



fact sheet

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Commonwealth Procurement Rules

This fact sheet provides a summary of key aspects of the Commonwealth Procurement Rules (CPRs): see <http://www.finance.gov.au/procurement/procurement-policy-and-guidance/commonwealth-procurement-rules/>. It is important to consult the CPRs to get full details of the requirements. The legislation referred to in this fact sheet can be accessed at <http://www.finance.gov.au/resource-management/pgpa-legislation-rules-and-associated-instruments/>.

The Commonwealth Procurement Rules

The CPRs were issued under s 105B of the *Public Governance, Performance and Accountability Act 2013* (PGPA Act) with effect from 1 July 2014. The CPRs are the core of the procurement framework and set out the rules for procuring goods and services for non-corporate Commonwealth entities and prescribed corporate Commonwealth entities listed in s 30 of the Public Governance, Performance and Accountability Rule 2014 (PGPA Rule). These entities are referred to in the CPRs as 'relevant entities'.

The procurement framework also includes Finance circulars, web-based guidance developed by the Department of Finance (available at <http://www.finance.gov.au/procurement/procurement-policy-and-guidance/buying/>) and, in each entity, your accountable authority instructions and delegations.

Accountable authorities of all Commonwealth entities must govern the entity in a way that promotes proper use and management of public resources, where 'proper' means efficient, effective, economical and ethical (PGPA Act s 15). Accountable authorities of non-corporate Commonwealth entities must govern the entity in a way that is not inconsistent with the policies of the Australian Government (PGPA Act s 21).

All officials of Commonwealth entities are subject to particular duties set out in ss 25–29 of the PGPA Act, some of which will be relevant to procurement activities. In particular, officials must not improperly use their position, or information obtained because they are an official to gain or seek to gain a benefit or advantage for themselves or any other person (ss 27 and 28). Moreover, officials must disclose details of any material personal interest that relates to the affairs of the entity (s 29).

Division 1: Rules for all procurements

Key underpinnings

Division 1 of the CPRs applies to all procurements (3.5, 3.6). A key requirement of Division 1 is value for money – this underpins the requirements of the division as a whole (3.2, 4.4).

Considering whether a procurement will deliver value for money

Where a business requirement arises, officials should consider whether a procurement will deliver the best value for money, taking into consideration (4.2):

- stakeholder input
- the scale and scope of the business requirement
- the relevant entity's resourcing and budget
- obligations and opportunities under other existing arrangements
- relevant Commonwealth policies
- the market's capacity to competitively respond to a procurement.

Achieving value for money

Officials must be satisfied, after reasonable inquiries, that the procurement to be undertaken achieves a value-for-money outcome (4.4). To achieve this outcome, relevant entities are required to:

- encourage competitive and non-discriminatory processes: relevant entities should consider the costs of participating in the procurement when designing a process that is commensurate with the scale, scope and risk of the proposed procurement (5.2), must treat all potential suppliers equitably (5.3), and need to apply procurement processes that provide appropriate opportunities for small and medium enterprises (SMEs) to compete for government business (5.4)
- use public resources in an efficient, effective, economical and ethical manner that is not inconsistent with the policies of the Commonwealth (6.1–6.8)
- make decisions in an accountable and transparent manner (7.1–7.24)
- consider the risks (8.1–8.3)
- conduct a process commensurate with the scale and scope of the business requirement (4.4).

Coordinated procurement

Where available, relevant entities must use coordinated procurements (whole-of-government arrangements for procuring goods and services) unless an exemption is granted (4.9–4.10). A list of coordinated procurements can be found at www.finance.gov.au/procurement/wog-procurement/.

Methods of procurement and requirement to estimate value of procurements

Procurement is conducted by (9.1):

- open tender: this involves publishing an open approach to market and inviting submissions (9.8)
- prequalified tender: this involves publishing an approach to market inviting submissions from all potential suppliers on (9.9):
 - a shortlist of potential suppliers that responded to an initial open approach to market on AusTender
 - a list of potential suppliers selected from a multi-use list established through an open approach to market
 - a list of all potential suppliers that have been granted a relevant licence or comply with a relevant legal requirement
- limited tender: in certain circumstances agencies may be able to approach one or more potential suppliers directly (9.10–9.11).

Before making a decision on which of these procurement methods is used, officials must estimate the expected value of a procurement (9.2) including options, extensions and renewals. The expected value is the maximum value of the proposed contract and must include (9.2–9.3):

- all forms of remuneration that may be provided for in the contract
- the value of the goods and services being procured, including the value of any options
- any taxes or charges.

There are additional rules for estimating the expected value of procurements where a procurement is to be conducted in multiple parts (9.4–9.5) or where the maximum value of a procurement over its entire duration cannot be estimated (9.6).

The estimated expected value of the procurement will also determine whether that procurement is subject to the additional rules in Division 2 of the CPRs (see discussion of Division 2 following).

Cooperative agency procurement

Relevant entities can procure cooperatively, by approaching the market together or by joining an existing contract of another relevant entity (4.11–4.13).

