

December 2008

Commonwealth Procurement Guidelines

© Commonwealth of Australia 2008

ISBN 1 921182 47 4

Department of Finance and Deregulation
(Asset Management Group)

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 Commonwealth. Requests and inquiries concerning reproduction and rights should be addressed to the:

Commonwealth Copyright Administration,
Attorney-General's Department,
Robert Garran Offices,
National Circuit,
Barton ACT 2600

or posted at <http://www.ag.gov.au/cca>

Acknowledgements

Photographs taken by Steve Keough, Steve Keough Photography

Copyright: Department of Finance and Deregulation

The Financial Management Guidance series of publications

- No.1 *Commonwealth Procurement Guidelines.*
- No.2 *Australian Government Foreign Exchange Risk Management Guidelines,* September 2006.
- No.3 *Guidance on Confidentiality in Procurement,* July 2007.
- No.4 *Australian Government Cost Recovery Guidelines,* July 2005.
- 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.9 *Australian Government Competitive Neutrality Guidelines for Managers,* February 2004.
- No.11 *The Role of the CFO – Guidance for Commonwealth Agencies,* April 2003.
- 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,* July 2007.
- No.16 *Introductory Guide to Public Private Partnerships,* December 2006.
- No.17 *Public Private Partnerships: Business Case Development,* December 2006.
- No.18 *Public Private Partnerships: Risk Management,* December 2006.
- No.19 *Public Private Partnerships: Contract Management,* December 2006.
- No.20 *Guidance on the Gateway Review Process – A Project Assurance Methodology for the Australian Government,* August 2006.
- No.21 *Australian Government Policy Principles for the Use of Public Private Partnerships,* December 2006.

The Financial Management Reference series of publications

- No. 1 *List of Australian Government Bodies and Governance Relationships.*
- No. 2 *Governance Arrangements for Australian Government Bodies.*
- No. 3 *Financial Management and Accountability Legislation, October 2005.*
- No. 4 *Commonwealth Authorities and Companies Legislation, February 2006.*
- No. 5 *Introduction to Cost-Benefit Analysis and Alternative Evaluation Methodologies, January 2006.*
- No. 6 *Handbook of Cost-Benefit Analysis, January, 2006.*
- No. 7 *Gateway Review Process – A Handbook for Conducting Gateway Reviews, August 2006.*

The Good Procurement Practice Guidance series of publications

- No. 1 *Chief Executive's Instructions and Operational Guidelines for Procurement, November 2006.*
- No. 2 *Preparing and Maintaining an Annual Procurement Plan, November 2006.*
- No. 3 *Cooperative Agency Procurement, December 2007.*
- No. 4 *Establishing and Using Panels, December 2007.*
- No. 5 *Establishing and Using Multi-Use Lists, December 2007.*
- No. 6 *Providing Feedback and Handling Complaints, December 2007.*

Foreword



I am pleased to issue updated *Commonwealth Procurement Guidelines* under Regulation 7 of the *Financial Management and Accountability Regulations 1997*.

The *Commonwealth Procurement Guidelines* represent the policy framework under which agencies govern and undertake their own procurement.

While Chief Executives are responsible for the management of their agencies, they are required to manage within the context of the Government's policy framework. Under the FMA legislation, Chief Executives must promote the proper use of resources within the framework of policies that the Government has set for them. In effect, this means that achieving efficient, effective and ethical procurement outcomes - as required by section 44 of the FMA Act - involves doing so consistently with Government policies that may impact on procurement. This obligation is reinforced by the requirement in FMA Regulation 9 that Chief Executives and other approvers of public expenditure must be satisfied that the proposed expenditure is in accordance with the policies of the Government.

These Guidelines focus on value for money and how it may be achieved by agencies when undertaking procurement. This reflects the Government's approach of doing what works to get the job done.

In particular, there is provision for coordinated procurement contracting across the whole of government. This aims to enable the Australian Government to achieve better terms commensurate with the aggregated value of its participation in a particular market sector. It will also create efficiencies for agencies and for potential suppliers including through a reduced number of approaches to the market.

There is also a focus on agencies adopting processes that reflect the scale and risk profile of a procurement. Simple procurements should be undertaken using simple processes. Agencies should seek to ensure that wherever possible their processes allow for suppliers to provide innovative solutions to their requirements.

Of course, governments must be accountable for public resources. AusTender is a most valuable tool in helping us to achieve world-leading performance in accountability and transparency for procurement. Agencies must ensure requirements to report on AusTender receive a high priority.

I commend these Guidelines to Australian Government officials involved in procurement.

A handwritten signature in black ink, which reads "Lindsay Tanner". The signature is written in a cursive, flowing style.

Lindsay Tanner
Minister for Finance and Deregulation

Contents

INTRODUCTION	1
1. Purpose	2
2. Scope	3
3. The Legislative and Policy Framework	5
DIVISION 1 — PROCUREMENT PRINCIPLES	9
4. Value for Money	10
5. Encouraging Competition	11
Non-discrimination	11
Competitive Procurement Processes	12
6. Efficient, Effective and Ethical Use of Resources	13
Efficiency and Effectiveness	14
Ethics	16
7. Accountability and Transparency	17
Policy and Legislative Obligations	18
Documentation	18
Disclosure	20
Dealing with Complaints	24
DIVISION 2 — MANDATORY PROCUREMENT PROCEDURES	25
8. Mandatory Procurement Procedures	26
Procurement Thresholds	26
Valuing Procurement	26
Approaching the Market	27
Open Tendering	28
Multi-Use Lists	28
Select Tendering	28
Direct Sourcing	30
Panels	32
Cooperative Agency Procurement	32
Request Documentation	33
Conditions for Participation	35
Minimum Time Limits	36
Receipt and Opening of Submissions	38
Awarding of Contracts	38
Notification of Decisions	38
APPENDICES	39
Appendix A: Exemptions from Mandatory Procurement Procedures	40
Appendix B: Abbreviations	42
Appendix C: Definitions	43



Introduction

1 Purpose

- 1.1 These *Commonwealth Procurement Guidelines* (CPGs) are issued by the Minister for Finance and Deregulation (Finance Minister) under the *Financial Management and Accountability Regulations 1997* (FMA Regulations).
- 1.2 The CPGs establish the core procurement policy framework and articulate the Government's expectations for all departments and agencies (agencies) subject to the *Financial Management and Accountability Act 1997* (FMA Act) and their officials¹, when performing duties in relation to procurement.
- 1.3 The CPGs establish the procurement policy framework within which agencies determine their own specific procurement practices. The FMA Regulations require officials to have regard to the CPGs when performing duties related to procurement. The FMA Regulations also require that proposals to spend public money (including proposed procurement of property or services) must be approved. An approver² is required to be satisfied, after making reasonable enquiries, that the spending proposal is in accordance with Commonwealth policy and that it is an efficient and effective use of public money.
- 1.4 Bodies subject to the *Commonwealth Authorities and Companies Act 1997* (CAC Act) are legally and financially separate from the Commonwealth and are generally not subject to the CPGs. However, CAC Act bodies listed in Schedule 1 of the *Commonwealth Authorities and Companies Regulations 1997* (CAC Regulations) as subject to section 47A of the CAC Act (relevant CAC Act bodies) can be directed by the Finance Minister to apply the CPGs.
- 1.5 Obligations which must be complied with, in all circumstances, are denoted by the use of the term *must* in these CPGs. The use of the term *should* denotes matters of sound practice.
- 1.6 Breaches of the financial management framework, including in relation to procurement, may attract a range of criminal, civil or administrative remedies (including under the *Financial Management and Accountability Act 1997*, the *Public Service Act 1999* and the *Crimes Act 1914*).
- 1.7 Throughout the CPGs references to *days* mean *calendar days*.

¹ *Official* is defined in section 5 of the FMA Act to mean a person who is in an Agency or is part of an Agency.

² FMA Regulations define an approver as a Minister, a Chief Executive, or a person authorised by legislation to approve proposals to spend public money.

