as this remains the core principle underpinning procurement.

Once a panel is established, the purchase of good or services from a panel member, as specified in the panel arrangement with that panel member, does not attract the operation of the mandatory procurement procedures of the CPGs. However, the purchase is still governed by the other elements of the procurement policy framework (eg requirements to achieve value for money and to have appropriate authority for the expenditure of public money).

Further guidance on panels is provided in Appendix B.

Preparing to Approach the Market

## 6 Preparing to Approach the Market

Once the decision has been made as to the type of tender process that is appropriate, it is necessary to begin preparing the documents that are required for the market approach.

There are three main documents that should be prepared:

- a procurement plan;
- a request document; and
- a submission evaluation plan.

Where appropriate, a submission evaluation committee should also be formed prior to an approach being made to the market as the committee should be in agreement on the substance of the request document and the content of the submission evaluation plan.

This chapter is structured to describe in turn the purpose of each of the three documents identified above and the role of the submission evaluation committee.

### 6.1 The Procurement Plan

The procurement plan details the process that will be undertaken. It differs from the business case in that the business case explains *why* a procurement is being undertaken, while the procurement plan explains *how* the procurement is to be undertaken.

The procurement plan should cover the following:

- a description of the procurement;
- the conditions for participation;
- the evaluation criteria;
- the type of procurement process to be used;
- an explanation of why an open tender is not being used, if appropriate;
- a probity plan, if appropriate;
- governance arrangements, such as the need for a steering committee;
- the risk assessment;
- indicative time-lines; and
- the submission evaluation plan.

Certain aspects of the procurement plan will already have commenced during the “planning” phase (see Chapter 4).

The level of detail in the procurement plan should reflect the size and complexity of the procurement. In the case of simpler procurements, some of the above sections may not be necessary.

## Preparing to Approach the Market 6

For example, a simple procurement may not contain a probity plan, instead relying on probity provisions in Chief Executive's Instructions and/or other agency documentation. Judgements as to whether a procurement is considered large and/or complex can be based on its relation to the size of the agency, resources available and the agency's procurement profile.

The procurement plan should be approved at a level within an agency relative to the value of, risks inherent in, and importance of, the procurement. The process of approval provides a mechanism to inform managers (including the official who will approve any resulting spending proposal) that the necessary processes will fulfil legislative, government policy and internal procedural requirements and produce a value for money outcome.

### 6.2 Request Document

In essence, the request document provides the "ground rules" for the evaluation of submissions. It describes to the potential suppliers the specifics of the procurement, the manner in which submissions are to be forwarded to the agency and how the submissions will be evaluated. As well, if there is a possibility that other agencies will access the resulting contract, the request document must include a statement to that effect. If the agencies are known, they should be listed in the document, otherwise a broad statement is required.

The request document will usually be the primary source used by potential suppliers when developing a submission. After reviewing the request document the potential supplier should be able to understand the agency's procurement requirements and how the procurement is to provide value for money for the agency. Therefore, the request document must include all information necessary to permit suppliers to prepare and lodge responsive submissions. However, this obligation does not extend to the release of confidential information, information sensitive to essential security or information that may impede competition.

To fulfil these requirements, the request document should contain:

- a description of the procurement;
- conditions for participation;
- evaluation criteria;
- minimum content and format requirements;
- process rules; and
- a copy of the draft contract.

These are discussed in the following sections.

The request document should also provide a brief overview of the evaluation methodology, such as an explanation of whether submissions are to be shortlisted before a supplier is chosen.

## 6 Preparing to Approach the Market

### 6.2.1 Description of the Procurement

The request document must describe the property or service which is being procured. This should include:

- the nature, scope and, where known, quantity of the procurement;
- any requirements to be fulfilled, including conformity certification, plans, drawings and instructional materials; and
- whether the agency will require installation, training, after sales support and/or maintenance.

It may also be necessary to describe some procurements in terms of technical specifications. If so, the request document must be prescribed in terms of performance and functional requirements, rather than design or descriptive characteristics. Technical specifications should be based on international standards unless this would not satisfy the procurement's requirements or impose a greater burden than an Australian standard (see Section 4.2).

Consequently, technical specifications must not refer to a particular trademark or trade name, patent, copyright, design or type, specific origin, producer, or supplier unless there is no sufficiently precise or intelligible way of describing the requirements. Where such a specification is necessary words such as "or equivalent" must be included in the specification.

The document should also include the timeframes expected for the delivery of the property or service being procured.

### 6.2.2 Conditions for Participation

Conditions for participation are mandatory requirements which describe minimum standards or essential characteristics that suppliers must meet for their submissions to be considered. Considerable care should be taken when developing and specifying conditions for participation, as the CPGs require that an agency must reject any submission that fails to meet the conditions of participation.

The specification of conditions for participation in the request document should flow directly from the procurement planning process described in Chapter 4 of this guide and be limited to assuring the legal, financial, technical and/or commercial capabilities of the supplier to meet the procurement requirements of the case at hand.

Examples of conditions for participation include suppliers having:

- access to certain technical or operational skills, facilities or capabilities;
- relevant licences or professional accreditations/registrations;
- the ability to satisfy nominated security requirements;

## Preparing to Approach the Market 6

- minimum levels of financial assurance in terms of scale, financial viability, insurance policies;
- minimum occupational health and safety standards; and
- prior demonstrated experience or specific capability where such experience is essential to the delivery of the required property and services.

Agencies can also draft the conditions for participation to exclude suppliers on grounds of insolvency, false declarations or significant deficiencies in the performance of any substantive requirement or obligation under a prior contract.

Conditions for participation are not to arbitrarily limit competition by introducing factors that discriminate against a supplier or group of suppliers that would otherwise be competitive and capable in the related procurement process(es).

An agency conducting an open or select tender process must not award a contract to a supplier that does not meet stated conditions for participation. An agency that is uncertain about whether this level of importance is appropriate for a supplier requirement may choose to express the requirement as a priority evaluation criterion.<sup>19</sup>

Highly desirable characteristics or qualities should not be listed as conditions for participation. Rather, they can be specified as evaluation criteria.

### 6.2.3 Evaluation Criteria

Evaluation criteria set the foundations for a fair and equitable assessment of eligible submissions which have met the conditions for participation, if any. The criteria are highly dependent on the particular procurement under consideration and should flow from the procurement planning process as described in Chapter 4 of this guide.

Some examples of criteria that can be considered, as appropriate, are:

- a demonstrated ability to provide the property or services;
- the financial viability and capability of the supplier;
- any warranties and guarantees offered;
- the potential supplier's ability to manage risk;
- submission price;
- compliance with stated contract conditions; and
- specific criteria to the individual acquisition.

<sup>19</sup> Readers should note that identifying a criterion as non-essential prevents the procuring agency from later treating the criterion as essential during the submission evaluations.



