Public Procurement World - Australia

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# 1. The Laws

## 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.

# 2. Application of the Statutory Procurement Laws

## a. Which public agencies are covered by the laws?

At the federal and state/territory level, there are typically two types of government agencies for procurement purposes:

departments and agencies which do not have a separate legal identity to the Crown (complying with the procurement laws and policies in most cases is mandatory for these bodies). At the federal level, examples include the Department of Defence, the Department of Foreign Affairs and Trade, and the Attorney General's Department; and

other government created bodies that have a separate legal identity to the Crown (e.g., bodies created by statute or government-owned companies). At the federal level, examples include the Australian Broadcasting Corporation, the Commonwealth Scientific and Industrial Research Organisation and the Reserve Bank of Australia. Treatment of these bodies differs. In some cases they may choose to subject themselves to the procurement laws and policies and in other cases they can be directed to comply.At the local government level, each local government body will be required to comply with the local government procurement laws set by the responsible state government.

As a practical matter, most government created authorities and companies will have in place very similar procurement requirements to government departments and agencies.

## b. Which private entities are covered by the laws?

Private entities are generally not covered by the government procurement frameworks. However, in a number of cases, private sector entities may be permitted to benefit from government purchasing. For example, private schools and hospitals may be allowed to buy from government established supply arrangements.

## c. Are co-operations between contracting authorities exempted from public procurement law? If so, what are the conditions for the exemption?

One public body may provide products or services to another public body.  There is no exemption from procurement requirements just because the supplier and customer are each public bodies.  However, if the public bodies re each part of the Crown there will be no legally binding contract as the procurement will have been awarded within a single entity.  Additionally, the Commonwealth Competitive Neutrality Policy Statement applies competition principles to government activities (both federal and state/territory).  It aims to remove a net competitive advantage that government business activities may have over competitors by virtue of their public ownership.

## d. Which types of contracts are covered?

Any contracts that are awarded by government departments or agencies using public money or relating to public property will generally be subject to the procurement laws. It is important to check in each case whether the proposed procurement activity is covered by the relevant procurement laws, especially where the relevant activity is not for procuring goods or services or the means of acquisition or contracting are non-standard.

For the purposes of the federal CPRs, grants, investment (or divestment), sales by tender, loans, purchases of property or services for resale or of property or services used in the production of goods for resale and any property right not acquired through the expenditure of public money, statutory or ministerial appointments, and engagement of employees are not considered to be “covered” procurement activities.

At the federal level, the CPRs contain rules in two divisions. Division 1 applies to all procurements regardless of value. Division 2 applies additional rules to procurements valued at or above the relevant procurement threshold (unless an exception applies). The Division 2 rules require a higher level of transparency (e.g., stronger requirements to conduct open tenders and to follow certain rules in conducting the procurement).

The procurement thresholds are:

for non-corporate Commonwealth entities, other than for procurements of construction services, A$80,000;

for prescribed corporate Commonwealth entities, other than for procurements of construction services, A$400,000; or

for procurements of construction services by non-corporate Commonwealth entities and prescribed corporate Commonwealth entities, A$7.5 million.

For states and territories, the financial threshold for a contract usually determines the procurement method that must be used.

## e. How are changes to an existing contract dealt with? Do changes require a new procurement procedure?

The parties to the contract may agree on changes, however the procuring agency must always ensure that the change is not sufficiently different to the initial approach to market so as to trigger rules requiring a new procurement.

## f. What is the applicable regime for framework agreements?

At the federal and state/territory level, one agency is usually appointed as the lead agency to manage the framework arrangement (usually referred to as whole-of -government procurement arrangement). At the federal level, the lead agency is usually the Department of Finance.

Australian governments typically use whole-of -government procurement arrangements for certain types of supplies. Where there is such an arrangement for a type of supply, it is usually mandatory for government customers to purchase under the arrangement (unless an exemption applies).

Whole-of-government arrangements are often used for items routinely purchased by government bodies without the need to be further customised prior to use (e.g., supplies for hospitals, computer equipment, telecommunications services, cleaning services).

Whole-of-government arrangements may also be used for bespoke services, such as to pre-qualify suppliers able to provide certain IT services. From the pre-qualified list, government bodies may then conduct a further procurement to select a provider for particular projects.

Defence establishes framework arrangements for certain supplies, including IT services or to pre-qualify to participate in defence research programmes.

