



Australian Government Procurement Webinar Series 2022

Current Issues and Updates in Procurement

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2 August 2022

The 2022 Procurement Seminar Series

- Part 1 – Probity in Procurement (19 July 2022)
- **Part 2 – Current Issues and Updates in Procurement (2 August 2022)**
- Part 3 – Legal Issues and Risks in Procurement (17 August 2022)
- Part 4 – Open Q&A (30 August 2022)
- Part 5 – Tender Assessment with a focus on Sustainable Procurement (13 September 2022)
- Part 6 – Managing Procurement (28 September 2022)
- Part 7 – Prickly Issues in Procurement (11 October 2022)
- Part 8 – Open Q&A (25 October 2022)

If you have any questions about our Australian Government Procurement Series please contact Katarina Szivek, Business Development Specialist on kszivek@hwle.com.au.

Overview

- Statutory tender challenge rights
 - *Government Procurement (Judicial Review) Act (Cth) 2018*
- Sustainable procurement
- Covid-19
- ECI and unsolicited proposals



Statutory tender challenge rights

Background

- Ratification of Comprehensive and Progressive Agreement for Trans-Pacific Partnership and other Free Trade Agreements (**FTA**)
- Australia's response:
 - Cth – *Government Procurement (Judicial Review) Act 2018* – Assented 19 October 2018 and commenced 20 April 2019

Application

Cth

- Applies to “covered procurements” - a procurement that:
 - the rules in Divisions 1 and 2 of the Commonwealth Procurement Rules apply to
- Div 2 - meets the procurement thresholds \$7.5M (construction) or \$80,000 (goods or services non-corporate Cth entities) or \$400,000 (goods or services prescribed corporate Cth entities)

Application in closer detail

Cth – commencement date

- The Act applies to alleged breaches of the CPRs that occur after the Act's commencement date (20 April 2019)
- Procurement processes already on foot are caught if the alleged breach occurs after that date

What can suppliers complain about?



What can suppliers complain about?

Cth – breach of CPRs including:

- the provision of additional information to a supplier which provides it with an unfair advantage
- acceptance of a late tender where a valid exception does not apply
- an approach to market is published with a response time of less than 25 days, where an exception for a shorter timeframe does not apply
- modification of the evaluation criteria without notice to tenderers or use of separate evaluation criteria for different tenderers
- Not conducting procurement using the appropriate procurement method
- Australian preferencing
- Note CPRs updated 1 July 2022 – need to stay up to date

Who can complain?

- **Cth:**
 - A ‘supplier’ (broadly defined) if it believes:
 - a relevant Commonwealth entity engaged, is engaging or is proposing to engage, in any conduct in contravention of the CPRs (so far as those rules relate to a covered procurement)
 - the interests of the supplier are ‘affected’ by that conduct

Complaints procedure



Complaint

Procurement
suspended

Investigation

Complaints procedure

- Investigate and where possible resolve complaints
- Written reports of the investigation must be prepared
- Procurement is suspended unless a 'public interest certificate' is in place

Suspension of procurement

- **Cth** - procurement must be suspended until the earlier of:
 - the complaint is resolved or withdrawn
 - PIC issued (if not already in place)
 - a court makes a finding that the conduct was either in contravention or not in contravention of the relevant CPRs

Discontinued Investigations

Cth

- An investigation **may** be discontinued if:
 - the supplier withdraws the complaint / informs authority it is resolved
 - the supplier informs the authority the complaint is resolved
 - a determination is made in a court
- An investigation **must** be discontinued if:
 - proceedings are instituted in a court; and
 - the continuation of the investigation would be likely to result in prejudice to the proper administration of justice

Court Ordered Remedies

- Injunctions
- Compensation
- Courts with jurisdiction:
 - Cth
 - Federal Circuit Court of Australia (**FCCA**)
 - Federal Court of Australia (**FCA**)

Court ordered remedies

Injunctions

- Two types:
 - Restraining – prohibiting conduct
 - Performing – requiring compliance
- Cannot grant injunction if PIC unless in public interest
 - Factors to consider:
 - Would result in significant delay to procurement
 - Compensation a more appropriate remedy

