



Express law fast track information for clients

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New Commonwealth Procurement Rules

The Department of Finance and Deregulation (Finance) released the [Commonwealth Procurement Rules](#) (CPRs) on 10 April 2012. The CPRs will come into effect on 1 July 2012. The CPRs replace the Commonwealth Procurement Guidelines (CPGs) as the core of the procurement framework. This *Express Law* highlights the main changes which impact on departments and agencies that are subject to Finance's procurement policy.

Introduction

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

The procurement framework also includes web-based guidance developed by Finance (available at <http://www.finance.gov.au/procurement/procurement-policy-and-guidance/index.asp>), Finance circulars and Chief Executive's Instructions (CEIs), which a chief executive may use to set out agency-specific operation rules.

The CPRs set down *rules* for Australian Government procurement and articulate the Australian Government's requirements for officials performing duties in relation to procurement. The change in name from 'Commonwealth Procurement *Guidelines*' to 'Commonwealth Procurement *Rules*' reinforces the requirement in FMA reg 7 that officials comply with the CPRs when performing duties in relation to procurement. As was the case with the CPGs, the use of the word 'must' in the CPRs indicates a mandatory requirement, whilst 'should' indicates a practice that, while not compulsory, is considered good practice.

Achieving value for money when undertaking procurement remains the core principle for Australian Government procurement. Competition, proper use of resources and accountability and transparency are also still key elements in Australian Government procurement. However, the CPRs clarify a number of issues. There have also been changes in the terminology used and an increased focus on alternative solutions to the procurement process; risks and risk management; and conducting a procurement process that is commensurate with the scale and scope of the procurement.

Streamlining of Mandatory Requirements

The CPRs retain the structure of the CPGs and are set out in 2 divisions. Division 1 contains the rules that apply to all procurements regardless of the value or whether any exemptions apply and Division 2 contains the additional rules applying to procurements valued at or

above the relevant procurement threshold. The CPRs principally focus on the rules that agencies must comply with when conducting a procurement. Guidance and good practice developed to assist agencies during the procurement process is now concentrated in other areas of the procurement framework, such as the web-based guidance developed by Finance and Finance circulars.

This streamlining should make it easier for agencies to determine which requirements relating to procurements are mandatory and which are good practice.

Key Changes in Terminology

There have been a number of changes in terminology used in the CPRs. Some of these are discussed below.

The 3 methods of procurement

Chapter 9 of the CPRs provides that Australian Government procurement is conducted by one of 3 methods – open tender, prequalified tender or limited tender.

The term ‘open tender’ has been retained from the CPGs and involves publishing an open approach to market and inviting submissions.

A ‘prequalified tender’ is similar to a ‘select tender’ under the CPGs and involves publishing an approach to market inviting submissions from all potential suppliers on:

- 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 or
- 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.

‘Limited tender’ replaces the term ‘direct sourcing’ and involves an agency approaching one or more potential suppliers to make submissions where the process does not meet the rules for open tender or prequalified tender. For procurements at or above the relevant procurement threshold, limited tender can only be conducted in certain circumstances (see Division 2).

Definition of ‘procurement’

The definition of ‘procurement’ is essentially the same in the CPRs as in the CPGs. However, it is defined in terms of ‘goods and services’ rather than ‘property or services’. The term ‘goods’ in the CPRs and the term ‘property’ in the CPGs are defined in substantially the same terms. The only change is the addition of ‘contract options’ as an example of an intangible in the CPRs.

Agency agreement versus contract

The term ‘agency agreement’ has been deleted and replaced with the term ‘contract’, consistent with the terminology used in the FMA Regulations. ‘Contract’ is defined as ‘an arrangement, as defined by the FMA Regulations, for the procurement of goods and services, under which public money is payable or may become payable’. This includes standing offers and panels.

Other changes

The generic term 'approach to market' is used in the CPRs. It covers the terms 'invitation to tender', 'request for application for a multi-use list', 'requests for expressions of interests' and 'request for tender'. It is defined as any notice inviting potential suppliers to participate in a procurement.

