

Commonwealth Procurement Rules

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Department of Finance and Deregulation
(Financial Management Group)

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Content

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Foreword

I am pleased to issue the Commonwealth Procurement Rules under Regulation 7 of the *Financial Management and Accountability Regulations 1997*.

The Commonwealth Procurement Rules represent the Government's policy framework under which agencies govern and undertake their own procurement.

The Commonwealth Procurement Rules combine both Australia's international obligations and good practice. Together, these enable agencies to design processes that are robust, transparent and instill confidence in the Australian Government's procurement activities. This encourages agencies to design processes that allow for innovative solutions and that reflect the scale, scope and risk of the procurement.

The Government is committed to improving access to the Australian Government marketplace, particularly for small and medium enterprises, Indigenous businesses and competitive disability enterprises. Promoting the use of these competitive suppliers benefits both the Government in expanding its supplier base and in supporting the broader Australian community.

The Commonwealth Procurement Rules also focus on whole-of-government arrangements, in particular coordinated procurements. Coordinated procurements have improved the value for money achieved by agencies and have reduced agency procurement and potential supplier tendering costs. In addition to the coordinated procurements, agencies should continue to look for opportunities to establish cooperative procurements for related goods and services.

Building on the success of AusTender, the Government is committed to ensuring AusTender remains the primary source for procurement information. AusTender, the Australian Government's central procurement information website, is now well established in agencies, wider government and the private sector. AusTender provides accurate and timely procurement reporting and the Government is committed to ensuring this remains a focus of agencies.

To assist agencies in applying the Commonwealth Procurement Rules, a range of guidance material, templates, tools and advice has been developed by my Department (weblink). Officials are encouraged to make use of these resources when undertaking procurement.

I commend these Commonwealth Procurement Rules to Australian Government officials involved in procurement.

Penny Wong

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1.

1. Summary of Commonwealth Procurement Rules

1.1 Figures 1 and 2 highlight the location of the rules in the Commonwealth Procurement Rules (CPRs). Rules that must be complied with in undertaking *procurement* are denoted by the term '**must**' and have been bolded throughout the CPRs.

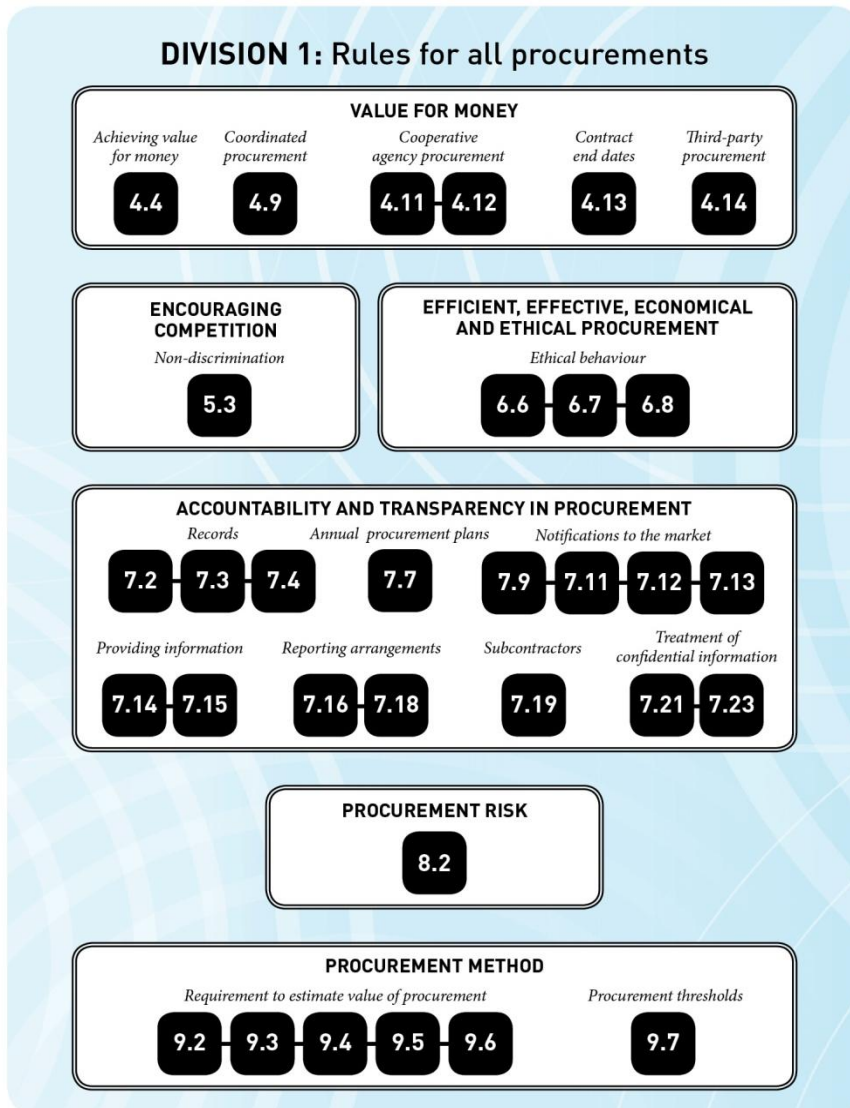


Figure 1: Division 1 – Rules for all procurements

DIVISION 2: Additional rules for procurements at or above the relevant procurement threshold

