

INTERNATIONAL PUBLIC PROCUREMENT

AUSTRALIA

By

Douglas S. Jones
Clayton Utz
Sydney, Australia

*Release 2004-2
Issued September 2004*

OCEANA PUBLICATIONS, INC., DOBBS FERRY, NY

C
O
M
M
E
N
T
A
R
Y

Information contained in this work has been obtained by Oceana Publications from sources believed to be reliable. However, neither the Publisher nor its authors guarantee the accuracy or completeness of any information published herein, and neither Oceana nor its authors shall be responsible for any errors, omissions or damages arising from the use of this information. This work is published with the understanding that Oceana and its authors are supplying information, but are not attempting to render legal or other professional services. If such services are required, the assistance of an appropriate professional should be sought.

You may order this or any Oceana publication by visiting Oceana's website at <http://www.oceanalaw.com> or contacting Customer Service at 1.914.693.8100 (domestic or international) or 1.800.831.0758 (U.S. only).

Library of Congress Cataloging-in-Publication Data

International public procurement / Dennis Campbell, general editor;
Center for International Legal Studies.

p. cm.

Includes bibliographical references.

ISBN 0-379-01252-9 (alk. paper)

1. Government purchasing--Law and legislation. 2. Letting of contracts.

I. Campbell, Dennis. II. Center for International Legal Studies.

K884.I588 1999

346.02'3--dc21

98-27426

CIP

© 2004 by Oceana Publications, Inc.

All rights reserved. No part of this publication may be reproduced or transmitted in any form or by any means, electronic or mechanical, including photocopy, recording, xerography, or any information storage and retrieval system, without permission in writing from the publisher.

Manufactured in the United States of America on acid-free paper.

Table of Contents

A. INTRODUCTION	1
B. PROCUREMENT ORGANIZATIONS	2
i. In General.....	2
ii. Competitive Tendering and Contracting Branch	2
iii. Asset Management Group.....	3
iv. Australian Government Information Management Office	3
v. Australian Procurement and Construction Council Inc.	4
C. PUBLIC PROCUREMENT AND ITS LEGAL BASIS	5
i. In General.....	5
ii. Constitution and Legislation	5
iii. Budget Regulations.....	8
iv. Award Regulations	8
v. Examination Regulations	9
vi. Rules Governing Bidding	9
vii. Notices.....	9
viii. Price Regulations	10
D. PROCEDURE FOR AWARD OF PUBLIC PROCUREMENT CONTRACTS	11
i. Application of Relevant Legislation and Regulations	12
ii. Award Principles	12
E. TYPES OF PROCEDURE	24
i. In General.....	24
ii. Notices.....	30
iii. Time Limits	31
iv. Qualification of Tenderers.....	31
v. Specifications.....	32

F. CONTRACTING AUTHORITY'S REQUIRED TERMS AND CONDITIONS	34
i. In General.....	34
ii. Government Information Technology Conditions.....	34
iii. Prices and Terms and Conditions Offered by Tenderer.....	35
iv. Tender.....	35
v. Processing of Tenders.....	36
vi. Evaluation of Tenders.....	36
vii. Award.....	39
viii. Post-Award Notifications.....	39
ix. Remedies.....	41
G. PROCEDURE FOR GOVERNMENT AGENCY AWARD OF PUBLIC UTILITY CONTRACTS	51
i. In General.....	51
ii. Application of Relevant Legislation and Regulations.....	51
H. IMPLEMENTATION OF PUBLIC PROCUREMENT CONTRACTS	52
i. Performance and Reviews.....	52
ii. Default and Termination.....	54
iii. Contractual Penalties.....	55
iv. Acceptance.....	55
v. Warranty.....	56
vi. Invoices and Payments.....	56
vii. Security.....	56
viii. Waivers.....	56
ix. Remedies for Contractors.....	56

AUSTRALIA

Douglas S. Jones
Clayton Utz
Sydney, Australia

A. INTRODUCTION

Australia is a federation of six states (New South Wales, Queensland, South Australia, Tasmania, Victoria, and Western Australia) and two territories (the Australian Capital Territory and the Northern Territory), with a central federal government based in Canberra. Consequently, there are nine separate jurisdictions within Australia, each with its own public procurement policies and procedures.

This chapter focuses on the purchasing policies and practices of the Australian federal government, hereafter referred to as the Commonwealth. While specific requirements and procedures vary among the states, territories, and the Commonwealth, the majority of policy matters here discussed are applicable to the states and territories.

This chapter begins by considering the source of the Commonwealth's power to contract for the procurement of goods and services and then proceeds to consider the steps involved in the procurement procedure from the initial determination of the need for goods or services through to award of the contract.

The Commonwealth's control of its procurement activities is effected by means of policy documents, such as the Commonwealth Procurement Guidelines, rather than through legislation and regulations enacted by parliament. The principles intended to guide the award of the Commonwealth's contracts to purchase goods and services are discussed in significant detail.

Unlike the European Union and United States, there is no specific regulatory regime for government contracts under Australian law. Thus, apart from a few exceptions, contracts between private suppliers and the Commonwealth are regulated by the same law as private contracts. The exceptions are discussed below.

B. PROCUREMENT ORGANIZATIONS

i. In General

Before considering the legal basis of Commonwealth procurement in Australia, a preliminary reference to the organizations primarily involved in the formulation of Commonwealth procurement policy and practice should be made, these being the Competitive Tendering and Contracting Branch, the Asset Management Group, the National Office for the Information Economy, and the Australian Procurement and Construction Council Inc.

ii. Competitive Tendering and Contracting Branch

The Competitive Tendering and Contracting Branch (formerly known as the Purchasing Reform Group, then as the Office for Better Buying, and later as Purchasing Australia)¹ is a division of the Commonwealth Department of Finance and Administration. It administers the Commonwealth government's guidelines and policies on procurement of goods and services as well as disposal of surplus goods² by Commonwealth departments and agencies subject to the Financial Management and Accountability Act 1997.

The Competitive Tendering and Contracting Branch provides an assistance and advisory service to both Commonwealth departments and agencies which are procuring goods or services as well as to businesses which are prospective or existing suppliers to those departments and agencies. Some of the ways in which the Competitive Tendering and Contracting Branch assists government buyers and private sector suppliers include:

1. Publication of brochures and handbooks explaining the procurement process;
2. Operation of national toll-free telephone help lines to assist buyers and suppliers with government procurement inquiries (telephone 1 800 650-531);
3. Maintenance of a World Wide Web page³ to provide on-line information concerning purchasing policy issues and links to other procurement websites; and
4. Provision of an Advisory Service which advises on implementation of purchasing reforms and best methods to review, evaluate, and report on the procurement process.

1 The Competitive Tendering and Contracting Branch is to change its name to the Competitive Tendering and Grants Branch in the near future.

2 Policies and procedures regarding disposal of goods are beyond the scope of this chapter.

3 See <http://www.finance.gov.au/ctc/>.

iii. Asset Management Group

The Asset Management Group⁴ is a Commonwealth government agency within the Department of Finance and Administration. It was formerly known as the Office of Asset Sales, and its name was subsequently changed to the Office of Asset Sales and Information Technology Outsourcing (OASITO) and, in July 2001, to the Office of Asset Sales and Commercial Support (OASACS). OASACS was abolished with effect from 27 November 2001, and the asset sales function was transferred back to the Department of Finance and Administration, being absorbed by the Asset Management Group.

The Asset Management Group manages the Commonwealth's business and non-defense property assets, and it manages the sale or divestment of such assets and the insurance and risk management operations within the government's finance portfolio.

The functions of the Asset Sales Division of the Asset Management Group which are relevant to Commonwealth procurement are:

1. Exercising its responsibility for the implementation of the sale of major Commonwealth business assets; and
2. Assisting the market testing of relevant activities starting with corporate services currently undertaken by agencies.

The Office of Asset Sales' strategies are intended to contribute to fiscal consolidation objectives, thereby supporting agencies to achieve economies of scale, and to improve efficiency by better utilizing processing capacity. The Office also strives to confine Commonwealth activities to those that are most appropriate and most cost effective.

The Asset Sales Branch itself obtains extensive support and assistance from private sector advisors, consultants, and project managers and maintains a register of consultants used to determine shortlists of consultants invited to tender for specific assignments.

With respect to the Asset Management Group, its role is to assist agencies in the tendering process generally by providing guidance and support. Market testing is the process of inviting private enterprise to tender for business.

iv. Australian Government Information Management Office

The Australian Government Information Management Office (AGIMO)⁵ is a division of the Department of Communications, Information Technology, and the Arts. Through the Agency, the Commonwealth is able to address the

4 See <http://www.finance.gov.au/go>.

5 See <http://www.agimo.gov.au>.

technical, regulatory, and social issues affecting government, business, and consumers in a coordinated manner in the development of the information economy. Part of the Australian Government Information Management Office's role is to simplify communications and administrative aspects of government computing activities and telecommunications on a "Whole of Government" basis.

This includes obtaining "Whole of Government" pricing and the standardizing of terms and conditions under a Head Agreement for telecommunications usage.⁶ Part of this process involves a proposed virtual private telecommunications network for government agencies. It is now mandatory for Commonwealth agencies to use the Whole-of-Government Telecommunications Arrangement (WOGTA) Head Agreement for the procurement of certain types of telecommunications services.

The WOGTA is a contracting framework managed by the AGIMO. Under the WOGTA, licensed carriers under the Telecommunications Act 1997 (Cth.) and carriage service providers are required to sign a separate Head Agreement with the AGIMO. Under this arrangement, the Commonwealth is treated as a single customer and uses competitive processes wherever practical to seek access to new and innovative telecommunications services.

The AGIMO also is the key government agency responsible for the implementation of the Commonwealth's Electronic Procurement Strategy. The strategy includes setting up a central supplier database and the goal of access to all Commonwealth government services online. Due to the substantial achievement of the goal of online access, almost all of the references provided throughout this chapter refer to publications produced by government agencies that are available online or general information available on particular government websites.

v. Australian Procurement and Construction Council Inc.

The Australian Procurement and Construction Council Inc.⁷ was previously called the National Public Works Council Inc. and was renamed in 1997. The Australian Procurement and Construction Council Inc. is the peak council of government departments responsible for procurement and construction policy for the governments of the Commonwealth, the States, and the Territories.

It provides a national reference on policy advice, principles, best practice initiatives, procurement, and construction industry interface. Consistency of

6 A set of terms and conditions, called the "Whole of Government Telecommunications Arrangement", have been agreed with carriers for the provision of telecommunications services to the Commonwealth. See text, below.

7 See <http://www.apcc.gov.au>.

approach to broad procurement policies is one of the Australian Procurement and Construction Council Inc.'s aims. Suppliers and government representatives alike can participate in the Australian Procurement and Construction Council Inc. forum.

The Australian Procurement and Construction Council Inc. has established a National Code of Practice for the Construction Industry. Suppliers who wish to do business with governments throughout Australia must comply with all aspects of the Code. Other projects include the development of national procurement guidelines for capital works and improving the quality and standard of technical documentation.

In line with the Commonwealth's overall policy of providing flexible guidelines for the achievement of broad procurement outcomes, it is up to individual agencies to decide on the specific method of conducting their own construction outsourcing projects. The Australian Procurement and Construction Council Inc. provides assistance and support for agencies as they decide on and implement construction procurement projects.

