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## **Draft Commonwealth Procurement Guidelines issued by the Department of Finance and Administration**

The Department of Finance and Administration (Finance) has issued draft Commonwealth Procurement Guidelines (draft CPGs) incorporating changes to implement Australia's obligations under Chapter 15 of the Australia – United States Free Trade Agreement (FTA). In addition, a draft Ministerial Direction has been prepared under section 47A of the *Commonwealth Authorities and Companies Act 1997* (CAC Act) that will require, for the first time, certain CAC bodies to comply with the CPGs. It is proposed that the draft CPGs will apply from 1 January 2005.

### *Introduction*

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The draft CPGs continue to apply to the procurement of property and/or services by agencies. The general procurement policy framework is set out in Part 1 of the draft CPGs. In addition, to implement FTA requirements, there are now mandatory procurement procedures for 'covered procurements'. These are set out in Part 2 of the draft CPGs. An overview of the mandatory procurement procedures is set out below.

### *Open competition and non-discrimination*

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Under the procurement policy framework, the core principle underpinning Australian Government procurement remains 'value for money', based on whole of life costing. Value for money is enhanced by:

- *encouraging competition* by ensuring non-discrimination in procurement and using competitive procurement process;
- promoting the *efficient, effective and ethical* use of resources; and
- making decisions in an *accountable and transparent* manner.

The concepts of non-discrimination and competitive procurement processes clearly reflect the influence of the FTA. It is significant that in the current and previous versions of the CPGs, there was a recognition that non-competitive procurement processes may be used where this could be justified on a value for money basis. By contrast, the draft CPGs have a greater focus on competition.

In addition, the draft CPGs require agencies to consider the procurement of goods and services on the basis of their suitability for their intended purpose, and not on the basis of their origin. This will mean there is far less scope to include industry development or local content requirements in tender documentation, although agencies are still encouraged to source at least 10% of their purchases by value from SMEs.

The focus on open competition is also reflected in the proposed new requirement for agencies to publish annual procurement plans to enable suppliers to be better aware about procurement opportunities.

## ***Mandatory procurement procedures***

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### **Covered procurements**

The mandatory procurement procedures in Part 2 of the draft CPGs apply to 'covered procurements'. Covered procurements are procurements that exceed the following monetary thresholds:

- \$80,000 for procurements in FMA agencies, other than for construction services;
- \$400,000 for procurements in relevant CAC bodies, other than for construction services; and
- \$6 million for procurements of construction services by FMA agencies or relevant CAC bodies.

However, certain kinds of procurements are excluded from the mandatory procedures (although not necessarily from the other parts of the draft CPGs). These are set out in Appendix A to the draft CPGs, and include leasing of real property, purchases funded by grants or sponsorships and the procurement of research and development services.

### **Open, select and direct sourcing**

The mandatory procurement procedures have a presumption in favour of open approaches to the market, that is, approaches inviting submissions from any interested business. A more restricted procurement process (ie 'select tendering' or 'direct sourcing') is permitted only in limited circumstances.

Select tendering may be used only where an agency has a basis for identifying all interested (or potentially interested) eligible suppliers. However, this does not mean that an agency can rely on its 'knowledge of the market' to select suppliers for inclusion in its tender process. Agencies may use select tendering only by shortlisting from an initial expression of interest, or by using a multi-use list (eg the current endorsed supplier arrangement) or by issuing a tender to all suppliers who comply with essential external legal requirements (eg suppliers who hold a particular kind of licence).

An agency may use direct sourcing only in certain defined circumstances. Direct sourcing is where an agency invites one or more suppliers of its choice to tender. The circumstances include cases of extreme urgency brought about by unforeseen events, purchases made under exceptionally advantageous conditions that only arise in the very short term, or in particular cases where there is no reasonable alternative or substitute supplier.

### **Other particular requirements**

Part 2 of the draft CPGs also sets out particular requirements that must be met by agencies in relation to the content of their tender documentation and the tender evaluation and contract award processes. In brief, agencies are required to ensure that:

- conditions for participation are limited to requirements aimed at ensuring a supplier has the legal, commercial, technical and financial abilities to fulfil the requirements of the procurement. These conditions may include a requirement for relevant prior experience, but not a requirement that the relevant prior experience is with a particular agency, the Australian Government or in a particular location;

- tender documentation is available electronically (where possible) and fully describes the nature of the procurement, conditions for participation, evaluation criteria to be used, and other terms and conditions relevant to tender evaluation;
- as far as possible, any technical specifications are specified in terms of functional and performance requirements and based on international standards where they exist;
- a time limit of at least 25 days is given for suppliers to lodge submissions (except in certain circumstances which may permit a lesser period, but no less than 10 days);
- all tenders are assessed fairly and impartially and are treated in confidence;
- contracts are awarded to complying tenders that represent the 'best value for money'; reasons are given to unsuccessful suppliers.

Agencies should also be aware of the proposed requirement that they put in place an internal review process for dealing with any complaints arising from procurement processes.

Agencies will be required to ensure that suppliers have fair, equitable and non-discriminatory access to the review process. The involvement of an independent probity auditor in the review process may be invaluable in assisting with the conciliation and resolution of any complaints.

### ***Application of the draft CPGs to CAC bodies***

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The decision to apply Part 2 of the draft CPGs to certain CAC bodies is also significant. The current CPGs apply to FMA agencies and not to CAC bodies. However, it is important to note that the draft Ministerial Direction will not require the relevant CAC bodies to also comply with other parts of the draft CPGs, that is, the CAC bodies will not be subject to those parts of the CPGs that set out the requirements of FMAR regulations 9, 10 and 13. CAC bodies will also not be subject to Part 3 of the draft CPGs which deals with other Government policies that interact with procurement.

### ***Further information***

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A more detailed analysis of the draft CPGs and the current version of the CPGs will be contained in the forthcoming edition of Commercial Notes.

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