Court ordered remedies

Injunctions – preconditions both Cth

- Time limits: must be applied for within **10 days** of breaching conduct / awareness of breaching conduct
 - Or longer determined by Court due to attempts to resolve complaint, or special circumstances
- Contract must not have already been entered into
- The Court must first be satisfied that the applicant has made:
 - a complaint to the relevant authority
 - a reasonable attempt made to resolve the complaint

Public Interest Certificates

- PIC may be issued at any time by the agency / authority if it is not in the public interest for a procurement to be suspended while:
 - a complaint is being investigated
 - an application for an injunction is being considered
- Cth - PIC should only be issued when suspension would result in real adverse consequences (Explanatory Memorandum)

Compensation

- Court may order compensation for a contravention of the relevant EPPs / CPRs
- Compensation amount must not exceed the reasonable expenditure of the tenderer in:
 - preparing the tender
 - making the complaint
 - making a reasonable attempt to resolve the complaint
- does not include loss of profit

Practical tips to minimise risk and avoid challenges

- Review current and upcoming procurements to determine if they are caught by the legislation
- Review internal processes and tender documentation to ensure compliance with the CPRs
- Review internal complaints review processes for dealing with tenderer complaints
- Review tender processes to ensure they allow for potential time delays which may be caused by a suspension to investigate a complaint or a Court ordered injunction
- Consider where a public interest certificate may be required for current or upcoming procurements

Existing Remedies

- Existing remedies are not limited by the legislation and continue to be available to tenderers, including:
 - damages for a breach of ‘process contract’ claim (including for loss of profit or loss of chance)
 - equitable remedies for equitable estoppel (for example an injunction, order for specific performance or damages in equity)
 - compensation for misleading and deceptive conduct under the Australian Consumer Law (where applicable in respect of Government procurement)
 - damages for misrepresentation at common law
 - judicial review of the procurement decision under administrative law



Sustainable Procurement

Sustainable Procurement

- CPR 4.4 and 4.5 – Achieving Value for Money
 - 4.5(e) *environmental sustainability... recognising the Australian Government's 'Sustainable Procurement Guide' (DAWE – 2021)*
- Sustainable Procurement – Life-Cycle Costing as well as all associated costs, environmental and social risks and benefits, and broader social and environmental implications.

Sustainable Procurement

- The 5 Stages of Procurement
 - Stage 1 – Plan the Procurement
 - Stage 2 – Approach to Market
 - Stage 3 – Evaluate and Engage
 - Stage 4 – Report and Manage
 - Stage 5 – Review and Learn

Whole of Life Costs Considered

ACQUISITION COSTS	OPERATING COSTS	MAINTENANCE COSTS	END-OF-LIFE COSTS
Purchase Cost	Labour	Specialist Labour	Safe Disposal
Delivery Charge	Materials	Specialist Tooling	Resale
Insurance and Taxes	Consumables	Spare and Replacement Parts	Ongoing Liabilities
Installation and Commissioning	Energy Supply and Consumption	Reduced Output with Age	Decommissioning
Training and Support	Contract and Supplier Management	Maintenance and Recommended Downtime	Removal for Sale or Scrap
Internal Costs Associated with Changing Suppliers	Transaction Costs	Servicing and Inspection Regimes	Reinstatement of Land or Buildings for Alternative Use
25	Cost of Change	Cost Associated with Downtime	
	Environmental Costs		

Sustainable Procurement

- Model Clauses
 - Appendix D to Sustainable Procurement Guide
 - A. Environmental Sustainability – CoT and CoC Terms and ‘Ideal Response’
 - B. Environmental Management Practices – CoT and CoC Terms and ‘Ideal Response’
 - C. Environmental Sustainability Plan – CoT and CoC Terms and ‘Ideal Response’ and ‘Ideal Response’
 - D. Waste Management – CoT and CoC Terms and ‘Ideal Response’
 - E. Use of Recycled Content – CoT and CoC Terms and ‘Ideal Response’

Modern Slavery

Commonwealth Act – Cth Gov Obligations

- The following are **reporting entities**: The Commonwealth, Commonwealth entities or companies, with a revenue over \$100 million per financial year, or an entity which has volunteered to comply with the Act (s 5)
- No penalties Administered by the Cth Minister of Department of Home Affairs
- Commonwealth Government Modern Slavery Statement – Dept of Finance