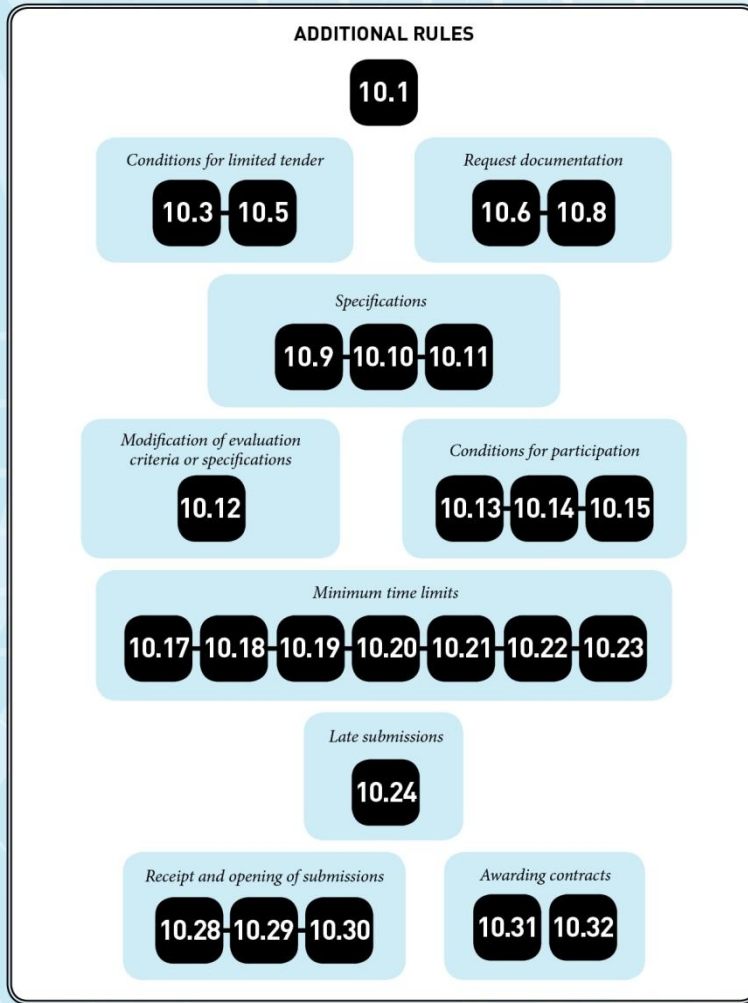


Figure 2: Division 2 – Additional rules

2. Procurement framework

- 2.1 The Commonwealth Procurement Rules (CPRs) are issued by the Minister for Finance and Deregulation (Finance Minister) under Regulation 7 of the *Financial Management and Accountability Regulations 1997* (FMA Regulations).
- 2.2 The CPRs set down the rules for Australian Government *procurement* and articulate the Australian Government's requirements for officials performing duties in relation to *procurement*.
- 2.3 Rules that **must** be complied with in undertaking *procurement* are denoted by the term '**must**'. Non-compliance with the rules of the CPRs is reportable in an agency's Certificate of Compliance. The term 'should' indicates good practice.
- 2.4 The CPRs are the core of the procurement framework, which also includes:
 - a. web-based guidance, developed by the Department of Finance and Deregulation (Finance) to assist agencies to implement the procurement framework;
 - b. Finance Circulars, which advise of key changes and developments in the procurement framework; and
 - c. *Chief Executive's Instructions (CEIs)*, which a Chief Executive may use to set out agency-specific operational rules to ensure compliance with the rules of the procurement framework.
- 2.5 FMA Regulation 7 requires officials to comply with the CPRs when performing duties related to *procurement*. The FMA Regulations also require that proposals to spend public money (including proposed *procurement of goods and services*) **must** be approved. In particular, FMA Regulation 9 requires an *approver*¹ to be satisfied, after making reasonable enquiries, that the spending proposal is an efficient, effective, economical and ethical use of public money that is not inconsistent with the policies of the Commonwealth.
- 2.6 Nothing in any part of these CPRs prevents an official from applying measures determined by their Chief Executive 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 FMA Regulations define an approver as a Minister, a Chief Executive, or a person authorised by legislation to approve proposals to spend public money. Chief Executives commonly delegate this power to officials in their agency.

Procurement

- 2.7 *Procurement* encompasses the whole process of procuring *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, the awarding of a *contract*, the delivery of and payment for the *goods* and services and, where relevant, the ongoing management of the *contract* and consideration of disposal of *goods*.
- 2.8 In addition to the acquisition of *goods* and services by an agency for its own use, *procurement* includes the acquisition of *goods* and services on behalf of another agency or a third party.
- 2.9 *Procurement* does not include:
- a. grants (whether in the form of a contract, conditional gift or deed)²;
 - b. investments (or divestments);
 - c. sales by tender;
 - d. loans;
 - e. *procurement* of *goods* and services for resale or *procurement* of *goods* and services used in the production of *goods* for resale;
 - f. any property right not acquired through the expenditure of public money (for example, a right to pursue a legal claim for negligence);
 - g. statutory appointments;
 - h. appointments made by a minister using the executive power (for example, the appointment of a person to an advisory board); or
 - i. the engagement of employees, such as under the *Public Service Act 1999*, the *Parliamentary Services Act 1999*, an agency's enabling legislation or the common law concept of employment.

² As defined in FMA Regulation 3A.

Financial framework

2.10 Agencies and officials operate within an environment of legislation and Commonwealth policy. Within that broad context, the financial management framework consists of the legislation and policy governing the management of the Commonwealth’s resources. Figure 3 sets out the main elements of this environment related to *procurement*.

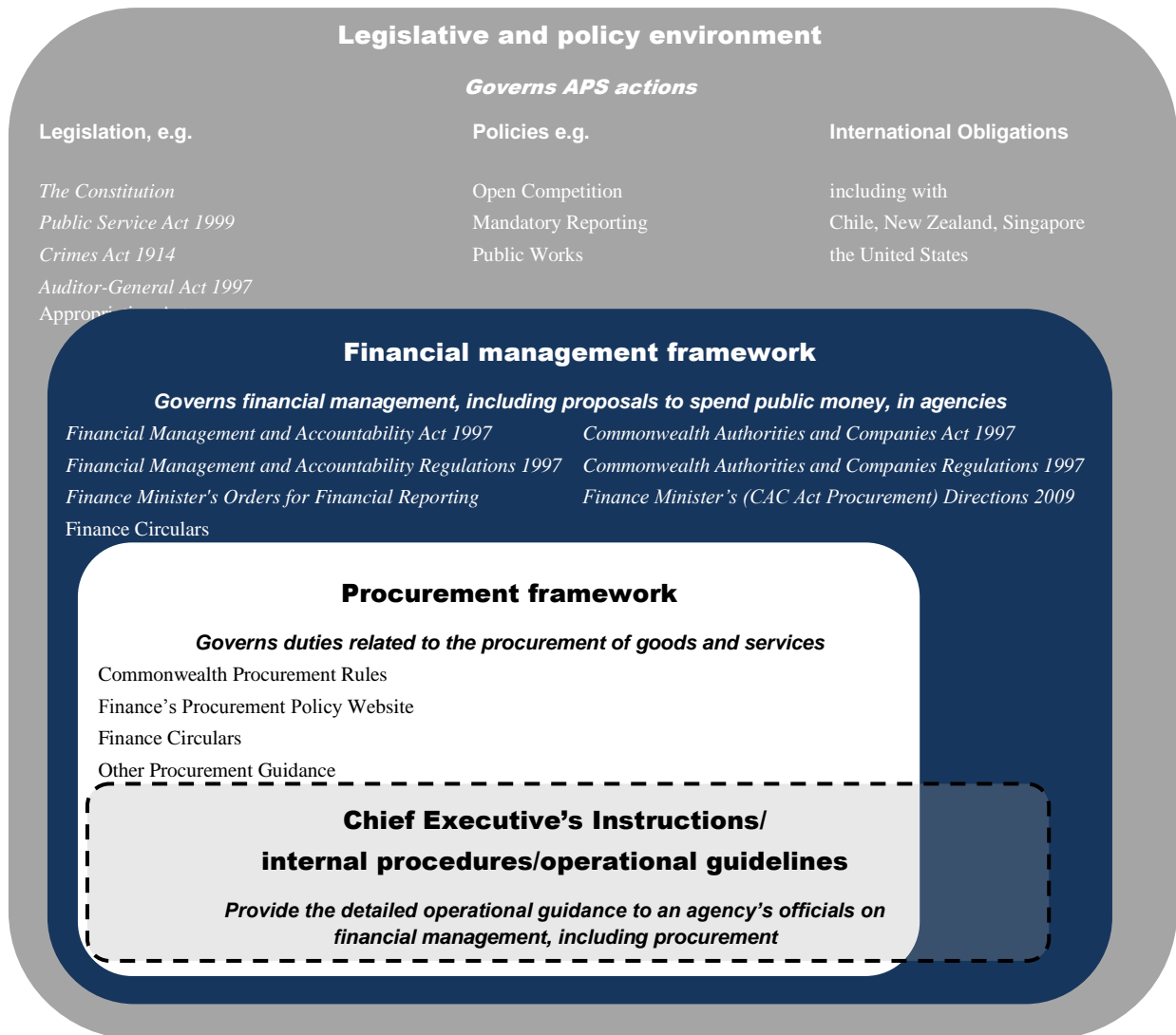


Figure 3: Legislation and policy

2.11 The procurement framework is a subset of the financial management framework related to the *procurement of goods* and services.