## 6 Preparing to Approach the Market

Evaluation of suppliers should be based on the relative importance of each criterion. There are a variety of methodologies that can be used to achieve this. The most commonly used is to weight criteria according to their relative significance using a rating scale. If a rating scale is used, agencies should consider providing the scale to potential suppliers if it will assist them to appropriately focus their responses. This will make the process more transparent, which should limit misunderstandings that may result in complaints.

The request document must clearly identify any criteria that are to be treated as essential in the evaluation of submissions.

Questions about whether a criterion should be listed under the conditions for participation or evaluation criteria can be resolved by determining whether the criterion is essential or highly desirable. If the former, the criterion should be a condition for participation while the latter should be listed under the evaluation criteria and given an appropriate ranking.

Submissions cannot be ranked using conditions for participation, so essential criteria that are to also form part of the value for money evaluation should be listed twice. They should be identified in the conditions for participation so that they are recognised as essential. They should also be separately listed in the evaluation criteria to enable them to be assessed and rated.

### **6.2.4 Minimum Content and Format Requirements**

In relation to submissions by potential suppliers, the agency may impose standards with regard to minimum content and format requirements:

- in relation to minimum content the agency may, for example, require the potential supplier to provide a certificate of insurance or a particular licence to support the submission; and
- in relation to formatting, the agency may require the submission to be provided electronically.

In most circumstances where the potential supplier's submission does not meet the required standard with respect to minimum content or formatting, the agency must automatically disqualify the potential supplier from the procurement process. However, in circumstances where it is considered by the agency that the potential supplier has made an unintentional error of form in the submission, the agency has discretion to allow the submission to be corrected (see Chapter 7). An agency also has the discretion to not accept any corrections to submissions if it considers such an action is necessary to maintain fairness.

The capacity of the agency to automatically disqualify a potential supplier on the basis that the minimum content or formatting requirements have not been satisfied ensures that the integrity of the procurement process is protected and that deadlines are satisfied.

To assist potential suppliers in meeting the minimum content and formatting requirements, agencies must ensure that they are clearly stated in the request document.

## Preparing to Approach the Market 6

Better practice is to:

- include a checklist for potential suppliers to certify completion of required tasks of the submission;
- investigate the feasibility and appropriateness of unusual requirements as part of researching the market (see Chapter 4); and
- require potential suppliers to designate the original or a certified copy of the original document to be used as the authoritative document.

### 6.2.5 Process Rules

The request document should detail the responsibilities of the potential supplier in the lodgement of submissions. For example, the document must provide details of the place that submissions are to be delivered and the deadline for the acceptance of submissions. Adherence to deadlines is important in maintaining the integrity and probity of the tender process. Therefore, late submissions are not to be accepted, unless there has clearly been a mishandling of the tender by the agency. The decision on whether the agency has mishandled the submission must be made before it is opened.

During the time that the tender process is open, the agency must 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 document should explain the protocols for answering questions and distributing responses.

It is also highly recommended that the request document contain a description of the rules and procedures which are to be followed if it is necessary to modify the request document after the approach to the market has been made, (this is discussed in the following chapter).

Similarly, the request document can contain a description of the procedures to be followed when an unintentional error of form is identified between the opening of submissions and the awarding of the contract.

An unintentional error of form is an error that the procuring agency is satisfied:

- represents incomplete information not consistent with the supplier's intentions and, if relevant, capabilities at the time the submission was lodged; and
- does not materially affect the competitiveness of the supplier's bid.

Some examples of "unintentional errors of form" are:

- corrections of inconsistencies in the submission where the area of error is clear and not critical to comparative evaluation;
- the accidental omission of declarations; and
- an attachment referred to in the body of a submission but omitted from the submission.

## 6 Preparing to Approach the Market

Information provided by potential suppliers is to remain confidential prior to the award of a contract and, in respect of unsuccessful tenderers, after the contract award. Therefore, confidentiality arrangements should be clearly articulated in the request document so that all potential suppliers understand how their information will be managed.

### 6.2.6 Draft Contract

The primary purpose for attaching a draft contract to the request document is to assist the potential supplier to provide a submission that clearly relates to the procurement requirements of the agency.

The agency may require potential suppliers to use the draft contract to indicate compliance against each clause and to clearly state any intention to negotiate alternative clauses. In these circumstances, the agency should use the potential suppliers' level of compliance with the draft contract as part of the published evaluation criteria.

Officials may wish to obtain legal advice concerning the draft contract to ensure that the clauses correspond with the agency's position with respect to all matters relevant to the procurement.

The draft contract may include information and clauses that relate to the following matters:

- the purpose, services, timing and standards of property or services to be provided;
- financial matters which may include pricing, the method of payment, reimbursement of expenses or tax/invoice issues;
- risk management issues including insurance and indemnities;<sup>20</sup>
- ownership and licences including intellectual property rights, privacy<sup>21</sup> and confidentiality clauses<sup>22</sup>, or
- communication management, including the delivering of notices and dispute management clauses.

The draft contract should also identify relevant Australian Government policies that apply to the procurement. In particular, it should identify confidentiality arrangements based on the Government's policy that information should not be kept confidential unless there is a sound reason, informed by legal principle, for maintenance of the confidentiality of that information. Officials should make a specific assessment of whether information should be kept confidential before agreeing to make any contractual commitment of confidentiality<sup>23</sup>.

For most covered procurements, other than those for routine property or service procurements, the draft contract should alert prospective providers to the accountability requirements of the Australian Government, including disclosure of information to the Parliament and its Committees. There should also be a provision to enable the Australian National Audit Office to access contractors' records and premises to carry out appropriate audits<sup>24</sup>.

<sup>20</sup> Refer to *Guidelines for Issuing and Managing Indemnities, Guarantees, Warranties and Letters of Comfort*, available from <http://www.finance.gov.au> (under the *Government Finances* menu).

<sup>21</sup> Refer to the *Privacy Act 1988* and the information privacy principles.

<sup>22</sup> Refer to *Guidance on Confidentiality of Contractor's Commercial Information*, available from <http://www.finance.gov.au> (under the *Government Finances* menu).

## Preparing to Approach the Market 6

As noted in Chapter 4, the draft contract should also contain reference to any security obligations that will be placed on the service provider. Agencies should be aware of the security requirements contained in the *Protective Security Manual* and, when necessary, seek assistance to address security issues.

### 6.3 Submission Evaluation Plan

The submission evaluation plan is an internal document that maps the processes to be followed when submissions are evaluated. To reduce the risks of a perceived or actual bias in the procurement process, the plan should be developed and finalised before an approach is made to the market. Agencies often require a formal approval processes for submission evaluation plans prior to the approach to the market.