C. PUBLIC PROCUREMENT AND ITS LEGAL BASIS

i. In General

At the time of writing, Australia was not a signatory to the World Trade Organization (WTO) government Procurement Agreement. The Agreement sets down elaborate procedures for conducting tenders, whereas the Commonwealth currently prefers a flexible system based on general principles.

If Australia does become a signatory, and this seems unlikely, then the process of government tendering in Australia would be transformed.

ii. Constitution and Legislation

a. In General

The Commonwealth is a legal entity.⁸ However, unlike a natural person, its powers to contract are limited to some extent. This is because the Commonwealth is created by statute (the Constitution of Australia) and so may act only within the limits established by that statute.⁹

In practical terms, the only relevant limitation is one of subject matter. The Commonwealth can only contract within certain heads of power which are expressly¹⁰

8 *Commonwealth v. Bogle* (1953) 89 C.L.R. 229.

9 "... a stream cannot rise above its source." Griffith CJ, in *Heiner v. Scott* (1914) 19 C.L.R. 381, at p. 393.

10 The majority of expressly mentioned heads of power are listed in section 51 of the Constitution.

or impliedly established within the Constitution. The States retain the power to legislate and contract in all those areas outside those contained in the Constitution.

If a contract entered into by the Commonwealth is beyond power, then the contract may not be enforceable. The Commonwealth's contractual capacity derives from three sources, namely:

1. The executive power in section 61 of the Constitution;
2. The Common Law; and
3. Express statutory conferment.

b. Executive Power in Section 61 of the Constitution

Section 61 of the Constitution provides:

The executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative, and extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth.

A detailed discussion of the extent of the Commonwealth's contractual power is beyond the scope of this chapter. For the present purposes, it is sufficient to note that, in practice, the power of the Commonwealth to enter into contracts to procure goods or services is unlimited, with the exception of certain subject matter constraints as mentioned above.

c. Common Law

The power of the Commonwealth to contract at Common Law, including any prerogative powers of the Crown, has been subsumed within section 61 of the Constitution.

d. Express Statutory Conferment

Federal legislation, which confers a specific contract-making power, is a third source of power to contract. The specific provisions of the statute displace the more general executive power to contract.

The provisions of the Financial Management and Accountability Act 1997 and the Financial Management and Accountability Regulations referred to below provide a specific procurement example.¹¹

e. International Treaties

In Australia, international instruments do not have the status of law until they are incorporated into Australian law by way of legislation made by Parliament.

¹¹ Seddon, *Government Contracts: Federal, State and Local* (1999).

Absent incorporation, the signing (ratification) of an international convention may still give rise to a "legitimate expectation" that administrators will act in conformity with the instrument in an administrative law sense.¹² If an administrator intends to act contrary to the instrument, then adversely affected persons should be given the opportunity to present a case against that course of action.

This is an administrative law concept, so that threshold questions of whether or not the actions or decisions of the government body are susceptible to judicial review must be dealt with first.

A number of international instruments have been ratified by Australia that are relevant to public procurement in Australia. These include:

1. The Australia–United States Free Trade Agreement;
2. The Australia–Singapore Free Trade Agreement;
3. The Memorandum of Agreement between the Government of Australia and the Government of the United States of America concerning Reciprocal Defense Procurement;
4. The Australia–New Zealand Government Procurement Agreement; and
5. The Australia–New Zealand Closer Economic Relations Trade Agreement.

These agreements focus on removing the barriers to supply between the relevant countries.

Under the Australia–United States Free Trade Agreement, in return for Australian suppliers now being allowed to compete in the United States procurement market, Australia agreed to a presumption in favor of open tendering procedures and transparency obligations in relation to United States suppliers. Under the United States Defense Procurement Agreement, the two countries agreed to remove barriers to supply between the two countries, exchange information, promote interoperability of military equipment, and facilitate mutual procurement for certain categories of military supply. The Memorandum was affirmed in the Free Trade Agreement.

Similarly, the Australia–Singapore Free Trade Agreement guarantees non-discriminatory treatment in tendering for government business with 47 Singapore ministries, agencies, and statutory authorities listed in the World Trade Organization (WTO) Government Procurement Agreement, to which Australia is not a party.

Under the Agreements with New Zealand, equal and transparent competition is fostered along with the goal of consistency in contractual, technical,

12 *Minister for Immigration & Ethnic Affairs v. Teoh* (1995) 183 C.L.R. 273.

and performance standards and specifications. The trade agreement also has as its objective the removal of any preferences for domestic suppliers.

iii. Budget Regulations

Section 65 of the Financial Management and Accountability Act 1997 empowers the Governor-General to make regulations for carrying out the provisions of the Financial Management and Accountability Act 1997. In particular, these regulations may make provisions relating to spending public money and acquiring property that is to be public property.¹³

The Financial Management and Accountability Regulations have been enacted pursuant to section 65 of the Financial Management and Accountability Act 1997. The Financial Management and Accountability Regulations apply generally throughout Australia and its external territories to Commonwealth procurement activities.¹⁴

iv. Award Regulations

There is no statutory regime which directly regulates the award of public procurement contracts to suppliers. However, there is an extensive policy framework established under the Financial Management and Accountability Regulations.¹⁵

This does not amount to a legal requirement to comply with the Commonwealth Procurement Guidelines, but the Regulations do require that if a decision is taken that is not consistent with the Commonwealth Procurement Guidelines, the official must make a written record of the reasons for doing so.¹⁶

Regulation 6 of the Financial Management and Accountability Regulations empowers the chief executive of an Agency to give procurement directions to officers whose departments are subject to the provisions of the Financial Management and Accountability Act 1997.¹⁷ These directions, called Chief

13 Financial Management and Accountability Act 1997, section 65 (2).

14 Financial Management and Accountability Act 1997, section 4t.

15 Regulation 7(1) of the Financial Management and Accountability Regulations empowers the Finance Minister to issue guidelines relating to procurement. The Commonwealth Procurement Guidelines were announced in 1998. All officials undertaking procurement for Commonwealth departments or agencies must have regard to the Commonwealth Procurement Guidelines. The Commonwealth Procurement Guidelines are under review but, at the date of writing, the new version had not been released. It is not anticipated that the core principles of the Guidelines will change.

16 Financial Management and Accountability Regulations, regulation 8(1) and (2).

17 A complete list of Commonwealth entities subject to the Financial Management and Accountability Act 1997 and, consequently, to the Commonwealth Procurement Guidelines, can be obtained at www.dofa.gov.au/finframework under the link "Financial Management and Accountability Act 1997".

Executive's Instructions, may not be inconsistent with the Financial Management and Accountability Act 1997 and Regulations.

There also is a general obligation on procurement officers to promote proper use of Commonwealth resources¹⁸ and to make purchases consistent with the efficient and effective use of public moneys.¹⁹ Specific obligations may be created by individual pieces of legislation, such as the Australian Land and Transport Development Act 1988 (Cth).²⁰

There also is a growing judicial trend to recognize a pre-award contract between the body issuing the tender and the bidder. Such a contract governs the process of dealing with and assessing tenders and may include an implied term to the effect that the issuing body will evaluate tenders fairly and in good faith according proper and reasonable consideration to each complying tender.²¹

v. Examination Regulations

No legislation or regulations specifically control the tender examination and evaluation process. The examination process is dealt with at the policy level and is considered below.

vi. Rules Governing Bidding

Apart from the provisions of Parts IV, IVA, and V of the Trade Practices Act 1974 (Cth), dealing generally with restrictive trade practices (including collusive tendering), unconscionable conduct, and consumer protection, respectively, no legislative framework governs the bidding process.

vii. Notices

Regulation 7(3) of the Financial Management and Accountability Regulations states that a Commonwealth Procurement Guideline may require that a matter be published in the *Commonwealth Purchasing and Disposals Gazette*.

The Commonwealth Procurement Guidelines currently stipulate that all publicly open business opportunities and contracts or standing offers entered into above Aus. \$2,000 in value must be gazetted. The *Commonwealth Purchasing and Disposals Gazette* consists of two websites, i.e., www.ads.gov.au for business opportunities and www.contracts.gov.au for contracts and standing offer agreements entered into.

18 Financial Management and Accountability Act 1997, section 44.

19 Financial Management and Accountability Regulations, regulation 9(b).

20 Australian Land and Transport Development Act 1988 (Cth.), section 32(a)(ii).

21 *Hughes Aircraft Systems International v. Airservices Australia* (1997) 146 A.L.R. 1; *Dalcon Constructions v. State Housing Commission* (Unreported, Supreme Court of Western Australia, 1998); *Willow Grange Pty. Ltd. v. Yarra City Council* (Unreported, Supreme Court of Victoria, 1997).

viii. Price Regulations

a. Prices Surveillance

Under the Trade Practices Act 1974, the Australian Competition and Consumer Commission has statutory power to:

1. Conduct price inquiries in relation to the supply of goods and services;²²
2. Monitor price levels in markets where competition is lacking;²³
3. Restrict price rises by businesses, or in relation to goods and services that have been "declared" under the Act.²⁴

Where a business and product or service is declared under the Trade Practises Act, the price of the declared product or service cannot be raised beyond its highest price during the past 12 months unless a number of requirements set down in the Act are met. The penalty for failure to comply with the Act is a fine of Aus. \$10,000.

b. Goods and Services Tax

Sweeping tax reforms commenced on 1 July 2000 in Australia, including the introduction of a Goods and Services Tax and the abolition of a number of existing taxes, including the Wholesale Sales Tax. The Goods and Services Tax is levied at a uniform rate of 10 per cent on most goods and services. Tenderers should check their Goods and Services Tax obligations, and government buyers should ensure that tender prices include Goods and Services Tax where appropriate.

Under the new tax system, suppliers generally should hold an Australian Business Number. If the supplier does not have an Australian Business Number, the government buyer is required to withhold 48.5 per cent of payments.²⁵

Substantial penalties apply where suppliers increase their prices for Goods and Services Tax but fail to pass on the savings arising from the abolition of other taxes. Guidance is available at www.ato.gov.au.

22 Trade Practices Act 1974, section 95H.

23 Trade Practices Act 1974, sections 95ZE and 95ZF.

24 Trade Practices Act 1974, section 95Z (1).

25 Commonwealth Procurement Circular 02/1, "Use of Australian Business Number — Mandatory Reporting Requirements for the Gazette Publishing System". The Circular advises of changes to the Gazette Publishing System (Ga.P.S.) mandatory reporting requirements which now include the mandatory entry of a supplier's Australian Business Number (ABN) as the Ga.P.S. supplier identifier. The Circular updates C.P.C. 00/3, issued 28 June 2000.

D. PROCEDURE FOR AWARD OF PUBLIC PROCUREMENT CONTRACTS

a. *Changes to Relevant Legislation and Regulations*

In 1997, the Commonwealth government completed a review of Commonwealth Purchasing Policies and Functions. As a result of that review, the government announced in December 1997 new purchasing arrangements. The aim of these new arrangements was to cut the cost of doing business with Commonwealth government departments and to provide greater opportunities for small business to participate in government markets. The new approach seeks to establish defined outcomes for procurement while devolving decisions on the process of achieving those outcomes to individual government agencies.