2.12 Chief Executives of *FMA Act agencies* may issue instructions (*CEIs*) on any matter that promotes the proper use³ of the Commonwealth resources for which they are responsible. The CPRs provide the necessary framework for Chief Executives when issuing *CEIs* and operational requirements in relation to *procurement*. In the area of *procurement*, *CEIs* provide a mechanism to:

- a. apply the principles and requirements of the financial management and procurement frameworks, focusing on the agency's operations; and
- b. provide primary operational instructions to agency officials in carrying out their duties related to *procurement*, in a way that is tailored to an agency's particular circumstances and needs.

2.13 Non-compliance with the requirements of the financial management framework, including in relation to *procurement*, may attract a range of criminal, civil or administrative remedies (including under the *FMA Act*, the *Public Service Act 1999* and the *Crimes Act 1914*).

Commonwealth Authorities and Companies Act

2.14 Bodies subject to the *Commonwealth Authorities and Companies Act 1997* (*CAC Act*) are legally and financially separate from the Commonwealth and are generally not subject to the CPRs. However, the CPRs as amended by the *Finance Minister's (CAC Act Procurement) Directions 2009* (*CAC Act Procurement Directions*) are applicable to some⁴ *CAC Act bodies*.

International obligations

2.15 Australia is party to a range of bilateral free trade arrangements. These arrangements are implemented domestically by legislation and/or Commonwealth policy. Relevant international obligations have been incorporated in these CPRs. Therefore, an official undertaking a *procurement* is not required to refer directly to international agreements.

³ When the CPRs commenced, 'Proper use' was defined in section 44 of the *FMA Act* as 'efficient, effective, economical and ethical use that is not inconsistent with the policies of the Commonwealth'.

⁴ The *CAC Act* bodies subject to the *Finance Minister's (CAC Act Procurement) Directions 2009* are listed in Schedule 1 to the *Commonwealth Authorities and Companies Regulations 1997*.

3. How to use the Commonwealth Procurement Rules

- 3.1 The CPRs set out the rules that officials **must** comply with when they procure *goods* and services. The CPRs have been designed to provide officials with flexibility in developing and implementing procurement processes that reflect their agencies' needs.
- 3.2 Achieving value for money is the core rule of the CPRs. This requires the consideration of the financial and non-financial costs and benefits associated with *procurement*. To assist officials to understand and undertake *procurements* that achieve value for money, the CPRs have two divisions:
 - a. Division 1 – Rules applying to all procurements regardless of their value or whether an exemption applies to them. Officials **must** comply with the rules in Division 1 when conducting procurements; and
 - b. Division 2 – Additional rules applying to procurements valued at or above the relevant procurement threshold. Officials **must** also comply with the rules in Division 2 where the expected value of the procurement is at or above the relevant procurement threshold and where an exemption in accordance with Appendix A does not apply.
- 3.3 The *procurement thresholds* (including GST) are:
 - a. for *FMA Act agencies*, other than for *procurements of construction services*, the *procurement threshold* is \$80,000;
 - b. for relevant *CAC Act bodies*, other than for *procurements of construction services*, the *procurement threshold* is \$400,000; or
 - c. for *procurements of construction services* by *FMA Act agencies* and relevant *CAC Act bodies*, the *procurement threshold* is \$9 million.
- 3.4 Further information and guidance on applying the CPRs are available on Finance's procurement policy website at www.finance.gov.au/procurement.
- 3.5 Agencies may have additional rules, guidance, templates or tools that apply when conducting *procurements*.

Division 1

Rules for all procurements

Division 1 – Rules for all procurements

4. Value for Money

Considering value for money

- 4.1 A thorough consideration of value for money begins by officials clearly understanding and expressing the goals and purpose of the *procurement*.
- 4.2 Where a business requirement arises, officials should consider whether a *procurement* will deliver the best value for money. It is important to take into consideration:
 - a. non-procurement alternatives;
 - b. consultation with stakeholders;
 - c. the business need;
 - d. resourcing;
 - e. pre-existing arrangements; and
 - f. Commonwealth policies.
- 4.3 Where an agency determines that *procurement* represents the best value for money, those considerations will inform the development and implementation of the *procurement*.

Achieving value for money

- 4.4 Achieving value for money is the core rule of the CPRs. *Approvers must* be satisfied, after reasonable enquires, that the *procurement* achieves a value for money outcome. Value for money in *procurement* requires:
 - a. encouraging competitive and non-discriminatory processes;
 - b. using Commonwealth resources in an efficient, effective, economical and ethical manner that is not inconsistent with the policies of the Commonwealth⁵;
 - c. making decisions in an accountable and transparent manner;
 - d. considering the risks; and
 - e. conducting a process commensurate with the scale and scope of the *procurement*.

⁵ This reflects the requirement in section 44 of the FMA Act that a Chief Executive must manage the affairs of the agencies for which they are responsible in a way that promotes the proper use of Commonwealth resources.

- 4.5 The price of the *goods* and services is not the sole determining factor in assessing value for money. A comparative analysis of the relevant financial and non-financial costs and benefits of alternative solutions throughout the *procurement* will inform a value for money assessment. Factors to consider include, but are not limited to:
- a. fitness for purpose;
 - b. a *potential supplier's* experience and performance history;
 - c. flexibility (including innovation and adaptability over the lifecycle of the *procurement*);
 - d. environmental sustainability (such as energy efficiency and environmental impact);
and
 - e. whole-of-life costs.

Procurement-connected policies

- 4.6 Procurement-connected policies are policies of the Commonwealth for which *procurement* has been identified as a means of delivery. To assist agencies in complying with policies of the Commonwealth, Finance maintains a list of procurement-connected policies, which can be found at www.finance.gov.au/procurement.
- 4.7 Many of these procurement-connected policies are the responsibility of agencies other than Finance. The policy agency is responsible for administering, reviewing and providing information on the policy as required.

Coordinated procurement

- 4.8 Coordinated procurement refers to whole-of-government arrangements for procuring *goods* and services. A list of coordinated procurements can be found at www.finance.gov.au/procurement.
- 4.9 Agencies **must** use coordinated procurements. Exemptions from coordinated procurements can only be granted jointly by the requesting agency's Portfolio Minister and the Finance Minister where an agency can demonstrate a special need for an alternative arrangement.⁶

⁶ Or where the coordinated *procurement* specifies an alternative approach for obtaining exemptions.

Cooperative agency procurement

4.10 Cooperative agency procurements involve more than one agency as the buyer. Agencies can procure cooperatively by approaching the market together or by joining an existing *contract* of another agency.

4.11 If an agency intends to join an existing contract of another agency, the initial *request documentation* and the *contract* **must** have already specified potential use by other agencies.