The submission evaluation plan must be consistent with the request document and should provide:

- an identification of the procurement method;
  - in the case of select and direct source tender processes the submission evaluation plan must also list the reasons why this type of tender process was used.
- a description of the resourcing, including a description of the roles and the responsibilities of the submission evaluation committee (see the following section);
- protocols for handling submissions;
- the disallowance of late submissions;
- protocols for identifying and handling conflicts of interest;
- rules for submission registration and safekeeping;
- the conditions for participation;
- minimum content and format requirements;
- the evaluation criteria and, where appropriate, the associated weightings to be applied;
- evaluation methodology;
- the nominated approver; and
- an indicative evaluation timetable.

The submission evaluation plan can be varied during the approach to market, however, it must remain consistent with the request document. The plan cannot be materially changed after the tender closing date has passed to ensure there is no basis for allegations that the evaluation methodology was changed after submissions have been viewed.<sup>25</sup>

<sup>23</sup> Refer to *Guidance on Confidentiality of Contractor's Commercial Information*, available from <http://www.finance.gov.au> (under the *Government Finances* menu).

<sup>24</sup> Model Australian National Audit Office (ANAO) access clauses are available from <http://www.finance.gov.au> (under the *Government Finances* menu).

<sup>25</sup> An exception is where a modification to the request document necessitates a modification to the submission evaluation plan (see Chapter 7).

## 6 Preparing to Approach the Market

### 6.4 The Submission Evaluation Committee

The role of the submission evaluation committee is to evaluate the submissions received and make a recommendation on the preferred supplier to the approver.

The committee should be structured along the following lines:

- the committee should be comprised of at least three individuals, one of which takes on the role of chairperson;
- each member of the committee should make a declaration that no conflict of interest arises with respect to the procurement, however where a conflict does arise (whether at the commencement or during the procurement process) the relevant member should make a declaration to this effect and include details of the conflict;
  - where a member has made a declaration that a conflict of interest exists, the chairperson of the committee should decide whether the member can continue to participate as a member of the committee, or where the member continues to participate on the committee, how the conflict may be managed by the committee.
  - the chairperson of the committee should report any conflicts of interest, and management strategies to resolve, to the relevant authority (eg chair of the steering committee, probity advisor or internal auditor) as set out in the governance arrangements of the submission evaluation plan.
- members should possess the necessary technical/subject matter skills to effectively assess submission; and
- each member should possess a sound understanding of the requirements to run a fair, unbiased process and to maintain confidentiality and probity.

At the outset, it is critical that the committee agrees on the substance of the request document and the submission evaluation plan as these provide the criteria on which the evaluation will be based. At this early stage, the committee should also agree and formalise a management strategy for dealing with any inquiries on the procurement which arise during the process. This should also be described in the submission evaluation plan.

It is permissible for an external expert(s) to be brought in for the technical part of a submission evaluation. They will be required to agree to abide by confidentiality requirements and will need to make a declaration that they have no conflict of interest. The expert is not, however, a committee member.

# Preparing to Approach the Market 6

## 6.5 Resources

Attorney-General's Department, *Protective Security Manual*.

Department of Finance and Administration, *Commonwealth Procurement Guidelines*.

Department of Finance and Administration, *Guidance on Complying with Legislation and Government Policy in Procurement*.

Department of Finance and Administration, *Guidance on Confidentiality of Contractors' Commercial Information*.

Department of Finance and Administration, *Guidelines for Issuing and Managing Indemnities, Guarantees, Warranties and Letters of Comfort*.

### **Chapter 6 Checklist**

- Has a procurement plan been developed, which specifies the key components of how the procurement is to be undertaken?
- Has a request document been developed covering all essential sections?
- Has legal advice been sought in relation to the draft contract or other elements of the process as necessary?
- Has a submission evaluation plan been developed prior to approaching the market?
- Has a submission evaluation committee been formed?



Approaching the Market



## 7 Approaching the Market

To ensure a procurement process upholds principles of fairness and access for all interested parties, there are procedures which must be followed when an agency approaches the market. These requirements relate to the time that a request/invitation is open and the manner in which the market is to be notified about the procurement.

In addition, issues surrounding the procurement can arise after the AusTender notice has been published and copies of the request document have been issued to potential suppliers. These issues can range from request document errors to the need for clarification of certain matters. Resolving these in a fair and accessible manner requires certain processes to be followed.

Therefore, this chapter discusses the procedures to be followed when:

- notifying the market about the procurement;
- modifying the request document; and
- clarifying certain matters.

### 7.1 Notifying the Market About the Procurement

42

In an open tender process the procuring agency issues an open request to the market for the supply of property or services. This is done through the publication of a public request notice inviting interested parties to lodge submissions. The notice must be published electronically on AusTender and may also be published elsewhere. However, the content of any other notices must be identical to the AusTender notice.

As discussed in Chapter 5, the following information must be included in the public request notice:

- the name of the procuring entity and other information necessary to contact the procuring entity and obtain all relevant documents relating to the procurement;
- a description of the procurement and any conditions for participation;
- the address for the submission of responses;
- the closing date for the submission of responses; and
- the timeframe for the delivery of goods or services.

In the case of multi-use lists it is necessary to run an initial open process to establish a field of suppliers. This field will then be approached in any subsequent select tender processes.

Particularly, the request for application for inclusion on a multi-use list must either be published continuously or re-published annually on Austender. Agencies may also publish the notice elsewhere, for example on their website. However, this does not remove the requirement for the agency to publish on AusTender.

All suppliers who apply for inclusion on the multi-use list must be included on the list as soon as practicable, provided they have met the procurement requirement.

## 7.2 Modifying the Request Document and Clarifying Matters

As stated previously, the general principle is that all suppliers are to be provided with an equal opportunity to make a submission. Accordingly, all eligible suppliers must have equal access to the procurement information. Equally important under this principle is that when an agency modifies a request document it must issue a notice or amendment that can be accessed by all.

Therefore, all modifications must:

- be issued to all suppliers that have responded to the AusTender notice or are participating in the procurement process at the time the information is amended; and
  - in the case where an agency keeps a register of suppliers receiving the request document, it should send the modification to all these suppliers.<sup>26</sup> Where there is no register, the agency should post the modification in the same manner as the original information.
- provide adequate time to allow suppliers to modify and re-submit their initial submissions. This could entail extending the date for delivery of submissions.

As noted previously, in order to reduce the scope for confusion, it is recommended that the request documents describe the rules and procedures relating to the modification of submissions.

In the case of clarifications, answers to potential suppliers' questions should also be provided to all other suppliers - provided that this will not disclose sensitive financial information about a potential supplier or commercial-in-confidence material received by the agency. Therefore, judgement should be used.

If all potential suppliers have access to the internet, additional information provided in response to an individual supplier's enquiry could be posted on a dedicated website during the submission period so that all potential suppliers have the same clarification of the requirements already provided.<sup>27</sup>

## 7.3 Resources

Department of Finance and Administration, *Commonwealth Procurement Guidelines*.

