

AUSTRALIAN GOVERNMENT PROCUREMENT SERIES 2023

PART 1: PLANNING A PERFECT PROCUREMENT... SETTING UP FOR SUCCESS

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Acknowledgement of Country

HWL Ebsworth would like to acknowledge the Traditional Custodians of the land on which we are today. We would also like to pay our respects to Elders past and present.

THE 2023 PROCUREMENT SEMINAR SERIES

Part 1: Planning for a Perfect Procurement... Setting Up For Success – Wednesday, 09 August 2023

Part 2: Probity in Procurement – Wednesday, 23 August 2023

Part 3: Current Issues and Updates in procurement – NACC, Unsolicited Proposals and ECI Processes– Wednesday 6 September 2023

Part 4: Key Learnings from the ANAO Reports – Tuesday 19 September 2023

Part 5: Legal Issues and Updates in Procurement – GPJR and the Process Contract – Wednesday 4 October 2023

Part 6: The Art of Tender Assessment and Achieving VFM – 17 October 2023

Part 7: Managing your Procurement – 1 November 2023

Part 8: Prickly Issues in Procurement – 15 November 2023

Part 9: The Cth Contracting Suite and Cth Procurement Policies – 29 November 2023

To find out more about the additional seminars in our Procurement Seminar Series, and to register to attend, please contact Katarina Szivek on kszivek@hwle.com.au

OVERVIEW

What is Procurement

Commonwealth Procurement Framework

What can we buy / procure

How does the need arise

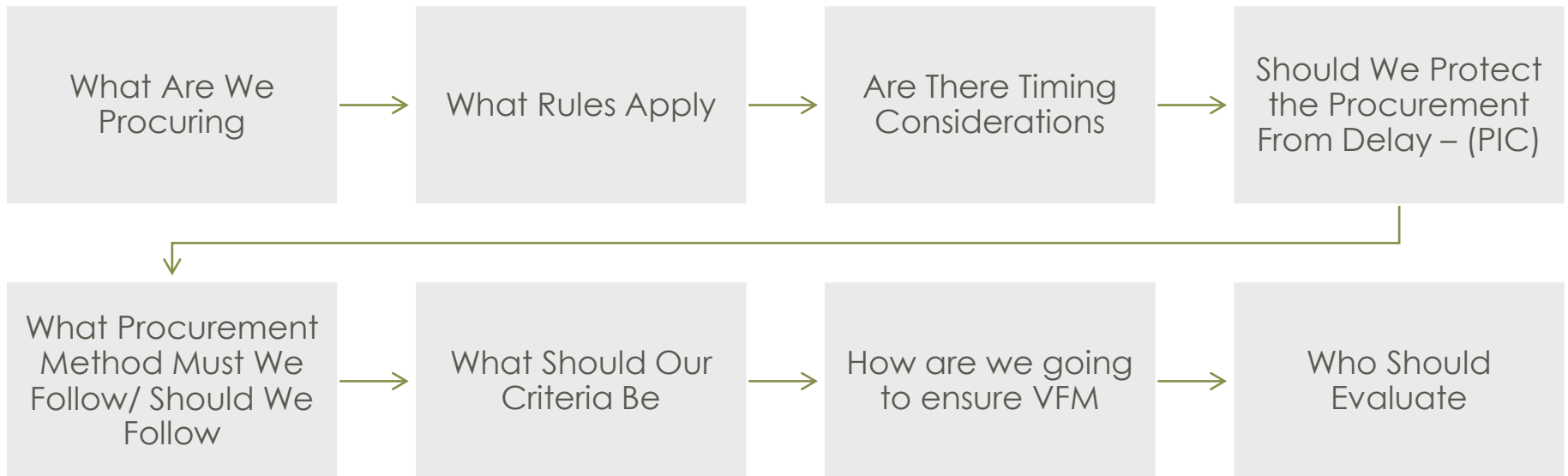
What are we actually buying

How can we buy it

How should we buy it (the Procurement Strategy)

What agreement should we use (the Contract Strategy)

EARLY CONSIDERATIONS



WHAT IS PROCUREMENT?



Procurement is the process of acquiring goods and services. It **begins** when a need has been identified and a decision has been made on the procurement requirement.



Procurement **continues** through the processes of risk assessment, seeking and evaluating alternative solutions, and the awarding and reporting of a contract.

Commonwealth Procurement Rules (CPRs) CPR 2.7

WHAT IS PROCUREMENT?