4.12 Agencies joining an existing *contract* **must** ensure that:

- a. value for money is achieved;
- b. the *goods* and services being procured are the same as provided for within the *contract*; and
- c. the terms and conditions of the *contract* are not being materially altered.

Contract end dates

4.13 Where a *contract* does not specify an end date it **must** allow for periodic review and subsequent termination of the *contract* by the agency, if the agency determines that it does not continue to represent value for money.

Third-party procurement

4.14 *Procurement* by third parties on behalf of an agency can be a valid way to procure *goods* and services, provided it achieves value for money. Agencies **must not** use third-party arrangements to avoid the rules in the CPRs when procuring *goods* and services.

5. Encouraging competition

- 5.1 Competition is a key element of the Australian Government's procurement framework. Effective competition requires non-discrimination and the use of competitive procurement processes.
- 5.2 Participation in *procurement* imposes costs on agencies and *potential suppliers*. Those costs should be considered when designing a process that is commensurate with the scale, scope and risk of the proposed *procurement*.

Non-discrimination

- 5.3 The Australian Government's procurement framework is non-discriminatory. 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.

Small and Medium Enterprises

- 5.4 To ensure that *Small and Medium Enterprises (SMEs)* can engage in fair competition for Australian Government business, officials should apply procurement practices that do not unfairly discriminate against *SMEs* and provide appropriate opportunities for *SMEs* to compete. Officials should consider, in the context of value for money:
 - a. the benefits of doing business with competitive *SMEs* when specifying requirements and evaluating value for money;
 - b. barriers to entry, such as costly preparation of *submissions*, that may prevent *SMEs* from competing;
 - c. *SMEs'* capabilities and their commitment to local or regional markets; and
 - d. the potential benefits of having a larger, more competitive *supplier* base.
- 5.5 The Australian Government is committed to *FMA Act agencies* sourcing at least 10 per cent of *procurement* by value from *SMEs*.

6. Efficient, effective, economical and ethical procurement

- 6.1 The Australian Government promotes the proper use of Commonwealth resources. Proper use means efficient, effective, economical and ethical use that is not inconsistent with the policies of the Commonwealth.
- 6.2 Efficient relates to the achievement of the maximum value for the resources used. In *procurement*, it includes the selection of a procurement method that is not inconsistent with policies of the Commonwealth and that is the most appropriate for the procurement activity, given the scale, scope and risk of the *procurement*.
- 6.3 Effective relates to the extent to which intended outcomes or results are achieved. It concerns the immediate characteristics, especially price, quality and quantity, and the degree to which these contribute to specified outcomes.
- 6.4 Economical relates to minimising cost. It emphasises the requirement to avoid waste and sharpens the focus on the level of resources that the Commonwealth applies to achieve outcomes.
- 6.5 Ethical relates to honesty, integrity, probity, diligence, fairness and consistency. Ethical behaviour identifies and manages conflicts of interests, and does not make improper use of an individual's position.

Ethical behaviour

- 6.6 In particular, officials undertaking *procurement* for the Australian Government **must** act ethically throughout the *procurement*. Ethical behaviour includes:
 - a. recognising and dealing with actual, potential and perceived conflicts of interest;
 - b. dealing with *potential suppliers*, *tenderers* and *suppliers* equitably, including by
 - i) seeking appropriate internal or external advice where probity issues arise, and
 - ii) not accepting inappropriate gifts or hospitality;
 - c. carefully considering the use of Commonwealth resources; and
 - d. complying with all directions, including their agency's *CEIs*, in relation to gifts or hospitality, the information privacy principles of the *Privacy Act 1988* and the security provisions of the *Crimes Act 1914*.

- 6.7 Agencies **must not** seek to benefit from *supplier* practices that may be dishonest, unethical or unsafe. This includes not entering into *contracts* with *tenderers* who have had a judicial decision against them (not including decisions under appeal) relating to employee entitlements and who have not paid the claim. Officials should seek declarations from all *tenderers* confirming that they have no such unsettled judgments against them.
- 6.8 If a complaint about *procurement* is received, agencies **must** apply equitable and non-discriminatory complaint-handling procedures. Agencies should aim to manage the complaint process internally, where possible, through communication and conciliation.

7. Accountability and transparency in procurement

7.1 The Australian Government is committed to ensuring accountability and transparency in its procurement activities. Accountability means that officials are responsible for the actions and decisions that they take in relation to *procurement* and for the resulting outcomes. Transparency involves agencies taking steps to enable appropriate scrutiny of their procurement activity. The fundamental elements of accountability and transparency in *procurement* are outlined in this section.

Records

- 7.2 Officials **must** maintain appropriate documentation for each *procurement*. The appropriate detail of documentation should be commensurate with the scale, scope and risk of the *procurement*. Documentation should provide accurate and concise information on:
- a. the requirement for the *procurement*;
 - b. the process that was followed;
 - c. how value for money was considered and achieved; and
 - d. relevant decisions, including under the FMA Regulations, and the basis of those decisions.
- 7.3 Agencies **must** have appropriate documentation with the *supplier*, such as a written *contract* or purchase order.
- 7.4 Documentation **must** be retained in accordance with the *Archives Act 1983*.

AusTender

- 7.5 *AusTender*⁷, the Australian Government's procurement information system, is a centralised web-based facility that publishes a range of information, including agencies' planned *procurements*, *open tenders* and *contracts* awarded. It also supports secure electronic tendering to deliver integrity and efficiency for agencies and *potential suppliers*.
- 7.6 *AusTender* is the system used to enable agencies to meet their publishing obligations under the CPRs. It also enables agencies to monitor and review their AusTender-based *procurements*, including *approaches to market*, publication of *contracts* and *multi-use lists*, and amendments to *contracts* and *multi-use lists*.

⁷ *AusTender* is available at www.tenders.gov.au.

Annual procurement plans

- 7.7 In order to draw the market's early attention to potential procurement opportunities, each agency **must** publish by 1 July each year on *AusTender* an *annual procurement plan* containing a short strategic procurement outlook.
- 7.8 The *annual procurement plan* should include the subject matter of any significant planned *procurement* and the estimated publication date of the *approach to market*. Agencies should update their plans regularly throughout each financial year.

Notification to the market

- 7.9 Agencies **must** use *AusTender* to publish *open tenders* and, to the extent practicable, to make relevant *request documentation* available. Agencies may use *AusTender* to publish *prequalified or limited tender approaches to market* and make relevant *request documentation* available.
- 7.10 Agencies should include relevant *evaluation criteria* in *request documentation* to enable the proper identification, assessment and comparison of *submissions* on a fair, common and appropriately transparent basis.
- 7.11 In any additional notification through other avenues, such as printed media, the details selected for inclusion in the notification **must** be the same as those published on *AusTender*.
- 7.12 Where an agency provides *request documentation* or any other document, already published on *AusTender* in any other form (for example, a printed version) that documentation **must** be the same as that published on *AusTender*.
- 7.13 A notice of a *multi-use list* **must** be published on *AusTender*. Where a *multi-use list* is open to applications at any time, an *approach to market* inviting applications **must** be published continuously on *AusTender* for the entire period of the *multi-use list's* operation. Alternatively, where a *multi-use list* will be updated only at specific times and according to set deadlines for application, an *approach to market* inviting applications **must** be re-published at least once every 12 months.