<sup>26</sup> AusTender has this capability.

<sup>27</sup> AusTender has this capability.

## 7 Approaching the Market

### *Chapter 7 Checklist*

- Have potential suppliers been appropriately notified?
- Have all potential suppliers been notified of any modifications to the request document?
- Have clarifying answers been provided to all potential suppliers, as appropriate?

Evaluating Submissions

## 8 Evaluating Submissions

The evaluation of submissions is the most important aspect of the value for money consideration. When evaluating submissions agencies must apply the procedures and criteria they have outlined in the request document and submission evaluation plan.

A failure to follow the published processes could, in the event of a major breach:

- compromise the outcome;
- give rise to a complaint and/or legal action by disadvantaged suppliers; or
- force the agency to set aside the evaluation and possibly the whole procurement process.

This chapter sets out the procedures which should be followed when evaluating submissions to ensure the evaluation process is properly conducted.

### 8.1 Receiving Submissions

When receiving submissions, agencies are to employ procedures that continue to guarantee the fairness and impartiality of the procurement process. Submissions should only be received into a secure environment. This can be a tender box or secure electronic system, such as AusTender. Submissions can only be accepted in the manner prescribed in the request documents.

Submissions are not to be opened until after the date and time submissions are due. Upon opening, the agency must record receipt of the submissions. Any submissions received after this point should be considered late and are not to be accepted.

- however, if a submission is received after the procurement's closing date and time because of an agency error, the affected supplier must not be penalised.

Agencies must treat all submissions in confidence and must not convey information to other suppliers.

The submissions should also be checked to ensure that they satisfy all mandatory requirements, such as those for format and content.

### 8.2 Submission Evaluation

In evaluating submissions the submission evaluation committee needs to ensure it rates the submissions against the evaluation criteria rather than other submissions. In order to maintain consistency across all potential suppliers, any additional items beyond the scope of the request document that have been included within a submission should not be considered by the submission evaluation committee.

It is permissible for the committee to clarify any errors of form, such as technical omissions, ambiguities and anomalies, in a submission with the supplier. However, this should not extend to a substantial re-tailoring of the submission.

It is permissible for the committee to make supplier/tenderer and referee site visits where this will assist in the evaluation process.

In the case of the preferred supplier, the submission evaluation committee is strongly encouraged to confirm the supplier's claims with the nominated referees, if the request document has called for the nomination of such references.

### 8.3 Submission Evaluation Report

Agencies must maintain appropriate documentation of the decision-making process for each procurement. Therefore, it is good practice for the submission evaluation committee to be scrupulous in recording the evaluation process 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 authorisations, and the basis of those decisions.

As a consequence of the need to maintain proper documentation, the submission evaluation committee is required to draft a submission evaluation report to document the evaluation process and to identify a "preferred supplier" or "selected suppliers". The report can also assist in the provision of feedback to unsuccessful tenderers.

The submission evaluation report should contain:

- a summary of the evaluation process;
- a summary of each received submission;
- a summary of the assessment of each submission;
- reasons for any elimination of a submission from further consideration;
- recommendations concerning the preferred submission(s); and
- details of any issues which need resolution during subsequent contract negotiations.

The report is to be signed by the members of the committee and is to be addressed to the approver. The approver is to sign the report if they are in agreement with its recommendations.

As stated earlier, the *Archives Act 1983* may also require documentation relating to a procurement to be retained.

### 8.4 Debrief

Suppliers who make a submission must be promptly advised by the agency of the final procurement decision. If requested, agencies must also provide participating suppliers with a debrief.

## 8 Evaluating Submissions

In the case of an expression of interest process, unsuccessful suppliers may request a written debrief.<sup>28</sup> In the case of tender processes, agencies must provide a debrief when requested (by either unsuccessful or successful suppliers) but debriefs may be oral. In such cases, the debrief should be documented by the agency.

The debriefs should include, as appropriate:

- an explanation of why the submission was unsuccessful;
- areas of weakness or non-compliance in the offer;
- suggestions as to how future submissions can be improved; and
- if the contract has already been successfully negotiated, the name of the successful supplier and total price of the successful submission.

Written records of the debriefing should be appended to the procurement's file.

### 8.5 Resources

Department of Finance and Administration, *Commonwealth Procurement Guidelines*.

Department of Finance and Administration, *Guidance on Confidentiality of Contractors Information*.

*Archives Act 1983*.

#### **Chapter 8 Checklist**

- Have the submissions been fairly and impartially rated?
- Has appropriate documentation of the process been maintained?
- Have potential suppliers of the final procurement decision been advised and offered a debrief?

<sup>28</sup> In the case of multi-stage offers, agencies may wish to advise potential suppliers immediately that they are no longer in contention, thereby allowing potential suppliers to “stand down” their bid teams.

Concluding the Process



## 9 Concluding the Process

The final stage in the procurement process relates to the awarding of the contract.

Prior to signature there are still some matters that need attention. For example, it may be necessary to negotiate the final contract and have the procurement's approver execute their responsibilities under FMA regulation 13. It is also possible for certain circumstances to arise which can cause the procurement to be cancelled or a complaint made against the agency.

As final actions, the agency needs to ensure it reports the procurement to the appropriate authorities and properly stores all records.

Therefore, this chapter describes:

- contract negotiations;
- how the public is to be notified about a contract;
- the conditions under which a procurement can be cancelled;
- the suggested procedures to be followed when a complaint is made about the procurement process;
- reporting obligations; and
- records storage.

### 9.1 Negotiating the Contract

Notwithstanding whether a chosen supplier has totally complied with the draft contract, there can still be matters open for negotiation between the supplier and agency. These must be settled and, if appropriate, incorporated into the final contract before signature.

### 9.2 Publishing the Awarding of the Contract

Once a procurement has been undertaken, a contract must be awarded to a capable and compliant tender, unless it is not in the "public interest". Details of contracts awarded must be published through AusTender.

The notice must include:

- the name of the procuring agency;
- the name and address of the successful supplier;
- a description of the property or services procured;
- the date of award or contract date;
- the contract value;
- the contract end date; and
- the type of procurement process (ie open, select or direct source).

Disclosure, an element of the accountability principle, requires agencies to make their procurement activities visible and transparent. To meet this requirement agencies must publish agency agreements and Commonwealth contracts with an estimated liability of \$10,000 or more within six weeks of entering into the agreement. Amendments of \$10,000 or more must also be published.

Publication is through the Australian Government website AusTender. The details of what should be reported are set out in the *Guidance on Procurement Publishing Obligations*.<sup>29</sup>

### 9.3 Cancelling a Procurement

At any time during the procurement process an agency can determine that awarding a contract is not in the public interest. Public interest grounds generally arise in response to unforeseen events or new information which materially affect the objectives or reasons underlying the original procurement requirement as specified in the request document.

