



## **Express law** *fast track information for clients*

15 October 2008

### **New Commonwealth Procurement Guidelines**

The Department of Finance and Deregulation (Finance) has undertaken a revision of the January 2005 *Commonwealth Procurement Guidelines* (CPGs), *Financial Management Guidance No. 1*. This *Express law* highlights the main changes which will impact on departments and agencies subject to the CPGs under the [updated Commonwealth Procurement Guidelines—to take effect on 1 December 2008](#).

#### ***Background***

---

The CPGs are issued by the Finance Minister under Regulation 7 of the *Financial Management and Accountability Regulations 1997* (FMA Regulations) and establish the core procurement policy framework for agencies subject to the *Financial Management and Accountability Act 1997* (FMA Act). The CPGs also apply in certain circumstances to bodies subject to the *Commonwealth Authorities and Companies Act 1997* (CAC Act).

The purpose of the CPGs is to ensure that agencies manage public resources efficiently, effectively and ethically when undertaking procurement and that these activities occur in accordance with the ongoing management and improvement of the Commonwealth's Financial Management Framework.

Achieving value for money when undertaking procurement remains a strong focus throughout the CPGs. However, in the new CPGs there is further emphasis on compliance with government policies and, in particular, coordinated procurement which aims to enable the Australian Government to achieve better terms proportionate to the value of its participation in certain market sectors and to increase efficiency by reducing the number of approaches to market. There is also a greater focus on adopting processes which reflect the size and risk of a procurement with the recommendation that simple procurements should be undertaken using simple processes.

#### ***Key changes to the Commonwealth Procurement Guidelines: introduction***

---

##### **Breaches of the financial management framework (paragraph 1.6)**

Paragraph 1.6 of the new CPGs states that breaches of the financial management framework (including in relation to procurement) may attract a range of criminal, civil or administrative remedies, including under the FMA Act, the *Public Service Act 1999* and the *Crimes Act 1914*.

### **Definition of 'procurement' (paragraph 2.4)**

The new CPGs include an expanded list of items which are specifically excluded from the scope of procurement. These items are mainly incorporated from *Finance Circular 2006/02: Commonwealth Procurement Guidelines—Clarification* (the Clarification Circular), which Finance has advised will be withdrawn from 1 December 2008. They are:

- investment (or divestment)
- sales by tender
- purchases of property or services for resale or of property or services used in the production of goods for resale
- any property not acquired through the expenditure of public money—for example, a right to pursue a legal claim for negligence
- statutory appointments
- appointments made by a Minister using the executive power—for example, the appointment of a person to an advisory board, or
- 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.

### **Applying necessary measures (paragraph 2.7)**

Previously in the CPGs, the discretion of a Chief Executive to apply measures necessary for the maintenance and restoration of international peace and security, the protection of human life, essential security interests or national treasures applied to Division 2 of the CPGs only. This has now been moved to Division 1. The effect of this change is that this discretion applies to the CPGs more generally and is no longer limited to the Mandatory Procurement Procedures (MPPs) outlined in Division 2. This is consistent with the Clarification Circular.

### **Chief Executive Instructions (paragraph 3.3)**

The purpose of the Chief Executive Instructions (CEIs) in the area of procurement has been expanded in the new CPGs. Paragraph 3.3 of the CPGs highlights the importance of the CEIs in providing guidance on procurement processes.

### **Coordinated procurement contracting (paragraphs 3.5 to 3.7)**

The Commonwealth is currently in the process of developing a centralised, coordinated procurement approach in relation to certain procurements. Paragraphs 3.5 to 3.7 have been included in the new CPGs to outline agency obligations in relation to coordinated procurement contracting arrangements. This may include the establishment of whole-of-government panels which agencies are required to use unless specifically exempted.

The purpose of these arrangements is to reduce duplication between agencies in meeting common procurement requirements and to improve value for money by using the government's combined purchasing power in particular market sectors.

### **Policies that interact with procurement (paragraphs 3.9 to 3.12)**

Previously under the CPGs, Division 3 expressly outlined the framework for government policies impacting on procurement by FMA agencies. In the new CPGs, the explanation of how policies interact with procurement is condensed within paragraphs 3.9 to 3.12 and the examples of policies previously provided are removed. The CPGs no longer reference *Financial Management Guidance 10: Complying with Legislation and Government Policy in Procurement* (FMG 10), although Finance has advised that guidance on this matter will continue to be available on the Finance website.

### **Section 44 of the Financial Management and Accountability Act (paragraph 3.10)**

The CPGs also clearly state that Chief Executives must promote the proper use of resources within the framework of policies set by the government. In effect, this means 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, such as the CPGs.