Providing information

- 7.14 Officials **must**, on request, promptly provide, to eligible *potential suppliers*, documentation that includes all information necessary to permit the *potential supplier* to prepare and lodge *submissions*.
- 7.15 Following the rejection of a *submission* or the award of a *contract*, officials **must** promptly inform affected *tenderers* of the decision. Debriefings **must** be made available, on request, to unsuccessful *tenderers* outlining the reasons the *submission* was unsuccessful. Debriefings **must** also be made available, on request, to the successful *supplier(s)*.

Reporting arrangements

7.16 Agencies **must** report *contracts* and amendments on *AusTender* within 42 *days* of entering into (or amending) a *contract* if they are valued at or above the *reporting threshold*.

7.17 The *reporting thresholds* (including GST) are:

- a. \$10,000 for *FMA Act agencies*; and
- b. for relevant *CAC Act bodies*
 - i) \$400,000 for *procurements* other than *procurement of construction services*, or
 - ii) \$9 million for *procurements of construction services*.

7.18 Regardless of value, *standing offers* **must** be reported on *AusTender* within 42 *days* of the agency entering into or amending such arrangements. Relevant details in the *standing offer* notice, such as *supplier* details and the names of other agencies participating in the arrangement, **must** be reported and kept current.

Subcontractors

7.19 Agencies **must** make available on request, the names of any subcontractor(s) engaged by a contractor in respect of a *contract*.

- a. Agencies **must** require contractors to agree to the public disclosure of the names of any subcontractors engaged to perform services in relation to a *contract*.
- b. Contractors **must** be required to inform relevant subcontractors that the subcontractor's participation in fulfilling a *contract* may be publicly disclosed.

Treatment of confidential information

7.20 When conducting a *procurement* and awarding a *contract*, agencies should take appropriate steps to protect the Commonwealth's confidential information. This includes observing legal obligations, such as those under the *Privacy Act 1988*, and statutory secrecy provisions.

7.21 *Submissions* **must** be treated as confidential before and after the award of a *contract*. Once a *contract* has been awarded the terms of the *contract*, including parts of the *contract* drawn from the *supplier's submission*, are not confidential unless the agency has determined and identified in the *contract* that specific information is to be kept confidential in accordance with the guidance on *Confidentiality throughout the Procurement Cycle* at www.finance.gov.au/procurement.

7.22 The need to maintain the confidentiality of information should always be balanced against the public accountability and transparency requirements of the Australian Government. It is therefore important for officials to plan for, and facilitate, appropriate disclosure of procurement information. In particular, officials should:

- a. include provisions in *request documentation* and *contracts* that alert *potential suppliers* to the public accountability requirements of the Australian Government, including disclosure to the Parliament and its committees;
- b. where relevant, include a provision in *contracts* to enable the Australian National Audit Office to access contractors' records and premises to carry out appropriate audits; and
- c. consider, on a case-by-case basis, any request by a *supplier* for material to be treated confidentially after the award of a *contract*, and enter into commitments to maintain confidentiality only where such commitments are appropriate.

7.23 Where confidential information is required to be disclosed, for example following a request from a parliamentary committee, reasonable notice in writing **must** be given to the party from whom the information originated.

Other obligations

7.24 Other reporting and disclosure obligations apply to officials undertaking *procurement*, including:

- a. disclosure of procurement information for agency annual reporting purposes;
- b. disclosure of non-compliance with the CPRs in an agency's Certificate of Compliance;
- c. disclosure to the Parliament and its committees, as appropriate, in line with the *Government Guidelines for Official Witnesses before Parliamentary Committees and Related Matters*;
- d. disclosure of information consistent with the *Freedom of Information Act 1982*; and
- e. disclosure of discoverable information that is relevant to a case before a court.

8. Procurement risk

- 8.1 Risk management comprises the activities and actions taken by an agency to ensure that it is mindful of the risks it faces, that it makes informed decisions in managing these risks, and identifies and harnesses potential opportunities.⁸
- 8.2 Agencies **must** establish processes for the identification, analysis, allocation and treatment of risk when conducting a *procurement*. The effort directed to risk assessment and management should be commensurate with the scale, scope and risk of the *procurement*. Agencies should consider risks and their potential impact when making decisions relating to value for money assessments, approvals of proposals to spend public money and the terms of the *contract*.
- 8.3 As a general principle, risks should be borne by the party best placed to manage them, that is, agencies should generally not accept risk which another party is better placed to manage. Similarly, where an agency is best placed to manage a particular risk, it should not seek to inappropriately transfer that risk to the *supplier*.

⁸ Department of Finance and Deregulation, Comcover *Better Practice Guide – Risk Management*.

9. Procurement method

9.1 Australian Government *procurement* is conducted by one of three methods – *open tender*, *prequalified tender* or *limited tender*. These methods are detailed in this section.

Requirement to estimate value of procurement

- 9.2 The expected value of a *procurement* **must** be estimated before a decision on the procurement method is made. The expected value is the maximum value (including GST) of the proposed *contract*, including options, extensions, renewals or other mechanisms that may be executed over the life of the *contract*.
- 9.3 The maximum value of the *goods* and services being procured **must** include:
- all forms of remuneration, including any premiums, fees, commissions, interest, allowances and other revenue streams that may be provided for in the proposed *contract*;
 - the value of the *goods* and services being procured, including the value of any options in the proposed *contract*; and
 - any taxes or charges.
- 9.4 Where a *procurement* is to be conducted in multiple parts with *contracts* awarded either at the same time or over a period of time, with one or more *suppliers*, the expected value of the *goods* and services being procured **must** include the maximum value of all of the *contracts*.
- 9.5 A *procurement* **must not** be divided into separate parts solely for the purpose of avoiding a relevant *procurement threshold*.
- 9.6 Where the maximum value of a *procurement* over its entire duration cannot be estimated the *procurement* **must** be treated as being valued above the relevant *procurement threshold*.

Procurement thresholds

- 9.7 Where the expected value of a *procurement* is at or above the relevant *procurement threshold* and an exemption in Appendix A does not apply, the rules in Division 2 **must** also be followed. The *procurement thresholds* (including GST) are:
- for *FMA Act agencies*, other than for *procurements of construction services*, the *procurement threshold* is \$80,000;
 - for relevant *CAC Act bodies*, other than for *procurements of construction services*, the *procurement threshold* is \$400,000; or
 - for *procurements of construction services* by *FMA Act agencies* or relevant *CAC Act bodies*, the *procurement threshold* is \$9 million.

Three procurement methods

Method 1 – Open tender

9.8 *Open tender* involves publishing an *open approach to market* and inviting *submissions*.

Method 2 – Prequalified tender

9.9 *Prequalified tender* involves publishing an *approach to market* inviting *submissions* from all *potential suppliers* on:

- a. a shortlist of *potential suppliers* that responded to an initial *open approach to market* on *AusTender*;
- b. a list of *potential suppliers* selected from a *multi-use list* established through an *open approach to market*; or
- c. a list of all *potential suppliers* that have been granted a specific licence or comply with a legal requirement, where the licence or compliance with the legal requirement is essential to the conduct of the *procurement*.