The end result is that the former detailed Commonwealth Procurement Guidelines have been replaced following the enactment of the Financial Management and Accountability Act 1997. The Financial Management and Accountability Regulations were made under section 65 of the Financial Management and Accountability Act 1997. Both the Act and the Regulations came into force on 1 January 1998. The revised Commonwealth Procurement Guidelines were issued on 31 March 1998 by the Minister for Finance and Administration under regulation 7(1) of the Financial Management and Accountability Regulations.

The guidelines themselves are contained in a document entitled *Commonwealth Procurement Guidelines and Best Practice Guidance*.²⁶ This document allows government agencies far more independence in developing their own guidelines for procurement than was previously the case. The introduction states that “. . . the purpose of the Commonwealth Procurement Guidelines is to provide a policy framework to assist and ensure that Government agencies achieve Value for Money in their procurement activities”. The Best Practice Guidance section does not form part of the Guidelines. It is intended to assist procurement activities by providing best practice procurement guidance to officials.

In the place of a large number of universally applicable mandatory guidelines relating to procurement, it is intended that each government agency will develop its own set of Chief Executive's Instructions in their place to suit that particular agency. The chief executives of individual agencies are given this power under regulation 6 of the Financial Management and Accountability Regulations. These Instructions must be consistent with the Financial Management and Accountability Act 1997 and Regulations.²⁷

²⁶ See <http://www.finance.gov.au/ctc/publications/publications.html>.

²⁷ Financial Management and Accountability Act 1997, section 6.

Many of the requirements previously contained in the Commonwealth Procurement Guidelines may be found in similar form in the Instructions issued by chief executives of individual government agencies.

i. Application of Relevant Legislation and Regulations

Part 4 of the Financial Management and Accountability Regulations deals with commitments to spend public money.

Regulation 7 empowers the Finance Minister to issue procurement guidelines to which Commonwealth officials performing procurement duties must have regard. At the time of writing, one set of Commonwealth Procurement Guidelines has been issued by the Minister.²⁸ In addition, each government agency is expected to develop its own set of Chief Executive's Instructions for procurement under regulation 6 of the Financial Management and Accountability Regulations.

ii. Award Principles

a. In General

Value for money is the core principle that governs Commonwealth procurement. Underpinning this are four supporting principles, namely:

1. Efficiency and effectiveness;
2. Accountability and transparency;
3. Ethics; and
4. Industry development.

b. Value for Money

The core principle governing Commonwealth procurement is "Value for Money".²⁹ In recognition of this objective, regulation 9 of the Financial Management and Accountability Regulations provides that Commonwealth officers approving expenditure for procurement must ensure that the proposed expenditure uses public moneys effectively and efficiently and is in accordance with Commonwealth policies. If expenditure approval is not already in writing, such approval must be recorded in writing as soon as practicable after the procurement expenditure approval is granted.³⁰

28 These guidelines were launched in March 1998 and revised in February 2002. The revised guidelines are referred to briefly above and extensively below as they form the core of Commonwealth procurement policy.

29 Commonwealth Procurement Guidelines: Core Principle 1 (Value for Money).

30 Financial Management and Accountability Regulations, regulation 12.

More closely related to the aim of obtaining value for money are the Commonwealth Procurement Guidelines. They require that Commonwealth officers entering into financial commitments should be satisfied that the best possible outcome has been achieved, taking into account all relevant costs and benefits over the procurement cycle.

A Commonwealth agency achieves value for money “when the most appropriate solution is achieved for a specific procurement activity”.³¹ Thus, the balancing of price versus benefit involved will mean that the least-cost procurement source will not always be selected. More expensive services or products will be chosen in preference to the cheapest tender or price quotation where there is a clear and reasonable justification for doing so, such as lower maintenance costs or a better fit with government policy.

To assess whether value for money has been achieved in procurement involves identification and consideration of fiscal and non-fiscal factors which are significant in the particular procurement in question. Without limiting the matters which may be considered, factors include:

1. Procurement method adopted;
2. Market maturity;
3. Performance;
4. Financial considerations; and
5. Anticipated price that could be obtained at the point of disposal.

Furthermore, the procurement method adopted must also represent Value for Money and not impose unnecessary cost on buyers or suppliers. In cases where they exist, agencies are to use Strategic Common Use Arrangements. These Arrangements are established in cases where the Minister for Finance concludes that such an arrangement would best suit the interests of the Commonwealth.³²

c. Efficiency and Effectiveness

The Guidelines provide that to achieve Value for Money, procurement must be efficient and effective. Pursuant to Regulation 9 of the Financial Management and Accountability Regulations 1997, an official who approves a proposal to spend public money must be satisfied that the agency will make efficient and effective use of that money.

The Guidelines do not prescribe a specific purchasing method; rather, they suggest that the requirements and market conditions of each procurement must be considered and the appropriate procurement method selected accordingly.

31 Best Practice Policy Guidance, Competitive Tendering and Contracting Branch, see www.finance.gov.au/ctc/toolkits/valueformoney/value-for-money.html.

32 Commonwealth Procurement Guidelines: Value for Money.

Furthermore, agencies must monitor and evaluate procurement arrangements to ensure they continue to provide the expected benefits. At a more strategic level, agencies must ensure that procurement arrangements integrate corporate governance mechanisms so that they most effectively contribute to agencies' outcomes.

Underpinning the requirements of efficiency and effectiveness are the Commonwealth's Contestability and Competitive Neutrality requirements and its Whole-of-Government Supplier Pre-qualification Arrangements.

The contestability and competitive neutrality requirements are designed to ensure that government businesses do not have competitive advantages over the private sector by virtue of their private ownership. Thus, competitive neutrality policy promotes efficient competition between public and private businesses.

In key industry segments where the government is a major purchaser, a pre-qualification scheme has been developed. The Endorsed Supplier Arrangement covers a number of industry sectors. This arrangement helps reduce the cost to industry of doing business with government by simplifying source selection by pre-qualifying suppliers.³³

d. Accountability and Transparency

This principle is concerned with value for money being achieved through visibility of business and performance management. Chief Executives of Commonwealth agencies are accountable for their agency's procurement performance.

They also are responsible for ensuring that adequate systems of reporting are in place and maintained. Typically, Commonwealth employees and organizations are answerable for their plans, actions, and outcomes. Staff, senior executives, and chief executive officers form a chain of accountability. More specifically, agencies need to consider:

1. Commonwealth access to records — The Commonwealth has a number of standard clauses which are commonly found in contracts with the private sector providing for monitoring and compliance checks by the purchasing agency. The standard clauses usually provide that records are the property of the Commonwealth and grant the Commonwealth power to access those records. The Commonwealth Auditor-General has power to compel any recipient of Commonwealth monies to open their records for audit inspection. This power cannot be excluded by the terms of any contract.

33 Commonwealth Procurement Guidelines: Efficiency and Effectiveness.

2. Commercial-in-confidence — Agencies also may need to consider, on a case-by-case basis, what might be commercial-in-confidence; such as a company's commercial strategies, fee structures, and intellectual property.
3. Outsourcing — If an agency has outsourcing arrangements in place, the agency must ensure that the provider has appropriate systems for recording decisions and the reasons for those decisions relating to the outsourced function.

Transparency is an essential element of all processes relating to procurement. The guidelines provide that agency officials must:

1. Report business opportunities in the *Purchasing and Disposals Gazette*;
2. Report agency agreements, contracts, and standing offers with an estimated liability of Aus. \$2,000 or more;
3. Report to the Equal Opportunity for Women in the Workplace Agency when they receive bids not compliant with the associated Act;³⁴
4. Refer public works costing in excess of Aus. \$6-million to the Parliamentary Standing Committee on Public Works; and
5. Publish, at regular intervals, lists of contracts to the value of Aus. \$100,000 or more which have not been fully performed or which have been entered into in the previous 12 months.³⁵

e. *Ethics*

The Commonwealth requires that its officers act ethically and deal fairly.³⁶ The Commonwealth Procurement Guidelines assert that ethical standards allow parties to:

1. Deal with each other on a basis of mutual trust and respect; and
2. Conduct business fairly, reasonably, and with integrity.³⁷

In particular, striving to achieve the goal of value for money in procurement should not cause those officers charged with purchasing to compromise their conduct in any way, and agency staff may not use their positions to benefit themselves or others. Rather, maintenance of high ethical standards should enhance the prospects of securing value for money on the principle of "like

34 Equal Opportunity for Women in the Workplace Act 1999.

35 These lists are to be published on the Internet, with access through the agency's homepage. Commonwealth Procurement Guidelines: Accountability and Transparency.

36 The legislative framework which deals with the duties and obligations of Commonwealth officers is set out in the Public Service Act 1922 (Cth.) and the regulations made under that Act, as well as the Crimes Act 1914 (Cth.).

37 Commonwealth Procurement Guidelines: Ethics.

attracts like", i.e., buyers with integrity are more likely to deal with ethical suppliers who will deal ethically with the procuring department or agency.

Adherence by procurement staff to ethical standards helps to avoid fraud, theft, and corruption. The Commonwealth Procurement Guidelines: Ethics Principles lays down the following guidelines for ethical behavior in procurement. Officials involved in procurement should ensure they:

1. Recognize and deal with conflict of interest;
2. Deal with suppliers even-handedly;
3. Consider seeking appropriate probity advice;
4. Avoid compromise of the Commonwealth's standing by accepting gifts or hospitality;
5. Make scrupulous use of public property; and
6. Comply with the duties and obligations including the APS Code of Conduct as set out in the Public Service Act 1999, the information privacy principles of the Privacy Act 1988, the security provisions in the Crimes Act 1914, and the Chief Executive's Instructions.

With regard to this last point, each agency is required by the Privacy Act 1988 to ensure that a contract does not authorize the service provider or subcontractor to engage in a practice that would, if done by the agency, breach the Information Privacy Principles. The Act also requires a party to a contract to inform any person who enquires, whether that particular contract contains provisions that are inconsistent with the National Privacy Principles, or other privacy code.³⁸

f. Industry Development

The Guidelines include a commitment to promoting and developing Australian and New Zealand industry, particularly small to medium enterprises. For major procurement projects of Aus. \$5-million or more, agencies are required to include in their tender documentation industry development criteria, evaluation methodology, and opportunities for small and medium enterprise participation. More generally, the Guidelines encourage:

1. Competitive businesses;
2. Ease of access and reduced costs of doing business with government (particularly for small to medium-sized enterprises); and
3. Value-added activities and workforce training.

³⁸ Commonwealth Procurement Guidelines: Ethics.

More specifically, the Guidelines require the buyer to be able to demonstrate that the buyer has:

1. Considered any commercial and practical benefits of doing business with Australian and New Zealand industry;
2. Ensured procurement methods do not discriminate against Australian and New Zealand suppliers;
3. Taken into account the capability and commitment to regional markets of small businesses in their local regions; and
4. Considered any supplier-base and competitive benefits of ensuring access for new entrants to the market.

In furtherance of this policy, the Commonwealth, each of the state and territory governments, and New Zealand have signed the Australia–New Zealand Government Procurement Agreement. The objective of the Agreement is to “create and maintain a single ANZ government procurement market”.³⁹ Under the Agreement, each government has undertaken to:

1. Work toward more uniform procurement practices; and
2. Ensure that government departments and agencies do not discriminate against Australian or New Zealand suppliers in procurement decisions and report to the Agreement’s other signatories regarding compliance with the Agreement.