## g. What is the applicable regime for public-private partnerships (PPPs)?

The National Public Private Partnership Policy and Guidelines which indicate the default position of the government on all key issues) are generally applied by the federal and state/territory (not local) governments. Individual jurisdictions supplement the Policy with additional local rules. PPPs must be considered for any project with capital investment over $A50 million.

## h. How are concessions dealt with?

Australia does not have the special laws for concession contracts encountered in civil law jurisdictions.

## i. Are there anti-avoidance rules (including laws on bid rigging)?

The Competition and Consumer Act 2010 (Cth) (“CCA”) was enacted to encourage competition in Australia. The CCA prohibits practices such as cartel conduct, anti-competitive agreements, boycotts, misuse of market power, exclusive dealing, resale price maintenance and acquisitions that substantially lessen competition. The CCA prohibits collusive tendering and price fixing and would apply to bid rigging between competitors.

At the federal level, Part 7.6 of the Criminal Code Act 1995 (Cth) prohibits bribery of a Commonwealth government official. The states and territories also have laws prohibiting bribery and the giving of secret commissions.

There is also legislation and supporting codes of conduct and policies at federal and state/territory level regulating the conduct of public servants and elected officials. These include requirements to obtain approval to receive gifts and register the receipt of any gifts and for dealing with actual or perceived conflicts of interest.

# 3. Procurement Procedures

## a. What procurement procedures can be followed?

Public agencies in Australia can use a broad range of approaches.

Consistent with the underlying principles referred to above, Australian governments will generally be required to procure goods and services by way of competitive tendering processes for procurements over a certain price threshold. Even below the threshold, there may be requirements to “go to market” in an attempt to ascertain the best value for money for the proposed procurement.

Generally, one of the following different forms of procurement will be adopted:

Competitive procurement – this can be open so that any supplier can bid or a closed or select procurement where a prequalification process results in a limited set of suppliers being invited to bid. The prequalification process might be conducted through an earlier open tender, expression of interest or request for proposal process.

Sole/direct source – sole sourcing arrangements may be permitted in limited cases but are generally subject to additional rules.

Period arrangements – period contracts are established to enable agencies to purchase pre-qualified products. Period contracts operate as a standing offer by a supplier to supply specified product to a defined customer group at a pre-agreed cost for a given period. Agencies can source the products offered without the requirement for a tender each time. These types of arrangements are generally established by an initial competitive tender to appoint one or more suppliers to a panel to supply the identified products.

State and territory jurisdictions are beginning to introduce rules governing (and encouraging) unsolicited proposals from the private sector. These rules generally provide that an agency will, in its absolute discretion, consider such a proposal if it establishes unique elements (e.g. intellectual property, ownership of subject real property, unique financial arrangements, unique ability to deliver a strategic outcome) that justify direct negotiations.

## b. What status do electronic means/procedures have?

The CPRs require that that each agency publish the agency’s annual procurement plan containing details about planned approaches to market on the AusTender website by 1 July each year.

Details about awarded and amended contracts are also required to be published on AusTender if the contract is valued at or over the reporting threshold, which is A$10,000 for non-corporate Commonwealth entities. For prescribed federal entities bound by the CPRs, the reporting threshold is A$400,000 for procurements other than procurement of construction services, or A$7.5 million for procurement of construction services.

State and territory government also maintain public websites where procurement opportunities must be advertised.

## c. Where are contract notices, i.e. calls for bid, published?

At the federal level, calls for tender are published on the AusTender website at <https://www.tenders.gov.au/>.

## c. Can certain prospective bidders be excluded from the competition?

Bidders can be excluded from the competition where a government agency is permitted to undertake a select approach to market or sole/direct sourcing.

For example, as noted above, the government may conduct a tender to establish a period contract panel of suppliers for certain supplies and permit government agencies to procure from those suppliers without needing to go to market. Prospective bidders not on the panel have to wait to seek inclusion on the panel until the panel expires and is re-tendered or opened up for new panel members. Select tendering can also be permitted in certain circumstances (e.g., when the agency has made enquiries about suitable prospective suppliers) (see Section 4(a) on sole/direct sourcing).

Prospective bidders can be excluded from the competition through the use of conditions for participation. For example, procurement terms will usually require bidders to demonstrate their ability to participate in a procurement. Conditions can require a potential supplier to demonstrate it has the legal, commercial, technical and financial abilities to fulfil the requirements of the procurement. Additionally, procurement frameworks will often enable government agencies to exclude potential suppliers on grounds such as bankruptcy, insolvency, false declarations or significant deficiencies in performance of any substantive requirement or obligation under a prior contract.