9.10 Officials should report the original procurement method used to establish the *standing offer* when they report *procurements* from *standing offers*.

Method 3 – Limited tender

9.11 *Limited tender* involves an agency approaching one or more *potential suppliers* to make *submissions*, where the process does not meet the rules for *open tender* or *prequalified tender*.

9.12 For *procurements* at or above the relevant *procurement threshold*, *limited tender* can only be conducted in accordance with paragraph 10.3, or where a *procurement* is exempt as detailed in Appendix A.

Division 2—
Additional rules for
procurements at or above
the relevant procurement
threshold

Division 2 – Additional rules for procurements at or above the relevant procurement threshold

10. Additional rules

- 10.1 The rules set out in Division 2 are additional to those in Division 1 and **must not** be interpreted or applied in a manner that diminishes or negates Division 1.
- 10.2 A *procurement*, except a *procurement* that is specifically exempt in accordance with Appendix A, is subject to the rules contained in Division 2 if the expected value of the *procurement* is at, or above, the relevant *procurement threshold* (see paragraphs 3.3 and 9.7).

Conditions for limited tender

- 10.3 An agency **must** only conduct a *procurement* at or above the relevant *procurement threshold* through *limited tender* in the following circumstances:
- a. where, in response to an *approach to market*
 - i) no *submissions*, or no *submissions* that represented value for money, were received,
 - ii) no *submissions* that met the *minimum content and format* requirements for *submission* as stated in the *request documentation* were received, or
 - iii) no tenderers satisfied the conditions for participation, and the agency does not substantially modify the essential requirements of the procurement; or
 - b. where, for reasons of extreme urgency brought about by events unforeseen by the agency, the *goods* and services could not be obtained in time under *open tender* or *prequalified tender*; or
 - c. for *procurements* made under exceptionally advantageous conditions that arise only in the very short term, such as from unusual disposals, unsolicited innovative proposals, liquidation, bankruptcy, or receivership, and which are not routine *procurement* from regular *suppliers*; or
 - d. where the *goods* and services can be supplied only by a particular business and there is no reasonable alternative or substitute for one of the following reasons
 - i) the requirement is for works of art,
 - ii) to protect patents, copyrights, or other exclusive rights, or proprietary information, or
 - iii) due to an absence of competition for technical reasons; or

- e. for additional deliveries of *goods* and services by the original *supplier* or authorised representative that are intended either as replacement parts, extensions, or continuing services for existing equipment, software, services, or installations, where a change of *supplier* would compel the agency to procure *goods* and services that do not meet requirements for compatibility with existing equipment or services; or
 - f. for *procurements* in a *commodity market*; or
 - g. where an agency procures a prototype or a first good or service that is intended for limited trial or that is developed at the agency's request in the course of, and for, a particular *contract* for research, experiment, study, or original development; or
 - h. in the case of a *contract* awarded to the winner of a design contest, provided that
 - i) the contest has been organised in a manner that is consistent with these CPRs, and
 - ii) the contest is judged by an independent jury with a view to a design contract being awarded to the winner; or
 - i. for new *construction services* consisting of the repetition of similar *construction services* that conform to a basic project for which an initial *contract* was awarded through an *open tender* or *prequalified tender*, and where the initial *approach to market* indicated that *limited tender* might be used for those subsequent *construction services*.
- 10.4 A *procurement* at or above the relevant *procurement threshold* conducted by *limited tender* is not required to meet the rules in paragraphs 10.6-10.12 (Request Documentation), 10.17-10.27 (Minimum Time Limits), or 10.31 (Awarding Contracts).
- 10.5 In accordance with the general rules for accountability set out in these CPRs, for each *contract* awarded through *limited tender*, an official **must** prepare and appropriately file within the agency's records management system a written report that includes:
- a. the value and type of *goods* and services procured;
 - b. a statement indicating the circumstances and conditions that justified the use of *limited tender*; and
 - c. a record demonstrating how the *procurement* represented value for money in the circumstances.

Request documentation

- 10.6 *Request documentation* **must** include a complete description of:
- the *procurement*, including the nature, scope and, where known, the quantity of the *goods* and services to be procured and any requirements to be fulfilled, including any technical *specifications*, conformity certification, plans, drawings, or instructional materials;
 - 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
 - any other terms or conditions relevant to the evaluation of *submissions*.
- 10.7 However, agencies are not obligated to release confidential information, information sensitive to essential security or information that may impede competition.
- 10.8 Agencies **must** ensure that *potential suppliers* and *tenderers* are dealt with fairly and in a non-discriminatory manner when providing information leading to, or following, an *approach to market*. Agencies **must** promptly reply to any reasonable request from a *potential supplier* for relevant information about a *procurement*, and when responding to such enquiries **must** avoid a *potential supplier*, or group of *potential suppliers*, gaining an unfair advantage in a competitive procurement process.

Specifications

- 10.9 In prescribing *specifications* for *goods* and services, an agency **must**:
- not use *specifications* or prescribe any conformity assessment procedure in order to create an unnecessary obstacle to trade;
 - where possible, set out the *specifications* in terms of performance and functional requirements; and
 - base technical *specifications* on international standards, where they exist and apply to the relevant *procurement*, except where the use of international standards would fail to meet the agency's requirements or would impose greater burdens than the use of recognised Australian standards.
- 10.10 A *specification* **must not** require or refer to a particular trademark or trade name, patent, copyright, design or type, specific origin, producer, or *supplier*, unless there is no other sufficiently precise or intelligible way of describing the requirement. In an exceptional circumstance where this type of *specification* is used, words such as 'or equivalent' **must be** included in the *specification*.

10.11 An agency may conduct market research and other activities in developing *specifications* for a particular *procurement* and allow a *supplier* that has been engaged to provide those services to participate in *procurements* related to those services. Agencies **must** ensure that such a *supplier* will not have an unfair advantage over other *potential suppliers*.

Modification of evaluation criteria or specifications

10.12 Where, during the course of a *procurement*, an agency modifies the *evaluation criteria* or *specifications* set out in an *approach to market* or in *request documentation*, or amends or reissues an *approach to market* or *request documentation*, it **must** transmit all modifications or amended or reissued documents:

- a. to all the *potential suppliers* that are participating at the time the information is amended, if known, and, in all other cases, in the same manner as the original information; and
- b. in adequate time to allow *potential suppliers* to modify and re-lodge their *submissions*, if required.

Conditions for participation

10.13 Agencies may specify *conditions for participation* that *potential suppliers* **must** be able to demonstrate compliance with in order to participate in a *procurement* or, if applicable, class of *procurement*. *Conditions for participation* **must** be limited to those that will ensure that a *potential supplier* has the legal, commercial, technical and financial abilities to fulfil the requirements of the *procurement*.

10.14 *Conditions for participation* may require relevant prior experience where that experience is essential to meet the requirements of the *procurement* but **must not** specify, as a requirement, that *potential suppliers* have previous experience with the agency or with the Australian Government or in a particular location.