Examples of situations in which it may not be in the public interest to award the contract include:

- decision to cancel or vary the programme to which the procurement relates;
- machinery of government changes affecting responsibilities between agencies for programmes to which the procurement relates;
- unforeseen technological or environmental change affecting the business case for the procurement as specified;
- unforeseen technical or operational problems which can be attributed to inadequate, incorrect or inappropriate specifications in the request document;
- discovery of new information materially affecting the policy or operational effectiveness of the continuation of a project and/or procurement as specified; and
- funding is unavailable or insufficient through changes to appropriations or inability to obtain Regulation 10 authority where necessary.

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 an agency'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 protect the integrity of procurement processes and avoid the awarding of a contract in a manner inconsistent with an announced process (including related essential requirements of a procurement).

Termination of a procurement process is not appropriate where it is due to dissatisfaction with the outcome of competitive assessment of suppliers through a submission evaluation process conducted in accordance with the stated rules, conditions and criteria set out in the request document and submission evaluation plan.

<sup>29</sup> Available from <http://www.finance.gov.au> (under the *Government Finances* menu).

## 9 Concluding the Process

Nor can an agency cancel a procurement in order to protect domestic suppliers if a contract is likely to be awarded to a foreign supplier. This would not only breach the Australian Government's international obligations as reflected in Division 2 of the CPGs, but would also breach the principle of non-discrimination.

If an agency cancels a procurement on the basis that it is not in the public interest it should consider providing potential suppliers with reasons.

### 9.4 Dealing With Complaints

A well-planned and conducted procurement is less likely to attract complaints. Strategies to minimise complaints can assist agencies in avoiding unnecessary conflict and can save agencies and suppliers valuable time and resources. Many complaints arise due to a lack of understanding or poor communication between those procuring and their potential suppliers.

In the event that a complaint is made by a participant in the procurement process, the agency should aim to manage this process through communication and conciliation with the aggrieved party.

All complaints made in writing should be answered in the same way. If verbal complaints are satisfactorily dealt with without the need to correspond in writing then agencies should record the complaint and response.

Conciliation will be facilitated if an agency has in place a fair, equitable and non-discriminatory complaint handling procedure.

This procedure should:

- be systematic and well understood by the parties involved;
- involve senior management and officials independent of the procurement process, as appropriate; and
- give each party sufficient time to appropriately respond to developments (no less than 10 calendar days unless urgent).

In the first instance the submission evaluation committee should deal with the complaint. Its response should outline the issue that has been raised, what has been examined and an assessment of the complaint. The response should also inform the potential supplier of their options, in case they remain dissatisfied with the agency response.

If the supplier subsequently lodges a request for a further examination of the issue, the agency should conduct a prompt internal independent review. This should be conducted by senior management officers who were not party to the procurement but do have experience with procurement processes.

External review options are available if an independent review of a complaint is necessary. The primary external complaint mechanism is the civil legal system, which can be used to settle disputes through a formal judicial process. The Commonwealth Ombudsman also has limited powers to investigate procurement complaints. The Ombudsman can make recommendations regarding the procurement process and decision but cannot override agency decisions, nor direct that they vary their decision. The Ombudsman aims to resolve disputes by negotiation and persuasion, and if necessary, by making formal recommendations to the most senior levels of Government.

If a matter has been referred to an external body for review, agencies are strongly advised to provide all relevant documents to that body.

Agencies are to also ensure that the initiation of a complaint process does not prejudice the supplier's participation in future procurement processes.

### 9.5 Reporting

In order to provide broader visibility of procurements, agencies are required to comply with a range of reporting obligations to the Parliament, its Committees and to the public. Officials should seek advice from the *Guidance on Procurement Publishing Obligations*, their Chief Finance Officer or procurement unit regarding these obligations.

### 9.6 Storing Records

Once the procurement process is concluded all documents should be collected and filed together, thereby providing a record of procurement activities and how they have been conducted. The records should facilitate an understanding of the reasons for the procurement, the process that was followed and all relevant decisions, including approvals and authorisations.

Filing should reflect appropriate security classifications to manage handling of procurement information. The *Protective Security Manual* identifies security policies, principles, standards and procedures to be followed by all Australian Government agencies for the protection of official resources.

As stated earlier, the *Archives Act 1983* identifies requirements for Commonwealth records, including dealings with, and access to, such records.

## 9 Concluding the Process

### 9.7 Resources

Agency Annual Reports.

*Archives Act 1983.*

Attorney-General's Department, *Protective Security Manual.*

Australian Government, *Government Guidelines for Official Witnesses Before Parliamentary Committees and Related Matters.*

Commonwealth Contracts and Agency Agreements (including Standing Offers).

Department of Finance and Administration, *Commonwealth Procurement Guidelines.*

Department of Finance and Administration, *Guidance on Confidentiality of Contractors' Commercial Information.*

