

AUSTRALIAN GOVERNMENT PROCUREMENT SERIES 2023

PART 9: THE COMMONWEALTH CONTRACTING SUITE AND COMMONWEALTH PROCUREMENT POLICIES

PRESENTED BY
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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

COMMONWEALTH CONTRACTING SUITE

COMMONWEALTH PROCUREMENT RULES

CPR 2.4 c

Templates such as the CCS, which simplify and streamline processes, creating uniformity across Commonwealth contracts to reduce the burden on businesses when contracting with the Commonwealth.

CPR 6.10 – Commonwealth Contracting Suite

Non-corporate Commonwealth entities **must** use the Commonwealth Contracting Suite for contracts under \$200,000. Corporate Commonwealth entities are encouraged to apply the suite of template.

COMMONWEALTH CONTRACTING SUITE

Resource Management Guide 420

- Mandatory use of the Commonwealth Contracting Suite for procurements under \$200,000
- The guide is relevant to all non-corporate Commonwealth entities (NCEs)
- Corporate Commonwealth entities (CCEs) are encouraged to apply this policy

COMMONWEALTH CONTRACTING SUITE

RMG 420

- The CCS is designed to minimise the burden on businesses in contracting with the Commonwealth Government and to streamline and simplify procurement processes for Commonwealth entities

The mandatory components are:

- The ATM (incorporating the Glossary, the Cth ATM Terms and the Response to the ATM)
- The Cth Contract (incorporating the Glossary and the Cth Contract Terms)
- Also a range of **non-mandatory** documents
- CCS Decision Tree to determine if CCS right for specific procurement <https://ccs.finance.gov.au/>

COMMONWEALTH CONTRACTING SUITE

RMG 420

- NCEs **must** use the CCS when purchasing goods or services <\$200,000 where a formal contract is required, except under Part 2 RMG
- For procurements between \$200,000 and \$1 million, use of the CCS is encouraged consistent with the RMG

COMMONWEALTH CONTRACTING SUITE

RMG 420 Part 2 - Exceptions

- Where no formal ATM or contract is required (eg procurement <\$10,000)
- Industry practice to use supplier's T&Cs, and any resulting risks are acceptable to the Delegate and subsequently managed
- Using a mandated WoAG arrangement or standing offer arrangement that prescribes particular contractual arrangements
- Purchasing ICT goods and services (refer to Digital Sourcing contract templates)
- Construction work, specialist scientific equipment or specialist military goods or services
- Procurement under para 2.6 of the CPRs
- Formal risk assessments indicates that a bespoke contract is required to manage specific risks
- The procurement is significantly impacted by Prescribed Terms, being conditions, guarantees and warranties implied by law which cannot be excluded (eg ease agreements)
- Both procurement and delivery will take place outside Australia.

COMMONWEALTH CONTRACTING SUITE

THE CCS

- ATM
- Commonwealth Contract Terms
- Commonwealth Purchase Order Terms
- Commonwealth Deed of Standing Offer ATM Terms
- Commonwealth Deed of Standing Offer Terms
- Commonwealth Glossary and interpretation

COMMONWEALTH CONTRACTING SUITE

ATM

- 1.4 – Process Contract excluded
- 4.1 (b) – Validity Period – 90 days
- 4.2(d) – Prices must be in Australian currency
- 5.3 to 5.7 – Criteria (equal importance)
 - Extent to which the Response meets the Requirement
 - Extent to which demonstrates capability and capacity to provide the Requirement
 - Whole of life costs
 - IPP
 - Viability of Respondent

COMMONWEALTH CONTRACTING SUITE

Commonwealth Contract Terms

- CC3 – Conflicts of Interest - ongoing obligation
- CC5 – Governing Law – ACT
- CC13 – Specified Personnel
- CC14 – Indemnity – negligence or breach
- CC15 – Termination or Reduction for Convenience
- CC16 – Termination for Cause
- CC19 – Transition In
- CC20 – Transition Out
- CC21.K – *NACC Act 2022* (Cth) Requirements
- CC22 – Notification of Significant Events