10.15 In assessing whether a *tenderer* satisfies the *conditions for participation*, an agency **must**:

- a. evaluate financial, commercial, and technical abilities on the basis of the *tenderer's* business activities, wherever they have occurred; and
- b. base its determination solely on the *conditions for participation* that the agency has specified in either the *approach to market* or the *request documentation*.

10.16 An agency may exclude a *tenderer* on grounds such as bankruptcy, insolvency, false declarations, or significant deficiencies in performance of any substantive requirement or obligation under a prior *contract*.

Minimum time limits

- 10.17 *Potential suppliers must* be required to lodge *submissions* in accordance with a common deadline.
- 10.18 Agencies **must** provide sufficient time for *potential suppliers* to prepare and lodge *submissions* in response to an *approach to market*. Time limits discussed in this section represent minimum time limits to lodge *submissions* and should not be treated as default time limits.
- 10.19 The time limit for *potential suppliers* to lodge a *submission must* be at least 25 days from the date and time that an agency publishes an *approach to market* for an *open tender* or a *prequalified tender*, except under the following circumstances where an agency may establish a time limit that is less than 25 days but not less than 10 days:
- a. where the agency has published details of the *procurement* in an *annual procurement plan* on *AusTender*, at least 30 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*;
 - b. where the agency procures *commercial goods and services*;
 - c. in the case of second or subsequent approaches to the market for recurring *procurements*; or
 - d. where a genuine state of urgency renders the normal time limit impracticable.
- 10.20 Where an agency has not electronically issued an *approach to market*, the 25 day period referred to in the preceding paragraph **must** be extended to 30 days.
- 10.21 The time limits stated above apply to each *approach to market*. That is, a single *approach to market must* comply with the time limits or, in the case of a multi-stage *procurement* (such as inviting expressions of interest followed by a *prequalified tender*), each *approach to market must* comply with the time limits stated in paragraph 10.19.
- 10.22 Where an agency intends to specify *conditions for participation* that require *potential suppliers* to undertake a separate registration procedure, the agency **must** state the time limit for responding to the registration in the *approach to market*. Any such *conditions for participation must* be published in sufficient time to enable all *potential suppliers* to complete the registration procedures within the time limit for the *procurement*.
- 10.23 Where an agency extends the time limit for registration or *submission*, or where negotiations are terminated and *potential suppliers* are permitted to lodge new *submissions*, the new time limit **must** apply equitably.

Late submissions

- 10.24 Late *submissions* **must not** be accepted unless the *submission* is late as a consequence of mishandling by the agency. An agency **must not** penalise any *potential supplier* whose *submission* is received after the specified deadline if the delay is due solely to mishandling by the agency.
- 10.25 Agency mishandling does not include mishandling by a courier or mail service provider engaged by a *potential supplier* to deliver a *submission*. It is the responsibility of the *potential supplier* to ensure that the *submission* is dispatched in sufficient time for it to be received by the agency by the deadline.
- 10.26 Late *submissions* should be returned unopened to the *potential supplier* who submitted them, to:
- a. ensure that they are not evaluated or compared with *submissions* which were submitted by the due time and date;
 - b. demonstrate to other *tenderers* that the process for receiving *submissions* is fair and impartial; and
 - c. eliminate scope for any suggestion that the *submission* was rejected for any reason other than because it was late.
- 10.27 It may be necessary to open a late *submission* if there is no return address or any indication of which *approach to market* the *submission* relates. Where a *submission* has been opened under such circumstances the *potential supplier* should be advised that the *submission* was rejected due to lateness and of the reason it was opened.

Receipt and opening of submissions

- 10.28 Procedures to receive and open *submissions* **must** guarantee fairness and impartiality and **must** ensure that *submissions* are treated in confidence.
- 10.29 Where an agency provides *tenderers* with opportunities to correct unintentional errors of form between the opening of *submissions* and any decision, the agency **must** provide the opportunity equitably to all *tenderers*.
- 10.30 Further consideration **must** be given only to *submissions* that meet *minimum content and format requirements*.

Awarding contracts

- 10.31 Unless an agency determines that it is not in the public interest to award a *contract*⁹, it **must** award a *contract* to the *tenderer* that the agency has determined:
- a. satisfies the *conditions for participation*;
 - b. is fully capable of undertaking the *contract*; and
 - c. will provide the best value for money, in accordance with the essential requirements and *evaluation criteria* specified in the *approach to market* and *request documentation*.
- 10.32 An agency **must not** cancel a *procurement*, or terminate or modify an awarded *contract*, so as to avoid the rules of Division 2 of these CPRs.

⁹ Public interest grounds generally arise in response to unforeseen events or new information that materially affects the objectives or reasons underlying the original procurement requirement as specified in the request document.

Appendices and Index

Appendices

Appendix A: Exemptions from Division 2

Procurements that are exempt from the rules of Division 2 by the operation of Appendix A are still required to be undertaken in accordance with value for money and with the rules of Division 1 of these CPRs.

Division 2 does not apply to:

1. leasing or *procurement* of real property or accommodation (note: the *procurement* of *construction services* is not exempt);
2. *procurement* of *goods* and services by an agency from other Commonwealth, state, territory or local government entities where no commercial market exists or where legislation or Commonwealth policy requires the use of a government provider (for example, tied legal services);
3. *procurements* funded by international grants, loans or other assistance, where the provision of such assistance is subject to conditions inconsistent with this document;
4. *procurements* funded by grants and sponsorship payments from non-Commonwealth entities;
5. *procurement* for the direct purpose of providing foreign assistance;
6. *procurement* of *research and development* services, but not the *procurement* of inputs to *research and development* undertaken by an agency;
7. the engagement of an expert or neutral person, including engaging counsel or barristers, for any current or anticipated litigation or dispute;
8. *procurement* of *goods* and services (including construction) outside Australian territory, for consumption outside Australian territory;
9. acquisition of fiscal agency or depository services, liquidation and management services for regulated financial institutions, and sale and distribution services for government debt;
10. *procurement* of motor vehicles;
11. *procurement* by the Future Fund Management Agency of investment management, investment advisory, or master custody and safekeeping services for the purposes of managing and investing the assets of the Future Fund;

12. *procurement of blood plasma products or plasma fractionation services;*
13. *procurement of government advertising services¹⁰;*
14. *procurement of goods and services by, or on behalf of, the Defence Intelligence Organisation, the Defence Signals Directorate, or the Defence Imagery and Geospatial Organisation;*
15. *contracts for labour hire;*
16. *procurement of goods and services from a business that primarily exists to provide the services of persons with a disability; and*
17. *procurement of goods and services from an SME with at least 50 per cent Indigenous ownership.¹¹*

¹⁰ This includes information and advertising services for the development and implementation of information and advertising campaigns.

¹¹ FMA Regulation 7b – Commonwealth Cleaning Services Guidelines (Act s64) must be complied within the use of this exemption for the procurement of cleaning services.