- Procurement does not include:
 - grants (whether in the form of a contract, conditional gift or deed)
 - investments (or divestments)
 - sales by tender
 - loans
 - procurement of goods and services for resale or procurement of goods and services used in the production of goods for resale
 - any property right not acquired through the expenditure of relevant money (for example, a right to pursue a legal claim for negligence)
 - statutory appointments
 - appointments made by a Minister using the executive power (for example, the appointment of a person to an advisory board)
 - the engagement of employees, such as under the *Public Service Act 1999*, the *Parliamentary Services Act 1999*, a relevant entity's enabling legislation or the common law concept of employment
 - arrangements between non-corporate Commonwealth entities where no other suppliers were approached

CPR 2.9

WHAT ARE WE PROCURING?

- Routine Goods or Services
- Specialist / Bespoke / Unique Goods and Services
- Basic / Complex Equipment... Installation
- Routine Works / Maintenance
- Specialist / Complex / Valuable Works / Maintenance
- A Tenant / Licensee (Lease / Event)
- An opportunity (advertising space / revenue contract)
- Disposal

WHY ARE WE PROCURING?

New Need

An Old Need (back to market)

Unsolicited Approach

New Acquisition / New System / New Way of
Doing Business

Disposing?

BENEFITS OF PROCUREMENT?

- Aggregation leads to savings – but be careful – e.g. competition
- Competitive environment produces ‘Value for Money’
- Accountability / Defendability
- Potential to tap into innovation
- Trust and confidence of market and providers

DISADVANTAGES OF PROCUREMENT?



Time



Cost



Can stifle
innovation



Hamstrung by
process /
compliance



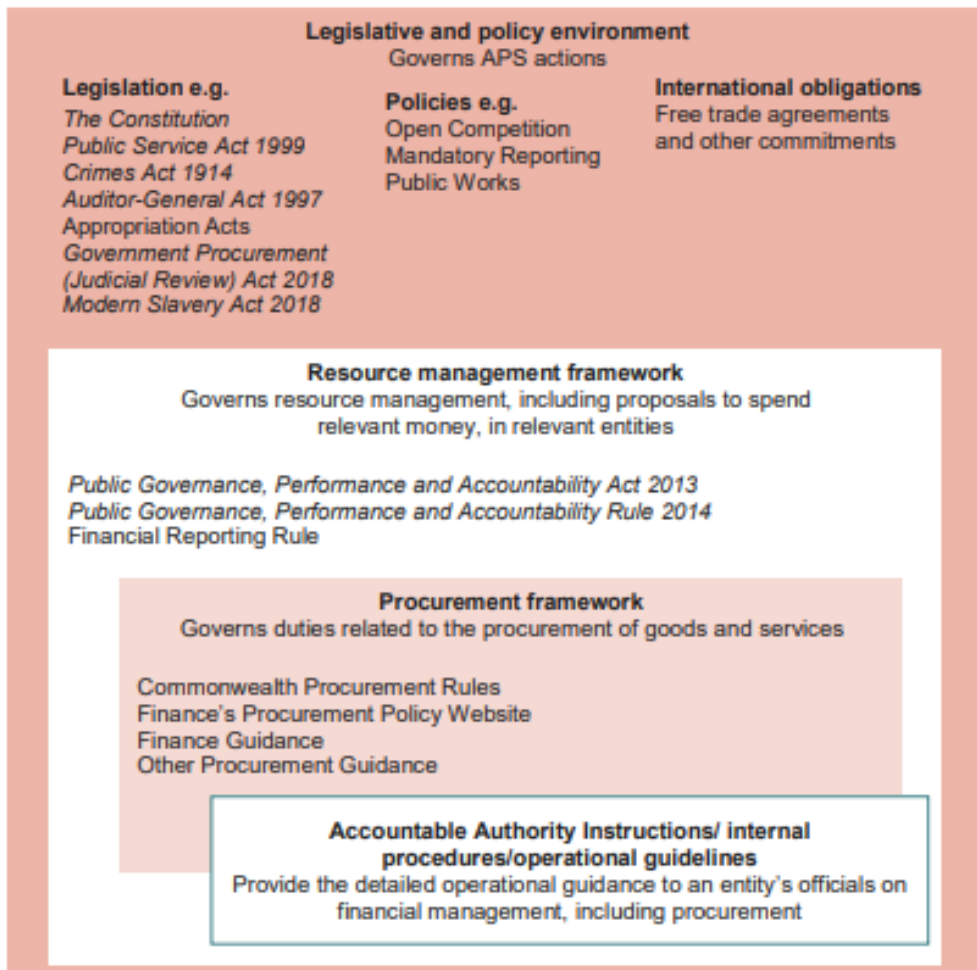
Potential litigation



The market
controls what you
get

The Framework, The Law and the Rules

CTH PROCUREMENT FRAMEWORK



[Commonwealth Procurement Rules - 13 June 2023 \(finance.gov.au\)](#)