- 2.1 The CPGs apply to procurement conducted by all officials in agencies and in relevant CAC Act bodies.
- 2.2 *Procurement* encompasses the whole process of acquiring property³ or services. It begins when an agency has identified a need and decided on its procurement requirement. Procurement continues through the processes of risk assessment, seeking and evaluating alternative solutions, contract award, delivery of and payment for the property or services and, where relevant, the ongoing management of a contract and consideration of options related to the contract.
- 2.3 In addition to the acquisition of property or services by an agency for its own use, *procurement* also encompasses a situation where an agency is responsible for the procurement of property or services for other agencies, or for third parties.
- 2.4 While procurement relates to the acquisition of property or services, it does not include:
 - a. grants (whether in the form of a contract or conditional gift);
 - b. investment (or divestment);
 - c. sales by tender;
 - d. loans;
 - e. purchases of property or services for resale or of property or services used in the production of goods for resale;
 - f. any property right not acquired through the expenditure of public money - for example, a right to pursue a legal claim for negligence;
 - g. statutory appointments;
 - h. appointments made by a Minister using the executive power - for example, the appointment of a person to an advisory board; or
 - i. the engagement of employees - such as under the *Public Service Act 1999*, the *Parliamentary Services Act 1999*, an agency's enabling legislation, or under the common law concept of employment.

³ *Property* refers to 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 and goodwill.

2 Scope

- 2.5 There are three key types of documents which set out and explain the Government's procurement policy framework:
- a. the CPGs, issued by the Finance Minister, which establish the procurement policy framework;
 - b. Finance Circulars, issued by the Department of Finance and Deregulation (Finance), which advise of key changes and developments in the Government's procurement policy framework; and
 - c. a range of web-based and printed guidance documents, developed by Finance to assist agencies to implement the Government's procurement policy.
- 2.6 The procurement policy framework outlined in the CPGs applies to all matters related to the procurement of property or services, irrespective of whether those matters are specifically mentioned in the CPGs.
- 2.7 Nothing in any part of these CPGs prevents an agency from applying measures determined by their Chief Executive to be necessary: for the maintenance or restoration of international peace and security; to protect human health; for the protection of essential security interests; or to protect national treasures of artistic, historic or archaeological value. Applying such measures does not diminish the responsibility of Chief Executives under section 44 of the FMA Act to promote the efficient, effective and ethical use of Commonwealth resources.

The Legislative and Policy Framework 3

- 3.1 Government agencies and officials operate within an environment of legislation and relevant government policy. Within this broad context, the financial management framework consists of the legislation and policy governing the management of the Australian Government's resources. Figure 1 sets out the main elements of this environment related to procurement.



Figure 1 Chief Executive's Instructions build on the procurement and financial management frameworks and the policy and legislative environment and provide operational guidance focussing on the agency's particular needs.

3 The Legislative and Policy Framework

- 3.2 The procurement policy framework is a subset of the financial management framework related to the procurement of property or services.
- 3.3 Chief Executives of agencies subject to the FMA Act may issue *Chief Executive's Instructions* (CEIs) to officials on any matter necessary or convenient for carrying out or giving effect to the FMA Act or FMA Regulations. The CPGs provide the framework within which Chief Executives may issue CEIs and associated operational guidance related to procurement in a specific agency. In the area of procurement CEIs can:
 - a. interpret the procurement policy and financial management frameworks, focussing on the agency's particular needs; and
 - b. provide primary operational instructions to agency officials in carrying out their duties related to procurement, in a way that is tailored to the agency's particular circumstances and needs.
- 3.4 The *Finance Minister's (CAC Act Procurement) Directions* require relevant CAC Act bodies to have regard to the CPGs when engaged in duties related to the procurement of property or services and to comply with the Mandatory Procurement Procedures in all circumstances for covered procurements.

Coordinated Procurement Contracting Arrangements

- 3.5 The Government may decide that for certain property or services improved value for money will be achieved through aggregation of government demand and negotiating whole-of-government procurement contracts. These processes are known as coordinated procurement contracting arrangements and may include the establishment of whole of government panels which agencies are required to use unless specifically exempted.
- 3.6 Where the Government establishes coordinated procurement contracting for a particular property or service, agencies must use the contract established for that property or service unless an exemption has been provided. Exemptions may only be provided where an agency can demonstrate a special need for alternate supply and approval is granted by the relevant portfolio Minister and the Finance Minister.
- 3.7 These arrangements will reduce duplication between agencies in meeting common procurement requirements and provide the ability for the Government to use its combined purchasing power to improve value for money.

International Obligations

- 3.8 Australia is a party to a range of bilateral free trade arrangements. These arrangements are implemented domestically as government policy and/or legislation. All relevant international obligations are incorporated in the procurement policy framework as expressed in these CPGs and therefore when an agency undertakes procurement they should not seek to directly implement measures contained in international agreements.

Policies that Interact with Procurement

- 3.9 The FMA Regulations require that an approver must not approve a proposal to spend public money unless satisfied, after reasonable inquiry that it is in accordance with the policies of the Commonwealth.⁴
- 3.10 While Chief Executives are responsible for the management of their agencies, they are required to manage within the context of the Government's policy framework. Under the FMA legislation, Chief Executives must promote the proper use of resources within the framework of policies that the Government has set for them. In effect, this means that achieving efficient, effective and ethical procurement outcomes, as required by section 44 of the FMA Act, involves doing so consistently with Government policies that may impact on procurement. This obligation is reinforced by the requirement in FMA Regulation 9 that Chief Executives and other approvers of public expenditure must be satisfied that the proposed expenditure is in accordance with the policies of the Government.
- 3.11 Many of these policies are the responsibility of agencies outside the Finance portfolio. The agency administering a policy is responsible for providing further information if required. The *Administrative Arrangements Order* includes a list of Departments of State and their responsibilities.⁵
- 3.12 Outsourced service providers may at times be required to comply with relevant legislation and general government policies. Agencies are to reflect requirements for contractors to comply with legislation in accordance with paragraph 6.20. Any requirement for an outsourced service provider to comply with a specific general policy must be reflected in request documentation and in appropriate clauses in government contracts.

⁴ Examples of such policies include privacy, public works notification and government advertising.

⁵ The *Administrative Arrangements Order* is available from www.pmc.gov.au.

DIVISION 1

Procurement Principles
Applies to all procurement

4 Value for Money

- 4.1 *Value for money* is the core principle underpinning Australian Government procurement. In a procurement process this principle requires a comparative analysis of *all* relevant costs and benefits of each proposal throughout the whole procurement cycle (whole-of-life costing).
- 4.2 Value for money is enhanced in government procurement by:
- a. *encouraging competition* by ensuring non-discrimination in procurement and using competitive procurement processes;
 - b. promoting the use of resources in an *efficient, effective and ethical* manner⁶; and
 - c. making decisions in an *accountable and transparent manner*.
- 4.3 In order to be in the best position to determine value for money when conducting a procurement process, request documentation needs to specify logical, clearly articulated, comprehensive and relevant conditions for participation and evaluation criteria which will enable the proper identification, assessment and comparison of the costs and benefits of all submissions on a fair and common basis over the whole procurement cycle.
- 4.4 Cost is not the only determining factor in assessing value for money. Rather, a whole-of-life value for money assessment would include consideration of factors such as:
- a. fitness for purpose;
 - b. the performance history of each prospective supplier;
 - c. the relative risk of each proposal;
 - d. the flexibility to adapt to possible change over the lifecycle of the property or service;
 - e. financial considerations including all relevant direct and indirect benefits and costs over the whole procurement cycle; and
 - f. the evaluation of contract options (for example, contract extension options).

⁶ This requirement is consistent with section 44 of the FMA Act for FMA agencies, sections 22 and 23 of the CAC Act for Commonwealth authorities and relevant provisions of the *Corporations Act 2001* for Commonwealth companies.

- 5.1 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.

Non-discrimination

- 5.2 The Australian Government procurement policy framework is non-discriminatory. All potential suppliers should have the same opportunities to compete for government business and must, subject to these CPGs, be treated equitably based on their legal, commercial, technical and financial abilities. Procurement methods must not discriminate against potential suppliers due to their degree of foreign affiliation or ownership, location or size. The property or services on offer must be considered on the basis of their suitability for their intended purpose and not on the basis of their origin.

