



fact sheet

Work Health & Safety

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Procurement

This fact sheet provides some general tips on issues that should be considered as a result of the new Work Health and Safety (WHS) legislation when the Commonwealth or a Commonwealth public authority is procuring goods and services. This fact sheet makes reference to codes of practice and regulations that may change, and should not be relied on as legal advice.

The new framework

The States, Territories and the Commonwealth have committed to enacting new work health and safety laws based on the Model Work Health and Safety Bill. The *Commonwealth Work Health and Safety Act 2011* (the WHS Act) commenced on 1 January 2012. The WHS laws place WHS duties on a number of persons. Some key elements of those duties are summarised below.

| | <i>Who has the duty?</i> | <i>Duty includes</i> |
|-----------------------|---|---|
| Primary duty | <p>The primary duty holder is a person conducting a business or undertaking (PCBU) who is responsible for its overall operation.</p> <p>For agencies that are legally part of the Commonwealth (which is most FMA Act agencies), the PCBU is the Commonwealth.</p> <p>For bodies that are ‘public authorities’ under the law, the relevant body will be the PCBU.</p> | <p>PCBUs owe a duty of care to all workers. They must ensure the health and safety of all workers, so far as is ‘reasonably practicable’.</p> <p>PCBUs also have duties to other persons.</p> |
| Officer’s duty | <p>An officer is an officer of a PCBU.</p> <p>In a Commonwealth agency, the Chief Executive Officer is likely to be regarded as an officer, as may others within the agency who make, or participate in making, decisions that affect the whole or a substantial part of a business or undertaking of the Commonwealth.</p> | <p>An officer of a PCBU has a duty to exercise ‘due diligence’ to ensure that the PCBU complies with its duty.</p> |
| Worker’s duty | <p>A worker is a person who carries out work in any capacity for a PCBU and includes an employee, a contractor or subcontractor, an employee of a contractor or subcontractor, a labour hire worker, an outworker, an apprentice or trainee, a student gaining work experience or a volunteer.</p> | <p>A worker must take ‘reasonable care’ for themselves and others, comply with reasonable instructions and cooperate with reasonable policies and procedures of the PCBU.</p> |
| Other’s duty | <p>A person who finds themselves at a workplace, whether or not they have another duty under the law.</p> | <p>Persons must take ‘reasonable care’ for themselves and others and comply with reasonable instructions of the PCBU.</p> |

In addition, the WHS law contains:

- specific duties on particular types of PCBUs including those involved in designing, manufacturing, importing or supplying plant, substances or structures or installing, constructing or commissioning plant or structures
- requirements in relation to consultation, representation and participation with workers and others with whom there are shared duties such as contractors
- procedures and requirements for issues resolution and a range of compliance and enforcement mechanisms under the Act including criminal penalties
- provision for codes of practice to be approved by the Minister which courts may have regard to in considering whether a person has complied with the WHS law
- specific obligations in relation to particular types of activities such as:
 - **Hazardous work:** obligations in relation to noise, confined spaces, falls from height, licensing for high risk work (eg scaffolding and forklifts), demolitions, electrical safety and diving
 - **Construction work:** including obligations on those who commission construction work and those who undertake construction work
 - **Hazardous chemicals:** obligations in relation to labelling of chemicals, and the provision of material safety data sheets
 - **Asbestos:** obligations in relation to removal and working with asbestos, and requirements in respect of asbestos management plans, health monitoring, training and licensing of work related to asbestos
 - **Major hazard facility:** duties in relation to licensing of operators, preparation of safety cases and reporting of incidents.

How is the new framework relevant to procurement?

Compliance with WHS duties by PCBUs, officers and workers will include consideration of WHS risks as part of procurement processes. WHS risks will need to be identified and consideration given to what is reasonably practicable to ensure the health and safety of workers and others.

The extent to which WHS considerations will require specific treatment in the procurement will depend on what is being procured, what type of contractor will be involved and how the procurement is intended to be conducted.

What are the risks?

The risks to be considered could include those arising:

- during the conduct of the procurement
- while the contract is being carried out
- from the ultimate use of the goods or services procured under the contract.