Commonwealth Act – Cth Gov Obligations

- Legislative Review Announced – Commence 31/3/2022 – Completion within 12 months
- Border Force Terms of Reference:
 - Operation of the Act
 - Compliance
 - Need for Penalties
 - Threshold
 - Independent Commissioner

Commonwealth Act – Cth Gov Obligations

- Paper Promises? Evaluating the early impact of Australia's Modern Slavery Act (Feb 2022, Human Rights Law Centre)
 - 77% failed to comply with reporting requirements
 - 52% failed to identify obvious modern slavery risks
 - Only 27% appeared to be taking any form of effective action

Procurement during and after COVID

Covid-19 – Procurement Policy Note – July 2022 (Finance)

- Approaches to Market
 - Follow the rules unless exemption
 - CPR 2.6 – Accountable Authorities may apply appropriate measures for a range of reasons including protection of human health
 - CPR 10.3(b) – allows for streamlined process due to reasons of extreme urgency due to unforeseen events
- Contracts
 - Be collaborative
 - Ensure business continuity (Termination / LDs)
 - Necessary Variations only
- In all circumstances compliance with PGPA 2013 is necessary
- Other matters
 - Keep good notes and justify all decisions
 - Pay quickly
 - Remember Good Faith obligations and Model Litigant Rules



Early Contractor Involvement and Unsolicited Proposals

Introductory Comments

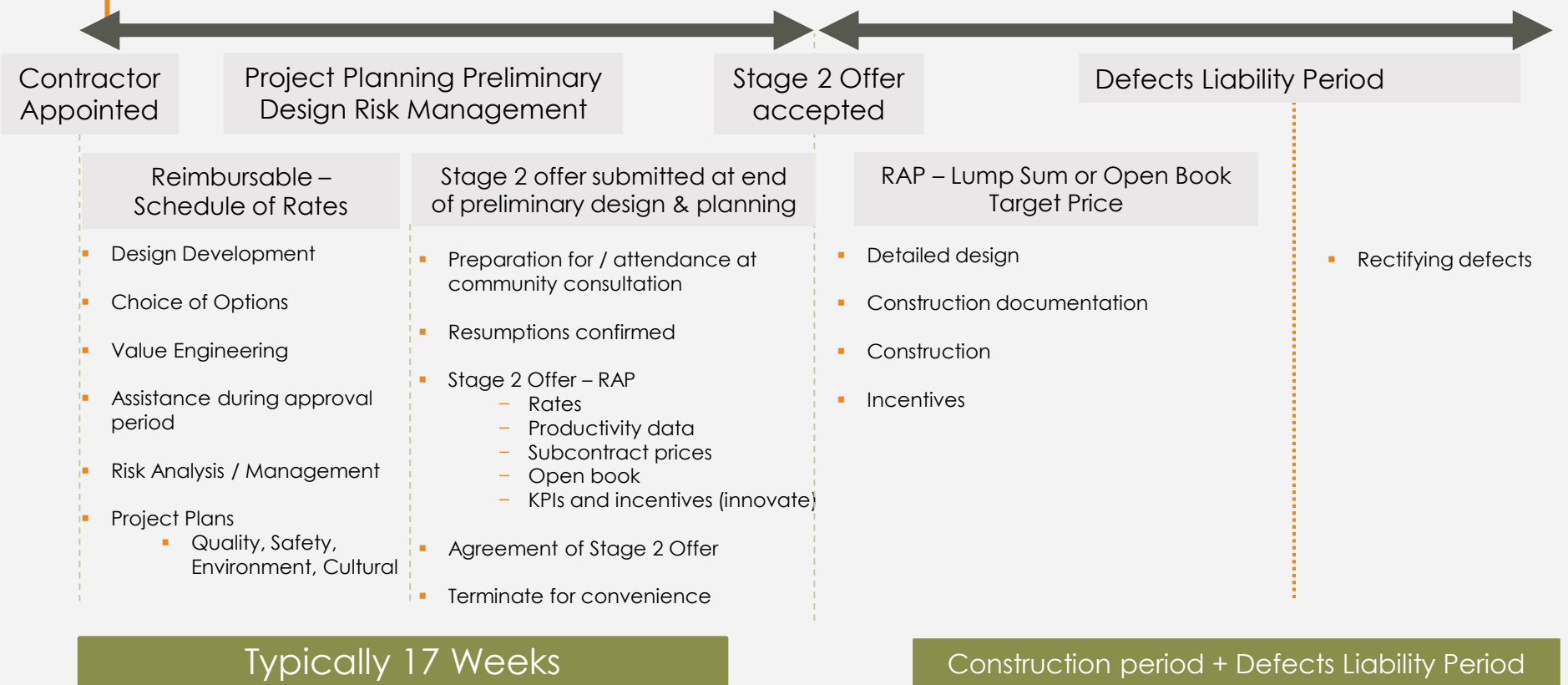
What is ECI?