COMMONWEALTH CONTRACTING SUITE

Commonwealth Purchase Order

- Similar to Commonwealth Contract Terms

Commonwealth Deed of Standing Offer ATM Terms

- Similar to ATM

Commonwealth Deed of Standing Offer Terms

- Similar to Commonwealth Contract Terms

COMMONWEALTH CONTRACTING SUITE

Sample ATM

- Key Information and Dates
 - Industry Briefing
 - Site Inspection
 - Question Closing Date and Time
 - Minimum Content and Format Requirements
 - Conditions of Participation
- AA2(b) – Security Requirements
- Additional Contract Terms
 - AC1 – IP
 - AC2 – Payment Terms
- 5.4 – Non-Compliance – Respondents to set out Non-Compliance

COMMONWEALTH CONTRACTING SUITE

Sample Contract

- CA2(a) – Standards
 - Performance Measures
- CA2(b) – Security Requirements – security clearances
- CA3 – Contract Price
 - Adjustment to Fixed Pricing for Contract Variation/ Extension
- Additional Contract Terms
 - CB1 – Intellectual Property
 - Payment Terms
 - *Workplace Gender Equality Act 2012 (Cth)*
- Contract Annex 1 – Conflicts of Interest Management Plan
- Contract Annex 2 – Supplementary Information

COMMONWEALTH CONTRACTING SUITE

Frequently Asked Questions (selected)

- Does the CCS meet the Unfair Contract Terms Legislation?
 - Commonwealth Government does not have to comply with the Unfair Contract Terms Legislation. CCS developed in close consultation with the Office of the Australian Small Business Commissioner. It was designed to be consistent with the unfair contract terms legislation and to be equitable to both parties.
- Are the terms negotiable?
 - The terms are non-negotiable

PROCUREMENT CONNECTED POLICIES

Payment Times Procurement Connected Policy

Shadow Economy – increasing the integrity of government procurement

Indigenous Procurement Policy

Workplace Gender Equality Procurement Principles and User Guide

Australian Industry Participation Plans for Government Procurement

The Code for the Tendering and Performance of Building Work 2016 (Building Code 2016)
and Building Code 2013

CPR 4.5 – Environmental Sustainability

CPR 4.7 – Broader Benefits to the Australian Economy

PROCUREMENT CONNECTED POLICIES

Payment Times Procurement Connected Policy

- From 1 October 2021
- Threshold >\$4 million (Contracts and DoSO expected to exceed)
- Requires large businesses (Reporting Entities under the *Payment Times Reporting Act 2020*) that are awarded Aus Gov contracts over \$4 million to pay their subcontracts valued up to \$1 million within 20 calendar days
- Flow down payment times requirements to subcontracts that contribute to the Cth contract and which are:
 - Valued >\$4 million
 - Awarded to a Reporting Entity
 - Require further flow down where the above conditions are met
- All NCEs must comply
- Other Commonwealth entities encouraged to use best endeavours to apply the policy

PROCUREMENT CONNECTED POLICIES

Payment Times Procurement Connected Policy – FAQs

- Does the policy apply to overseas procurements or contracts
 - No. If party local and partly overseas – then applies to extent of local
- Does the policy apply to real property procurements, including leases and licences
 - No

PROCUREMENT CONNECTED POLICIES

Shadow Economy – increasing the integrity of government procurement

- From 1 July 2019
- Threshold >\$4 million
- Businesses must provide a statement from the ATO showing a satisfactory tax record for the past 4 years
- All NCEs must comply with the policy
- CCEs encouraged to adopt this policy
- Note Part 8 of the Policy regarding new and foreign Tenderers – Tenderer declaration:
 - Is foreign or new
 - Will comply and pay Australian tax obligations
 - Has no tax convictions in last 4 years
 - Is complying with tax obligations outside Australia
- Applies to panels – total value of panel collectively >\$4 million