What is reasonably practicable to manage those risks?

Deciding on what is 'reasonably practicable' to ensure health and safety of workers and others requires taking into account and weighing up all relevant matters including:

- the likelihood of the hazard or the risk concerned occurring
- the degree of harm that might result from the hazard or the risk
- what the relevant person knows or ought to know about the hazard or risk, and ways of eliminating or minimising the risk
- the availability and suitability of ways to eliminate or minimise the risk

- after assessing the extent of the risk and the available ways of eliminating or minimising the risk, the cost associated with the available ways of eliminating or minimising the risk, including whether the cost is grossly disproportionate to the risk.

A code of practice on how to manage WHS risks has been released and is available at <http://www.comlaw.gov.au>

Every procurement will be different and, in some cases, specific legal and other expert advice on compliance with WHS requirements will be required. The following are some general tips.

Ask yourself...

Planning

Is the procurement related to a new activity or new equipment for the agency?

- Has the agency considered new WHS risks that will need to be managed?
- Employee consultation obligations may be triggered.

Is this the type of activity or equipment where there are WHS risks?

- The greater the risks, the greater the attention that should be given to the management of those risks in the procurement process.

If this is an existing activity:

- Does the history of the activity suggest that new WHS management strategies will need to be considered as part of the procurement?

What are you buying? – the specification

The specification should take account of specific WHS obligations relevant to the type of activity covered by the contract (for example WHS plans, licensing requirements, specific consultation requirements, information requirements), allocate clear roles and responsibilities for WHS obligations, and clearly articulate the requirement including the ultimate use to which the goods or services will be put.

What type of goods or services are being procured?

- What WHS risks are inherent in those goods or services? How will this be best managed? Who is best placed to manage these risks? How will this be reflected in the specification?
- What will the agency do with the goods or services after they have been delivered? This might raise additional risks to those inherent in the generic goods or services:
 - What features are required of the goods or services to make them suitable for that purpose?
 - It is important to state in the specification what the agency intends to do with the goods or services.
 - If the agency is buying goods 'off the shelf' – does the OEM specification or operating procedure encompass the use proposed by the agency?
- Are there any specific WHS codes of practice, safety standards or Commonwealth/agency WHS policies relevant to these types of goods or services, or the purpose to which they will be put?
 - If there is an applicable code of practice, consider specifying that a tenderer must comply with that code of practice or alternatively that the tenderer may provide evidence to demonstrate that they have a different approach which is equally compliant with the WHS law.
 - If specific requirements apply to the activity, the specification and contract will need to be developed taking into account and allocating responsibility for those requirements. For example if the agency is commissioning construction work, the contract will need to take account of the specific consultation and report requirements in Chapter 6 of the WHS Regulations.

- In addition to the goods or services themselves, are there any specific WHS deliverables – for example, WHS reports, certificates or information that should be specified? This would work hand-in-hand with the WHS law requirements for designers, manufacturers, importers, suppliers and installers to provide adequate information.
- Is the contract clear as between the parties who is intended to have which role for WHS purposes (eg who the ‘Designer’ is)?
- Should the specification include any necessary manuals and training from the contractor to ensure agency staff are properly equipped to use the deliverables?
- If the agency is supplying any items to the contractor (sometimes referred to as Government Furnished Materials), have the risks associated with those items been considered and responsibility for managing those risks assigned?

The selection process

Another key consideration is the selection of an appropriate contractor/goods/services.

Consider what WHS issues are relevant to selecting the contractor.

- Do you need to find out about the contractor (and subcontractor) WHS track record, WHS prosecutions, policies and WHS procedures?
- Should any third party certifications regarding WHS management be requested?
- Do you need to find out about the proposed methodology for performing the contract, and how this will meet WHS requirements?
- Does the contractor hold any necessary licences (for example, an asbestos removal licence or a high risk work licence)?

What WHS issues are relevant to selecting goods?

- What information will you need to determine if the proposed goods will meet your required WHS standards (as set out in the specification)?

How will you assess compliance with the requirements of your specifications?