Third-party procurement

Provided that it achieves value for money, procurement may also be conducted by a third party on behalf of a relevant entity. However relevant entities must not use third-party arrangements to avoid the rules in the CPRs when procuring goods and services (4.15).

The procurement process

During the procurement process:

- Officials must act ethically, which includes (6.6):
 - recognising and dealing with conflicts of interest
 - dealing with potential suppliers, tenderers and suppliers equitably, including by seeking internal or external advice on probity issues and not accepting inappropriate gifts or hospitality
 - carefully considering the use of public resources
 - complying with all directions, including their accountable authority instructions, in relation to gifts or hospitality, the Australian Privacy Principles of the *Privacy Act 1988* and the security provisions of the *Crimes Act 1914*.
- Relevant entities must not seek to benefit from dishonest, unethical or unsafe supplier practices, which includes not entering into contracts with tenderers who have had a judicial decision against them (not including decisions under appeal) relating to employee entitlements and who have not satisfied any resulting order (6.7).
- Relevant entities must establish processes for the identification, analysis, allocation and treatment of risk and should ensure that risks are borne by the party best placed to manage them (8.2–8.3). Relevant entities should consider these risks when making decisions relating to contract terms, value-for-money assessments and approvals of proposals to spend relevant money, although it should also be noted that such risk assessment and management should be commensurate with the scale, scope and risk of the procurement (8.2).
- Officials should include provisions in request documentation and contracts that alert potential suppliers to the public accountability requirements of the Australian Government and, where relevant, provisions in contracts to enable ANAO audit and access (7.22).

Records

Officials must maintain appropriate documentation for each procurement commensurate with the scale, scope and risk of the procurement. Documentation must be retained in accordance with the *Archives Act 1983* (7.2, 7.4). After the entity has selected a supplier, it must have appropriate documentation with that supplier, such as a written contract or purchase order (7.3).

Notification to the market

Relevant entities must use AusTender to publish:

- an annual procurement plan (7.7–7.8)
- open tenders and, to the extent practical, make relevant request documentation available. Relevant entities may use AusTender to publish prequalified or limited tender approaches to market and to make relevant request documentation available (7.9). Any additional notification provided through other avenues must include the same details as those published on AusTender (7.11). Similarly, where a relevant entity provides request documentation or any other document already published on AusTender, in another form (such as a printed version), that documentation must be the same as that published on AusTender (7.12).
- a notice of a multi-use list. How long the multi-use list is open to applications will determine when an approach to market inviting applications must be published on AusTender (7.13).

Request documentation made available by a relevant entity should include relevant evaluation criteria to enable the proper identification, assessment and comparison of submissions on a fair, common and appropriately transparent basis (7.10).

Confidential information

Relevant entities should protect the Commonwealth's confidential information (7.20).

Relevant entities must also treat all submissions from potential suppliers as confidential before and after the award of a contract. However the terms of any resultant contract, including parts drawn from the successful submission, are not confidential (unless this has been determined and identified by the relevant entity in the contract) (7.21).

See Finance guidance on:

Confidentiality throughout the procurement cycle (see <http://www.finance.gov.au/procurement/procurement-policy-and-guidance/buying/contract-issues/confidentiality-procurement-cycle/principles.html>)

Transparency in Australia Government procurement (see <http://www.finance.gov.au/procurement/procurement-policy-and-guidance/buying/accountability-and-transparency/>)

Additional reporting on confidentiality (see <http://www.finance.gov.au/procurement/procurement-policy-and-guidance/buying/reporting-requirements/reporting-confidentiality/principles.html>)

Providing information

Officials must:

- on request, promptly provide to eligible potential suppliers all information necessary to permit that potential supplier to prepare and lodge submissions (7.14)
- after the rejection of a submission or award of a contract, inform affected tenderers of that decision. Debriefings must also be made available, on request, to both successful suppliers and unsuccessful tenderers (7.15).

Reporting obligations

Relevant entities must, within 42 days of entering into or amending a contract, report that contract or amendment on AusTender if they are valued at or above the reporting threshold (7.16–7.17).

Additionally, all standing offers, regardless of value, must be reported on AusTender within 42 days of the agency entering into or amending such arrangements (7.18). Officials should report the original procurement method used to establish the standing offer when they report procurements from standing offers (9.13).

Subcontractor details

Relevant entities must, on request, make available the names of any subcontractors engaged by a contractor in respect of a contract. As part of this, relevant entities must require contractors to agree to this disclosure, and those contractors must inform relevant subcontractors that their participation may be publicly disclosed (7.19).

Contract end dates

Where a contract does not specify an end date, it must allow for periodic review and subsequent termination by the relevant entity, if the relevant entity determines it no longer achieves value for money (4.14).