Small and Medium Enterprises (SMEs)

- 5.3 To ensure that SMEs⁷ are able to engage in fair competition for government business, officials undertaking procurement should ensure that procurement methods do not unfairly discriminate against SMEs.
- 5.4 Agencies should seek to ensure that procurement processes are readily communicated and accessible to SMEs and should not take action to deliberately exclude SMEs from participating.
- 5.5 Agencies need to ensure that SMEs have appropriate opportunities to compete for business, considering as appropriate in the context of value for money:
- a. the benefits of doing business with competitive Australian or New Zealand SMEs when specifying requirements and evaluating value for money;
 - b. the capability and commitment to regional markets of SMEs in their local regions; and
 - c. supplier-base and competitive benefits of access for new market entrants.
- 5.6 The Government is committed to FMA agencies sourcing at least 10 per cent of their purchases by value from SMEs.

⁷ An SME is an Australian or New Zealand firm with fewer than 200 full time equivalent employees.

5 Encouraging Competition

Competitive Procurement Processes

- 5.7 The procurement process itself is an important consideration in achieving value for money. Participation in a procurement process imposes costs on agencies and potential suppliers and these costs should be considered when determining a process commensurate with the scale, scope and relative risk of the proposed procurement.
- 5.8 Specific procedures must be followed for covered procurements. These procedures, which further encourage competition and in many circumstances require an open approach to the market, are outlined in Division 2.

- 6.1 Section 44 of the FMA Act requires Chief Executives to promote the efficient, effective and ethical use of the Commonwealth resources for which they are responsible. Chief Executives mainly discharge this responsibility for procurement by ensuring that their agencies have appropriate policies, procedures and guidelines in place to achieve value for money in procurement processes.
- 6.2 The devolved environments under the FMA Act and CAC Act give agencies considerable scope to determine specific practices and procedures in order to achieve value for money in procurement. However, many procurement processes will be consistent with Figure 2 below.

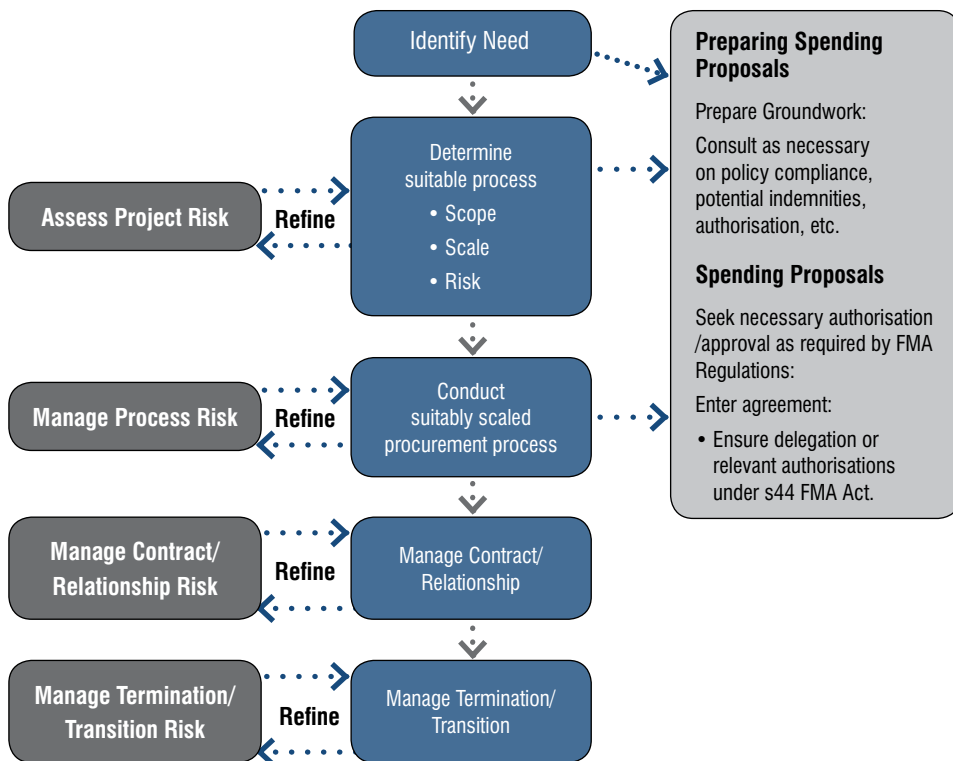


Figure 2 An efficient and effective procurement process incorporates rigorous risk management, enabling issues to be identified early in the process.

6 Efficient, Effective and Ethical Use of Resources

Efficiency and Effectiveness

- 6.3 *Efficiency* relates to the productivity of the resources used to conduct an activity in order to achieve the maximum value for the resources used. In relation to procurement, it includes the selection of a procurement process that is consistent with government policy and is the most appropriate to the procurement objective under the prevailing circumstances.
- 6.4 Efficiency in procurement is enhanced by conducting transparent, fair and appropriately competitive processes of a scale commensurate with the size and risk profile of each particular project.
- 6.5 *Effectiveness* relates to how well outcomes meet objectives. It concerns the immediate characteristics of an agency's outputs, especially in terms of price, quality and quantity, and the degree to which outputs contribute to specified outcomes.
- 6.6 Effectiveness can be achieved by ensuring that the property or service being sought will make the maximum possible contribution to the relevant outcome. This entails correctly identifying the need, accurately drafting functional specifications, rigorously assessing responses and negotiating the final contract, and then diligently managing the contract. Comprehensive monitoring and assessment at all stages of the procurement process further contributes to effectiveness.

Risk Management

Principles

- 6.7 Risk is part of the environment within which agencies operate. Risk management involves the systematic identification, analysis, treatment and allocation of risks.
- 6.8 Risk management should be built into an agency's procurement processes. The extent of risk management required will vary from following routine procurement processes, to a significant undertaking involving the highest level of planning, analysis and documentation. A variety of risks may arise during each stage of a procurement. Agencies should ensure that appropriate procedures are in place to identify and consider all relevant risks throughout the procurement cycle.
- 6.9 As a general principle, risks should be borne by the party best placed to manage them – that is, agencies should generally not accept risks which another party is better placed to manage. Similarly, where an agency is best-placed to manage a particular risk, it should not seek to inappropriately transfer that risk to a supplier.

- 6.10 Agencies need to carefully monitor the terms and conditions, including pricing, on which risk allocations are determined, to ensure that they reflect value for money.

Limiting a Contractor's Liability to the Commonwealth

- 6.11 The Commonwealth's policy on contingent liabilities is to only accept risk where the expected benefits outweigh the costs. This policy is set out in Finance Circular 2003/02 *Guidelines for Issuing and Managing Indemnities, Guarantees, Warranties and Letters of Comfort*.
- 6.12 Agencies must undertake a risk assessment to inform any decision about whether limiting a contractor's liability through a liability cap or indemnity would be appropriate, and if so, what limits may be suitable. This approach is consistent with the broader financial management framework that provides for agencies to consider all contingent liability matters in the context of sound risk and contract management practices.
- 6.13 An indemnity or a limitation on a contractor's liability transfers risk to the Commonwealth. As part of considering a limit on liability, FMA Act agencies need to comply with the requirements of the FMA Act and Regulations. As part of considering an indemnity, FMA Act agencies need to comply with the requirements of the FMA Act and Regulations and the guidance set out in Finance Circular 2003/02 *Guidelines for Issuing and Managing Indemnities, Guarantees, Warranties and Letters of Comfort*.
- 6.14 In addition, when considering a limit on a supplier's liability, agencies should note that arrangements to limit liability can carry direct or indirect costs which must be considered within the determination of value for money. Similarly, if a risk assessment determines it would be appropriate to require a supplier to accept unlimited liability, value for money impacts need to be considered.
- 6.15 If an agency decides to limit a contractor's liability, through a liability cap or indemnity, based on an assessment of the risks and value for money considerations, it should develop and implement a risk management plan.
- 6.16 For more complex procurements, request documentation should include a draft contract with clear liability provisions. Potential suppliers should be required to indicate compliance with the entire contract, including liability provisions, and separately identify any clauses of non-compliance or partial compliance, clearly providing details and costs for any alternative clauses. Request documentation may allow for any additional direct or indirect costs borne by the Commonwealth to be reflected in a commensurate adjustment to the terms of the contract where negotiations to limit a supplier's liability occur after the nomination of a preferred supplier.