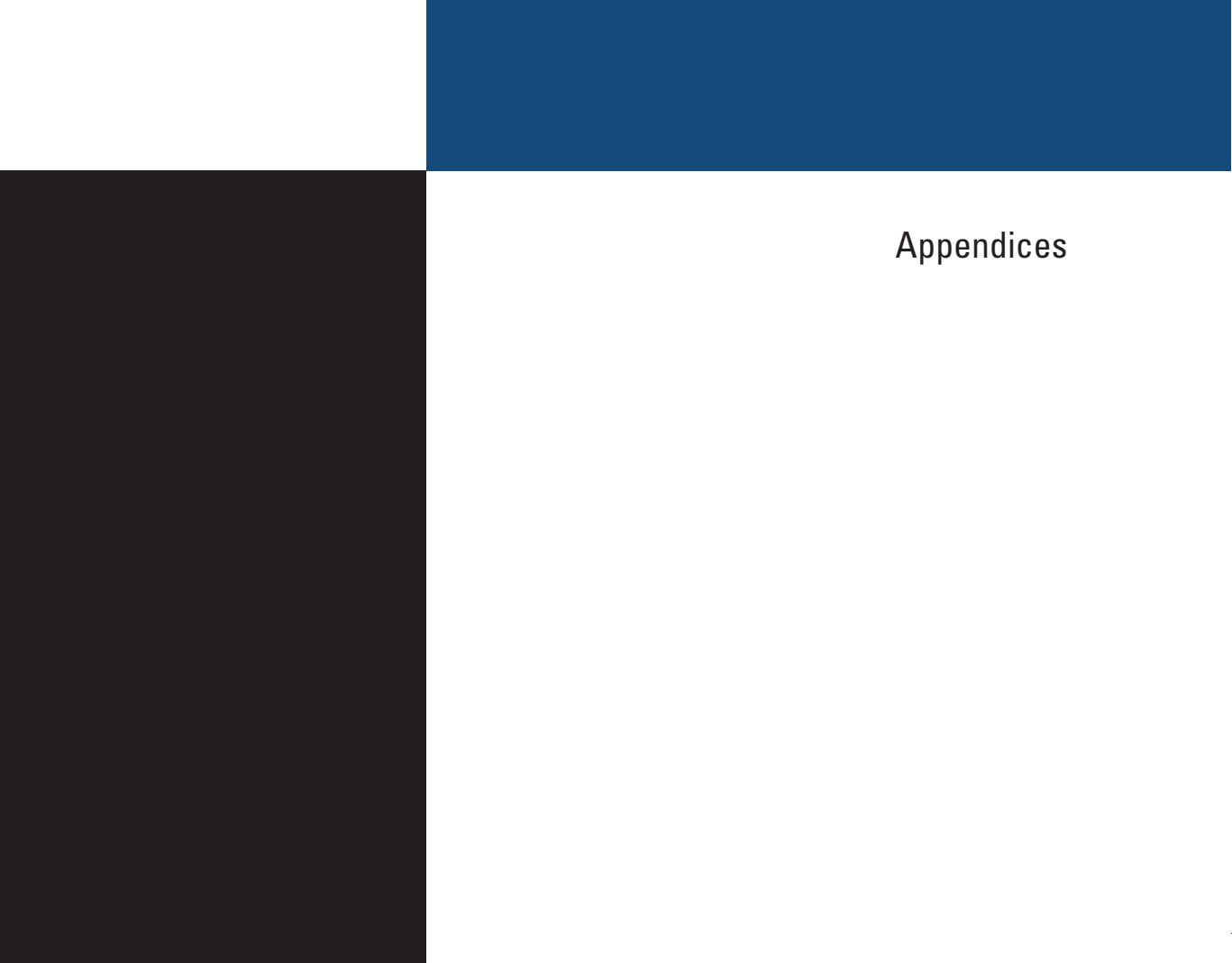
Department of Finance and Administration, *Guidance on Dealing With Complaints.*

Department of Finance and Administration, *Guidance on Procurement Publishing Obligations.*

Department of the Prime Minister and Cabinet, *Requirements for Departmental Annual Reports.*

#### **Chapter 9 Checklist**

- Has the final contract been agreed between the supplier and agency?
- Has the awarding of the contract been published?
- Have complaints been properly handled?
- Have all reporting requirements been satisfied?
- Have all records been stored properly?



## Appendices

## A Multi-Use Lists

A multi-use list is a list of pre-qualified suppliers who have satisfied the application's conditions for participation. An example of a whole of government multi-use list is the Endorsed Supplier Arrangement.

A multi-use list can require inclusion on the list as either:

- an essential criterion or condition for participation in an open tender; or
- as the basis for selecting participants in a select tender process, consistent with the mandatory procurement procedures of the CPGs.

A multi-use list would typically only be developed for property or services that an agency frequently procures. Agencies may need to balance the benefits that may be achieved through operating a select tender process from a multi-use list against alternative methods of procurement such as establishing a panel.

Inclusion in a multi-use list provides certainty for potential suppliers that they have been recognised as meeting conditions for participation. It does not guarantee a potential supplier that an agency will include them in a select tender process.

### Establishing a Multi-Use List

To establish a multi-use list, an agency must publish a request for application for a multi-use list<sup>30</sup> on AusTender which includes:

- the name of the procuring entity and other information necessary to contact the procuring entity and obtain all relevant documents relating to the procurement;
- a description of the procurement and any conditions for participation;
- the address for the submission of responses;
- the closing date for the submission of responses; and
- the timeframe for the delivery of goods or services.

The request for application for a multi-use list must be published either:

- continuously on AusTender; or
- annually on AusTender.

Agencies may also publish the notice elsewhere, such as in the press. However, this does not remove the requirement for the agency to publish on AusTender, and the content of any other notice must be identical to that of the notice published on AusTender.

An annual process for a multi-use list does not necessarily require the agency to rebuild the list. Rather it requires the agency to, at a minimum, receive and assess new applications for inclusion on the list. That is, if the agency does not wish to re-establish the list it may choose to retain the existing list with the annual AusTender notice providing an opportunity for new potential suppliers to apply for inclusion on the list.

<sup>30</sup> Request for application for a multi-use list is defined in Appendix C.

A multi-use list must be established through an open approach to the market, which enables potential suppliers applying for inclusion on a list to demonstrate they meet pre-defined conditions.

These pre-defined conditions, which must be specified in the AusTender notice might include, for example, financial viability or technical capacities. Normally however, the conditions would not extend to value for money considerations.

Conditions are limited to conditions for participation and must be drafted in such a way as to employ the principles of non-discrimination. They can only be assessed as being either 'met' or 'not met', rather than being a condition that can be partially demonstrated.

All potential suppliers who apply for inclusion on the multi-use list must be included on the list as soon as practicable, provided they have:

- responded on time;
- fulfilled the minimum content and format requirements; and
- fulfilled any conditions for participation specified in the invitation.

As the list is a pre-qualification process, it should be open to including all potential suppliers who meet the stated conditions. That is, agencies should not seek to limit the number of potential suppliers on the list on the basis of comparative evaluation or assessment against additional criteria.

### Operating a Multi-Use List

It is also important that the conditions for participation and rules of operation are clearly articulated to potential applicants. Over-prescribing or under-prescribing such rules will limit flexibility and may limit an agency's ability to deliver value for money outcomes from the operation of the list.

The rules of operation can include items such as:

- a notification that the agency may procure this type of property or service through another procurement mechanism (where appropriate);
- details of who will compile and manage the list (eg who has responsibility for assessing applications for inclusion on the list); and
- a register of which agencies may use the list, if relevant.

Agencies must publish a notice of the creation of a multi-use list on AusTender. After the list has been created, agencies may then use AusTender to advertise the existence of the list (including a short description) and provide a link to the list on the agency's website.



## A Multi-Use Lists

A participant on a multi-use list who ceases to meet the required conditions for participation for inclusion must be removed. A participant on a list may also be removed on the basis of the list's rules of operation.

### Using a Multi-Use List in an Open Tender Process

By specifying inclusion on the multi-use list as a condition for participation in an open tender process, an agency can benefit from both the competitive advantages of an open process and take advantage of assessment work already undertaken during the pre-qualification process.

When using this method the list needs to have been open for a sufficiently long period, prior to publication of the request for tender notice, for potential suppliers to have previously applied and been assessed for inclusion on the list.

A request for application for a multi-use list may be combined with a request for tender. The AusTender notice for the open tender process must clearly state that submissions will be used to both establish a preferred supplier for a particular procurement and to concurrently establish a multi-use list for future procurements.