EXEMPT PROCUREMENTS - R2.6

2.6 These 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.¹

- Exemption from Div. 1 & 2 - to the extent deemed necessary
- Not a 'covered procurement'

EXEMPT/ LIMITED PROCUREMENTS – APPENDIX A

- Exempt under Appx A to CPRs
 - limited to Div 2 and rules 4.7, 4.8 (Broader benefits to Aus economy) and 7.26 (contract management/ verification) of Div 1
 - Not a 'covered procurement'
- Limited Tender under CPR 10.3 (a to h)
 - In these circumstances – no requirement to comply with CPR10.6 to 10.8 (Request documentation), 10.20 to 10.31 (Minimum time limits) or 10.35 (Awarding contracts)

PROCUREMENT METHODS - CPRS

- Method 1 – Open tender (CPR 9.8)
 - Open tender involves publishing an open approach to market and inviting submissions. This includes multi-stage procurements, provided the first stage is an open approach to market.

PROCUREMENT METHODS - CPRS

- Method 2 – Limited tender – Conditions (CPR 10.3)
 - A relevant entity must only conduct a procurement at or above the relevant procurement threshold through limited tender in the following circumstances:
 - No submissions due to VFM or non-compliance for reasons of extreme urgency brought about by events unforeseen
 - Exceptionally advantageous conditions that arise only in the very short term e.g. unusual disposals, unsolicited innovative proposals, liquidation, bankruptcy, or receivership,
 - No reasonable alternative or substitute due to intellectual property or an absence of competition for technical reasons
 - Additional deliveries from original supplier where change in supplier would require change in equipment or services
 - Procurements from commodity market
 - Prototype
 - Design competition

PROCUREMENT METHODS - CPRS

- Procurements from standing offers (CPR 9.12)
 - Procurements from an existing standing offer are not subject to the rules in Division 2 of these CPRs
 - However, these procurements must comply with the rules in Division 1
 - Officials should report the original procurement method used to establish the standing offer when they report procurements from standing offers

THE PROCESS

A Traditional Process

- Single Stage Traditional Procurement
- Two Stage Traditional Procurement

An Alternative Process

- Limited Tender
- Market Led Proposal / Unsolicited Proposal
- Early Tenderer Involvement / Early Contractor Involvement

THE STRATEGY



What – what are we procuring



Why – why are we procuring it



Who – who will be likely suppliers/ who are our internal stakeholder and approvers



When – when do we need it by (work backwards)



How – how are we going to engage the market

THE PROCUREMENT STRATEGY AND CONTRACT MODEL

Document the Procurement Strategy

- How are we going to engage the market
- How have we engaged the market before
- Why are we doing it this way – why aren't we doing it a different way
- The process
- Approvals
- What's the alternative
- Stay flexible... Discretion (Privilege Clauses) vs Good Faith and Admin Law

THE PROCUREMENT STRATEGY AND CONTRACT MODEL

Document the contract strategy

- What contract philosophy are we using – Traditional Adversarial v Relationship v Alliance
- What are they doing for us
- How long are they doing it
- Pricing model – Reimbursable cost / Cost plus / GMP / Fixed price lump sum / Rates and margins / Hybrid (e.g. fixed management fee plus rates)
- Design THEN Build / Design AND Build / Design Build Maintain
- Contract Model / Contract Form (Standard / Bespoke / Amendments)

TIMELINE/ OVERVIEW



MINIMUM TIME LIMITS

- Relevant entities must provide sufficient time for potential suppliers to prepare and lodge submissions in response to an approach to market
- The time limit for potential suppliers to lodge a submission must be at least 25 days from the date and time that a relevant entity publishes an approach to market for an open tender
- The 25 day period must be extended by five days for each of the following circumstances:
 - when a relevant entity does not make request documentation available electronically from the date that a relevant entity publishes an approach to market; and/or
 - when a relevant entity does not accept submissions electronically.

CPRs 10.21 – 10.23

MINIMUM TIME LIMITS

- A relevant entity may establish a time limit that is less than 25 days but no less than 10 days under the following circumstances:
 - when the relevant entity has published details of the procurement in an annual procurement plan on AusTender, at least 40 days and not more than 12 months in advance, and those details include a description of the procurement, the timing of the approach to market and the procedure to obtain request documentation;
 - when the relevant entity procures commercial goods and services (unless the relevant entity does not accept the submissions electronically, in which case the minimum time limit must be no less than 13 days);
 - when a genuine state of urgency renders the normal time limit impracticable.