A bidder might also be excluded if the bidder has failed to comply with a mandatory procurement policy requirement. At the federal level, such policies include:

the Australian Industry Participation ("AIP") National Framework, which applies to major Commonwealth government procurements (generally above A$20 million), tenderers for certain Commonwealth procurements are required to prepare and implement an AIP Plan; and

the Workplace Gender Equality Procurement Principles and User Guide require government agencies to obtain a letter of compliance from certain tenderers (employers with 100 or more employees) that indicates compliance with their obligations under the Workplace Gender Equality Act 2012 (Cth).

# 4. Bidder Selection

## a. Are there any rules on the selection criteria?

The rules on selection criteria are not prescriptive. At the federal level, the CPRs require agencies to include criteria that enables the evaluation of bids on a fair, common and appropriately transparent basis. For procurements above the relevant procurement threshold, the CPRs require that the tender requirements include evaluation criteria to be considered in assessing submissions. The key consideration in evaluating a tender will be value for money.

## b. Is prequalification an option? If so, what are the requirements? What is the procedure?

Prequalification is permitted. A prequalified tender involves publishing an approach to market inviting submissions from all potential suppliers on:

a shortlist of potential suppliers that responded to an initial open approach to market on AusTender;

a list of potential suppliers selected from a multi-use list established through an open approach to market; or

a list of all potential suppliers that have been granted a specific licence or comply with a legal requirement, when the licence or compliance with the legal requirement is essential to the conduct of the procurement.

## d. Do “blacklists” for bidders exist? If so, what are the conditions for unlisting?

No such public "blacklists" exist.

## e. Does the involvement of a company in the set-up of a procurement procedure exclude the company from said procedure due to conflict of interest?

Not as a default rule, however such a company would likely need to demonstrate to the procuring agency that the prior involvement did not constitute an actual or apparent conflict of interest. What is an actual or apparent conflict of interest is typically left as a matter for the judgement of the agency. The terms for a particular procurement might also contain terms restricting a bidder from participating in the scoping phase and then bid phase (eg, because in the circumstances the government has assessed that to allow such participation could create a conflict of interest or be unfair to other bidders).

## f. Can bidders combine to submit a bid (bidder consortia)? What limitations apply?

Generally yes such combined bids are permitted.

Division 1 of Part IV of the CCA contains parallel civil and criminal prohibitions on companies making or giving effect to a “cartel provision” in a contract, arrangement or understanding. A cartel provision is a provision of a contract, arrangement or understanding between competitors that has the purpose or effect of fixing, controlling or maintaining prices for the purpose of rigging bids, restricting outputs or allocating customers, markets or territories. Under these prohibitions, bid rigging includes a provision of a contract, arrangement or understanding which has the purpose of ensuring that if there is a request for bid:

one or more of the parties bid but others do not;

parties bid on the basis that one bid is more likely to be successful;

some parties will withdraw from the bidding process;

parties will proceed with the bidding process on the basis that one bid is more likely to be successful; or

parties agree on a material component of their bids.

Collusive tendering by competitors can also constitute price fixing and customer allocation for the purpose of the prohibitions on cartel conduct.

## g. Can members of a bidder consortium be changed during a procurement procedure?

Yes, such changes may be permitted with the consent of the customer. The Customer will consider matters such as whether the change is in the interests of the competitive process and the capabilities of the replacement member. To allow such a change the government customer will need to be satisfied it is within the procurement rules and that the other bidders are not suffering an unfair disadvantage.

## h. Do limitations apply for participation of related bidders in the same procurement procedure with competitive bids?

There is no prohibition on related bidders competing in a competitive bid process. However, related bidders may need to satisfy the procuring agency that their participation does not constitute a conflict of interest and that they have appropriate ethical barriers in place (eg, so that the related bidders do not have access to each other's pricing information).

## i. Is there a special regulation or a special requirement for a foreign company to participate in a procurement procedure?

No such regulations exist, however tender documents will generally specify, among other things, that tender responses be in English, that prices be quoted in Australian dollars, and that Australian units of measurement be used.