Where an agency wishes to concurrently run an open tender process and establish a multi-use list, the AusTender notice must clearly state that a potential supplier may make any of the following responses to the notice:

- a submission for the current procurement only;
- an application for inclusion on the multi-use list only (noting this response would not include a submission in the current procurement); or
- a response that is both a submission for the current procurement and an application for inclusion on the list.

### Using a Multi-Use List in a Select Tender Process

An agency may invite potential suppliers from a multi-use list to tender for a procurement in a select tender process. In this case, the agency may:

- invite all participants on the multi-use list to tender; or
- invite only a number of participants on the multi-use list to tender, provided the invitation is non-discriminatory<sup>31</sup>, and the number of potential suppliers invited ensures competition.

<sup>31</sup> Refer to the Encouraging Competition chapter of the CPGs for an explanation of non-discrimination.

### *Checklist for Establishing a Multi Use List*

- Have you conducted an open tender process that meets the requirements of the mandatory procurement procedures set out in the revised CPGs?
- Have you included the following in the request document:
  - a statement that the purpose of the procurement is to establish a multi-use list;
  - details of the property or services to be supplied;
  - the conditions for participation; and
    - The conditions for participation are limited to those that ensure that a supplier has the legal, commercial, technical, and financial abilities to fulfil the requirements of the procurement.
  - the names of the agencies that may use the multi-use where the list is being established for use by more than one agency.

## B Panels

A panel is an arrangement under which a number of suppliers may each supply property or services to an agency without further attracting the operation of the mandatory procurement procedures of the CPGs after the panel has been established.

Panels are usually established through a single procurement process and are allowable for covered procurements where:

- a panel will provide value for money;
- the panel is established in accordance with the mandatory procurement procedures of the CPGs;
- there is a panel arrangement with each panel member which clearly specifies:
  - the types of property or services which may be purchased under the panel arrangement;
  - a set/indicative price/rate, as appropriate, for the property or services;
  - how the agency will purchase from the panel, including seeking refined offers (eg where there are large procurements from a member or members of the panel).<sup>32</sup>

60

It is acceptable for a panel procurement process to result in a single supplier. This can occur where there are benefits in a single supplier providing the property or service or where only one supplier submitted a bid assessed as meeting the tender requirements.

For the purpose of assessing whether a panel arrangement exceeds set financial thresholds for application of the mandatory procurement procedures of the CPGs, the value of a procurement is the estimated total value of the property or services that may be procured from all members of the panel over the life of the panel arrangements. That is, the threshold is not the amount of each separate contract under the panel. Rather, it is the estimated total of all contracts or deeds of standing offer relating to the panel. It would be rare for the expected total value of the property or services to be procured from a panel to be below the threshold amount.

Although the purchase of property or services from a panel member does not attract the operation of the mandatory procurement procedures of the CPGs, the purchase is a procurement-related task and is still governed by the other elements of the procurement policy framework (eg the requirements to achieve value for money and to have appropriate authority for the expenditure of public money).

### Establishing a Panel

Before an agency approaches the market they should consider which process is most appropriate for the outcome they are seeking. Thorough planning before conducting the tender process is essential to achieve the desired procurement outcome. Except under the limited circumstances stated in the mandatory procurement procedures of the CPGs, in all procurements there must be some open approach to the market.

<sup>32</sup> Where it is likely that more complex purchases may be made under a panel, agencies should ensure that the approach to the market clearly states that refined offers may be sought from panel members under certain circumstances. These circumstances and the procedures to be followed must also be outlined in each panel arrangement.

This open stage may be, for example, to seek expressions of interest or to seek applications to participate in a multi-use list. From the responses to this open approach the procuring entity can conduct a select tender process (eg from a multi-use list).

The tendering processes available are:

- Open tender – in order to establish a panel through open tendering an agency must publish a tender notice and issue a request document. All suppliers who meet the stated conditions for participation must be allowed to submit tenders.
- Select tender from expressions of interest – to establish a panel through this method, the appropriate notice must be published. If the agency intends to rank suppliers who respond and only issue invitations to tender and the request document to a certain number of suppliers based on their ranking, this must be stated clearly in the notice. If this is not done then all suppliers who responded to the notice must be allowed to participate.
- Select tender from a multi-use list – agencies may establish a panel through a select tender from an existing or specially established multi-use list. Transparency would be aided by having a clause in the notice inviting businesses to participate in the multi-use list which stated that it may be used to also establish a panel through a select tender process.

### Purchasing from a Panel

Officials making purchases under panel arrangements must ensure that they achieve a value for money outcome. For basic purchases this will usually involve contacting the panel member whose panel arrangement covers the property or services sought and who offers the best price, taking into account any other relevant factors such as the timeframe available to do the job and the quality of the property, services or personnel offered.

Where these criteria have been met by more than one panel member, officials may contact panel members whose panel arrangements cover the property or services sought and seek a refined offer for the particular purchase.

Purchases made from a panel member or members must be within the terms of the panel arrangement. The property or services that may be procured under the relevant panel arrangements may vary between panel members. Only the property or services identified in the initial approach to the open market may be included in the subsequent deed of standing offer or contract with the panel member.

## B Panels

### Competitive Approaches within a Panel

It is possible to establish a competitive approach within a panel where such an approach would provide value for money. Instances where this may be appropriate are where the agency wishes to procure a particularly large quantity of property or services (eg where an agency has a particular issue which may require a significant amount of legal advice).

In such cases, the initial approach to the open market to establish the panel must have clearly specified that the panel being established may also be utilised for competitive procurement.

### Record Keeping

Agencies are required to keep adequate records of the decision making process when establishing and procuring from a panel.

Such records should include as a minimum:

- the rationale for establishing a panel (including consideration of how value for money will be achieved);
- the process for determining which suppliers to include in the panel;
- a record of the evaluation of applicants and the reasons for selecting panel members;
- formal documentation, such as the request document, deeds of standing offer or contracts; and
- a record of purchases of property or services from panel members under the panel arrangement, including the associated assessment of value for money.

The records must demonstrate that the panel is not being used to avoid competition or to discriminate against suppliers of other nations.

NOTE: Guidance on the publication of details of contracts which arise from panel arrangements is provided in the Finance publication *Guidance on Procurement Publishing Obligations*.