It is noted that this requirement echoes the proposed new definition of 'proper use' which is inserted into section 44 of the FMA Act by the amendments to the FMA Act that received Royal Assent on 20 September 2008.

### **Key changes to the Commonwealth Procurement Guidelines: Division 1**

---

Outlined below are some of the substantive changes to Division 1 of the CPGs which apply to all procurement.

#### **Value for money assessment (paragraph 4.4)**

Paragraph 4.4 of the new CPGs, which outlines factors to be taken into account in assessing whole-of-life value for money, has been refined.

#### **Risk management (paragraph 6.9)**

The general principle in risk management remains that the party best placed to manage the risk should bear the risk. The CPGs have been amended to clearly state a balanced approach to risk allocation in contracts. In particular, under paragraph 6.9, if an agency is best placed to manage a particular risk, it should not seek to inappropriately transfer that risk to a supplier.

#### **Limiting a contractor's liability to the Commonwealth (paragraphs 6.11 to 6.16)**

Under the new CPGs, agencies must undertake a risk assessment as an initial exercise to determine whether limiting a contractor's liability through a liability cap or indemnity would be appropriate, and if so, what limits may be suitable. Such a limit on liability must be considered within the determination of value for money. Furthermore, if an agency decides to limit a contractor's liability it should also develop and implement a risk management plan.

For more complex procurements, agencies should include a draft contract with request documentation (such as requests for tender or requests for proposals) and potential suppliers should be required to indicate compliance with the entire contract including being required to separately identify any clauses of non-compliance or partial compliance, clearly providing details and costs for any alternative clauses (see paragraph 6.16).

### **Compliance with laws (paragraph 6.20)**

The new CPGs specify that agencies should include contract provisions which require contractors to comply with materially relevant laws. Furthermore, agencies should (as far as practicable) require suppliers to apply this requirement to subcontractors.

### **Subcontractors (paragraph 6.20)**

Paragraph 6.20 also states that contractors must be able to make available to the agency details of all subcontractors engaged in respect of a procurement contract. Again, contracts entered into between an agency and the supplier will need to include provision for this requirement.

### **Unpaid employee entitlement judicial decisions (paragraph 6.21)**

Under the new CPGs, agencies must not enter into contracts with suppliers who have a judicial decision (not including decisions under appeal) against them in respect of unpaid employee entitlements. Agencies should seek a declaration from tenderers confirming that there are no such unsettled judgements.

### **Documentation (paragraph 7.12)**

Agencies should ensure that there is a written contract in existence in a procurement process. If a written contract with the supplier does not exist, such a contract or sufficient written documentation should be formulated as soon as practicable.

### **AusTender requirements (paragraphs 7.17 to 7.20)**

Agencies must make available for download from AusTender, to the extent practicable, all relevant documentation providing information on the approach to market. Furthermore, agencies must ensure that the information included in an open approach to market advertised through other avenues is the same as the information published on AusTender. Also, where an agency is required to publish documentation on AusTender, the information in any other form (for example a printed version) of the document must be the same as published on AusTender.

### **Reporting requirements (paragraphs 7.24 to 7.25)**

While the reporting requirements in the CPGs have been amended, there are no substantive changes from the previous policy position. The amendments reflect the *Financial Management Guidance 15: Guidance on Procurement Publishing Guidelines* (FMG 15), which was published in July 2007.

### **Other obligations (paragraph 7.26)**

Additional reporting and disclosure obligations have been included in the CPGs to enhance transparency in procurement. In relation to a Commonwealth contract for procurement, agencies must:

- make available on request, the name of any subcontractor engaged by a contractor, and
- require contractors to agree to the public disclosure of the names of any subcontractors engaged to perform services.

In addition, contractors must be required to inform relevant subcontractors that their participation in a Commonwealth contract for procurement may be publicly disclosed.

#### **Treatment of confidential information (paragraphs 7.28 to 7.32)**

Agencies should take appropriate steps to protect the Commonwealth's confidential information during a procurement process. This includes ensuring that potential suppliers maintain the confidentiality of any information released to assist in the preparation of submissions (see paragraph 7.29).

The new CPGs also state that agencies should keep the submissions of potential suppliers confidential during the procurement process prior to the award of a contract. Agencies should also keep unsuccessful submissions confidential once a contract has been awarded (see paragraph 7.30).

Agencies should also comply with the public accountability requirements of the Australian Government. In particular, agencies should expressly include in all request documentation and contracts provisions regarding public accountability and disclosure requirements and where relevant, include provisions enabling ANAO audit and access (see paragraph 7.31).

*Financial Management Guidance 3: Guidance on Confidentiality in Procurement*, July 2007, is also referenced.