Under the Agreement, each government has a “Designated Body” whose role is to monitor compliance with the Agreement and investigate complaints alleging non-compliance. The Commonwealth’s designated body is the Department of Finance and Administration. Compliance with the Agreement does not prohibit restricted bids or confined quotes so long as the basis for selection of bidders is not determined by the potential supplier’s country of origin.

As justification for its policy, the Commonwealth has stated that, apart from the economic benefits for the nation as a whole, buying from Australian and New Zealand suppliers has the following advantages:

1. Better price, as well as lower whole-of-life cost;
2. Better long-term support, such as spare parts being more readily available;
3. Shorter supply lines and, consequently, delivery times, which allow departments and agencies to make a lower inventory investment;
4. Avoidance of the vagaries of currency fluctuations;
5. Reduction of administrative costs to the department or agency due to easier, less costly, and generally quicker communication;

39 Australia–New Zealand Government Procurement Agreement.

6. Ease of dispute resolution and legal enforcement of contractual obligations where suppliers are within the Australian jurisdiction;
7. Greater potential for cooperative programs involving product development; and
8. Ease of vetting of suppliers' claims, particularly where subcontractors will be used.⁴⁰

g. Support for Other Commonwealth Policies

In General The Financial Management and Accountability Regulations require that Commonwealth agencies must make sufficient inquiries to satisfy themselves that a proposed purchase accords with Commonwealth policies.⁴¹ Some of these policies are:

1. Preservation of the environment and the national estate;
2. Workplace relations;
3. Indigenous interests;
4. Affirmative action;
5. Occupational health and safety;
6. Trade and foreign policy;
7. Commonwealth-State coordination and cooperation;
8. Privacy and access to records by the Australian National Audit Office; and
9. Commonwealth strategy for electronic procurement.

Preservation of the Environment and the National Estate Relevant environmental criteria are to be included in tender specifications and requests for offers.

At the time of writing, Commonwealth policies focus on ecologically sustainable development, oceans, forests, greenhouse gas emission and waste management, conservation of threatened species, and conservation of Australia's wetlands.⁴²

Workplace Relations Suppliers must comply with applicable legislative requirements, awards, and workplace arrangements, including industrial relations legislation and superannuation legislation.

40 This was the position under the original Commonwealth Procurement Guideline 12, section 6 (subsequently superseded). However, the Commonwealth's position on this issue has not changed substantially since this Guideline was withdrawn.

41 Financial Management and Accountability Regulations, regulation 9(1)(a).

42 See <http://www.ea.gov.au/industry/sustainable/greening-govt/index.html>.

The area of industrial legislation is prone to frequent change with changes to the governing political party. Current policy emphasizes freedom of association. To the extent that it is possible, workplace arrangements are to be determined at the workplace or enterprise level.⁴³

Indigenous Interests For projects above Aus. \$5-million (Aus. \$6-million in the case of construction) which are located in areas of significant indigenous populations, government agencies must consider the employment and training opportunities for local indigenous communities and the capabilities of local indigenous communities.

During the planning stage of projects, government agencies should consult the Aboriginal and Torres Strait Island Commission (ATSIC) or relevant community body.

Affirmative Action Corporations employing more than 100 people must comply with the Equal Employment Opportunity for Women in the Workplace Act 1999 (Cth).⁴⁴ This is a prerequisite to doing business with the Commonwealth.⁴⁵

Compliance involves developing and implementing a program designed to ensure that discrimination against women in the workplace is eliminated and that measures are taken towards achieving equal opportunity for women.⁴⁶ Compliance also requires the appointment of an equal opportunities officer and annual reporting to the Equal Opportunity for Women in the Workplace Agency.⁴⁷ Non-compliance results in the following serious consequences:

1. Named in Parliament as non-complying;
2. Not eligible for government contracts;
3. Not eligible for specified industry assistance programs; and
4. Placed on a list of non-complying organizations which is publicly available from the Opportunity for Women in the Workplace Agency and on the Internet.

Occupational Health and Safety The Occupational Health and Safety (Commonwealth Employees) Act 1991 (Cth) applies to contractors working on Commonwealth premises.⁴⁸

43 Commonwealth Procurement Guidelines: Core Principle 6.

44 Equal Opportunity for Women in the Workplace Act 1999 (Cth.), sections 3 and 5.

45 Commonwealth Procurement Circular Number 99/5, "Contract Compliance Policy in Support of Affirmative Action".

46 Equal Opportunity for Women in the Workplace Act 1999 (Cth.), sections 3 and 6.

47 Equal Opportunity for Women in the Workplace Act 1999 (Cth.), sections 3, 8, 13, and 13A.

48 Occupational Health and Safety (Commonwealth Employment) Act 1991 (Cth.), sections 5 and 16(4).

The Act requires government agencies to take all reasonable practicable steps to protect the health and safety of employees, contractors, and other persons within the workplace.

Trade and Foreign Policy Commonwealth policy in this area centers around trade liberalization and a commitment to the World Trade Organization (WTO) and the Asia Pacific Economic Cooperation (APEC), and it places priority on relationships within the Asia Pacific, particularly with the countries of East Asia.

Commonwealth State Coordination and Cooperation There is no single policy document that elaborates on this policy. However, the policy is most evident in the coordinated approach to the implementation of electronic commerce taken by State governments and the Commonwealth.⁴⁹

Privacy and Access to Records by the Australian National Audit Office Government agencies should include the ability to meet obligations under the Privacy Act 1988 (Cth) as a mandatory tender requirement.⁵⁰ Contractors holding personal information about individuals in relation to services provided to the Commonwealth may be required to commit to measures securing the privacy of that information, including employment arrangements which require employees to be bound by a duty not to disclose information obtained in relation to services provided by the Commonwealth.⁵¹

Under the Privacy Act 1988, private sector organizations are required to protect personal information from disclosure.

In contrast to privacy obligations, the Commonwealth seeks to ensure that contractors are aware of their obligations under the Freedom of Information Act 1982 (Cth.). The Act creates a *prima facie* right to access to government records. The right is available to citizens (including companies and organizations) who apply in writing for access to particular records. Certain exemptions apply.

Electronic Procurement Strategy The Commonwealth, via the AGIMO, is committed to:

1. Paying all government suppliers electronically by the end of 2000; and
2. Trading electronically with all "simple procurement" suppliers who wish to do so, using open standards, by the end of 2001.⁵²

49 The 1999 "Framework for National Cooperation on Electronic Commerce in Government Procurement", published by the Australian Procurement and Construction Council Inc., was revised in 2002 and is now called the "Government Framework for National Cooperation on Electronic Procurement".

50 Competitive Tendering and Contracting Branch: Outcomes and Outputs Framework.

51 Competitive Tendering and Contracting Branch: Outcomes and Outputs Framework.

52 These are the twin goals of the "Government Electronic Procurement Implementation Strategy". See <http://www.ogo.gov.au>.

To this end, the Commonwealth supports and encourages suppliers to move to online transactions and has set up a single supplier registration database. This database allows suppliers to register their details at one single point. These details will be automatically disseminated to government agencies. Suppliers also will be able to notify new products to be added to the database. In moving to electronic arrangements, the emphasis is on simple and free access to government business.

In general, the decision as to how to transact electronically with the Commonwealth is left to the supplier. Suppliers with sophisticated electronic support systems may choose to deal directly with government agencies, while those with less sophisticated systems may use electronic marketplaces.

Another aspect to the government Electronic Procurement Implementation Strategy is the development of a single entry point for information on Commonwealth, state, and territory government tenders.⁵³

The following three areas are covered within Commonwealth Procurement Guidelines or the Chief Executive Instructions for procurement applicable for each individual government agency.

h. Planned Government Procurement

The Procurement Branch provides guidance towards a reasoned approach to planning with the aim of assisting departmental managers and other procurement staff to plan for and structure the procurement process. The following list provides a summary of the steps for the procurement planning process:

1. Identify and confirm program objectives, scope, and timetable;
2. Research the market to identify those solutions and suppliers which are available;
3. Provide information about likely future requirements to suppliers at the concept or research stages;⁵⁴
4. Identify the total resources necessary, including a comparison between utilizing in-house or external resources where this is appropriate;
5. Obtain the necessary financial and other approvals;
6. Prepare the details of the acquisition, including the specification and ancillary matters, such as a risk-management strategy;

⁵³ See <http://www.ogo.gov.au> or <http://www.bep.gov.au> for more information or contact the National Office for the Information Economy.

⁵⁴ This advance notice may allow alternative and novel solutions to be developed by suppliers to meet the Commonwealth's requirements.

7. Select an appropriate contracting strategy, either by use of a common-use arrangement or a tailored contract, with fixed price, rise and fall, or incentive pricing;
8. Where a standard use contract is not being utilized, prepare a draft contract encompassing all relevant aspects of the transaction;⁵⁵
9. Evaluate the planned procurement against the defined program objectives; and
10. Monitor the procurement process as it actually takes place in comparison with the planned process.

Although all the above steps, in some form, should appear in all procurement planning, the time and resources devoted to planning a procurement should be commensurate with the complexity, value, and size of the purchase. However, extra effort in planning may be warranted despite the item purchased having a low cost, e.g., where it is an integral component of expensive or critical equipment.

Procurement planning should occur at varying levels of specificity from overarching departmental planning, specific program and project level planning, as well as planning at a product level, e.g., for consumables such as stationery.

i. Negotiation

In the past, the general practice of procurement staff was to follow a set of strict procedural rules laid down for the conduct of procurement. The Commonwealth now considers that the resulting lack of flexibility resulted in failure to achieve value for money in many instances. The assumption that use of competitive tendering would of itself ensure that overall value for money would be achieved was erroneous.

Consequently, the Commonwealth Procurement Guidelines and Best Practice Guidance leaves open to individual agencies the option of engaging in negotiation.

j. Principles Applicable to Contracting for Consultancy Services

The same principles which guide procurement of goods and other services are relevant and will be applied to procurement of consultancy services. In general, the services of a consultant will be retained when:

1. There is a requirement for specialized skill or knowledge which the department or agency lacks;

⁵⁵ This should include delivery schedules or time periods for performance of procured services, installation and inspection requirements, as well as evaluation criteria, and arrangements for payment.

2. Rapid access to leading edge technology and experience in its use and maintenance is required;
3. An independent perspective is essential to the task being undertaken, for example, a procedures audit; or
4. Although the skills or knowledge exist within the department or agency, there is insufficient staff and the duration of the excess workload does not warrant a part-time or permanent increase in staffing levels.

The scope of tasks for which consultants may be engaged is virtually unlimited, but it may include researching a solution to a defined problem, training staff, or providing some other particular professional service. Consultancies in the information technology field are common.

The Commonwealth Procurement Guidelines and Best Practice Guidance require that each department or agency set their own administrative arrangements with regard to which officers have the authority to determine the need for consultancy services. In addition, such issues as responsibility for performance monitoring and evaluation of the services provided must be determined by the department or agency internally.