# 5. Specifications

## a. Are there any rules on the specifications?

There are no specific rules. There are principles, codes of practice and government policies that broadly address these issues such as requiring procuring agencies to be clear on their requirement, reasonable and considerate of not wasting bidder time with overly burdensome requirements or deadlines that cannot be met.

## b. Are bidders allowed to change the specifications or submit their own standard terms of business?

Requests for tender terms will generally include specifications and proposed contract terms. The extent to which the tenderer's proposed solution meets such specifications and terms will usually be a key evaluation criteria. The terms may also identify that acceptance of certain specifications or terms is mandatory and a tenderer non compliant with those requirements risks being excluded from consideration.

## c. Is the protection of Small and Medium Enterprises addressed in procurement legislation? If so, how?

At the federal level, the CPRs state that officials should apply procurement practices that do not unfairly discriminate against Small and Medium Enterprises ("SMEs") and provide appropriate opportunities for SMEs to compete. The CPRs also state that the Australian Government is committed to non-corporate Commonwealth entities sourcing at least 10 per cent of procurement by value from SMEs, however there is no obligation for it to do so. Several of Australia's free trade agreements exclude from the government procurement chapter measures aimed at supporting SMEs.

# 6. Contract Award

## a. Are there any rules on the award of contracts?

As a general rule, government procurement rules require that contracts be awarded to the bid which demonstrates the best value for money and otherwise satisfies the conditions of participation.

The terms of any tender will set out specific evaluation criteria that will be considered in awarding a contract under that tender.

It is common for tender terms to give the government agency flexibility in awarding contracts. Tender terms will typically state that the lowest price bid will not necessarily be accepted and that the agency may exercise discretion to accept a non-compliant or alternate bid.

## b. Are there any limitations regarding the offered bid price?

No such limitations generally exist. In limited cases such as for certain local government procurements there will be rules on accepting the lowest bids.

## c. Are there any rules on alternative bids?

Alternative bids are allowed in Australia and will be governed by the tender terms itself. For example, tender terms might permit an alternate bid to be submitted but will often require that a compliant bid also be submitted.

# 7. Exemptions to Competitive Bidding

## a. Are there any exemptions to competitive bidding, i.e. under what conditions is a direct award/single sourcing permissible?

Sole sourcing (or direct sourcing) is permitted in limited circumstances. Typically a legislative instrument will set out the circumstances where sole sourcing is permitted. Examples where sole sourcing might be permitted are:

where, in response to an approach to the market, no suitable submissions were received;

where, for reasons of extreme urgency brought about by events unforeseen by the agency, the property or services could not be obtained in time under open tendering procedures;

for purchases made under exceptionally advantageous conditions that only arise in the very short term, such as from unusual disposals, unsolicited innovative proposals, liquidation, bankruptcy, or receivership and which are not routine purchases from regular suppliers; or

where the property or services can only be supplied by a particular business and there is no reasonable alternative or substitute.In any sole or direct sourcing arrangement, the general procurement policy framework still applies, including the requirement to achieve value for money.

Sole sourcing cannot be used for the purposes of avoiding competition or to discriminate against any domestic or foreign supplier.

In any sole or direct sourcing arrangement, the general procurement policy framework still applies, including the requirement to achieve value for money.

## b. What are the consequences for violation of the competitive bidding requirement?

If a public body entered a contract without conducting a competitive bid process when required, it is unlikely the contract would be undone unless the contractor awarded the contract was knowingly involved in the contravention. There may be disciplinary consequences for the public officials involved.

A potential bidder who missed the opportunity to bid may have a cause of action under administrative law such as for lack of procedural fairness (but this is unlikely absent serious wrongful conduct). Damages are not available as a remedy but if the administrative law action is successful the contract wrongly awarded could be undone.

However, currently there is no specific judicial body established in Australia to hear procurement disputes. This would change with Australia's accession to the WTO Agreement on Government Procurement (as having a specific judicial body to hear procurement disputes is a requirement under the agreement).

# 8. Remedies and Enforcement

## a. Are there any remedies and enforcement mechanisms in the procurement legislation?

As at May 2017, there is no specific legislation granting rights to challenge procurement decisions. There is also no specific standalone court system in Australia for addressing procurement grievances (as noted above, Australia is not a member of the WTO Agreement on Government Procurement).

At a federal level, the CPRs require government agencies to have a fair, equitable and non-discriminatory procurement complaint handling procedure. Legislation also allows a complaint about procurement to be made to the Commonwealth Ombudsman. The Ombudsman has powers to investigate and make a recommendation, but no power to change a decision.