#### **Key changes to the Commonwealth Procurement Guidelines: Division 2**

---

Division 2 of the CPGs outlines the MPPs to be applied to covered procurements. The order of the MPPs has been reorganised in the new CPGs. We note that only the main substantive changes are highlighted below. Some of the changes to the MPPs reflect clarifications that were identified in Finance guidance or circulars. These are not necessarily highlighted below.

#### **Conditions for direct sourcing (paragraph 8.33a.i)**

The circumstances in which an agency may conduct procurement through direct sourcing under the CPGs have been clarified to include market approaches where no submissions were received which represented value for money. This reflects the position outlined in the Clarification Circular.

#### **Request documentation (paragraph 8.44)**

The new CPGs also outline that, where practicable, all request documentation for an open or select approach to market must be distributed through AusTender. Where this is not practicable, agencies must promptly provide request documentation on request. It is noted that this paragraph does not diminish the operation of paragraph 7.17 (see comments above).

#### **Agency mishandling and late submissions (paragraphs 8.64–8.66)**

The new CPGs now clearly provide that late submissions must not be accepted unless the submission is late as a consequence of agency mishandling. Mishandling by a courier or mail service provider engaged by a potential supplier to deliver a submission does not constitute agency mishandling, and it is the supplier's responsibility to ensure that there is sufficient time for the agency to receive the submission (see paragraph 8.64).

Furthermore, agencies are now advised that any late submissions received should be returned unopened to the tenderer unless it is necessary to open the submission to identify a return address or indication of which tender process the submission is for (see paragraphs 8.65 and 8.66).

### **Exemptions from Mandatory Procurement Procedures (Appendix A)**

Additional exemptions from the MPPs have been included in Appendix A of the new CPGs. Some of these were previously identified in Finance Circulars.

Contracts for labour hire but not contracts with an intermediary (i.e. 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) are now specifically exempt from the MPPs.

Also exempt from the MPPs is the procurement of goods and services from businesses which primarily exist to provide the services of persons with a disability.

It is also noted that the exemption for procurement by the PSS Board or CSS Board has been replaced in the new CPGs with an exemption for procurement by the Australian Reward Investment Alliance and the Future Fund Management Agency.

### ***What agencies need to do now***

---

Finance has advised that the new CPGs are to be applied to procurement processes that commence from 1 December 2008. If you are planning a procurement process that will commence on or after that date, you need to review your documentation and proposed processes to ensure compliance. AGS can assist you in doing this. Please contact one of the contacts mentioned below.

The new CPGs may require some amendments to CEIs and current template documents, including request documents such as EOIs and RFTs as well as contracts and standing offers. AGS can also assist you in doing this. Please contact our precedent co-ordinator, Kenneth Eagle, T 03 9242 1290, or one of our other procurement specialists listed below.

*For further information please contact:*

[Henry Addison](#) T 02 6253 7264 [CANBERRA]

[Tony Beal](#) T 02 6253 7231 [CANBERRA]

[John Berg](#) T 02 9581 7624 [SYDNEY]

[Peter Blennerhassett](#) T 07 3360 5767 [BRISBANE]

[Peter Bowen](#) T 03 6210 2104 [HOBART]

[Lee-Sai Choo](#) T 08 9268 1137 [PERTH]

[Garth Cooke](#) T 03 9242 1494 [MELBOURNE]

[James Docherty](#) T 08 8943 1405 [DARWIN]

[Kenneth Eagle](#) T 03 9242 1290 [MELBOURNE]

[Peter Kidd](#) T 02 6253 7210 [CANBERRA]

[Simon Konecny](#) T 02 9581 7585 [SYDNEY]

[Paul Lang](#) T 03 9242 1322 [MELBOURNE]

[Lynette Lenaz](#) T 03 9242 1358 [MELBOURNE]

[Cathy Reid](#) T 03 9242 1203 [MELBOURNE]

[Linda Richardson](#) T 02 6253 7207 [CANBERRA]

[John Scala](#) T 03 9242 1321 [MELBOURNE]

[Adrian Snooks](#) T 02 6253 7192 [CANBERRA]

[Peter Watson](#) T 08 8205 4287 [ADELAIDE]

---

**Important: The material in *Express law* is provided to clients as an early, interim view for general information only, and further analysis on the matter may be prepared by AGS. The material should not be relied upon for the purpose of a particular matter. Please contact AGS before any action or decision is taken on the basis of any of the material in this message.**

This message may contain confidential or legally privileged information. Only the addressee has the right to use or disseminate this information. If you think it was sent to you by mistake, please delete all copies and advise the sender. For the purposes of the *Spam Act 2003*, this email is authorised by AGS. Find out more about AGS at <http://www.ags.gov.au>.

If you do not wish to receive similar messages in the future, please reply to: <mailto:unsubscribe@ags.gov.au>