6 Efficient, Effective and Ethical Use of Resources

Ethics

- 6.17 *Ethics* are the moral boundaries or values within which officials work. Ethical behaviour encompasses the concepts of honesty, integrity, probity, diligence, fairness, trust, respect and consistency. Ethical behaviour identifies and avoids conflicts of interests, and does not make improper use of an individual's position.
- 6.18 A procurement conducted in an ethical manner will enable purchasers and potential suppliers to deal with each other with mutual trust and respect. Adopting an ethical, transparent approach enables business to be conducted fairly, reasonably and with integrity. A specific aspect of ethical behaviour relevant to procurement is an overarching obligation to treat potential suppliers as equitably as possible.
- 6.19 Agencies need to ensure that officials involved in procurement, particularly those dealing directly with suppliers and potential suppliers:
- recognise and deal with any conflicts of interest, including perceived conflicts of interest;
 - deal with suppliers and potential suppliers even-handedly;
 - consider seeking advice where probity issues arise;
 - do not compromise the Australian Government's standing by accepting inappropriate gifts or hospitality;
 - are scrupulous in their use of public property; and
 - comply with all duties and obligations including the agency's CEIs in relation to gifts or hospitality, the information privacy principles of the *Privacy Act 1988*, the security provisions of the *Crimes Act 1914* and, where applicable, the Australian Public Service's Code of Conduct as set out in the *Public Service Act 1999*.
- 6.20 Agencies should include contract provisions requiring contractors to comply with materially relevant laws and should, as far as practicable, require suppliers to apply such a requirement to sub-contractors. Contractors must also be able to make available details of all sub-contractors engaged in respect of the procurement contract.
- 6.21 Agencies must not enter into contracts with suppliers who have had a judicial decision against them (not including decisions under appeal) relating to employee entitlements and have not paid the claim. Agencies should seek to confirm a tenderer has no such unsettled judgements by seeking a declaration on the matter from all tenderers.
- 6.22 Agencies must not seek to benefit from supplier practices that may be dishonest, unethical or unsafe.

Accountability and Transparency 7

- 7.1 Accountability and transparency are primary considerations throughout the procurement process.
- 7.2 Accountability and transparency encourage the efficient, effective and ethical use of Commonwealth resources. An agency and its officials have the responsibility of ensuring that any procurement process is open and transparent and that decisions are justified. Agencies need to have procedures in place to ensure that procurement processes are conducted soundly and that procurement related actions are documented, defensible and substantiated in accordance with legislation and government policy.
- 7.3 A well planned, conducted and documented procurement, which accords with government policy, is well placed to withstand external scrutiny. Adherence to the CPGs and full documentation of the process can be relied upon to provide substantiation of decisions.
- 7.4 *Accountability* means that officials are responsible for the actions and decisions that they take in relation to procurement and for the resulting outcomes. Officials are answerable for such activity through established lines of accountability including the agency's Chief Executive and senior management, the Government and the Parliament, as shown in Figure 3.

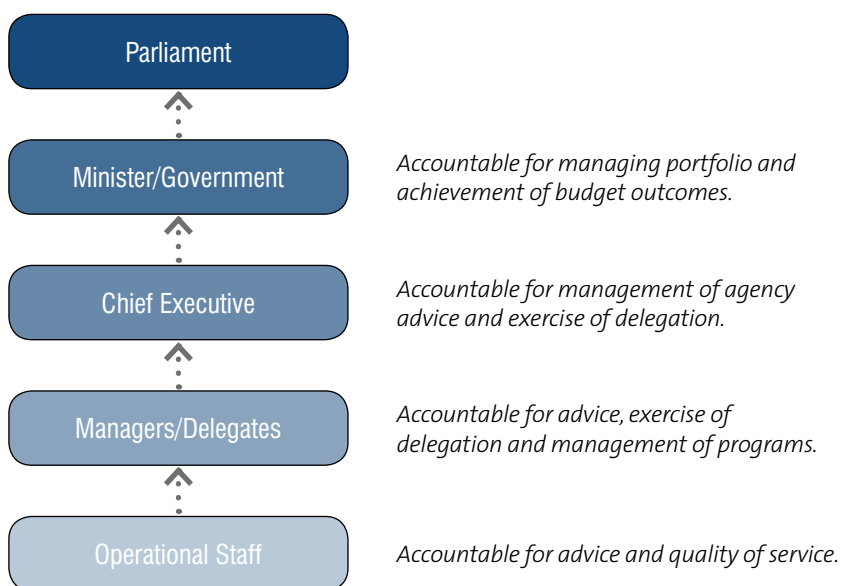


Figure 3 Accountability in procurement extends from officials in agencies through the Minister and Government to the Parliament.

7 Accountability and Transparency

- 7.5 *Transparency* provides assurance that procurement processes undertaken by agencies are appropriate and that policy and legislative obligations are being met. Transparency involves agencies taking steps to support appropriate scrutiny of their procurement activity.
- 7.6 The fundamental elements of accountability and transparency are policy and legislative obligations, documentation and disclosure. These are outlined below.

Policy and Legislative Obligations

- 7.7 Officials undertaking procurement are accountable for complying with relevant general government policies and legislative requirements. This includes the procurement-specific policies and legislative requirements set out in the CPGs, the FMA Act and FMA Regulations, and other policies and legislation that interact with procurement.

Documentation

- 7.8 Documentation is critical to accountability and transparency. It provides a record of procurement activities and how they have been conducted, and facilitates scrutiny of these activities.
- 7.9 Agencies must maintain appropriate documentation for each procurement. The appropriate mix and level of documentation depends on the nature and risk profile of the procurement being undertaken. Agencies need to ensure there is sufficient documentation to provide an understanding of the reasons for the procurement, the process that was followed and all relevant decisions, including approvals and authorisations, and the basis of those decisions.
- 7.10 Documentation relating to a procurement must be retained for a period of three years or for a longer period if required by legislation or other reason for a specific procurement. In addition, the *Archives Act 1983* sets out requirements in relation to Commonwealth records, including dealings with, and access to, such records.
- 7.11 The FMA Regulations set out specific requirements for the preparation of documentation when making commitments to spend public money.
- 7.12 Agencies should ensure there is a written contract with the supplier in a procurement process. Where a written contract does not exist, agencies should ensure that sufficient written documentation or a written contract is formulated as soon as practicable. For low value, routine purchases a purchase order would be considered sufficient documentation.

7.13 Documentation requirements vary throughout the procurement cycle. Documentation that may be appropriate for each stage includes, but is not limited to, that shown in Table 1. It is an agency's responsibility to ensure that adequate and appropriate documentation is kept for each stage of a procurement.

Stage	Example of Documentation Requirements
Identify Need	<ul style="list-style-type: none"> • annual procurement plan • budget papers • business case • risk assessment • legal advice • procurement method decision • evaluation plan, including selection criteria • procurement budget
Determine Suitable Process	<ul style="list-style-type: none"> • time limits and timetable • approach to the market • probity plan • request documentation (including draft contract) • due diligence process • tenders received and acknowledgements • value for money assessment • evaluation report and recommended decision • probity report
Conduct Procurement Process	<ul style="list-style-type: none"> • decisions (including relevant approvals/or authorisations) and their basis • contract negotiations and contract • advice to unsuccessful tenderers • reporting of contract (if ≥\$10,000)
Manage Contract/ Relationship	<ul style="list-style-type: none"> • contract management plan • performance indicators • milestones • performance reports • correspondence between the parties • variations of the contract • decisions regarding variation, records of the receipt of orders • evaluations of property and/or services • payment information

Table 1 Examples of documentation requirements at different stages of the procurement process.

7 Accountability and Transparency

Disclosure

Definition

7.14 *Disclosure* is the mechanism by which agencies make their procurement activities visible and transparent. The broad aim of disclosure is to provide confidence in the processes that an agency intends to undertake, or has undertaken, and reassurance that the Chief Executive is promoting the efficient, effective and ethical use of resources. For further guidance on procurement disclosure requirements, agencies should refer to *Guidance on Procurement Publishing Obligations*.

Annual Procurement Plans

- 7.15 Agencies must publish on AusTender, by 1 July each year, an Annual Procurement Plan (APP) to draw suppliers' early attention to potential procurement opportunities.
- 7.16 The APP is to contain a short strategic procurement outlook for the agency supported by details of any planned procurement. The detail should include the subject matter of any planned procurement and the estimated date of the publication of the approach to the market.