The Department of Finance and Administration's Best Practice Policy Advice advises on the use of Consultancy Panels by Commonwealth departments and agencies. Agencies are able to select consultants from the Panel to avoid a separate selection process. A typical departmental consultancy panel will be established using deeds of standing offers, which may occasionally be created using a head agreement. Opportunities for suppliers to apply for admission to a Consultancy Panel will depend on the duration and expense of existing panels, but is usually every two to three years. More information on Consultancy Panels can be obtained from the Procurement Branch.⁵⁶

Typically, Consultancy Panels are established for agency-specific services, such as legal services, accounting, or other professional services. The panelists "provide a range of consultancy services to support Commonwealth agencies . . . in their implementation of competitive tendering and contracting".⁵⁷

Consulting firms and suppliers wishing to register should contact the Competitive Tendering and Contracting Branch, Purchasing Advisory and Complaints Service (tollfree 1 800 650 531).

⁵⁶ See <http://www.finance.gov.au/ctc/>.

⁵⁷ Competitive Tendering and Contracting Branch Information Kit on "Panel of Competitive Tendering and Contracting Branch Consultants" for Commonwealth Departments and Agencies.

E. TYPES OF PROCEDURE

i. In General

Commonwealth departments and agencies utilize various methods of approaching the marketplace to procure goods or services, including:

1. Through an Endorsed Supplier Arrangement;
2. By inviting bids from the market directly; or
3. By a collaborative approach using limited or single suppliers.

The Commonwealth Procurement Guidelines and Best Practice Guidance leave the choice of methods of procurement largely to the decisions of individual agencies. Government agencies are instructed to select the procurement method that itself represents the best value for money in terms of being the most appropriate method to achieve the desired outcome.⁵⁸ More detailed instructions as to procedures to be applied, including conditions for their use, may be found in each individual agency's Chief Executive's Instructions, which themselves are based on the Commonwealth Procurement Guidelines.

a. *Endorsed Supplier Arrangements*

In General The Endorsed Supplier Arrangement is a pre-qualification scheme for suppliers in the information technology, major office machine, commercial office furniture, and auctioneering industries to sell into the government marketplace. The scheme replaces the former Common Use Arrangement policy. At the time of writing, all Common Use Arrangements had been effectively phased out with only one exception relating to storage records.

Suppliers seeking Endorsed Supplier status must submit an application to the Competitive Tendering and Contracting Branch.⁵⁹ The following criteria must be satisfied:

1. Favorable referee reports;
2. Product and service compliance with agreed industry standards;
3. Financial viability;
4. Compliance with government policies; and
5. Agreement and adherence to the endorsement rules (any future breaches of the agreed rules may result in suspension or revocation of endorsed supplier status).

58 "Value for Money --- Best Practice Policy Guidance", Competitive Tendering and Contracting Branch.

59 Online forms are available at <http://www.esa.finance.gov.au>.

Industry development is an additional criteria applying to information technology and major office machine suppliers. Suppliers in these markets must demonstrate that long-term, value-adding activities are being undertaken in Australia.

If successful, the supplier is granted endorsement in perpetuity subject to a review system under which the endorsement may be suspended or revoked. The endorsed supplier is then free to use the Australian government Endorsed Supplier logo and to contract with any government buyer.

A web database allows government agencies to search online for information on endorsed suppliers, their dealer network, and products and services. It also provides for buyers to communicate electronically with suppliers and negotiate on issues such as price.

The Endorsed Supplier Arrangement database may be used by a government buyer to select a supplier, select a short list of suppliers who will be invited to quote or, if the purchase is to be done by way of tender, use the database to establish a short list for a restricted bid.

Information Technology In the area of information technology and major office machines, a standard set of Terms and Conditions called the "Head Agreement" has been established under the Government Information Technology and Communications framework, version 4 (GITC 4). Suppliers in these two areas must sign the Head Agreement if they wish to do business with the Commonwealth. However, the Head Agreement is not mandatory. It may be used in part or in full by mutual agreement and may be customized for specific purchases.

The Head Agreement allows for the streamlining of government contracting. For example, it provides for a single performance guarantee and insurance policy arrangement for each supplier rather than for each contract entered into by the supplier. Similar arrangements have been established for telecommunications and computer software for management functions.

Telecommunications To obtain the benefits of bulk purchasing power, a Head Agreement for telecommunications and usage is in place.⁶⁰

Suppliers wishing to provide telecommunications services to the Commonwealth must sign the Head Agreement before they can sell such services to the Commonwealth agencies. Again, the use of the Head Agreement is mandatory for certain telecommunication services.

⁶⁰ A set of terms and conditions, called the "Whole of Government Telecommunications Arrangement", has been agreed with carriers for the provision of telecommunications services to the Commonwealth.

Computer Software for Management Functions The National Office for the Information Economy maintains a suite of Whole of Government software agreements for public service management functions in the areas of finance, personnel, and records and information.

General terms and conditions are standardized, while functional specifications, price, and escrow terms are left to the individual agencies to negotiate with suppliers.⁶¹

b. Direct Approach to the Market

In General As with all decisions on the actual process of procurement, whether to approach the market directly or not is a decision left to the individual government departments and agencies. The method of approach chosen will be largely determined by the nature of the supplies or services required. Methods which may be utilized include:

1. Public tendering;
2. Restricted bids; or
3. Direct purchasing.

Public Tendering Calls for tenders by the Commonwealth follow a similar format to private sector requests for tenders, apart from the advertising of requests in the *Commonwealth Purchasing and Disposals Gazette* with advertisements being placed in national newspapers. Potential suppliers may be required to submit detailed proposals or tenders or merely to register their interest.

The potential suppliers' information will commonly be treated as confidential during the tender process; however, under the Freedom of Information Act 1982 (Cth), it is possible for the public, including aggrieved tenderers, to request access to tender documentation. While there is no statutory requirement that material be kept confidential, government agencies are aware of the fact that bidders may be reluctant to submit innovative tenders where confidentiality is not assured. Where intellectual property is created under a contract with the Commonwealth, the rights to that intellectual property usually belong to the Commonwealth.⁶²

Purchases Exceeding Aus. \$5-Million Where the procurement will exceed Aus. \$5-million, government agencies must include an industry development

61 See <http://www.ogo.gov.au>.

62 Commonwealth Procurement Guidelines: Core Principle 6 requires agencies to obtain the rights it needs for the least cost and effort.

criteria in the tender documentation.⁶³ Agencies are encouraged to use model industry development criteria which can be summarized as follows:

1. Development of long-term, internationally competitive industry in Australia;
2. Commitment to sustainable long-term industry development;
3. Development of long-term, strategic alliances between local companies and companies that operate in global markets;
4. Enhancement of Australia's export potential and/or import replacement;
5. Value-added activity;
6. Opportunities for participation by small and medium enterprises;
7. Existing industry development activity and proposed new investment;
8. Innovation, research, and development; and
9. Employment, training, and skills development and initiatives in regional areas.⁶⁴

Tenders will generally be scaled against these criteria using pre-determined standards or benchmarks. Performance of the successful tenderer's industry development commitments should be monitored, and the contract should provide for consequences for non-compliance with these commitments, such as liquidated damages or forfeiture of a performance bond.

Restricted Bids A variety of factors may lead to the decision to invite only a limited number of potential suppliers to register their interest or provide quotes. Where a low-cost product or service is to be acquired or the requirement is localized, the higher cost of an unrestricted invitation may not result in value for money being achieved.

Where a product or service is manufactured or supplied by only a small number of suppliers, a restricted invitation would be the only logical course. Often, a government buyer will use the Endorsed Supplier Arrangement database as a starting point for the selection of potential bidders.

Direct Purchasing Low-value, low-risk requirements, such as office supplies and other consumables, may be directly purchased from a local retailer by a department or agency.

63 Commonwealth Procurement Guidelines: Industry Development.

64 Commonwealth Procurement Circular Number 99/1, "Model Industry Development Criteria for Major Projects: Guidance Notes".

Where tendering is chosen as the preferred method, further decisions must be made as to whether the process will be selective, open, one-staged, or multi-staged. The strategy chosen must ensure that Core Policies and Principles are met.

Single-Staged Tender Process The Single-Staged Tender Process is likely to be used where the market is known, it is possible to direct a Request for Tenders to selected providers, or where the market is comparatively small.⁶⁵

Multi-Staged Tender Process Agencies should choose the Multi-Staged Tender Process where there are many possible providers, tendering costs are high, industry assistance is required to develop the tender documents, or there is little competition and extensive negotiation may be needed. In addition to a Statement of Requirements (see text, below), staged tenders may include:

1. Invitations to Tender and Expressions of Interest (to establish the level of interest);
2. Requests for Information and Requests for Proposals (to seek information on providers and their capabilities and to avoid wasted tendering costs by removing unsuitable proposals); and
3. Requests for Tender, which must include the final Statement of Requirements, instructions to bidders, contractual terms and conditions, evaluation or selection criteria and methodology, the timetable for evaluation, and a nominated contact.

Statement of Requirements for Tenders Agencies should define the activity and objectives, specify required outcomes, and determine expected performance levels.⁶⁶ These are to be included in the Statement of Requirements which is to form part of the tender documents. Agencies may elect to prepare draft tender documents for industry and client comment before formal release.

Activities are to be expressed in terms of outputs or outcomes rather than processes or inputs to assist tenderers to develop innovative solutions for achieving the desired outcomes. The Statement of Requirements should include performance targets, assumptions or constraints that may apply, the relevant human resource and industrial relations strategies, and an indication as to whether an in-house bid is being sought. Tender evaluation and selection criteria are to be closely linked to the Statement of Requirements.

65 Competitive Tendering and Contracting Branch: Procurement and C.T.C. Best Practice Advice.

66 Competitive Tendering and Contracting Branch: Procurement and C.T.C. Best Practice Advice.

Performance criteria for the monitoring of the contract are to be specified in the Statement of Requirements and “should reflect stakeholders’ expectations and the wider policy and strategic aims of the government”, as well as more conventional internal and operational issues, such as the achievement of milestones. For example, selection criteria should cover such aspects as “past performance and experience, ability to provide the required outputs, available resources, and financial viability”.⁶⁷

Measures should be few in number, visible at all levels of the Competitive Tendering and Contracting Branch process, and reflect key performance indicators.⁶⁸ The Statement of Requirements also should establish where responsibility lies if service levels are not met and how complaint mechanisms may be accessed.

The Statement of Requirements also must address any issues relating to special needs of clients, such as non-English speakers, people with disabilities, and people in regional areas.

c. *Understanding the Market*

In General The decision as to which purchasing method to use demands an understanding of the market. Government buyers have a number of methods of accessing information relating to potential suppliers.

Other than the obvious methods, buyers may access the Single Supplier Register,⁶⁹ the Endorsed Supplier Arrangement database for pre-qualified suppliers, or the Industrial Supplies Office network.