The position is substantially the same at the state/territory and local government levels.

As part of Australia’s accession to the WTO Agreement on Government Procurement, the Government Procurement (Judicial Review) Bill 2017 ("Judicial Review Bill") was introduced into the Federal Parliament in May 2017. The Bill if passed will provide suppliers with a statutory basis to challenge alleged non-compliance with the CPRs. Initiation of proceedings could result in a procurement being put on hold until the matter is heard (unless contrary to the public interest). If a supplier bringing a complaint is successful it could result in an injunction against entering a contract or compensation to the supplier.

## b. Are remedies available outside the scope of procurement legislation, e.g. civil law damage claims?

In theory, a number of government processes and legal actions may be available to challenge a procurement decision. In practice, challenging procurement decisions can be difficult.

There are government processes for handling procurement complaints. There is no charge to use them. They are purely administrative and the complainant has no legal rights. However, they can provide a quick solution. Each jurisdiction will typically require the agency conducting the procurement to have in place a complaints handling process. There is usually also a central body to whom complaints can be escalated.

Administrative and private law actions may also be available to provide a remedy for a procurement complaint.

Administrative law may allow a claim based on:

denial of natural justice, a lack of procedural fairness or on the legitimate expectation doctrine; or

legislation allowing review of administrative decisions made under an enactment. However, these cases are rare as procurement decisions are not usually found to have been made under an enactment.

Procurement complaints may also be referred to the Ombudsman in that jurisdiction or an anticorruption body (established in some jurisdictions).

Different private law remedies may be available depending on the jurisdiction, which government agency conducted the procurement and whether there was a “process contract” for conduct of the procurement. For example:

some procurements (particularly for large-scale projects) will be conducted under a process contract. Where a process contract has been created, an action in breach of contract may be available if the agency fails to follow the procurement process;

if the agency has acted in a misleading manner in conducting the procurement, it may be liable for misleading conduct in breach of the CCA or under corresponding state and territory fair trading legislation. However, there are differences between jurisdictions in whether the government can be liable under the legislation; or

the doctrine of estoppel may also be available to provide redress for a tendering complaint where representation, reliance and detriment can be shown to have occurred.

## c. Is there a specific forum before which procurement disputes are heard?

There is currently no standalone court system in Australia for addressing procurement grievances. However, if passed, the Judicial Review Bill would confer jurisdiction on the Federal Circuit Court and the Federal Court of Australia to deal with certain procurement disputes.

There are government processes for handling procurement complaints. The Judicial Review Bill contemplates that these should be used before an aggrieved supplier would be entitled to bring a complaint before the Court.

The jurisdiction for an administrative law case against a federal government body will be the federal court. The jurisdiction for an administrative law case against a local government or state/territory body will be the relevant state court (for a claim against a local government body or state body) or territory court.

The jurisdiction for a breach of contract case against a government body will ordinarily be that of the state or territory law governing the contract.

The jurisdiction for a case for breach of legislation against a government body will be the courts with jurisdiction over the legislation.

## d. Are there any timing requirements for the review?

A party’s right to bring any legal action will be subject to the relevant limitation period in legislation prescribing the period in which a party must bring any action.

As a practical matter, procurement decisions are highly unlikely to be undone unless the complainant acts quickly (and usually before a contract is entered into).

## e. What are the main preconditions for review?

The pre-conditions differ according to the basis for the cause of action (eg, administrative law remedy which as a threshold issue will require the complainant to have standing or contract dispute which as a threshold issue will require a contract).

## f. What are admissible grounds for starting a review proceeding?

There is no established list of admissible grounds for review. Rather, an aggrieved tenderer will need to establish that the act or omission of the procuring agency founds a claim in law.

## g. Does a review proceeding affect an ongoing procurement procedure or an awarded contract respectively?

Unless it relates to an allegation of serious misconduct, the mere commencement of a review proceeding is unlikely to affect an on-going tender procedure or an awarded contract. It is possible for an aggrieved tenderer to seek urgent interlocutory relief (e.g. to seek an urgent order to stop a contract from being signed).

## h. What are the consequences of a successful review proceeding for the affected procurement procedure or awarded contract respectively?