Appendix B: Abbreviations and acronyms

CAC Act	<i>Commonwealth Authorities and Companies Act 1997</i>
CEIs	Chief Executive's Instructions
CPRs	Commonwealth Procurement Rules
Finance	Department of Finance and Deregulation
Finance Minister	Minister for Finance and Deregulation
FMA Act	<i>Financial Management and Accountability Act 1997</i>
FMA Regulations	<i>Financial Management and Accountability Regulations 1997</i>
GST	Goods and Services Tax
SMEs	Small and Medium Enterprises

Appendix C: Definitions

The following definitions apply for the purposes of these CPRs:

Annual procurement plan – a document published on *AusTender* through which agencies provide a short summary of their strategic procurement outlook for the coming year and information on significant *procurements* they plan to undertake.

Approach to market – any notice inviting *potential suppliers* to participate in a *procurement* which may include a request for tender, request for quote, request for expression of interest, request for application for inclusion on a *multi-use list*, request for information or request for proposal.

Note: the acronym 'ATM' is used on AusTender and other procurement documents to reference an approach to market.

Approver – is defined by the FMA Regulations as:

- a. a Minister; or
- b. a Chief Executive;
or
- c. a person authorised by or under an Act to exercise a function of approving proposals to spend public money.

AusTender – the central web-based facility for the publication of Australian Government procurement information, including business opportunities, *annual procurement plans* and *contracts* awarded.

CAC Act body – an entity that is subject to the *Commonwealth Authorities and Companies Act 1997* (CAC Act). *CAC Act bodies* are legally and financially separate from the Commonwealth but can be directed by the Finance Minister under section 47A of the CAC Act to apply the CPRs in accordance with the CAC Act Procurement Directions if they are listed in schedule 1 to the CAC Regulations (relevant *CAC Act bodies*).

Chief Executive's Instructions (CEIs) – directions issued by the Chief Executive of an agency under the authority of section 52 of the FMA Act and FMA Regulation 6.

Commercial goods and services – commercial *goods* and services are of a type that are offered for sale to, and routinely purchased by, non-government buyers for non-government purposes, including any modifications common in the commercial marketplace and any minor modifications not common in the commercial marketplace.

Commodity market – a recognised exchange dealing in generic, largely unprocessed, goods that can be processed and resold.

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. This may include a requirement to undertake an accreditation or validation procedure.

Construction services – *procurements* related to the construction of buildings and all *procurements* covered by the *Public Works Committee Act 1969*.

Contract – an arrangement, as defined by the FMA Regulations, for the *procurement* of *goods* and services under which public money is payable or may become payable.

Note: this includes standing offers and panels.

Contracts for labour hire – a *contract* under which an agency engages an individual to provide labour, where the individual is engaged either directly or through a firm which primarily exists to provide the services of only that individual. This includes the appointment of an eminent individual to a special role by a Chief Executive, or the appointment of a person or persons by a Chief Executive to a governance committee (for example, an audit committee, ethics committee or steering committee), but does not include the engagement of consultants.

Days – means calendar *days*.

End date (in a contract) – can be defined by reference to a specific date or by reference to a specific event.

Evaluation criteria – the criteria that are used to evaluate the compliance and/or relative ranking of *submissions*. Evaluation criteria **must** be clearly stated in the *request documentation*.

FMA Act agency – an agency as defined in section 5 of the *Financial Management and Accountability Act 1997* (FMA Act).

Goods – every type of right, interest or thing which is legally capable of being owned. This includes, but is not restricted to, physical goods and real property as well as intangibles such as intellectual property, *contract* options and goodwill.

Limited tender – involves an agency approaching one or more *potential suppliers* to make *submissions*, where the process does not meet the rules for *open tender* or *prequalified 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.

Multi-use list – a list, intended for use in more than one procurement process, of pre-registered *suppliers* who have satisfied the *conditions for participation* on the list. Each approach to a *multi-use list* is considered a new *procurement*.

Open approach to market – any notice inviting all *potential suppliers* to participate in a *procurement* which may include a request for tender, request for quote, request for expression of interest, request for application for inclusion on a *multi-use list*, request for information and request for proposal.

Open tender – involves publishing an open *approach to market* and inviting *submissions*.

Potential supplier – an entity or person who may respond to an *approach to market*.

Prequalified tender – involves publishing an *approach to market* inviting *submissions* from all *potential suppliers* on:

- a. a shortlist of *potential suppliers* that responded to an initial *open approach to market* on *AusTender*;
- b. a list of *potential suppliers* selected from a *multi-use list* established through an *open approach to market*; or
- c. a list of all *potential suppliers* that have been granted a specific licence or comply with a legal requirement, where the licence or compliance with the legal requirement is essential to the conduct of the *procurement*.

Procurement – encompasses the whole process of procuring *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, the awarding of a *contract*, delivery of and payment for the *goods* and services and, where relevant, ongoing *contract* management and consideration of disposal of *goods*. *Procurement* does not include:

- a. grants (whether in the form of a *contract*, conditional gift or deed)¹²;
- b. investment (or divestment);
- c. sales by tender;
- d. loans;
- e. *procurements of goods* and services for resale or of *goods* and services used in the production of *goods* for resale;
- f. any property right not acquired through the expenditure of public money – for example, a right to pursue a legal claim for negligence;
- g. statutory appointments;
- h. appointments made by a Minister using the executive power – for example, the appointment of a person to an advisory board; or
- i. the engagement of employees – such as under the *Public Service Act 1999*, the *Parliamentary Services Act 1999*, an agency's enabling legislation, or the common law concept of employment.

Procurement thresholds – the *procurement thresholds* (including GST) are:

- a. for *FMA Act agencies*, other than for *procurements of construction services*, the *procurement threshold* is \$80,000;
- b. for relevant *CAC Act bodies*, other than for *procurements of construction services*, the *procurement threshold* is \$400,000; or
- c. for *procurements of construction services* by *FMA Act agencies* or relevant *CAC Act bodies*, the *procurement threshold* is \$9 million.

¹² As defined in FMA Regulation 3A.

Reporting thresholds – the *reporting thresholds* (including GST) are:

- a. \$10,000 for *FMA Act agencies*; and
- b. for relevant *CAC Act bodies*
 - i. \$400,000 for *procurements* other than *procurement of construction services*, or
 - ii. \$9 million for *procurements of construction services*.

Request documentation – documentation provided to *potential suppliers* to enable them to understand and assess the requirements of the procuring agency and to prepare appropriate and responsive *submissions*. This general term includes documentation for expressions of interest, *multi-use lists*, *open tender*, *prequalified tender* and *limited tender*.

Research and development – research is described as systematic enquiry or investigation into a subject in order to discover facts or principles. Research includes surveys, market research, scientific research and educational research. Development applies to the function of creating/producing new and improved products, devices, processes or services. Development also extends to design, proof of concept and the production of prototypes.

Small and medium enterprises (SMEs) – an Australian or New Zealand firm with fewer than 200 full-time equivalent employees.

Specification – a description of the features of the *goods* and services to be procured.

Standing offer – an arrangement setting out the terms and conditions, including a basis for pricing, under which a *supplier* agrees to supply specified *goods* and services to an agency for a specified period.

Submission – any formally submitted response from a *potential supplier* to an *approach to market*. Submissions may include tenders, responses to expressions of interest, applications for inclusion on a *multi-use list* or responses to request for quote.

Supplier – an entity or person who has entered into a *contract* with the Commonwealth.

Tenderer – an entity or person who has responded with a *submission* to an *approach to market*.

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