Industrial Supplies Office The Industry Capability Network (ICN)⁷⁰ is a network of technical professionals with experience in and knowledge of the resources and capabilities of Australian and New Zealand industry. The ICN offers services to both government and private sector purchasers who are seeking to maximize the Australian and New Zealand content of their procurement activities by:

1. Confidentially identifying those Australian and New Zealand manufacturers with the capacity, either existing or potential, to meet the requirements provided by the prospective purchaser;
2. Assisting potential suppliers in identifying improvements which are necessary to meet the purchaser’s quality and technical requirements; and

67 Competitive Tendering and Contracting Branch: Procurement and C.T.C. Best Practice Advice.

68 Competitive Tendering and Contracting Branch: Procurement and C.T.C. Best Practice Advice.

69 See <http://www.ogo.gov.au>.

70 See <http://www.icn.org.au>.

3. Acting in an independent intermediary capacity to facilitate open and effective communication between suppliers and purchasers.

ii. Notices

All publicly open business opportunities to supply goods or services to the Commonwealth must be advertised in the *Commonwealth Publishing and Disposals Gazette*,⁷¹ including:

1. Invitations to express or register interest;
2. Invitations for suppliers to pre-qualify;
3. Invitations to enter into standing offer supply agreements;
4. Requests for proposals; and
5. Requests for tenders, bids, or quotations.⁷²

The Commonwealth Procurement Guidelines may specify the details which must, in the public interest, be published as well as the period within which the publication must occur. Commonwealth Procurement Guidelines: Accountability and Transparency Principle does so, setting out those matters which must be published for public invitations.

For each of those different forms of invitation, the following information⁷³ should, where appropriate and in the public interest, be included:

1. The Ministerial portfolio, buying department, or agency, location of the arranging office and its division or branch within the department or agency, and its post code;
2. A description of the goods or services sufficient to identify the nature and quantity of the procurement, and any delivery period that may apply, closing date and time of invitation, place of delivery and post code, and names, telephone numbers, and email addresses of contact officers for supply of documents, or responses to commercial and technical inquiries;
3. A unique reference number, allocated by the department or agency, which identifies the invitation or request;
4. The name and telephone number of contact officers for inquiries about the notification; and
5. The Australian and New Zealand Standard Commodity Classification (ANZSCC) code, details of which are included on the forms to obtain gazetting.

71 See <http://www.ads.gov.au>.

72 Commonwealth Procurement Guidelines: Core Principle 2.

73 Commonwealth Procurement Guideline Number 99/4, "New Mandatory Reporting Arrangements — Business Opportunities, Contracts and Standing Offers".

Unlike contracts which have already been arranged, there is no minimum monetary threshold above which public invitations to supply the Commonwealth must be published in the Commonwealth Purchasing and Disposals Gazette. Rather, the factor which mandates publication is that the decision has been made to approach the public at large. In contrast, where an officer, with appropriate authority, has determined that a restricted approach will be made to certain known suppliers or a particular sector of the market, then gazetting is not required.

iii. Time Limits

a. *In General*

Apart from the period within which gazetting of awarded contracts must occur (within six weeks of entering the contract), there are no time limits laid down by Commonwealth procurement policy for any step in the procurement process.

b. *Tender Documents*

The invitation documentation will contain the cut-off date by which tenders or expressions of interest must be received. Naturally, the amount of time tenderers are allowed to prepare their bids should realistically reflect the complexity of the procurement.

In addition, the date by which the evaluation will be complete and on which the award of the contract will be made should be included in the invitation documentation.

iv. Qualification of Tenderers

a. *In General*

The qualifications which a tenderer is required to possess, including minimum production capacity and experience, will be set out in the specification.

Pre-qualification may be attained by way of applying for endorsed supplier status under the Endorsed Supplier Arrangement. Quality assurance requirements are particularly important.

b. *Quality Assurance*

The Commonwealth follows a flexible approach with respect to assuring quality.⁷⁴ In selecting an appropriate means of assuring quality, buyers are required to take into account the value of the procurement and the level of risk arising from the likelihood and consequences of non-conformance.

74 Commonwealth Procurement Guidelines: *Value for money; Efficiency and Effectiveness Principles*.

In some cases, this may extend to Industrial Supplies Office 9000 certification or may simply be a mix of product testing, quality plans, intermediate quality systems, and special conditions of contract or supplier guarantees. Where appropriate Australian standards are to be used and international standards elsewhere, the Chief Executive's Instructions for each individual government agency may include specific quality assurance requirements.

c. How Suppliers Become Quality Assured

The following steps will typically be involved in a supplier obtaining certification of their quality system. The supplier must:

1. Determine its customers' expectations;
2. Identify its own internal needs;
3. Identify the relevant standard for which it wishes to obtain certification;
4. Prepare manuals and institute appropriate procedures;
5. Lodge an application with the relevant certification body;
6. Allow that body to assess the procedures established;
7. Remedy any deficiencies identified in the assessment report prepared by the certification body;
8. Receive certification; and
9. Maintain the standard to ensure certification is not withdrawn.

v. Specifications

a. In General

For any procurement to be effective, the requirements which are to be met by the purchase must be defined unambiguously. This allows suppliers to respond effectively and procurement officers to accurately evaluate whether any tenders meet the minimum requirements. In many respects, the quality of the bids will reflect the ability of the agency to clearly specify the requirements of the contract and client needs. Sufficient background information also should be supplied to provide a context for the procurement activity or item.

As would be expected, the level of detail which is required in the description will vary with the scale and complexity of the objectives to be achieved by that purchase. A brief description will usually be sufficient for simple items or services which are readily commercially available and well understood.

As the specification defines what the government department or agency wishes to acquire, and thus what the supplier is required to provide, it should contain sufficient information to allow potential suppliers to comprehend the nature, extent, and price ceilings for the goods or services. The focus is

on providing a complete specification of all significant aspects, clarity of expression and care with terminology, measurability, and a focus on objectives rather than processes.⁷⁵

Publicly available procurement opportunities must be notified consistently in ways that provide bidders with reasonable opportunity to meet any pre-qualification requirements and bid against any particular requirements. The evaluation criteria for any particular procurement should clearly identify the relative importance of all relevant factors and provide a sound basis for a procurement decision. Those wishing to respond to opportunities must be given adequate information to enable them to do so effectively.

Care must be taken in specification writing to ensure that no feature is included as a mandatory requirement which discriminates, either directly or indirectly, against any supplier or suppliers, particularly Australian or New Zealand suppliers. Such discrimination can take the form of unnecessarily specifying a particular feature which is unique to a particular product or technology as mandatory. However, care also must be taken to specify genuine requirements in sufficient detail so as not to confuse suppliers. Computer hardware compatibility requirements provide a good example where some product bias may be necessary in specifications.

Some products being acquired may require laboratory testing either during or after the evaluation process to ensure that obligatory quality standards are met. Where this is the case, the Commonwealth must use a National Association of Testing Authorities accredited laboratory to conduct the testing.⁷⁶

b. Consultancy Services

Like specifications for the acquisition of goods, a specification for the procurement of consultancy services should concentrate on the outcome which is expected from the term of the consultancy.

Although drafting a comprehensive specification will be time consuming, it should ensure that value for money is obtained in the long run. Dissatisfaction with the services provided by a consultant will often stem from imprecise or otherwise inadequate specification at the outset of the tasks to be undertaken and the results that should be achieved.

75 MAB/MIAC Report, "Before You Sign on the Dotted Line: Ensuring Contracts Can be Managed", 1997; Competitive Tendering and Contracting Branch: "Questions and Answers: The Tendering Process".

76 Memorandum of Understanding between the Commonwealth of Australia and the National Association of Testing Authorities, article 5.4.

F. CONTRACTING AUTHORITY'S REQUIRED TERMS AND CONDITIONS

i. In General

For most purchases, the Commonwealth government does not require the use of standard form contracts. Each individual purchasing body can develop its own standard form or develop terms and conditions on a contract-by-contract basis. Exceptions to this are the Head Agreements for information technology, telecommunications, and office machinery.

Suppliers are required to sign these agreements to indicate their willingness to supply the Commonwealth government under their terms and conditions. However, use of the terms and conditions under the Head Agreement is by mutual agreement between the buyer and the supplier rather than being mandatory.

To fully inform prospective suppliers, any contract or conditions intended to be used should be incorporated in, attached to, or identified in the tender documentation.⁷⁷

ii. Government Information Technology Conditions

The Government Information Technology Conditions, now in its fourth version, is the document which sets out standard terms and conditions for government procurement of information technology products and services and major office machines.⁷⁸ The Government Information Technology Conditions are the result of a collaborative effort between the Commonwealth, state and territory governments, the Brisbane City Council, and the State Electricity Commission of Victoria.

The Government Information Technology Conditions may be used as either a term arrangement or standing offer and may be used for hardware supply and maintenance, software licensing, development and modification, as well as systems integration and data migration. The Government Information Technology Conditions are comprised of two stages. Firstly, Government Information Technology Conditions 4 is made legally binding by deed under seal, then, when an order is placed by the procuring department or agency, a contract is formed which activates the pre-agreed terms and conditions.

All suppliers in the information technology and major office machinery area are required to sign the Government Information Technology Conditions 4 Head Agreement as an indication of their willingness to use Government

77 Competitive Tendering and Contracting Branch: Commonwealth Procurement Guidelines and Best Practice Guidance.

78 The Government Information Technology Conditions and General Government Information Technology Conditions information are accessible at www.gitc.finance.gov.au.

Information Technology Conditions 3 Terms and Conditions. However, the ultimate decision as to whether to employ Government Information Technology Conditions 4 or some other form of contract is made by mutual agreement between the buyer and the supplier. Moreover, if the buyer elects to use the Government Information Technology Conditions 4 framework, it retains the flexibility to tailor terms and conditions to suit the particular procurement project at hand.

A similar arrangement, whereby suppliers enter into a Head Agreement, which may then become the basis for individual purchases by government buyers (at the buyer's election), now applies for telecommunications carriage services. The Whole of Government Telecommunication Arrangements is administered by the National Office for the Information Economy, and government buyers are advised that their Requests for Tenders should preferably state that the products/service must be offered under the Whole of Government Telecommunications Arrangement and will be subject to the Whole of Government Telecommunications Arrangement Head Agreement terms and conditions.⁷⁹ By aggregating purchasing power in this way, cost and other efficiencies are obtained.

iii. Prices and Terms and Conditions Offered by Tenderer

The prices and conditions offered by tenderers will depend on the unique circumstances of the particular procurement. Generally, a price slightly below market value will be tendered with the hope of securing high volume government orders.

However, as mentioned above, the lowest tender price will not always be accepted if other "whole of life" factors, such as service and reliability, combine to make a higher-priced tender better value for money in the medium to long term. As noted above, price may be a matter open to negotiation in the procurement process.

iv. Tender

a. Contractual Analysis

A preliminary note should be made that, on a strict contractual analysis, unless otherwise specifically provided for, no contract comes into existence until the contract is awarded to the successful tenderer. This accords with traditional principle, so that any circulated or advertised Request for Tenders or other invitations are merely invitations to treat with a tender, therefore constituting an offer by the tenderer, which may be accepted or rejected by the Commonwealth.

⁷⁹ National Office for the Information Economy: "The Office of Government Online's Services to Clients". See <http://www.gitc.finance.gov.au>.

However, recent Australian case law suggests that government agencies may in fact enter into contractual relationships during the tendering process and be required to evaluate tenders quite strictly in accordance with the priorities and methodology set out in the tender documentation.⁸⁰ There are a multiplicity of other sources of potential liability and appropriate remedies which are discussed below.

b. Format of Tenders

The format which a tender must take, its specific content, and administrative matters, such as the number of copies required, will be set out in the invitation documentation.

v. Processing of Tenders

There is no standard procedure for receipt and processing of tenders. The invitation documentation, usually a Request for Tenders, will contain information about the form in which tenders must be submitted, to whom they should be addressed, and the location at which they will be received.

vi. Evaluation of Tenders

a. In General

The primary objective in assessing the bids which have been received from prospective suppliers is to conduct a fair comparison between them to identify the supplier or suppliers whose tender provides the best overall value for money to the procuring department or agency.⁸¹ The assessment of the relative merits of the tenders will usually require detailed consideration of technical factors, including the appropriateness of a design, its durability, and ease of operation.