Notification

- 7.17 Agencies must publish all open approaches to the market on AusTender.⁸ Relevant documentation providing information on the approach to market must also be available, to the extent practicable, for download from AusTender.
- 7.18 If an agency advertises an open approach to the market through other avenues, such as print media, the details selected for inclusion in the notification must be the same as those contained in AusTender. Advertising an open approach to the market through other avenues does not diminish the requirement to publish the approach on AusTender.
- 7.19 Where an agency is required to publish any other notification, request documentation, or any other document on AusTender, the information in any other form (for example, a printed version) of the document must be the same as that published on AusTender.

⁸ www.tenders.gov.au.

- 7.20 For select tenders, agencies must issue all invitations to tender electronically⁹ and, to the extent practicable, make tender documentation available electronically to all potential suppliers that are invited. Electronic invitations may also be supplemented by other documented forms of invitation.

Process

- 7.21 Agencies need to promptly provide, on request, to any potential supplier, documentation that includes all information necessary to permit potential suppliers to prepare and lodge submissions. Agencies must, to the extent practicable, use AusTender to make request documents available.
- 7.22 Where an agency rejects a potential supplier's submission, the agency must promptly advise them, and on request provide a written explanation for that rejection.
- 7.23 Following the award of a contract, agencies must promptly inform all tenderers of the tender decision and on request provide an unsuccessful tenderer with the reasons its submission was not successful. On request, debriefings should also be provided to successful tenderers.

Reporting

- 7.24 Agencies must report on AusTender all Commonwealth contracts¹⁰ and agency agreements¹¹, including standing offer arrangements and amendments to these arrangements, which meet the *contract reporting criteria* in *Guidance on Procurement Publishing Obligations*.¹²
- 7.25 The *contract reporting criteria* have reporting thresholds of:
- a. \$10,000 for FMA agencies; and
 - b. for relevant CAC Act bodies, above:
 - i. \$400,000 for procurements other than procurement of construction services; or
 - ii. \$9 million for procurements of construction services.

⁹ *Electronic* for the purposes of these 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.

¹⁰ FMA Regulations define a Commonwealth contract as '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'.

¹¹ FMA Regulations define an agency agreement as 'an agreement for the procurement of goods and services under which an Agency is obliged, or may become obliged, to make a payment of public money to another Agency'. This will often take the form of a memorandum of understanding.

¹² See *Guidance on Procurement Publishing Obligations* available from www.finance.gov.au.

7 Accountability and Transparency

Other Obligations

- 7.26 To enhance transparency, agencies must make available on request, the names of any sub-contractor engaged by a contractor in respect of a Commonwealth contract for procurement.
- Agencies must require contractors to agree to the public disclosure of the names of any sub-contractors engaged to perform services in relation to a Commonwealth contract for procurement.
 - Contractors must be required to inform relevant sub-contractors that the sub-contractor's participation in fulfilling a Commonwealth contract for procurement may be publicly disclosed.
- 7.27 Various other reporting and disclosure obligations apply, including:
- disclosure of procurement information for agency annual reporting purposes;
 - disclosure to the Parliament and its committees, as appropriate, in line with the *Government Guidelines for Official Witnesses before Parliamentary Committees and Related Matters*;
 - disclosure of information consistent with the *Freedom of Information Act 1982*; and
 - disclosure of discoverable information that is relevant to a case before a court.

Treatment of Confidential Information

- 7.28 When conducting a procurement and awarding a contract, agencies should take appropriate steps to protect the Commonwealth's confidential information. This includes observing legal obligations such as under the *Privacy Act 1988* and statutory secrecy provisions.
- 7.29 Agencies should therefore ensure that where it is necessary for potential suppliers to have access to confidential information for the purpose of preparing a submission that appropriate steps are taken to ensure that potential suppliers maintain the confidentiality of that information.
- 7.30 Agencies should ensure that potential suppliers' submissions are treated as confidential prior to the award of a contract and that unsuccessful submissions are kept confidential after the award of the contract to a supplier. Once a contract has been awarded the terms of the contract and successful supplier's submission are not confidential unless the agency has determined that specific information is to be kept confidential in accordance with the *Guidance on Confidentiality in Procurement*.

Accountability and Transparency 7

- 7.31 The need to maintain the confidentiality of information should always be balanced against the public accountability requirements of the Australian Government. It is therefore important for officials to plan for and facilitate appropriate disclosure of procurement information. In particular, officials should:
- a. include provisions in request documentation and contracts that alert prospective suppliers to the public accountability requirements of the Australian Government, including disclosure to the Parliament and its committees;
 - b. where relevant, include a provision in contracts to enable the Australian National Audit Office to access contractors' records and premises to carry out appropriate audits (model access clauses have been developed for agencies to tailor and, where appropriate, incorporate into relevant contracts)¹³;
 - c. consider, on a case by case basis, any request by a potential supplier for material to be treated confidentially after the award of a contract, only entering into commitments to maintain confidentiality where these are appropriate; and
 - d. be aware of the requirement for the disclosure of information consistent with the *Freedom of Information Act 1982*.
- 7.32 Where confidential information is required to be disclosed, for example following a request from a Parliamentary committee, reasonable notice in writing must be given to the party from whom the information originated.

¹³ See *Procurement Guidance – Standard Contract Clauses to Provide ANAO Access to Contractors' Information* available from www.finance.gov.au.

7 Accountability and Transparency

Dealing with Complaints

- 7.33 Procurement processes need to be based on clearly articulated and defensible evaluation criteria consistent with the procurement policy framework. Agencies' actions in undertaking procurement processes must be robust and defensible.
- 7.34 In the event that a complaint is received agencies should aim to manage this process internally, where possible, through communication and conciliation with the tenderer or supplier. Agencies must apply fair, equitable and non-discriminatory complaint handling procedures. The procedures should take account of the following:
- a. the process needs to be systematic and well understood by the parties involved;
 - b. senior management and officials independent of the process should be involved as appropriate;
 - c. complaints should be dealt with in writing;
 - d. each party must have sufficient time to appropriately respond to developments (no less than 10 days, unless urgent);
 - e. if a matter has been referred to an external body for review, agencies may be required to provide all relevant documents to that body as required by law; and
 - f. agencies must ensure that the initiation of a complaint process does not prejudice a supplier's or a potential supplier's participation in future procurement processes.
- 7.35 External options are available if independent review of a complaint is necessary. The primary external complaint mechanism is the civil legal system, which can be used to settle matters through a judicial process. The Commonwealth Ombudsman also has powers to investigate procurement complaints. The Ombudsman cannot override agency decisions, but aims to resolve matters by negotiation and persuasion and, if necessary, by making formal recommendations to senior levels of government.

DIVISION 2

Mandatory Procurement Procedures

For covered procurements

8 Mandatory Procurement Procedures

- 8.1 This Division of the CPGs outlines the Australian Government's Mandatory Procurement Procedures. Agencies must comply with the Mandatory Procurement Procedures where the estimated value of the property or services subject to a procurement indicates that it may be a covered procurement. *Covered procurements* are procurements, other than those which are exempt in accordance with Appendix A, which exceed the procurement thresholds specified below.
- 8.2 These Mandatory Procurement Procedures enhance the delivery of value for money through consistent and transparent procedures. In particular, the procedures set out in this Division complement the principles set out in Division 1 of these CPGs and are not to be interpreted or applied in a manner that diminishes or negates those principles.
- 8.3 These Mandatory Procurement Procedures also incorporate the Government's policy with respect to discharging specific international obligations in government procurement.

Procurement Thresholds

- 8.4 A procurement, except a procurement which is specifically exempt in accordance with Appendix A, is a covered procurement if the estimated value of the property or services being procured is above the relevant procurement threshold:
 - a. for procurements by FMA agencies, other than procurements of construction services, the procurement threshold is \$80,000;
 - b. for procurements by relevant CAC Act bodies, other than procurements of construction services, the procurement threshold is \$400,000; or
 - c. for procurements of construction services, the procurement threshold is \$9 million.

Valuing Procurement

- 8.5 Procurements need to be valued to determine whether they are covered procurements. The procurement value is the maximum anticipated value of a contract, including options, extensions, renewals or other mechanisms that may be executed over the life of a contract.

