



## Session 8 – Questions & Answers

Presented by **Scott Alden**, and **Brian Ambler**, Partner

25 October 2022

## Acknowledgement of Country

In the spirit of reconciliation HWL Ebsworth Lawyers acknowledges the Traditional Custodians of country throughout Australia and their connections to land, sea and community.

We pay our respect to their Elders past and present and extend that respect to all Aboriginal and Torres Strait Islander peoples today.

# 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](mailto:kszivek@hwle.com.au)

# Part I – Questions

# Q1 When Do I Have To Use AusTender

- CPR 7.10 – Must use AusTender
- CPR 7.11 – May use AusTender for limited tenders
- RMG 423 – for entities that are required to comply with the CPRs, AusTender must be used to publish:
  - Annual Procurement Plans
  - Notification of open Approaches to Market (ATMs)
  - Contract Notices and contract amendments
  - Standing Offer Notices (SONs)

Unless exempt (CPR 2.6 or a FOI Act exemption (where the information is sensitive and harm is likely to be caused by disclosure))

## Q2 When Purchasing Under DOSO – How Do Delegations Work?

- Know your limits (and those of others)
- Be aware of internal policies governing what happens when contracts exceed thresholds
- Each order under a DOSO (to the same contractor) should be taken as a spend in aggregate

## Q3 Do All RFIs Have To Go To All Tenderers?

- CPR 10.8 – must ensure potential suppliers and tenderers are dealt with fairly and in a non-discriminatory manner when providing information. Must avoid giving any entity or entities an advantage.
- CPR 10.14 - Where RFI leads to an amendment to the ATM – must be issued to all potential suppliers participating at the time.
- IP reasons to only answer to one (Department of Finance – Ethics and Probity in Procurement)

## Q4 Can I Advise Parties of Open RFT?

- This can be done – care must be taken to not give any advantage (Department of Finance – Ethics and Probity in Procurement)



## Q5 Can I Cancel an ATM Before Closing?

- CPR 10.36 – “must not... cancel a procurement... so as to avoid the rules of Division 2”
- Some circumstances will require an ATM to be cancelled and re-issued (with amendment):
  - Where the scope of the requirement fundamentally changes
  - If it is in the public interest to NOT award a contract under the existing ATM
- Follow the request documentation
- Seek probity advice

## Q6 What Should I Say In A Tender Debrief?

- CPR 7.17 – “debriefings **must** be made available” on request to unsuccessful tenderers and successful suppliers
- Purpose
- Give – contractor, value, description, start and end date (RMG 423 – Procurement Publishing and Reporting Obligations)
- Do not disclose Confidential Information:
  - Info is specifically identified
  - Info is commercially ‘sensitive’
  - Disclosure would cause detriment
  - Discloser was told would remain confidential

## Q7 When To Use CCS ?

- Mandatory for procurements <\$200,000
- Recommended for procurements \$200,000 - \$1,000,000
- CCE's are encouraged to use the CCS as appropriate
  
- Note: the CCS terms are non-negotiable standard terms
- Note: the Cth Gov is exempt from Unfair Contract Terms Legislation – but the CCS was designed to be fair and equitable

## Q8 How Do I Embed Sustainable Procurement into my Process?

- *Sustainable Procurement* definition:
  - Sustainable procurement looks beyond the up-front cost to make purchasing decisions based on the entire life cycle of the goods and services, taking into account associated costs, environmental and social risks and benefits, and broader social and environmental implications.
  
- Applied using the five sustainable procurement steps:
  1. Plan the procurement
  2. Approach the market
  3. Evaluate and engage
  4. Report and manage
  5. Review and learn



## Q9 When Does An Indemnity Create A Contingent Liability?

What is an indemnity - the Commonwealth accepts the risk of loss or damage which a 3<sup>rd</sup> party may suffer

- Sometimes necessary under existing contractual arrangements with foreign entities
- Granted by the Finance Minister and delegated to accountable authorities (s60 PGPA Act)
- Only permitted where likelihood <5% AND most probable expenditure is not significant (usually <\$20m)

## Q10 How Do I Deal With A Strong Incumbent In A Procurement?

- Level playing field of information
- Protect incumbent's IP
- Check in with other tenderers to see they are satisfied with information provided
- Additional briefings and site visit (if relevant)
- Attention to data room

## Q11 Do I Have To Publish The Criteria Weightings In The RFT?

- Breach of process contract
- False and misleading conduct
- Need to set criteria well

## Q12 Can I Change The Criteria During An Evaluation If They Are Wrong?

- Breach of process contract
- False and misleading conduct
- Need to set criteria well



## Q13 Can I Do Market Feedback Prior To Issuing An RFT?

- Yes - but don't start the process contract
- Need to set up correctly
- Suggest protocol to be signed by participants
- Need to have a process for selecting participants and for collecting the information and using it
- Be careful of IP issues

## Q14 Can I Do A PIC Before We Issue The RFT?

- Yes
- Public interest test
- Reasonably simple process for delegate to execute (at right delegation level)



| Any Questions?

## Contacts



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