The basic process involved in the evaluation of competing tenders will usually be to compare the elements of each bid against the mandatory criteria as set out in the specification.⁸² Those bids which fail to meet the obligatory minimum requirements will be eliminated from further consideration. The tenders that survive this first stage of consideration will be compared with the desirable or optional features which are laid down in the specification for the goods or services to be provided.

Depending on the nature of the criteria, either a quantitative or qualitative analysis of how well each of the competing bids meets or exceeds both the

80 *Hughes Aircraft Systems International v. Airservices Australia* (1997) 146 A.L.R. 1.

81 Competitive Tendering and Contracting Branch: Best Practice Policy Guidance.

82 The government literature generally stresses that evaluation criteria must be settled before the issue of the tender (including identification of mandatory and non-mandatory criteria, along with weightings).

mandatory and optional requirements will be conducted to rank the prospective suppliers' tenders in order of merit relative to the price or rate which has been quoted. Key issues that may be contained within the various selection criteria are:

1. Financial stability, competency, and experience of the provider;
2. Quality of the service;
3. Affordable public access to the service;
4. Costs over the whole of the contract period;
5. Likely market status at the end of the contract period;
6. Assessment of the risk associated with any tender, the acceptability of that risk, and the action required to manage it;
7. Overall compliance with tender requirements;
8. Managerial capability of tenderers;
9. Human resource strategies of tenderers;
10. Financial and commercial considerations; and
11. Extent to which the tender has offered to facilitate industry development in Australia relative to other tenders.

For some procurements, the resale value which the different products offered will command on disposal may be a relevant factor in the assessment of each tender's relative merit.

Where the long-term supply of goods or performance of services is being procured, it will be essential to consider the supplier's capacity to meet the requirements over the full life-time of the procurement.

To ensure openness and accountability in the procurement process, careful recording of each step in the tender evaluation process is necessary.⁸³ Noting the reasons for the elimination of tenders from contention will allow useful and accurate debriefing of unsuccessful tenderers and provide cogent evidence to refute allegations of bias or impropriety on the part of procurement officers. The Commonwealth's policy on ethics and fair dealing in procurement is discussed above.

In practice, decisions with regard to purchase of off-the-shelf, simple, or low-value items can often be made solely on the basis of lowest price. However, more complex or high-risk procurements will require careful and rigorous examination of offers to ensure value for money is obtained in an ethical and accountable fashion.

83 Competitive Tendering and Contracting Branch: Commonwealth Procurement Guidelines and Best Practice Guidance.

The Commonwealth Procurement Guidelines state that due diligence procedures must be followed with no favor afforded to any particular bidder over others. It goes on to encourage buyers to allow sufficient opportunity for post-offer negotiations “to make sure that both parties have a shared understanding of the project” and lists a number of situations in which negotiations would be appropriate where:

1. There are reasonable prospects for improving outcomes;
2. Alternative proposals are made within the parameters of the tender process;
3. Prices are unfair and unreasonable;
4. Unusual or complex requirements exist; and
5. There are substantial risks which require clarification.

After the conclusion of post-offer negotiations and due diligence, recommendations are put to the decision-making person or panel. The evaluation process should be documented at every stage to demonstrate probity, open competition and fair dealing, public visibility, commercial confidentiality, and a clear audit trail.

Note that in-house bids are to be treated in the same way as outside bids.

b. Evaluation of Offers to Provide Consultancy Services

As with offers to supply goods, offers for the provision of specialist services should be assessed against pre-determined evaluation criteria that were outlined to the prospective consultants when their bids were requested.⁸⁴

Evaluation of offers of consultancies should be assessed by an evaluator or evaluation team that is technically competent and unbiased. Ideally, the evaluators will have been nominated well before the selection process begins to ensure any potential conflicts of interest are identified and declared.

The primary consideration when evaluating these types of offers is whether the consultant can perform the task to the requisite standard. Fees and other costs of the consultant must be balanced against the benefits that will accrue from using the selected consultancy service. Commonwealth officers must bear in mind that, on the whole, fees charged are commensurate with the skill level and experience of the consultant concerned.

Naturally, consultants’ credentials and experience should be confirmed with any referees and by other appropriate means, particularly where the consultant is relatively new to the marketplace. However, excessive weighting of long experience should be avoided where it is not essential.

⁸⁴ Commonwealth Procurement Guidelines: Core Principle 2.

The cost of procuring consultancy services may be more open to negotiation than where goods are being purchased. Cost may be merely treated as one criterion with an allocated "weighting", or consultants' offers may be otherwise ranked according to merit, with negotiation then proceeding once that ranking is made known to short-listed consultants.

Commonwealth procurement officers must bear in mind that a far greater element of subjective judgment will be involved in the evaluation and selection of a consultant than would be required in purchasing decisions with regard to goods or more standard services, such as cleaning or routine maintenance work. In the end, the evaluation team must make an informed professional judgment based on a combination of objective and subjective factors.

To ensure full accountability, all evaluation and selection decisions should be meticulously recorded along with the reasons and relevant supporting evidence. This recording will assist officers charged with the task of monitoring consultants' performance by aiding their understanding of why matters have been arranged in the manner in which they have.

vii. Award

The procurement contract will be awarded to the tender which represents the best overall value for money as determined by the evaluation process.

viii. Post-Award Notifications

a. Public Notification

As soon as practicable after a contract worth Aus. \$2,000 or more is entered into, the details (at a minimum, the supplier, goods being procured, and total estimated liability must be identified) of the contract must be published in the *Gazette Publishing System* (www.contracts.gov.au).

The Commonwealth Guidance on Reporting Procurement in the *Gazette Publishing System* requires the following details to be published:

1. Agency details, i.e., name of the agency, portfolio, division, branch, and contact details;
2. Contract and agency agreement details, i.e., contract start and end dates, procurement method, contract value, description of contract, and relevant reference numbers;
3. Standing offer details, i.e., standing offer start and end date, procurement method, standing offer value, description of standing offer, and relevant reference number; and
4. Supplier details, i.e., name, contact details, and Australian Business number or other identification number.

This information must be published within six weeks of the date of the contract or transaction. However, this requirement is not absolute, and the Chief Executive of the relevant agency may direct that certain details of contracts or standing offers are exempt under the Freedom of Information Act 1982 (Cth.) and, consequently, not to be published.

b. Notifying the Successful Bidder

The successful bidder for the procurement contract also will be notified in the manner set out in the invitation documentation.

c. Unsuccessful Bidders

The Commonwealth has recognized that to assist the development in industry and the marketplace of the future capacity to meet the Commonwealth's further procurement requirements, it is important that unsuccessful bidders be debriefed following rejection of their bid. By highlighting those areas where the unsuccessful tender failed to meet specified criteria or was otherwise deficient, these problems can be remedied by the tenderer when it next seeks to fill a government procurement need.

In particular, the Commonwealth Procurement Guideline require that suppliers of goods and/or services produced wholly or partly in Australia or New Zealand who tender unsuccessfully be debriefed on request.

Debriefing of unsuccessful tenderers for the provision of consultancy services may be particularly useful and must be provided by the department or agency on request.⁸⁵ Explaining to consultants the reasons for their non-selection by reference to objective and subjective evaluation criteria will similarly assist those consultants in any future tenders for Commonwealth consultancy work.

Ideally, debriefing will follow promptly on notification of the award of the tender and will be applied fairly and consistently to all bidders taking care not to divulge commercially confidential information. Establishing a set of ground rules before commencing debriefing is advised.⁸⁶

d. Cancellation of the Procedure

Traditionally, it has been the case that no contract exists during the pre-award period. Consequently, cancellation of the tender process would not normally attract any contractual penalty. However, the current view is that a process contract may exist during the pre-award phase. If this is the case, then it may

85 Commonwealth Procurement Guidelines: Core Principle 2 — Open and Effective Competition.

86 Competitive Tendering and Contracting Branch: "Questions and Answers: The Tendering Process".

be that cancellation constitutes a breach of an implied term of that contract or in fact a repudiation, resulting in a liability for damages falling on the party canceling.

It also may be possible to seek judicial review of the decision to cancel the process on the ground that the tenderers had a reasonably based and legitimate expectation that the tender process would continue to a proper conclusion.

ix. Remedies

a. *In General*

This section discusses the methods by which the procurement process, particularly the tendering process, may be legally challenged. The remedies available to contractors for matters which arise post-award are dealt with below.

b. *Formal Complaints of Discrimination in Commonwealth Purchasing against Local Suppliers*

In General The Commonwealth, New Zealand, and all Australian States and Territories have executed the Australia–New Zealand Government Procurement Agreement.

The aim of this Agreement is to eliminate all forms of discrimination in government procurement activities against local, i.e., Australian or New Zealand, suppliers.

Complaint to Designated Body The first step which a supplier may take if it considers it is being denied access to either a particular supply opportunity or the broader government marketplace by the allegedly biased procurement practices of a department or agency is to lodge a complaint with the Designated Body for the Commonwealth under the Agreement, the Department of Finance and Administration.

Matters which may constitute discrimination against local suppliers are not limited to explicit bias but include such things as: specifications which are unnecessarily biased towards particular technologies which are not locally produced, or timing of Request for Offers/Tenders and closing times for offers which in practice preclude local suppliers from bidding.

The Designated Body has the capacity to investigate the complaint and is required to make a report. If the complainant is not satisfied with the report, then the matter may be referred to the relevant Minister responsible for procurement for further investigation and decision.⁸⁷

87 Australia–New Zealand Government Procurement Agreement, Annex 2.

Injunction The aggrieved tenderer also may apply to the courts for an injunction against an action of a Commonwealth agency which discriminates against New Zealand suppliers. In *Project Blue Sky Inc. v. Australian Broadcasting Authority*,⁸⁸ a New Zealand film and television industry body successfully challenged a decision of the Australian Broadcasting Authority to restrict foreign broadcasting content in Australia to 50 per cent of all programming.

Under the relevant legislation, the Australian Broadcasting Authority was required to set an Australian content standard, but it also was obliged to perform its functions generally in a manner consistent with international agreements. The Agreement in question here was the Australia–New Zealand Closer Economic Relations Trade Agreement. The content standard was found to be unlawful to the extent that it was inconsistent with the Agreement.

The New Zealand body was then free to pursue an injunction restraining the Australian Broadcasting Authority from taking any further action based on its unlawful action.

It remains to be seen whether similar action taken by a New Zealand tenderer alleging discrimination in favor of Australian tenderers would be as successful. It may be difficult to duplicate the *Project Blue Sky* case result in this situation since, unlike the obligations on the Australian Broadcasting Authority, the obligations on Commonwealth agencies with respect to procurement and the Australia–New Zealand Government Procurement Agreement and Australia–New Zealand Closer Economic Relations Trade Agreement fall short of requiring them to act in conformity with it.