- 8.6 The estimated value of the property or services being procured must include:
- a. all forms of remuneration, including any premiums, fees, commissions, interest and other revenue streams that may be provided for in the proposed contract;
 - b. the total maximum value of the property or services being procured, including the value of any options in the proposed contract; and
 - c. any taxes or charges (including Goods and Services Tax).
- 8.7 For procurement by lease or rental, or procurement that does not specify a total price, the basis for estimating the value of the property or services being procured is:
- a. for a fixed-term contract where the term is 12 months or less, the total estimated value for the contract's duration;
 - b. for a fixed-term contract where the term exceeds 12 months, the total estimated value, including the estimated residual value which will be payable at the end of the contract; or
 - c. for a contract for an indefinite period or where there is doubt as to whether the contract is to be a fixed-term contract, the estimated monthly instalment multiplied by 48.
- 8.8 Where a procurement is to be conducted in multiple parts with contracts awarded either at the same time or over a period of time, with one or more suppliers, the estimated value of the property or services being procured must include the estimated total maximum value of all of the contracts.
- 8.9 Where the total maximum value of a contract over its entire duration cannot be estimated and the procurement does not fall within an exemption listed in Appendix A, the procurement must be treated as being valued over the threshold.
- 8.10 A procurement must not be divided into separate parts for the purpose of avoiding a procurement threshold.

Approaching the Market

- 8.11 An approach to the market is when an agency issues a notice inviting potential suppliers to participate in a procurement.
- 8.12 Open approaches to the market include requests for tender, requests for expressions of interest and requests for application for inclusion on a multi-use list, all of which are published on AusTender.

8 Mandatory Procurement Procedures

- 8.13 Select approaches to the market include invitations to tender in a select process in accordance with the requirements for select tendering.

Open Tendering

- 8.14 An open tender process involves publishing a request for tender and receiving all submissions delivered by the deadline.

Multi-Use Lists

- 8.15 A multi-use list is a list, intended for use in more than one procurement, of pre-qualified potential suppliers that have satisfied the conditions for participation for inclusion on the list.
- 8.16 Inclusion on a multi-use list may be used either as an essential criterion or condition for participation in an open tender process or as the basis for selecting participants in a select tender process consistent with the procedures set out in the following section.
- 8.17 To establish a multi-use list, an agency must publish on AusTender a request for application for inclusion on a multi-use list which includes:
- a. a description of the property or services, or categories of property or services, for which the list may be used;
 - b. the conditions for participation to be satisfied by potential suppliers and the methods that will be used to determine a potential supplier's compliance with the conditions for participation;
 - c. the name and address of the agency and other information necessary to contact the agency and obtain all relevant documents relating to the list; and
 - d. any time limit for submissions seeking inclusion in the list.
- 8.18 The request for application for inclusion on a multi-use list must either be published continuously or re-published annually on AusTender.
- 8.19 Agencies must include all potential suppliers that satisfy the conditions for participation on a multi-use list as soon as practicable. (Conditions for participation are discussed later in this Division.)

Select Tendering

- 8.20 A select tender process involves issuing an invitation to tender to those potential suppliers selected in accordance with the procedures outlined below.

- 8.21 When using a select tender process agencies are required to ensure that the process is non-discriminatory.
- 8.22 Three methods are permitted for conducting a select tender process. In the first two, an initial open approach to the market must be, or have been, undertaken to identify potential suppliers eligible and interested in participating in the select tender process. Agencies may conduct a select tender process from:
- a. a multi-use list;
 - b. a list of potential suppliers that have responded to a request for expressions of interest; or
 - c. a list of all potential suppliers that have been granted a specific licence or comply with a legal requirement, where the licence or compliance with the legal requirement is essential to the conduct of the procurement.

Selecting From a Multi-Use List

- 8.23 An agency may invite potential suppliers selected from a multi-use list to participate in a procurement, providing that the property or services sought are consistent with those described in the notice of multi-use list.
- 8.24 In such cases, the agency may invite all or some of the listed potential suppliers to submit tenders, provided that the largest number of potential suppliers is selected that is consistent with an efficient procurement process.

Selecting From an Expression of Interest

- 8.25 An agency may publish a request for expressions of interest and use the list of potential suppliers who lodge a compliant submission as the basis for inviting potential suppliers to submit tenders.
- 8.26 A request for expressions of interest may include requests for information and/or proposals to be considered in selecting potential suppliers to be invited to make submissions. Providing that relevant requirements and evaluation criteria have been specified in the request for expressions of interest or the associated request documentation, an agency may:
- a. assess the extent to which a submission meets the technical and performance specifications of the procurement; and
 - b. limit the number of potential suppliers that it invites to tender, based on its rating of submissions, provided that the largest number of potential suppliers is selected that is consistent with an efficient procurement process.

8 Mandatory Procurement Procedures

- 8.27 In all other cases, the agency must invite all potential suppliers that have responded to the request for expressions of interest and that meet the conditions for participation to submit a tender.

Selecting on the Basis of a Licence or Specific Legal Requirement

- 8.28 Agencies may conduct a select tender from a list of all potential suppliers that have been granted a licence or that have been determined by the appropriate agency, authority or organisation to comply with specific legal requirements that exist independent of the procurement process, provided that:
- a. the requirement for a licence or compliance with specific legal requirements is essential to the conduct of the procurement; and
 - b. the complete list of such potential suppliers is maintained by the appropriate agency, authority, or organisation and is available to the procuring agency.
- 8.29 Under such circumstances, the agency must invite all potential suppliers on the list to submit tenders.

Direct Sourcing

- 8.30 Direct sourcing refers to a procurement process, in which an agency may invite a potential supplier or suppliers of its choice to make submissions under the conditions in paragraph 8.33.
- 8.31 Direct sourcing must not be used for the purposes of avoiding competition or to discriminate against any domestic or foreign supplier. In all such circumstances, the general procurement policy framework still applies, including the requirement to achieve value for money.
- 8.32 A direct sourcing process is not required to meet the requirements for request documentation, the time limits stated in this Division of the CPGs or the requirements of paragraph 8.70 of these CPGs.

Conditions for Direct Sourcing

- 8.33 An agency may only conduct procurement through direct sourcing in the following circumstances:
- a. where, in response to an approach to the market:
 - i. no submissions were received (this includes where no submissions were received which represented value for money);
 - ii. no submissions were received that conform to the minimum content and format of submission as stated in the request documentation;

Mandatory Procurement Procedures 8

- iii. no potential suppliers satisfied the conditions for participation, and the agency does not substantially modify the essential requirements of the procurement;
- b. where, for reasons of extreme urgency brought about by events unforeseen by the agency, the property or services could not be obtained in time under open tendering procedures; or
- c. for purchases made under exceptionally advantageous conditions that only arise in the very short term, such as from unusual disposals, unsolicited innovative proposals, liquidation, bankruptcy, or receivership and which are not routine purchases from regular suppliers; or
- d. where the property or services can only be supplied by a particular business and there is no reasonable alternative or substitute for the following reason:
 - i. the requirement is for works of art; or
 - ii. to protect patents, copyrights, or other exclusive rights, or proprietary information;
 - iii. due to an absence of competition for technical reasons; or
- e. for additional deliveries of property or services by the original supplier or authorised representative that are intended either as replacement parts, extensions, or continuing services for existing equipment, software, services, or installations, where a change of supplier would compel the agency to procure property or services that do not meet requirements of compatibility with existing equipment or services; or
- f. for purchases on a commodity market¹⁴; or
- g. where an agency procures a prototype or a first property or service that is intended for limited trial or that is developed at its request in the course of, and for, a particular contract for research, experiment, study, or original development; or
- h. in the case of a contract awarded to the winner of a design contest provided that:
 - i. the contest has been organised in a manner that is consistent with this Division; and
 - ii. the contest is judged by an independent jury with a view to a design contract being awarded to the winner; or

¹⁴ For the purposes of these CPGs a *commodity market* is a recognised exchange dealing in generic, largely unprocessed, goods that can be processed and resold.

8 Mandatory Procurement Procedures

- i. for new construction services consisting of the repetition of similar construction services that conform to a basic project for which an initial contract was awarded following an open or select tender process, and where the initial approach to the market indicated that direct sourcing might be used for those subsequent construction services.
- 8.34 In accordance with the general accountability requirements set out in these CPGs, for each contract awarded through direct sourcing, agencies must prepare and appropriately file within the agency's central filing system, a written report that includes:
- a. the value and kind of property or services procured; and
 - b. a statement indicating the circumstances and conditions that justify the use of a procedure other than an open or select tender process.