Division 2: Additional rules for procurements at or above the relevant procurement threshold

The additional rules in Division 2 of the CPRs apply to procurements if the expected value (see 9.2–9.6) of the procurement is at or above, the relevant procurement threshold (9.7, 10.2) and an exemption in Appendix A is not utilised. These thresholds are:

- \$80,000 for non-corporate Commonwealth entities and \$400,000 for prescribed corporate Commonwealth entities (except for procurements of construction services)(9.7.a–9.7.b)
- \$7.5 million for procurements of construction services (9.7.c).

Conditions for limited tender

A relevant entity must only conduct procurement at or above the relevant procurement threshold through limited tender in certain specified circumstances (10.3), for example where a relevant entity received no submissions in response to an approach to market (10.3.a.i). For these types of procurements, relevant entities must also comply with additional reporting requirements (10.5), although are not required to meet certain other Division 2 additional rules as stated in 10.4.

Additional rules for request documentation and provision of information

Officials must include in the request documentation a complete description of (10.6):

- the procurement, including the nature and quantity of the goods and services and any technical specifications
- any conditions for participation
- any minimum content and format requirements
- evaluation criteria
- any other terms or conditions relevant to the evaluation of submissions.

Relevant entities must also ensure that potential suppliers and tenderers are dealt with fairly and in a non-discriminatory manner when the entity provides information leading to, or following, an approach to market. This requires the entity to promptly reply to any reasonable request from a potential supplier for relevant procurement information and ensure that this response does not give a potential supplier an unfair advantage (10.8).

Specifications

Request documentation may include specifications. If so, relevant entities:

- must set out specifications as performance/functional requirements (10.9.b) and base technical specifications on international standards (10.9.c)
- must not use specifications or prescribe any conformity assessment procedure in order to create an unnecessary obstacle to trade (10.9.a)
- must not require or refer to a particular brand, supplier or similar in specifications unless unavoidable (10.10)
- may conduct market research to develop specifications (10.11).

Modification of evaluation criteria or specifications

Relevant entities must transmit all modifications, or amended or reissued request documentation to all potential suppliers and in adequate time to allow them to modify and re-lodge their submissions if required (10.12).

Conditions for participation

Relevant entities may specify conditions for participation in request documentation. Those conditions:

- must be limited to ensuring potential suppliers have the legal, commercial, technical and financial abilities to fulfil the requirements of the procurement (10.13)
- may require relevant prior experience, but must not specify as a requirement that potential suppliers have previous experience with the relevant entity, the Australian government or in a particular location (10.14)
- may exclude a tenderer on grounds such as bankruptcy, insolvency, false declarations or significant deficiencies in performing any substantive requirement or obligation under a previous contract (10.16).

When assessing whether a tenderer satisfies conditions for participation, entities must evaluate financial, commercial and technical abilities on the basis of the tenderer's business activities and base its determination solely on the conditions for participation (10.15).

Minimum time limits

For lodgment of submissions in response to each approach to market (10.21), relevant entities must provide potential suppliers:

- a common deadline to lodge submissions (10.17)
- sufficient time to prepare and lodge submissions, and in any case at least 25 days (or 30 days if the approach to market is not issued electronically) (10.18–10.20)
- at least 10 days in limited circumstances – for example, for commercial goods and services, or where there is a genuine state of urgency which renders the normal time limit impracticable (10.19).

If a relevant entity requires potential suppliers to undertake a separate registration procedure, the relevant entity must state the time limit for that procedure in the approach to market (10.22).

If a relevant entity extends the time limit for registration or submission, or potential suppliers are permitted to lodge new submissions, the relevant entity must apply the new time limit equitably (10.23).

Late submissions

Relevant entities:

- must not accept late submissions unless the submission is late as a consequence of mishandling by the entity (this does not include where there is mishandling by a courier or mail service provider engaged by a potential supplier to deliver a submission – potential suppliers remain responsible for the dispatch of submissions in sufficient time to be received by the entity by the deadline) (10.24–10.25)
- must not penalise any potential supplier whose submission is not received within the time because the entity has mishandled it (10.24)
- should generally return late submissions unopened (10.26–10.27).

Receiving and opening submissions

When receiving and opening submissions, relevant entities:

- must guarantee fairness and impartiality and treat submissions in confidence (10.28)
- may provide tenderers with opportunities to correct unintentional errors of form between the opening of submissions and any decision – however the entity must provide any such opportunity equitably to all tenderers (10.29)
- can only give further consideration to submissions which meet minimum content and format requirements (10.30).

Awarding contracts

Unless a relevant entity determines that it is not in the public interest to award a contract, it must award a contract to the tenderer that the entity has determined satisfies the conditions for participation, is fully capable of undertaking the contract and will provide the best value for money in accordance with the essential requirements and evaluation criteria specified in the approach to market and request documentation (10.31).

Cancelling procurement or terminating a contract

Relevant entities must not cancel a procurement, or terminate or modify an awarded contract, in order to avoid the rules in Division 2 of the CPRs (10.32).

Further information and guidance on applying the CPRs are available on Finance's procurement policy website (3.3) at www.finance.gov.au/procurement.

More information

If you require further legal advice about issues in relation to the CPRs, PGPA Act and Rule or procurement generally, please contact:

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