



Session 4 – Questions & Answers


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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



Part I – Under what circumstances can you run a limited tender under the CPRs?

Commonwealth Procurement Rules, 2.6

- r 2.6 states that *“CPRs do not apply to the extent that an official applies measures determined by their Accountable Authority to be necessary for the maintenance or restoration of international peace and security, to protect human health, for the protection of essential security interests, or to protect national treasures of artistic, historic or archaeological value”*.
- Relevant entities that apply this rule will need to:
 - identify the particular measures relating to the procurement which requires departure from the CPRs;
 - determine the extent of the departure from specific requirements of the CPRs to address the measure; and
 - document and obtain approval by the Accountable Authority on such measures, unless already in place.
- In 2018-2019 - The significant majority (95 per cent) of the exemptions claimed under r 2.6 of the CPRs were reported by the Department of Defence with a value of \$5bn ([source](#)).

Appendix A: Exemptions

- Sets out types of procurements that are exempt from the rules of Div 2 of the CPRs and from rules 4.7, 4.8 & 7.26 of Div 1.
- There are 17 types - these will be covered in the following slides.

Appendix A: Exemptions

1. *procurement* (including leasing) of land, existing buildings or other immovable property or any associated rights (note: the *procurement* of *construction services* is not exempt);
2. *procurement* of *goods* and services from another *Commonwealth entity*, or a state, territory or local government entity;
3. *procurements* funded by international grants, loans or other assistance, when the provision of such assistance is subject to conditions inconsistent with this document;
4. *procurements* funded by grants and sponsorship payments from non-Commonwealth entities;
5. *procurement* for the direct purpose of providing foreign assistance;
6. *procurement* of *research and development* services, but not the *procurement* of inputs to *research and development*;
7. the engagement of an expert or neutral person, including engaging counsel or barristers, for any current or anticipated litigation or dispute;
8. *procurement* of *goods* and services (including construction) outside Australian territory, for consumption outside Australian territory;
9. acquisition of fiscal agency or depository services, liquidation and management services for regulated financial institutions, and sale and distribution services for government debt;

Appendix A: Exemptions

10. *procurement* by the Future Fund Management Agency of investment management, investment advisory, or master custody and safekeeping services for the purposes of managing and investing the assets of the Future Fund;
11. *procurement* of blood plasma products or plasma fractionation services;
12. *procurement* of government advertising services¹²;
13. *procurement* of *goods* and services by, or on behalf of, the Defence Intelligence Organisation, the Australian Signals Directorate, or the Australian Geospatial-Intelligence Organisation;
14. *contracts for labour hire*;
15. *procurement* of *goods* and services from a business that primarily exists to provide the services of persons with a disability;
16. *procurement* of *goods* and services from an *SME* with at least 50 per cent Indigenous ownership; and
17. *procurement* of *goods* and services valued up to \$200,000, or up to \$500,000 by or on behalf of the Department of Defence, from an *SME* (note: the requirements under the *Indigenous Procurement Policy* must first be satisfied before this exemption is applied).

Limited Tender

- Involves approaching one or more potential suppliers directly and requesting that they make submissions without having to comply with the process for open pre-qualified tenders.
- Less competitive as it does not provide the opportunity for all potential suppliers to compete for the provision of goods and services.
- As the entity does not have to comply with the requirements of a full open market approach, limited tenders are often the quickest and cheapest procurement method.
- Reduce competition, so CPRs only allow limited tenders in specific circumstances.

CPRs - 10.2

- A procurement, except a procurement that is specifically exempt in accordance with Appendix A, is subject to the rules contained in Division 2 if the expected value of the procurement is at, or above, the relevant procurement threshold.

Limited Tender – procurement thresholds

- Must pay attention to the *procurement thresholds*:
 - for non-corporate Commonwealth entities, other than for procurements of construction services, the procurement threshold is \$80,000;
 - for prescribed corporate Commonwealth entities, other than for procurements of construction services, the procurement threshold is \$400,000; or
 - for procurements of construction services by relevant entities, the procurement threshold is \$7.5 million.

Limited Tender Exemptions

- For procurements at or above the relevant *procurement threshold*, limited tender can only be conducted in accordance with paragraph 10.3, or when a procurement is exempt as detailed in Appendix A.
- Bear the onus to demonstrate adherence to procurement principles, e.g. value for money, encouraging competition, ethical use of resources during limited tender.
- Records management system requirements, including:
 - the value and type of goods and services procured;
 - a statement indicating the circumstances and conditions that justified the use of limited tender; and
 - a record demonstrating how the procurement represented value for money in the circumstances.

Limited Tender Exemptions – 10.3

- Exemption 1
 - When, in response to an open approach to market:
 - i. no submissions, or no submissions that represented value for money, were received,
 - ii. no submissions that met the minimum content and format requirements for submission as stated in the request documentation were received, or
 - iii. no tenderers satisfied the conditions for participation,
- and the relevant entity does not substantially modify the essential requirements of the procurement.

Limited Tender Exemptions – 10.3

- Exemption 2
 - When, for reasons of extreme urgency brought about by events unforeseen by the relevant entity, the goods and services could not be obtained in time under open tender.

Limited Tender Exemptions – 10.3

- Exemption 3
 - For procurements made under exceptionally advantageous conditions that arise only in the very short term, such as from unusual disposals, unsolicited innovative proposals, liquidation, bankruptcy, or receivership, and which are not routine procurement from regular suppliers.