Panels

- 8.35 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 (or agencies where it is intended that a number of agencies will access the panel arrangements). The respective panel arrangements must contain minimum requirements, usually including an indicative or set price or rate as appropriate for the property or services to be procured in the period of the panel arrangement.
- 8.36 A panel can be established by either open tender or select tender.
- 8.37 An agency can only approach another agency to procure property or services from an existing panel if the original request documentation and the existing agreement with the suppliers states this possibility.

Cooperative Agency Procurement

- 8.38 Cooperative Agency Procurement refers to procurement involving more than one agency as the buyer. Agencies can procure cooperatively by approaching the market together (known as clustering) or by joining the contractual arrangement or standing offer arrangement of another agency.

- 8.39 The ability of agencies to join contractual arrangements of other agencies depends on the original request documentation issued by the agency holding the contract as well as on the terms and conditions of the contract itself. Potential use by other agencies needs to have been specified in the request documentation at the start of the procurement process and be within the terms of an existing contract that an agency intends to join.
- 8.40 Agencies joining an existing contractual or standing offer arrangement must ensure that:
- a. value for money is achieved;
 - b. the property or services being procured are the same as provided for within the contract or standing offer; and
 - c. the scope of the contract or standing offer is not being altered.

Request Documentation

- 8.41 Request documentation refers to documentation provided to potential suppliers to enable them to understand and assess the requirements of the procuring agency and to prepare submissions in response to an approach to the market. Request documentation must include the information necessary to permit potential suppliers to prepare and lodge responsive submissions.
- 8.42 Accordingly, request documentation must include a complete description of:
- a. the procurement, including the nature, scope and, where known, the quantity of the property or services to be procured and any requirements to be fulfilled, including any technical specifications, conformity certification, plans, drawings, or instructional materials;
 - b. any conditions for participation, including any financial guarantees, information and documents that potential suppliers are required to submit;
 - c. any minimum content and format requirements;
 - d. all evaluation criteria to be considered in assessing submissions; and
 - e. any other terms or conditions relevant to the evaluation of submissions.
- 8.43 However, agencies are not obligated to release confidential information, information sensitive to essential security or information which may impede competition.

8 Mandatory Procurement Procedures

- 8.44 Where practicable, request documentation for an open or select approach to the market must be distributed through AusTender. Where distribution through AusTender is not practicable, the agency must promptly provide the request documentation, on request from any potential supplier.¹⁵
- 8.45 Agencies need to ensure that potential suppliers are dealt with fairly and in a non-discriminatory manner when providing information leading to, or following, an approach to the market. Agencies must promptly reply to any reasonable request for relevant information about a procurement from a potential supplier and need to take particular care when responding to such enquiries to avoid a potential supplier, or group of potential suppliers, gaining an unfair advantage in a competitive procurement process.

Specifications

- 8.46 Specifications describe the features of the property or services to be procured.
- 8.47 An agency must not use specifications or prescribe any conformity assessment procedure in order to create an unnecessary obstacle to trade.
- 8.48 In prescribing specifications for property or services, an agency must:
- a. where possible, set out the specifications in terms of performance and functional requirements; and
 - b. base technical specifications on international standards, where they exist and apply to the relevant procurement, except where the use of international standards would fail to meet the agency's requirements or would impose greater burdens than the use of recognised Australian standards.
- 8.49 A specification must not require or refer to a particular trademark or trade name, patent, copyright, design or type, specific origin, producer, or supplier, unless there is no other sufficiently precise or intelligible way of describing the requirement. In exceptional circumstances where this type of specification is absolutely necessary words such as 'or equivalent' must be included in the specification.
- 8.50 An agency may conduct market research and other activities in developing specifications for a particular procurement and allow a supplier that has been engaged to provide those services to participate in procurements related to those services. Agencies need to ensure that such a supplier will not have an unfair advantage over other potential suppliers.

¹⁵ The requirement of this paragraph in no way diminishes the operation of paragraph 7.17.

Modification of Criteria or Specifications

- 8.51 Where, during the course of a procurement, an agency modifies the evaluation criteria or specifications set out in an approach to the market or in request documentation, or amends or reissues an approach to the market or request documentation, it must transmit all modifications or amended or reissued documents:
- a. to all the potential suppliers that are participating at the time the information is amended, if known, and in all other cases, in the same manner as the original information; and
 - b. in adequate time to allow potential suppliers to modify and re-lodge their initial submissions.

Conditions for Participation

- 8.52 Agencies may specify *conditions for participation* which are requirements with which potential suppliers must be able to demonstrate compliance in order to participate in a procurement or, if applicable, class of procurement. Conditions for participation must be limited to those that will ensure that a potential supplier has the legal, commercial, technical and financial abilities to fulfil the requirements of the procurement.
- 8.53 Conditions for participation may require relevant prior experience where essential to meet the requirements of the procurement but must not specify, as a requirement, that potential suppliers have previous experience with the agency, with the Australian Government or in a particular location.
- 8.54 In assessing whether a potential supplier satisfies the conditions for participation, an agency must:
- a. evaluate financial, commercial, and technical abilities on the basis of the potential supplier's business activities, wherever they have occurred; and
 - b. base its determination solely on the conditions for participation that the agency has specified in either the approach to the market or the tender documentation.
- 8.55 An agency may exclude a potential supplier on grounds such as bankruptcy, insolvency, false declarations, or significant deficiencies in performance of any substantive requirement or obligation under a prior contract.

8 Mandatory Procurement Procedures

Minimum Time Limits

- 8.56 All potential suppliers participating in a procurement must be required to lodge submissions in accordance with a common deadline.
- 8.57 Agencies need to provide sufficient time for potential suppliers to prepare and lodge a submission in response to an approach to the market. Time limits discussed in this section represent minimum periods and should not be treated as default time limits for potential suppliers to lodge submissions.
- 8.58 The time limit for potential suppliers to lodge a submission must be at least 25 days from the date and time that an agency publishes a notice of an open approach to the market or invites potential suppliers to participate in a select tender process, except under the following circumstances where an agency may establish a time limit that is less than 25 days but no less than 10 days:
- where the agency has published details of the procurement in an Annual Procurement Plan on AusTender, at least 30 days and not more than 12 months in advance, and these details include a description of the procurement, the estimated timing of the approach to the market and the procedure to obtain request documentation;
 - where the agency procures commercial property or services¹⁶;
 - in the case of second or subsequent approaches to the market for procurements of a recurring nature; or
 - where a genuine state of urgency renders the normal time limit impracticable.
- 8.59 Where an agency has not electronically issued a notice of approach to the market, the 25 day period referred to in the preceding paragraph must be extended to 30 days.
- 8.60 The time limits stated above apply to each approach to the market. That is, a single approach to the market must comply with the time limits; or in the case of a multi-stage procurement process (such as inviting expressions of interest followed by a select tender process) each approach to the market must comply with the time limits stated above.

¹⁶ Commercial property or services are of a type that are offered for sale to, and routinely purchased by, non-Government buyers for non-Government purposes, including any modifications common in the commercial marketplace and any minor modifications not common in the commercial marketplace.

- 8.61 Where an agency intends to specify conditions for participation that require potential suppliers to undertake a separate registration or pre-qualification procedure, the agency must state the time limit for responding to the registration or pre-qualification in the approach to the market. Any such conditions for participation must be published in sufficient time to enable all potential suppliers to complete the registration and qualification procedures within the time limit for the procurement.
- 8.62 Where an agency extends the time limit for qualification or submission, or where negotiations are terminated and potential suppliers are permitted to lodge new submissions, the new time limit must apply equitably.

Late Submissions

- 8.63 Late submissions must not be accepted unless the submission is late as a consequence of agency mishandling. An agency must not penalise any potential supplier whose submission is received after the specified deadline if the delay is due solely to mishandling by the agency.
- 8.64 Agency mishandling does not include mishandling by a courier or mail service provider engaged by a potential supplier to deliver a submission. It is the responsibility of the potential supplier to ensure that the submission is dispatched in sufficient time for it to be received by the agency by the deadline.
- 8.65 Late submissions should be returned unopened to the tenderer to:
- a. ensure that they are not accidentally evaluated or compared with submissions which were submitted by the due time and date;
 - b. demonstrate to other tenderers that the process for receiving submissions is fair and impartial; and
 - c. eliminate scope for any suggestion that the submission was rejected for any reason other than because it was late.
- 8.66 It may be necessary to open a late submission where there is no return address or any indication of which tender process the submission is for. Where a submission has been opened under such circumstances the tenderer should be advised the submission was rejected due to lateness and was opened only to either obtain a return address or establish which tender process it was for.