- A form of Procurement
- Not a Delivery Model
- Not a Contract
- Sometimes called:
 - Competitive Dialogue
 - Early Tenderer Involvement
 - Alliancing for the Faint Hearted
- Has been compared to Managing Contractor Model

What is ECI?

- The Process
 - Starts with an EOI of some kind
 - Rates / Margins
 - Similar Project Experience
 - Key Personnel
 - Understanding of Issues
 - Understanding of and Commitment to Process
 - Availability
 - Experience in and ability to work in relationship environment
 - Selection

ECI – The Contractual Model



Relationship Management Process

Contracts

- Stage 1 – Design Services Contract
 - IP
 - Payment
 - Sunset
 - Good faith negotiation of Stage 2 Contract – Price and Terms
- Stage 2 – Construction Contract

When to use ECI

Need to
Fast Track

Design is
Complex

Many
Unknowns

Significant
Risks

Hard Dollar
is Needed

Government
Funded

Benefits of ECI

Reduced
overall pre-
tender costs

Shortened
delivery times

Team
approach
and true
collaboration

Innovation –
deals with
complex
projects well

Integration of
construction
methods

Sustainability

Early
procurement

Fewer
variations

Bankable

Unsolicited Proposals

- The Philosophy
- The CPRs
- Guidance ?
- Issues

Unsolicited Proposals

- The Philosophy
 - Tension
 - Government should market test all 'substantial' projects / expenditure / opportunities
- versus*
- Market testing unique ideas of private sector is not appropriate and may lead to such ideas not coming forward

Unsolicited Proposals

- CPRs
 - CPR 9.10 – Limited Tender can only be conducted under 10.3 or where exempt under Appendix A
 - CPR 10.3(c) – Limited Tender – ‘for procurement made under *exceptionally advantageous conditions* that arise in the very short term, such as from *unsolicited innovative proposals*’
 - CPR 10.3(d) – goods / services can be supplied only by a particular business, e.g. to protect exclusive rights, or absence of competition for technical reasons
- Auditor-General Report No. 15 2021-2022 – Performance Audit
 - Reported on a particular unsolicited proposal

Unsolicited Proposals

Current Position and Common Themes – Cth

Current Cth position

- CPRs (cont)
 - A procurement conducted by limited tender is not required to meet the rules in CPR 10.6 - 10.8 (Request documentation), 10.20 - 10.31 (Minimum time limits), or 10.35 (Awarding contracts)
 - However, under CPR 10.5, a written report must be prepared that includes:
 - the value and type of goods and services procured
 - a statement indicating the circumstances and conditions that justified the use of limited tender
 - a record demonstrating how the procurement represented value for money in the circumstances

Unsolicited Proposals – Assessment Criteria

VIC	NSW	QLD
Characteristics justifying exclusive negotiation	Uniqueness	Is exclusive dealing in interests of the public
Meets a service need aligned with Govt policy objectives	Whole of Government impact	Investment alignment with Govt Policy
Value for money	Value for money	Value for money
Affordable and a relative priority for budget funding	Affordability	Investment ready (affordable)
Deliverable	Capability and Capacity	Investment ready (deliverable) Technical / legal and commercial feasibility
	Return on Investment	VFM (cost/ risk)
	Risk Allocation	

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