The terms 'covered procurement' and 'mandatory procurement procedures' have been deleted. Division 2 is now titled 'Additional rules for procurements at or above the relevant procurement threshold'.

Key Changes in Requirements and Guidelines

Outlined below are some of the substantive changes in the CPRs to the requirements and good practice applicable to the procurement process.

Contract end dates (paragraph 4.13)

The CPRs clarify the requirement regarding end dates for all contracts. Where a contract does not specify an end date it must allow for periodic review and subsequent termination of the contract by the agency if the agency determines that it does not continue to represent value for money. This is a mandatory requirement for all procurements regardless of value.

Cooperative agency procurements (paragraph 4.11)

The requirements for joining an existing contract of another agency will now apply to all procurements, regardless of value.

Documentation requirements (paragraphs 7.2–7.4)

The CPRs, like the CPGs, provide that officials must maintain appropriate documentation for each procurement commensurate with the scale, scope and risk of the procurement. However, there have been a number of changes to the requirements relating to documentation for procurements. The CPRs provide that documentation for each procurement should provide accurate and concise information on:

- the requirement for the procurement
- the process that was followed
- how value for money was considered and achieved
- relevant decisions, including under the FMA Regulations, and the basis of those decisions.

Agencies must also have appropriate documentation with the supplier, such as a written contract or a purchase order. Under the CPGs this was considered only good practice.

Under the CPRs, record-keeping requirements have been simplified and agencies must retain documentation relating to a procurement in accordance with the *Archives Act 1983*.

Risks and risk management (paragraph 4.4 and Chapter 8)

There is an increased focus in the CPRs on risks and risk management. The general principle in risk management remains that the party best placed to manage the risk should bear the risk. Value for money under the CPRs now specifically requires consideration of the risks, and the requirements relating to risk management have been set out in a new chapter headed 'Procurement risk'.

Agencies must establish processes for the identification, analysis, allocation and treatment of risk when conducting procurement. The CPRs are also more explicit on the stages at which risks should be considered.

Determining value for money

The CPRs emphasise that officials should consider whether the procurement process itself will deliver best value for money or whether an alternative method of achieving the required outcome represents the best value for money.

The CPRs have expanded the factors that are relevant to determining value for money in procurement to include a consideration of the risks and a requirement to conduct a process commensurate with the scale and scope of the procurement, as well as environmental sustainability and whole-of-life costs.

Other changes

There are a number of other smaller changes, including:

- in the context of value for money, officials should consider barriers to entry that may prevent Small and Medium Enterprises from competing
- debriefings must be made available on request to successful suppliers (this was only good practice under the CPGs)
- all standing offers, regardless of value, must be reported on AusTender within 42 days of the agency entering into it or amending such arrangements
- submissions must be treated as confidential (this was only good practice under the CPGs)
- the requirements relating to the proper use of Commonwealth resources (Ch 6) has been amended to include economical use (this accords with the terminology used in s 44 of the FMA Act)
- the disclosure of non-compliance with the CPRs in an agency's Certificate of Compliance has been added to the list of various other reporting and disclosure obligations that apply
- where a contract is awarded by limited tender, the agency's report must now include a record demonstrating how the procurement represented value for money in the circumstances, in addition to the requirements under the CPGs
- procurements of goods and services from Small and Medium Enterprises with at least 50% Indigenous ownership are exempt under the CPRs from the application of Div 2 of the CPRs. This exemption derives from the Indigenous Opportunities Policy and has now been incorporated into the text of CPRs.

What agencies need to do now

Finance has advised that the CPRs are to be applied to procurement processes that commence from 1 July 2012. Until that date, the CPGs will continue to apply. 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 CPRs may require some amendments to CEIs and template procurement documentation, including request documents such as requests for tenders and requests for expressions of interest as well as contracts and standing offers. AGS can assist you in doing

this. Please contact our precedent coordinator, Kenneth Eagle, T 03 9242 1290, or one of our procurement specialists listed below.

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