CPRs 10.21 – 10.23

THE ASSESSMENT PROCESS

- Be clear on it now / You can't change it later
- What high level weightings are we going to use
- What criteria are we going to use
- What sub weightings will we use
- How will we assess price – Initial up front cost, LCC / Whole of life costs / Other factors e.g. sustainable procurement (Environment etc.)

REVIEW THE DOCUMENT

A – Conditions of Tender

- Criteria in Conditions of Tender and Returnable Schedules
- Anything special about this procurement that needs disclosing
- What are we going to disclose (e.g. weightings / budget)
- Are we having a briefing / where / mandatory
- Mandatory criteria?
- Late Tenders

REVIEW THE DOCUMENT

A – Conditions of Tender

- Request documentation **must** include a complete description of:
 - the procurement, including the nature, scope and the quantity of the goods and services to be procured
 - any conditions for participation, including any financial guarantees, information and documents that potential suppliers are required to submit
 - any minimum content and format requirements
 - evaluation criteria to be considered in assessing submissions and, if applicable to the evaluation, the relative importance of those criteria
 - any dates for the delivery of goods or supply of services, taking into account the complexity of the procurement
 - any other terms or conditions relevant to the evaluation of submissions

CPR 10.6

REVIEW THE DOCUMENT

A – Conditions of Tender

- Conditions for participation
 - minimum conditions that potential suppliers must demonstrate compliance with, in order to participate in a procurement process or for submissions to be considered e.g. accreditation
 - must be limited to legal, commercial, technical and financial abilities
 - may require relevant prior experience but must not specify previous experience with the relevant entity or with the Aus Gov or in a particular location

CPRs 10.15-10.19

REVIEW THE DOCUMENT

A – Conditions of Tender

- Minimum content and format requirements
 - criteria that a tenderer's submission is required to meet, when responding to an approach to market, to be eligible for further consideration in a procurement process
 - following the receipt of submissions, consideration must be given only to submissions that meet minimum content and format requirements (CPR 10.34)

REVIEW THE DOCUMENT

A – Conditions of Tender

- Mandatory criteria
 - Non-discrimination CPRs 5.3-5.4
 - All potential suppliers to government must, subject to these CPRs, be treated equitably based on their commercial, legal, technical and financial abilities and not be discriminated against due to their size, degree of foreign affiliation or ownership, location, or the origin of their goods and services
- Late Tenders
 - Late submissions CPRs 10.28 – 10.31
 - Late submissions must not be accepted unless the submission is late as a consequence of mishandling by the relevant entity
 - Late submissions should be returned unopened

REVIEW THE DOCUMENT

B – Returnable Schedules

- What do we ask for?
- Match with Criteria
- Onerous?

C / D – General / Special Conditions of Contract

- Are we using the right contract?
- Are there any special conditions
(safety / insurance / job specific / entity specific)

GENERAL / SPECIAL CONDITIONS OF CONTRACT

- Commonwealth Contracting Suite (**CCS**) for procurements under \$1 million and mandatory under \$200,000
- Creates uniformity across Commonwealth contracts to reduce the burden on businesses contracting with the Commonwealth Government
- CCS Terms: the following components cannot be changed and are non-negotiable:
 - [Commonwealth Approach to Market Terms](#)
 - [Commonwealth Contract Terms](#)
 - [Commonwealth Purchase Order Terms](#)
 - [Commonwealth Contracting Suite Glossary](#)
 - [Commonwealth Deed of Standing Offer Approach to Market Terms](#)
 - [Commonwealth Deed of Standing Offer Terms](#)
 - [Commonwealth Deed of Standing Offer Glossary](#)

REVIEW THE DOCUMENT

E – Scope of Work / Specification

- Detailed
- The objective bystander test “would he/she know what you are procuring”
- Consistency
- Objective Consistency

REVIEW THE DOCUMENT

E – Scope of Work / Specification

- Applies for works or services
- Often a long lead time item
- 2 basic types - prescriptive or outcomes based
- may need expert input particular if prescriptive
- May be the source of internal differences that need to be worked through
- Language should be "doing" language
- Is often the source of most disputes so accuracy is key
- Consider where this sits in the hierarchy of documents
- Don't stray into non-specification areas
- Need to set what level of compliance is required - what is a must

SPECIFICATIONS

- A relevant entity must, where appropriate:
 - set out the specifications in terms of performance and functional requirements; and
 - base technical specifications on international standards, when they exist and apply to the relevant procurement, except when the use of international standards would fail to meet the relevant entity's requirements
- Any modification of a specification during the procurement must be notified to all potential suppliers:
 - in the same manner as the original information
 - in adequate time to allow potential suppliers to modify and re-lodge their submissions, if required

CPRs 10.9-10.14

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