### *Checklist for Establishing a Panel*

- Have you conducted an open or select tender process that meets the requirements of the mandatory procurement procedures set out in the revised CPGs. That is, one of the following:
  - an open tender process;
  - a select tender from a multi-use list, where:
    - the property or services to be supplied by the panel are consistent with those described in the request for application for inclusion on the multi-use list; or
  - a select tender process from an expression of interest, where:
    - the request for expressions of interest clearly stated that it was to be used to shortlist for a tender process to establish a panel; or
  - a select tender process on the basis of a licence or specific legal requirement.
- Have you included the following in the request document:
  - a statement that the purpose of the procurement is to establish a panel;
  - details of the property or services to be supplied by the panel;
  - the conditions for participation in the tender;
    - the conditions for participation are limited to those that ensure that a supplier has the legal, commercial, technical, and financial abilities to fulfil the requirements of the procurement.
  - the evaluation criteria to be considered in evaluating tenders;
  - how suppliers will be selected to be on the panel (the evaluation process);
  - how suppliers will be selected when placing orders under the panel;
  - where applicable, the circumstances and procedures for seeking refined offers under the panel; and
  - where the panel is being established for use by more than one agency, the names of the agencies that may use the panel.
- Have you determined which suppliers will be on the panel based on a value for money assessment, in accordance with the stated evaluation methodology?

## B Panels

- Have you established a contract or deed of standing offer with each supplier on the panel? Have you included in the contract or standing offer:
  - details of the property or services to be supplied by the panel;
  - comprehensive terms and conditions that apply to orders placed with the panel;
    - for example product specifications, liability/insurance, payment terms, subcontracting, intellectual property, confidentiality, audits and audit access, default and non-performance, compliance with government policies, and termination.
  - indicative rates for the property or services;
  - a finite period for operation and, where applicable, details of options for extension of the period of operation of the contract or standing offer;
  - how suppliers will be selected when placing orders under the contract or standing offer;
  - where applicable, the circumstances and procedures for seeking best value for money offers under the panel; and
  - where the panel is being established for use by more than one agency, the names of the agencies that may use the panel.
- Have you published details of each contract or deed of standing offer on AusTender, including:
  - the procurement method used; and
  - the total estimated value of the panel.

### *Placing orders under the panel*

- Is the order limited to property or services clearly covered by the contract or deed of standing offer?
- Is the order within the period covered by the contract or deed of standing offer?
- Have you complied with reporting obligations related to placing an order?

### *Seeking best value for money offers under the panel*

- Does the contract or deed of standing offer include the circumstances and procedures for seeking best value for money offers, where applicable?

- Are the circumstances and procedures followed in seeking best value for money offers consistent with those set out in the contract or deed of standing offer?

***Extension of the period of operation of the panel***

- Does the extension represent the exercise of an option built into the original contract or deed of standing offer in accordance with the contract or standing offer?
- Is the original contract or deed of standing offer clear on the types of property or services that may be covered in any extension, and the terms that apply to sourcing the property or services?



## C Definitions

The following definitions apply for the purposes of this *Guidance on the Mandatory Procurement Procedures* and the CPGs:

**Approach to the market** – any notice inviting potential suppliers to participate in a procurement including a request for tender, request for expression of interest, request for application for inclusion on a multi-use list, or invitation to tender.

**Conditions for participation** – minimum conditions that potential suppliers must meet 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 all procurements covered by the *Public Works Committee Act 1969*.

**Covered procurement** – a procurement, other than one that is specifically exempt, where the value of the property or services being procured exceeds the relevant procurement threshold. Covered procurements must comply with the mandatory procurement procedures.

**Deadline for submissions** – the precise time and date by which submissions must be received in response to an approach to the market.

**Direct sourcing** – a procurement process, available only under certain defined circumstances, in which an agency may contact a single potential supplier or suppliers of its choice and for which only a limited set of mandatory procurement procedures apply.

**Electronic** – for the purposes of this guidance and the CPGs means any information provided on AusTender, and includes documentation provided to a supplier or potential supplier by email, facsimile or otherwise transmitted to the recipient by another electronic means.

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

**Exempt** – a procurement or class of procurement which is exempt from the mandatory procurement procedures set out in Division 2 of the CPGs. Such a procurement is not a covered procurement irrespective of the value of the property or services being procured. Exempt procurements remain subject to other requirements of the CPGs, including the core principle of value for money.

**Expression of interest** – a response to an open approach to the market requesting submissions from businesses interested in participating in a procurement. The list of potential suppliers who have submitted expressions of interest may be used as the basis for conducting a select tender process.

**GST inclusive** – means the value of a good or service, including the amount of GST (if any) payable on that good or service.

**Invitation to tender** – an invitation issued to selected businesses inviting them to submit tenders in response to a select tender process or direct sourcing process.

**Mandatory procurement procedures** – a set of rules and procedures, outlined in Division 2 of the CPGs, which must be followed when conducting a covered procurement.

**Minimum content and format of submissions** – criteria that a submission must meet to be eligible for further consideration in a procurement process. These include conditions for participation where relevant.

**Multi-use list** – a list, intended for use in more than one procurement process, of pre-qualified businesses who have satisfied the conditions for participation for inclusion on the list.

**Open tender process** – a procurement procedure in which a request for tender is published inviting all businesses that satisfy the conditions for participation to submit tenders.

**Panel** – A panel may be established by an agency by entering into contracts or deeds of standing offer (panel arrangements) for the provision of identified property or services. Panel is defined as an arrangement under which a number of suppliers, usually selected through a single procurement process, may each supply property or services to an agency as specified in the panel arrangements.

**Procurement threshold** – a value above which a procurement, unless exempt, is considered to be a covered procurement.

**Property** – 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.

**Published** – listed electronically on AusTender in accordance with Government policy, as stated in the Accountability and Transparency section of the CPGs.

**Request documentation** – documentation provided to businesses to enable them to understand and assess the requirements of the procuring agency and to prepare appropriate and responsive submissions. This general term includes documentation for expressions of interest, multi-use lists, open and select tender processes, and direct sourcing.

**Request for application for a multi-use list** – a published notice inviting businesses to apply for inclusion on a multi-use list. The notice must be published on AusTender, either continuously or at least once per year.

**Request for expressions of interest** – a published notice inviting businesses to register an expression of interest in a procurement.

**Request for tender** – a published notice inviting businesses who satisfy the conditions for participation to submit a tender in accordance with requirements of the request for tender and other request documentation.

## Definitions

**Select tender process** – a procurement procedure in which the procuring agency selects which potential suppliers are invited to submit tenders. For covered procurements, a select tender process may only be conducted in accordance with certain procedures and circumstances set out in Division 2 of the CPGs.

**Submission** – includes any formally submitted response from a potential supplier to an approach to the market. Submissions include tenders, expressions of interest and applications for inclusion on a multi-use list.

**Tender** – a submission from a potential supplier making an offer to perform a procurement in response to a request for tender or invitation to tender.

**Time limit** – the minimum time that an agency must allow for potential suppliers to respond to an approach to the market.

**Value** – the total maximum estimated value of the property or services being procured, as determined in accordance with the rules in Division 2 of the CPGs. The value of the property or services being procured, except where a procurement is exempt, will determine whether a particular procurement is a covered procurement.