Limited Tender Exemptions – 10.3

- Exemption 4
 - when the goods and services can be supplied only by a particular business and there is no reasonable alternative or substitute for one of the following reasons
 - i. the requirement is for works of art,
 - ii. to protect patents, copyrights, or other exclusive rights, or proprietary information, or
 - iii. due to an absence of competition for technical reasons.

Limited Tender Exemptions – 10.3

- Exemption 5
 - For additional deliveries of goods and services by the original supplier or authorised representative that are intended either as replacement parts, extensions, or continuing services for existing equipment, software, services, or installations, when a change of supplier would compel the relevant entity to procure goods and services that do not meet requirements for compatibility with existing equipment or services.

Limited Tender Exemptions – 10.3

- Exemption 6
 - For procurements in a commodity market.

Limited Tender Exemptions – 10.3

- Exemption 7
 - When a relevant entity procures a prototype or a first good or service that is intended for limited trial or that is developed at the relevant entity's request in the course of, and for, a particular contract for research, experiment, study, or original development.

Limited Tender Exemptions – 10.3

- Exemption 8
 - In the case of a contract awarded to the winner of a design contest, provided that:
 - i. the contest has been organised in a manner that is consistent with these CPRs, and
 - ii. the contest is judged by an independent jury with a view to a design contract being awarded to the winner.



Part II – What is a Covered Procurement and Why Does it Matter?

'Covered Procurement'

- *Government Procurement (Judicial Review) Act 2018 (GPJR Act)*
- Where BOTH Divisions 1 and 2 of the CPRs apply in full
- *If an Appendix A exemption applies?*
 - NOT A COVERED PROCUREMENT (Division 2 does not apply)
- *If procuring from panel (standing offer arrangement)?*
 - NOT A COVERED PROCUREMENT (Division 2 does not apply)
 - BUT, the process to establish a panel will be covered (unless an exemption applies)
- *If an official measure under r2.6 is made?*
 - NOT A COVERED PROCUREMENT (CPRs will apply to the extent determined necessary, not in full)
- *If Limited Tender is justified?*
 - COVERED PROCUREMENT (CPRs apply in full)

Why does it matter?

- Complaints mechanism under GPJR Act.
- Suppliers can make written complaints alleging contravention of the CPRs.
- Suppliers may apply for court imposed injunctions and/or payment of compensation.

Note: this is in addition to existing mechanisms – Commonwealth Ombudsman or .common law causes of action

What to do if a GPJR Complaint is received?

RMG-422 Handling Complaints under the GPJR Act

- Ensure the complaint is validly made.
- Suspend the procurement (unless a Public Interest Certificate (PIC) has been issued).
- Investigate, notify and respond.
- Be aware, the Supplier may apply to Court seeking an injunction to:
 - Stop the procurement; or
 - Required an action to be undertaken.
- Be aware, compensation may be payable (costs of the supplier preparing its tender and of resolving the complaint).

Public Interest Certificates

- A PIC (applied to procurements where it would not be in the public interest to suspend a procurement).
- Allows the procurement to continue.
- Reduces the likelihood of an injunction.

- When? – *anytime*.
- How? – *public interest justification*.
- Who? – *delegates (NCEs), or Officials (CCEs)*.
- Where? – *AusTender, and/or website (to notify suppliers)*.

Part III – Questions

Validity of Contracts After Deed Expiry

- If a panel arrangement expires before the contract, is the contract still valid? As the contract was created while there was a current panel arrangement?
 - For example panel arrangement February 2020 to February 2023.
 - Contract agreement 1 July 2022 to 30 June 2024.

CPR Updates?

- Yes, for new procurements from 1 July 2022.
- Changes reflect the Gov's commitment to ensuring more opportunities are available to SMEs in Cth procurements.
 - See CPRs r 5.5 & r 5.8.
- Other updates include:
 - Removal of supplier's requirement for insurance until a contract is awarded, r 8.4.
 - Inclusion of compliance with international obligations, free trade agreements etc.
 - Other minor amendments.

“Must” and “Shall” Distinction

- The distinction between the two terms in the context of CPRs.

When can I accept a late tender?

- 10.28 Late submissions **must** not be accepted unless the submission is late as a consequence of mishandling by the relevant entity. A relevant entity **must** not penalise any potential supplier whose submission is received after the specified deadline if the delay is due solely to mishandling by the relevant entity.
- 10.29 Relevant entity mishandling does not include mishandling by a courier or mail service provider engaged by a potential supplier to deliver a submission. It is the responsibility of the potential supplier to ensure that the submission is dispatched in sufficient time for it to be received by the relevant entity by the deadline.

Late tenders continued...

- 10.30 Late submissions **should** be returned unopened to the potential supplier who submitted them, to:
- a. ensure that they are not evaluated or compared with submissions which were submitted by the due time and date;
 - b. demonstrate to other tenderers that the process for receiving submissions is fair and impartial; and
 - c. eliminate scope for any suggestion that the submission was rejected for any reason other than because it was late.
- 10.31 It may be necessary to open a late submission if there is no return address or any indication of which approach to market the submission relates. When a submission has been opened under such circumstances the potential supplier should be advised that the submission was rejected due to lateness and advised of the reason it was opened.

Other FAQs

- Can I change the evaluation criteria after receiving tenders?
- Can an entity bid for work that they helped define?
 - See Article: <https://hwlebsworth.com.au/commonwealth-procurement-can-a-contractor-bid-on-a-project-where-it-advised-on-an-earlier-stage/>

| Any Questions?

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