The consequences of a successful review will depend on the cause of action founding the review. For private law causes of action, the consequences can include injunctions, the setting aside of contracts, the ordering of new tenders and the awarding of damages for breach of tender process contracts. In practice, contracts are rarely undone, and the most likely remedy for a tenderer who obtains a favourable court decision regarding a procurement process is damages.

Remedies under administrative law will generally be quite limited. For example, powers to review an administrative law decision may only grant the court the power to require that the decision be remade (which may not change the outcome). There are some rare examples of contracts made in contravention of administrative law being declared void. Damages are also not available for all administrative law remedies.

## i. How long does a judicial proceeding for review take?

The timescale will be determined by the rules applying to the court to which the application is made.

## j. Must unsuccessful bidders be notified before the award? If so, when?

The CPRs require that after the rejection of a bid, officials must promptly inform affected bidders of the decision. An agency must debriefings an unsuccessful bidder on request, outlining the reasons why the submission was unsuccessful. Tender terms usually provide bidders the opportunity for a debriefing.

## k. Are review proceedings common?

No, review proceedings are uncommon.

## l. Are damage claims in relation with procurement procedures common?

No, such claims are uncommon.

## m. What are the leading court decisions involving procurement disputes?

*Hughes Aircraft Systems International v Airservices Australia* (1997) 146 ALR 1 is the leading Australian authority involving a procurement dispute. The case established that under Australian law a public tender could be governed by a “process contract”. The case further established that the process contract which was found to exist not only contained the express terms of how the tender process would be conducted but also the implied term that a government body is to evaluate all tenders fairly and in good faith.

*JS McMillan Pty Ltd v Commonwealth* (1997) 147 ALR 419 is the leading Australian authority for procurement disputes based on breach of trade practices or fair trading legislation, such as misleading or deceptive conduct. The decision examined when the federal government could be treated as carrying on a business. This was important as the legislative prohibition on engaging in misleading or deceptive conduct or conduct that is likely to mislead or deceive under what is now the CCA, only applies to the federal government to the extent it is carrying on a business. In *McMillian*, the federal government outsourcing its printing operations was not held to be carrying on a business.

# 9. Other Relevant Rules of Law

## a. Are there any related bodies of law of relevance to procurement by public agencies?

Some of the related bodies of law have been referred to in the other sections of this chapter. In a public law context, laws on bribing public officials, corruption and freedom of information are relevant to procurement.

Public agencies are subject to private laws in much the same way as private- sector bodies. Relevantly, this includes contract law and laws dealing with breach of confidence. In some cases, the government can be held to a higher standard of compliance with private laws (or an obligation to act in good faith more readily implied) than non-government bodies.

Legislation (other than legislation specifically intended to regulate government) can have more limited application. As noted in Section 5(b), a private sector organisation who engages in misleading conduct in conducting procurement can be liable under the CCA, but a government body engaging in the same conduct might not be.

## b. Does a specific contract law apply for public contracts?

No, the general Australian law of contract applies to public contracts.

# 10. Industry sectors of special importance or with a specific procurement regime

## a. Are there any specific laws or practices that apply in the technology sector?

There are no specific laws applying to procuring technology.

There are a number of technology-specific contract terms, technology panel agreements and procurement policies in place at the federal and state/territory levels. For example, a number of jurisdictions have specific liability policies for technology supplies.

A frequent difficulty faced by suppliers new to the Australian government market is becoming familiar with the different technology standard contract terms in each jurisdiction. Each jurisdiction’s standard contracts tend to raise similar issues for suppliers.

Government bodies also set policies for use of particular technology solutions such as cloud services and security requirements that are often relevant to IT supplies.

## b. Are there any specific laws or practices that apply in the defense sector?

Yes, these are explained at Section 1(d).

## c. Are there any specific laws or practices that apply in the health care sector?

At the state/territory level, health procurement, due to its large scale, is often run by a health procurement pubic body. Period contracts for supplies to hospitals are commonly used and hospitals are required to purchase from the period contract arrangements.

## d. Are there any specific laws or practices that apply to any other particular industry sector?

No.

# 11. Looking Ahead

## a. Are there any proposals to change the law in the future?

If Australia joins the WTO Agreement on Government Procurement, Australia's procurement laws will be changed to provide for a specific mechanism that will hear complaints about government procurement conduct. Specifically, if the Judicial Review Bill is passed, suppliers will have a statutory right to seek an injunction or compensation for breach of the CPRs, rather than having to obtain a remedy under the principles of administrative law or by demonstrating a breach of contract.

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