PROCUREMENT CONNECTED POLICIES

Shadow Economy FAQs

- Does policy apply to existing contracts operating after 1 July 2019
 - No
- What if not received before tender closes?
 - Must be received within 4 business days of tender closing and before a contract is awarded. If not lodged within 4 business days of tender closing, the tender response cannot be considered
- What do you do if tenderer says they have issues seeking an STR
 - Direct tenderer to contact ATO on 132866 (for business) or 137286 (for registered agents)
- What if estimate was <\$4 million but contract value >\$4 million
 - STR not required
- Is it necessary for applicants to submit STRs when a panel originally established prior to 1 July 2019 is refreshed
 - No
- Can a Cth Procurement Officer contact the ATO to confirm an applicant's details or tax history?
 - No

PROCUREMENT CONNECTED POLICIES

Indigenous Procurement Policy

- The IPP is intended to stimulate Indigenous entrepreneurship and business development, providing Indigenous Australians with more opportunities to participate in the economy has 3 key components:
 - A target for purchasing from Indigenous enterprises
 - A mandatory set-aside to direct some Commonwealth contracts to Indigenous enterprises
 - Minimum Indigenous participation requirements for certain Cth contracts
- Applies to all NCEs subject to the CPRs
- Other entities encouraged to adopt the policy as best practice

PROCUREMENT CONNECTED POLICIES

Workplace Gender Equality Procurement Principles and User Guide

- Effective 1 August 2013
- Threshold – at or above relevant procurement thresholds
- Tenderers with > 100 employees in Australia must be able to demonstrate compliance with WGEA 2021 by supplying a letter of compliance either with their submission, or before entering into a contract
- Do not apply to overseas suppliers if law does not apply to them
- Only applies to suppliers with commercial presence in Australia with >100 staff

PROCUREMENT CONNECTED POLICIES

WGE Procurement Principles and User Guide - FAQs

- My organization had 100 or more employees for 5 months last year – do I need a letter of compliance?
 - No – if < 6 months of a reporting period, no need to report to WGEA
- How do I know if supplier should have included a letter with its tender?
 - ATM should have declaration in the ATM requiring tenderers to identify whether or not they are a 'relevant employer'
- Do I need to check the list of non-compliant organisations on WGEA website?
 - No – you must include the declaration in the ATM for completion by the supplier
- If supplier has not indicated if relevant employer, and not included letter, can I exclude the tender?
 - Seek assistance from internal legal / probity
- Do the Principles apply to all deed of standing offer arrangements
 - Yes – refer to Model Clauses

PROCUREMENT CONNECTED POLICIES

Australian Industry Participation Plans for Government Procurement

- Major Cth Government Procurements >\$20 million
- Effective 1 January 2010
- Tenderers required to prepare and implement an AIP Plan
- Key objective – Aus industry (especially SMEs) should have full, fair and reasonable opportunity to supply goods and services to eligible Cth projects
- AIP is about how an entity will familiarise itself with capabilities of Aus industry. Does not mandate the use of Aus industry
- Policy applies to NCEs and not to CCEs (CCEs may choose to apply)

PROCUREMENT CONNECTED POLICIES

Procurement Connected Policies – Building Codes

- The Code for the Tendering and Performance of Building Work 2016 (Building Code 2016), and the Building Code 2013 have been repealed by *the Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022*
- Cth entities are no longer required to apply the Building Code 2016 and Building Code 2013
- Changes are retrospective meaning that the requirements of these codes do not apply to any active procurements, contract, expressions of interest or requests for tender that commenced or were entered into prior to repeal

PROCUREMENT CONNECTED POLICIES

CPR 4.5(e) – Environmental Sustainability

- An official must consider...
 - Environmental sustainability of the proposed goods and services (such as energy efficiency, environmental and climate change impact and the use of recycled products)
 - i. Recognising the Australian Government's commitment to sustainable procurement practices, entities are required to consider the Australian Government's Sustainable Procurement Guide where there is opportunity for sustainability or use of recycled content
 - ii. The Sustainable Procurement Guide is available from the Department of Agriculture, Water and the Environment's website