- Can you rely on the tenderers’ statements, or do you need to independently verify compliance and suitability?
- Do you have in-house expertise to consider suitability or do you need to hire-in?

How will you integrate WHS considerations into the evaluation methodology?

- Commonwealth procurement policy states that ‘fitness for purpose’ and ‘a potential supplier’s experience and performance history’ are relevant to the value for money assessment. WHS could go to both of these considerations.
- Will WHS be a specific evaluation criterion, considered as part of the general consideration of whether the ‘solution’ meets the requirements, or will it be part of overarching risk consideration?
- It is acceptable to consider the cost associated with controlling a hazard or risk against the likelihood of the hazard or risk occurring and the harm that would result.

How will you manage WHS risks during the selection process?

- The selection process itself may raise WHS issues such as during site visits and/or testing of proposed solutions by agency staff or contractors.

The contract

In addition to the specification, the contract will need to cover other aspects of WHS responsibility. The level of detail on WHS requirements in the contract will depend on the procurement. All contracts should include a requirement to comply with materially relevant laws. Many contracts include standard 'fitness for purpose' clauses and this may be sufficient in many cases. In other procurements, where WHS considerations are more significant, the contract/specification will need a more tailored WHS approach.

How will legal responsibilities for WHS matters be allocated in the contract?

- Does the specification clearly address WHS standards and requirements, and is it clear who is taking responsibility for each particular aspect?
- Do the deliverables include relevant WHS reports and certifications regarding WHS compliance?
- Is the contractor required to warrant fitness for purpose and that all relevant legal requirements including WHS laws have been met?
- Are acceptance testing procedures required? If so, do they cover WHS suitability?
 - Where WHS legislation requires particular testing, analysis or reports to be undertaken or provided, these reports could be part of the deliverables.

What will be the relationship with the contractor?

- Will the contractor be working on-site at the agency's premises? Will agency staff be working at the contractor's premises?
- Does the contract need to document how shared WHS responsibilities will be managed? Should the contract require the contractor and its staff to participate in agency WHS consultation, representation and participation activities or to agree particular procedures for these?
- Does the contract need to specify that the contractor will ensure that it does all things necessary to enable the agency to comply with its WHS obligations to workers and others?
 - If the agency is specifying any procedures or requirements for the contractor's workers, have the WHS implications of these been considered?

How will you approach approval of subcontractors, plans, etc under the contract?

- Be clear what responsibility the agency is intending to take by giving approvals.
- If the agency is not intending to take responsibility for particular types of risk (eg 'suitability' of plans), the contract should make this clear.

How will any disputes in relation to WHS issues be resolved?

- Does the agency want to put forward specific WHS issues resolution procedures? If not, the default procedures in the WHS Regulations will apply.

Contract management

Clearly the agency will have WHS responsibilities in relation to contractor staff on its premises but do the contract managers also understand the other WHS responsibilities that might be relevant to managing the contract such as...

- responsibilities for agency staff on contractor premises?
- responsibility for contractor staff arising from contract management actions whether or not on agency premises?
- the importance of ensuring that all WHS information required under the contract or the WHS law is provided by the relevant person (which could be the contractor or the agency)?
- when contractors and their employees need to be involved in consultation, representation and participation activities and what issues resolution procedures will apply?

In summary

- Consider WHS issues from the planning stage for the procurement
- Ensure that WHS risks have been considered in developing the specification and ensure that the purpose for which goods or services are to be used is stated clearly
- Check any specific WHS requirements that may apply to the activities covered by the contract such as requirements for licences, reports and consultation
- Be clear in the contract who is responsible for what in relation to WHS duties and obligations and how shared responsibilities will be managed
- Use an evaluation methodology that takes account of WHS requirements
- Ensure that you have the necessary resources and expertise to select a contractor/product that is suitable for the purpose for which it is to be used
- Ensure that your contract management systems deal with WHS deliverables (for example information required to be supplied by designers, manufacturers, suppliers etc) as well as your shared WHS duties with contractors in relation to workers and others.

More information

If you require further information about work health and safety please contact:

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