Public Procurement World - Australia

1. The Laws

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# a. What is the applicable legislation?

Government procurement activity in Australia is regulated at federal, state/territory and local government levels.

At the federal level, the Public Governance, Performance and Accountability Act 2013 (Cth) ("PGPA Act") (Cth) establishes a framework and rules for the proper expenditure of public monies by government departments and agencies.

Requirements for procurement are primarily contained in the Commonwealth Procurement Rules (“CPRs”) issued under the PGPA Act. Government procurement is also subject to other policies and directions. Many of these are captured in resource management guides issued by the Department of Finance. These guides address some contract positions (e.g., on indemnities). Unlike some jurisdictions, contract terms for Australian government procurement are not contained in regulations. At the state/territory and local levels, there is also legislation regulating the proper expenditure of public monies. Generally, regulation of government procurement activities at these levels tends to be more prescriptive than at the federal level.

At a state/territory level, legislative instruments typically require, subject to limited exceptions, that a competitive procurement process be conducted for government supplies. Legislation in most states/territories create a central procurement body to set procurement policy and conduct most procurement. The procurement policies address similar matters to the federal CPRs. Similar to the federal level, most states/territories issue Treasurer’s Instructions (or equivalent) that provide further policy and guidance on conducting procurement.

Discrete pieces of legislation or government policy in each jurisdiction also address other procurement issues such as public disclosure of contract details.

State enacted legislation regulating local government procurement tends to require, with limited exceptions, a tender to be conducted for supplies to local government.

Note, this chapter does not cover generally applicable legislation such as legislation dealing with freedom of information or foreign corrupt practices which apply to contracts entered into by government entities.

# b. Does the legislation relate to or interact with any applicable trade agreement, such as the European Union procurement rules, WTO Government Procurement Agreement (GPA) or the procurement requirements of the North American Free Trade Agreement (“NAFTA”)?

Trade agreements have impacted Australia’s procurement rules and requirements. For example, most of Australia’s free trade agreements contain a non-discrimination principle between Australian and foreign suppliers to government, set goals to eliminate preferential treatment, and commit to provide transparency within the tendering process.

However, the CPRs have recently been amended to provide that for procurements over A$4 million, officials must consider the benefit of the procurement to the Australian economy in light of the various international trade agreements to which Australia is a party. It is not yet clear what impact this will have on Australia's accession offer to the World Trade Organisation ("WTO") Committee on Government Procurement. Australia is currently an observer, but has applied to become a member, of the WTO Agreement on Government Procurement.

# c. What are the basic underlying principles of the legal framework?

The central principle of government procurement in Australia at all levels is value for money. Other procurement principles deal with encouraging competitive markets, adhering to non-discriminatory purchasing practices, accountability for purchasing decisions, and using efficient, effective, ethical and transparent procurement processes.

These principles are reflected in broadly the same manner in the CPRs and state and territory procurement requirements.

Outside of the legislative framework, the courts have found governments to be subject to an implied obligation to conduct tenders fairly and in good faith. However, such an obligation is not automatically implied into each government tender terms, but depends upon the facts of each case.

# d. Is aerospace and defense procurement treated differently from other types of procurement?

Defence procurement is undertaken by the federal government and is subject to the same legislative regime as other federal government procurement.

However, due to the size of defence procurement spending and the specialised nature of defence procurement, the Department of Defence has a number of complex additional defence-specific procurement rules.  These are primarily contained in the Defence Procurement Policy Manual ("DPPM"),which is updated regularly. Select defence procurement is also exempt from free trade agreement procurement commitments.

Defence also issues its own specialised contract terms.

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