PROCUREMENT CONNECTED POLICIES

Sustainable Procurement Guide

- CPRs specify when assessing VFM, an official must consider environmental sustainability of the proposed goods and services (such as energy efficiency, environmental impact and the use of recycled products)
- Guide provides step-by-step guidance on how to consider sustainability in the different stages of the procurement process – from identifying the need to the end of the contract, including review and reporting
- Applies to NCEs and prescribed corporate Commonwealth entities

PROCUREMENT CONNECTED POLICIES

Sustainable Procurement Guide

- Where appropriate officials should consider sustainability factors such as:
 - Energy consumption
 - Greenhouse gas emissions
 - Reduction of waste
 - Use of recycled products
 - Reduction in hazardous substances
 - Packaging
 - End-of-life recycling

PROCUREMENT CONNECTED POLICIES

Sustainable Procurement Guide

- Sustainable procurement practices include:
 - Devising strategies that reduce demand and extend the life of the product
 - Planning what happens with a product at the end of the contract, how will it be re-used, recycled or disposed of, to encourage potential suppliers to address this from the beginning
 - Considering costs over the life of the good or service and policies in the planning process (such as potential increases in energy prices)
 - Encouraging sustainable solutions and innovation in tenders
 - Measuring and improving sustainability throughout the life of the procurement

PROCUREMENT CONNECTED POLICIES

CPR 4.7 – Broader Benefits to the Australian Economy

- In addition to the value for money considerations at paragraphs 4.4 – 4.6 for procurement above \$4 million (or \$7.5 million for construction services) except procurement covered by Appendix A and procurement standing offers), officials are required to consider the economic benefit of the procurement to the Australian economy
 - This assessment will require officials to gather appropriate information on economic benefits as part of the decision-making process and document how economic benefit has been considered as part of the overall value for money assessment

PROCUREMENT CONNECTED POLICIES

CPR 4.7 – Broader Benefits to the Australian Economy

- What is a domestic benefit?
 - Make better use of Australian resources that would otherwise be under-utilised (eg employing people, making use of spare industrial capacity, freeing govt funds for other spending)
 - Otherwise increase productivity (eg adoption of new know-how or innovation, enabling more people to acquire in-demand skills, or ensuring that resources are allocated to sectors in which Australia has a comparative advantage)
 - Provides broader benefits that support the development and sustainment of industry capabilities
 - Eg enhancing key industry sectors through the DoDs Sovereign Industrial Capability Priorities

PROCUREMENT CONNECTED POLICIES

CPR 4.7 – Broader Benefits to the Australian Economy

- Productivity-enhancing technology development and adoptions can deliver economic benefit, eg
 - R&D related activities and investments
 - Transfer of technology to Australian business eg through licensing arrangements for IP
 - Indigenous workforce participation
 - Engaging a business that provides services of persons with a disability
 - Traineeships or apprenticeships in areas of skills shortage
 - Boosting a supplier's international competitiveness

PROCUREMENT CONNECTED POLICIES

CPR 4.7 – Broader Benefits to the Australian Economy

- How can a supplier provide a domestic economic benefit?
 - Competitive pricing
 - Building, leasing or procuring infrastructure that benefit Australian communities
 - Providing skills and training that benefit Australian communities
 - Employing workers in Australia
 - Employing apprentices or trainees in Australia
 - Paying taxes in Australia
 - The environmental benefit of the proposed solution to Australia:
 - Reducing environmental impact through energy efficient inputs
 - Using recycled materials or content

PROCUREMENT CONNECTED POLICIES

CPR 4.7 – Broader Benefits to the Australian Economy

- How can a supplier provide a domestic economic benefit?
 - Contributing to positive social outcomes in Australian communities eg engaging unemployed people
 - Using Indigenous businesses
 - Using SMEs in delivering goods and services, either directly or as a subcontractor or a supplier
 - Developing and adopting innovative products or practices that benefit Australian communities
 - Sharing knowledge, skills and technology with SMEs
 - Creating export opportunities for Australian goods and services
 - Using goods and services from a business that provides services of persons with a disability
 - Developing Australian industry capabilities or industrial capacity

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QUESTIONS?



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