8 Mandatory Procurement Procedures

Receipt and Opening of Submissions

- 8.67 Procedures to receive and open all submissions must guarantee fairness and impartiality and must ensure submissions are treated in confidence.
- 8.68 Where an agency provides potential suppliers with opportunities to correct unintentional errors of form between the opening of submissions and any decision, the agency must provide the same opportunity to all participating potential suppliers.
- 8.69 Further consideration can only be given to submissions which meet minimum content and format requirements.

Awarding of Contracts

- 8.70 Unless an agency determines that it is not in the public interest¹⁷ to award a contract, it must award a contract to the supplier that the agency has determined:
 - a. satisfies the conditions for participation;
 - b. is fully capable of undertaking the contract; and
 - c. whose submission is determined to provide the best value for money, in accordance with the essential requirements and evaluation criteria specified in the approach to the market and request documentation.
- 8.71 An agency may not cancel a procurement, or terminate or modify an awarded contract, so as to circumvent the requirements of the Mandatory Procurement Procedures.

Notification of Decisions

- 8.72 Where a potential supplier makes a submission in response to an approach to the market, the agency must promptly advise the potential supplier of its final decision regarding the submission.
- 8.73 On request, an agency must provide an unsuccessful potential supplier with the reasons that its submission was not successful.
- 8.74 Where an agency rejects an expression of interest or an application for inclusion on a multi-use list, or ceases to recognise a potential supplier as having satisfied the conditions for participation in either, the agency must promptly inform the potential supplier and, on request, promptly provide the potential supplier with a written explanation of the reasons for its decision.

¹⁷ 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. See *Guidance on the Mandatory Procurement Procedures*.



Appendices

A Exemptions from Mandatory Procurement Procedures

The **Mandatory Procurement Procedures** do not apply to:

1. leasing or purchase of real property or accommodation (Note: the procurement of construction services is not exempt);
2. procurement of property or services by an agency from other Commonwealth, State, Territory or Local Government entities where no commercial market exists or where legislation or general government policy requires the use of a government provider (for example tied legal services);
3. purchases funded by international grants, loans or other assistance, where the provision of such assistance is subject to conditions inconsistent with this document;
4. purchases funded by grants and sponsorship payments;
5. procurement for the direct purpose of providing foreign assistance;
6. procurement of research and development services, but not the procurement of inputs to research and development undertaken by an agency;
7. the engagement of an expert or neutral person, including engaging counsel or barristers, for any current or anticipated litigation or dispute;
8. procurement of property or services (including construction) outside Australian territory, for consumption outside Australian territory;
9. acquisition of fiscal agency or depository services, liquidation and management services for regulated financial institutions, and sale and distribution services for government debt;
10. procurement of motor vehicles;
11. procurement, by the Australian Reward Investment Alliance (ARIA) or the Future Fund Management Agency, of investment management, investment advisory, or master custody and safekeeping services for the purposes of managing and investing the regulated superannuation assets under the trusteeship of ARIA or for the purpose of investing the assets of the Future Fund;
12. procurement of blood plasma products or plasma fractionation services;
13. procurement of government advertising services;
14. procurement of property or services by, or on behalf of, the Defence Intelligence Organisation, the Defence Signals Directorate, or the Defence Imagery and Geospatial Organisation;

Exemptions from Mandatory Procurement Procedures **A**

15. contracts for labour hire but not to contracting with an intermediary (for example, a personnel firm) for the provision of an individual to supply labour (other than an intermediary that is a firm which primarily exists to provide the services of only that individual)¹⁸; and
16. procurement of property or services from a business that primarily exists to provide the services of persons with a disability.

Procurements which are exempt from the Mandatory Procurement Procedures by the operation of this Appendix, are still required to be undertaken in accordance with the principle of value for money and with the requirements of Division 1 of these CPGs.

¹⁸ A *contract for labour hire* is defined as 'a contract under which an agency engages an individual to provide labour, where the individual is engaged either directly or through a firm which primarily exists to provide the services of only that individual. This includes the appointment of an eminent individual to a special role by a Chief Executive, or the appointment of a person or persons by a Chief Executive to a governance committee (for example, an audit committee, ethics committee or steering committee), but does not include the engagement of consultants'.

B Abbreviations

ANZCERTA	Australia New Zealand Closer Economic Relations Trade Agreement
ANZGPA	Australian and New Zealand Government Procurement Agreement
APPs	Annual Procurement Plans
AUSFTA	Australia - United States Free Trade Agreement
CAC Act	<i>Commonwealth Authorities and Companies Act 1997</i>
Relevant CAC Act bodies	Bodies listed in CAC Regulation 9 as subject to section 47A of the CAC Act
CEIs	Chief Executive's Instructions
CPGs	Commonwealth Procurement Guidelines
Finance	Department of Finance and Deregulation
Finance Minister	Minister for Finance and Deregulation
FMA Act	<i>Financial Management and Accountability Act 1997</i>
FMA agencies	Departments and agencies prescribed for the purposes of the FMA Act
FMA Regulations	<i>Financial Management and Accountability Regulations 1997</i>
SAFTA	Singapore - Australia Free Trade Agreement
SME	Small and Medium Enterprises

The following definitions apply for the purposes of these CPGs:

Agency Agreement – an agreement for the procurement of property and services under which an FMA Act agency is obliged, or may become obliged, to make a payment of public money to another agency.

Annual Procurement Plan (APP) – a document through which agencies provide a short summary of the strategic procurement outlook for the coming year and information on significant procurements they plan to undertake.

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.

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

CAC Act Body – an entity which is subject to the *Commonwealth Authorities and Companies Act 1997* (CAC Act). CAC Act bodies are legally and financially separate from the Commonwealth but can be directed by the Finance Minister to apply the CPGs if they are listed in the *Commonwealth Authorities and Companies Regulations 1997* (CAC Act Regulations) as subject to section 47A of the CAC Act (relevant CAC Act bodies).

Chief Executive's Instructions (CEIs) – directions issued by the Chief Executive of an FMA Act agency under the authority of section 52 of the FMA Act and the FMA Regulations.

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*.

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

C Definitions

Coordinated procurement contracting arrangements – the Government may decide on a case-by-case basis that for certain properties or services improved value for money will be achieved through aggregation of government demand and negotiating whole-of-government procurement contracts. These processes are known as coordinated procurement contracting arrangements.

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.

Deeds of standing offer – arrangements setting out the terms and conditions, including indicative pricing, under which a supplier agrees to supply specified property or services to an agency for a specified period.

Direct sourcing – refers to a procurement process in which an agency invites a potential supplier or suppliers of its choice to make submissions. Direct sourcing may include a competitive process, for example obtaining quotes. For covered procurements, direct sourcing is permitted only under certain conditions.

Electronic – for the purposes of these CPGs includes any information provided on AusTender, and documentation provided to a supplier or potential supplier by email, facsimile or otherwise transmitted to the recipient by other 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 these 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 potential suppliers 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 Agency – a prescribed agency under the *Financial Management and Accountability Act 1997* (FMA Act).

Invitation to tender – an invitation issued to selected suppliers inviting them to submit tenders in response to an open or select tender 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 suppliers who have satisfied the conditions for participation for inclusion on the list.

Open Approach to the Market – an approach to all potential suppliers, usually in the form of an advertisement, seeking submissions as to suppliers' ability to provide certain property or services.

Open tender process – a procurement procedure in which a request for tender is published inviting all suppliers 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. A panel is defined as an arrangement under which a number of potential 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.

Procurement value – the maximum anticipated value of a contract, including options, extensions, renewals or other mechanisms that may be executed over the life of a contract. This value is used to determine whether a particular procurement is 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 chapter of these CPGs.

Reporting threshold – the value above which a procurement contract is required to be reported on AusTender.

C Definitions

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

Request for applications for a multi-use list – a published notice inviting suppliers 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 suppliers to register an expression of interest in a procurement.

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

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.

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

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.

Specification – a description of the features of the property or services to be procured.

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