Rather, Commonwealth agencies are required only to “have regard to” Commonwealth Procurement Guidelines, Core Policy 6 of which indirectly incorporates the Australia–New Zealand Government Procurement Agreement and the Australia–New Zealand Closer Economic Relations Trade Agreement.⁸⁹

Legitimate Expectations and Natural Justice Since the Australia–New Zealand Government Procurement Agreement has been ratified by Australia, it also may be possible for an aggrieved tenderer to argue that the Agreement raises a legitimate expectation that administrators will act in conformity with its terms. A legitimate expectation does not amount to a legal right to compel the administrator to conform, but it does affect natural justice considerations.

For this reason, if a government buyer decides to act contrary to the Australia–New Zealand Government Procurement Agreement, it should give notice to

88 *Project Blue Sky Inc. v. Australian Broadcasting Authority* (1998) 153 A.L.R. 490.

89 Financial Management and Accountability Regulations, regulation 8; Commonwealth Procurement Guidelines: Core Policy 6.

the affected tenderer and allow it an opportunity to present a case against departing from the Agreement.⁹⁰

c. *Contract and the Trade Practices Act during the Pre-Award Period*

Recent Australian case law has emphasized that government agencies may incur significant legal obligations in undertaking a tendering process and must evaluate tenders quite strictly in accordance with any priorities or methodology set out in the tender documentation.

In *Hughes Aircraft Systems International v. Airservices Australia*,⁹¹ the Federal court found that a letter and the Request for Tender evidenced the creation of a preliminary contract. An implied term of the contract required the Civil Aviation Authority to deal fairly with the tenderers, and conduct the tender evaluation fairly. The Civil Aviation Authority was in breach of the contract because it failed to evaluate the tenders in accordance with the evaluation criteria it had set out in its tender documentation and had breached confidentiality provisions set out in the Request for Tender.

The court indicated that an uncomplicated request for bids is generally not an offer that will give rise to contractual obligations, although it may still give rise to an obligation to act fairly.

In addition to the breach of contract, the court held that the Civil Aviation Authority was liable for a contravention of section 52 of the Trade Practices Act 1974 (Cth.), which prohibits misleading and deceptive conduct. The Civil Aviation Authority was held to have misled Hughes into believing that the Civil Aviation Authority was continuing to conduct the tender process in accordance with the Request for Tender. The *Hughes* decision is particularly relevant where the procurement project is funded by public money.

Note that a provision in the tender documentation disclaiming the existence of a pre-award contract may not be sufficient to prevent a court from implying such a contract. Moreover, where consultants are engaged to prepare tender material or conduct the tender process, the Commonwealth may be liable for the actions of the independent consultant.⁹² A good example of this is where the procurement body engages a consultant to undertake soil tests of a site prior to the issue of a construction tender. Where those reports are inaccurate, such that the successful contractor incurs additional expense in performing the contract, the Commonwealth may be liable for those extra expenses.⁹³

90 *Minister for Immigration and Ethnic Affairs v. Teoh* (1995) 183 C.L.R. 273.

91 *Hughes Aircraft Systems International v. Airservices Australia* (1997) 146 A.L.J. 1.

92 *Commonwealth v. Citra Constructions Ltd.* (1986) 2 B.C.L. 235.

93 *Commonwealth v. Citra Constructions Ltd.* (1986) 2 B.C.L. 235.

The Trade Practices Act 1974 applies to Commonwealth entities to the extent that they are carrying on a business.⁹⁴ This term does not generally apply to:

. . . procuring services or providing services (that are not systematic and regular) to government and the public [where] these services are only for the purpose of performing . . . ordinary functions as a Department of State of the Commonwealth.⁹⁵

However, “providing services for remuneration or as a business”⁹⁶ is more likely to constitute business activities for the purposes of the Trade Practices Act 1974.

Another case, *J S McMillan Pty. Limited v. Commonwealth of Australia*,⁹⁷ demonstrated that excluding a tender from the short list on the grounds that it did not comply with evaluation criteria where those criteria were inadequately expressed also would constitute a contravention of the Trade Practices Act 1974. Weighting of criteria and, in particular, mandatory criteria, which must be met in order for the tender to be considered further, must be made clear in the tender documentation.

In summary, there is an obligation, in the context of government procurement, that communications in the form of correspondence, tender documentation, and representations (including during negotiations, information forums, and debriefing sessions) may not be likely to mislead the recipient. Representations which lead the tenderer to expend money in anticipation that a contract will be awarded to them before the award is made run the risk of a claim in contract, under the Trade Practices Act 1974 or in estoppel.

Remedies which have been afforded to unsuccessful tenderers where a breach of the preliminary contract has occurred include damages for the cost of preparing the tender and may extend to loss of profit which would have been obtained had the tenderer been awarded the contract. Obtaining the latter of these may be contingent on the tenderer’s ability to prove that it would have been awarded the tender. Similar damages can be expected in the case of a Trade Practices Act 1974 action. Other Common Law, equitable, or statutory remedies which may be available to the tenderer are discussed below.

94 Trade Practices Act 1974, section 2A.

95 “Case Law — Fair Dealing in Tendering”, Competitive Tendering and Contracting Branch Toolkit: see www.finance.gov.au/ctc/toolkits/fairdeal/case-law-dealing-in-ten.html.

96 “Case Law — Fair Dealing in Tendering”, Competitive Tendering and Contracting Branch Toolkit: see www.finance.gov.au/ctc/toolkits/fairdeal/case-law-dealing-in-ten.html.

97 *J S McMillan Pty. Limited v. Commonwealth of Australia* (1997) 147 A.L.R. 419.

d. *Negligence*

In the context of tendering, the loss suffered by the tenderer will almost invariably be purely financial in nature arising from allegedly negligent statements by the officers of the procuring department or agency. Courts have been more reluctant to impose liability in these circumstances than where a negligent act has caused injury or property damage. Consequently, claims of negligence in the tendering process have received a lukewarm reception in Australian courts.

Although the High Court of Australia has held that a duty of care could arise in the pre-award period,⁹⁸ cases where losses claimed were for extra costs incurred by contractors in carrying out the awarded contract have been more successful. Alternatively, a claim for damages under the Trade Practices Act 1974 may offer better prospects.

The Trade Practices Act 1974 also may offer a more effective remedy in circumstances where a tenderer bases its tender on negligent misstatements made by the government buyer during the tender process and suffers loss as a result.

e. *Estoppel*

A plea of estoppel will provide relief to a person who has relied to their detriment on a representation made or encouraged by the other party in circumstances where it would be unconscionable to allow the representor to resile from their statement or conduct.⁹⁹ Estoppel is, thus, readily applicable to the tendering process, as detrimental reliance may be found where there is a departure from the announced procedure for the conduct and evaluation of the tender.

Just as the Commonwealth cannot fetter its discretion by contract, estoppel cannot be pleaded if it would bind the government to illegal action or impair its ability to govern. However, these restrictions will rarely be relevant in the procurement context.

The remedy which will be granted to the tenderer who successfully estops a procuring department or agency from denying its representation will be the minimum relief which is sufficient to avoid the detriment which the tenderer would otherwise suffer. This may range from damages for the cost of preparing the tender to effectively imposing a full contract on the liable party.¹⁰⁰

98 *Morrison-Knudsen International Co. Inc. v. Commonwealth* (1972) 46 A.L.J.R. 265.

99 *Waltons Stores (Interstate) Ltd. v. Maher* (1988) 164 C.L.R. 387.

100 *Metropolitan Transit Authority v. Waverley Transit Pty. Ltd.* [1991] 1 V.R. 181.

f. Restitution

Normally, tenderers bear the costs of preparing their tenders with the associated risk of losing those costs if they fail to win the tender. However, in rare circumstances, the negotiation and tender process may be such that the tenderer would only have undertaken the preliminary work if practically certain of securing the contract. An obligation to pay the tenderer may thus arise where:

1. The contract is not entered into by reason of a change of heart on the part of the proprietor;
2. The work done falls outside that normally expected of tenderers; or
3. The work performed is of particular benefit to the proprietor.¹⁰¹

g. Section 52 of the Trade Practices Act

Section 52 of the Trade Practices Act 1974 (Cth.) prohibits corporations from engaging in misleading or deceptive conduct, and this issue is discussed in more detail above.

In addition to a claim against a government agency for departing from evaluation procedures set out in the tender documents, a claim also may lie in circumstances where a government agency misleads a tenderer by communicating important information to one tenderer and not providing the same information to other tenderers.

A claim also may arise if a government selection panel misleads a tenderer by applying criteria in a way not contemplated in the tender documentation. This was demonstrated in the *J S McMillan* case. The aggrieved tenderer was able to obtain an injunction under section 80 of the Trade Practices Act 1974, stopping the Commonwealth from proceeding with the tender evaluation process. At the trial of the action, the proceedings were unsuccessful due to the fact that the Commonwealth was not carrying on a business within the scope of section 2A of the Trade Practices Act 1974. However, the court upheld the initial finding and stated that, had the requisite business activity been found, the broad remedy options provided under section 87 would have allowed the court to order that *J S McMillan* be placed on the short list.

Beyond the process of tendering, Trade Practices Act 1974 claims also may lie after the contract is awarded in circumstances where the tender documentation misleads the tenderer so that the resulting contract becomes more onerous than expected. For example, a soil report included in tender documents for a construction contract may represent that the site is more stable than it actually is.¹⁰²

101 *Brenner v. First Artists' Management Pty. Ltd.* [1993] V.R. 221, at p. 259, per Byrne J (citations omitted).

102 *Commonwealth v. Citra Constructions Ltd.* (1986) 2 B.C.L. 235.

Exclusion clauses may not be effective to limit liability under section 52.¹⁰³ The extent of their effectiveness will depend on whether the clause has the effect of preventing the conduct from being construed as misleading. In other words, an appropriately worded and sufficiently visible disclaimer provided early on in the tender process may prevent the tenderer from being or claiming to be misled by conduct of the government body to which the disclaimer applies.¹⁰⁴

h. Parts IV and XIB of the Trade Practices Act

Parts IV and XIB of the Trade Practices Act 1974 provide for remedies against anticompetitive conduct. The prohibitions are particularly relevant to collusive tendering by bidders.

i. Duty of Confidentiality

Currently, requests for tender, the identity of the winning bidder, and the value of the contract awarded are matters for the public record.¹⁰⁵

However, there may arise an express (by agreement of the parties) or implied obligation on the part of the government body to protect commercially sensitive information supplied by bidders during the tendering process. Types of information that may fall within the scope of a duty of confidentiality include trade secrets or intellectual property, innovative features of a bid, information that could benefit competitors, and pricing information.

In the *Hughes* case, pricing information was divulged to a government minister and personnel from another department. The role of the other department was to assess the bid for conformity to government industry development policy. The court held that pricing information was irrelevant to such an assessment and, therefore, the disclosure was a breach of the duty of confidentiality. It is difficult to assess, however, what damages may be awarded for such a breach.

j. Administrative Law Remedies

Freedom of Information Under the Freedom of Information Act 1982 (Cth), unsuccessful bidders (or a citizen or any other party) have a *prima facie* right of access to the documents of the procuring government department or agency regardless of their reason for seeking such access.¹⁰⁶

103 *Henjo Investments Pty. Ltd. v. Collins Marrickville Pty. Ltd.* (1988) 39 F.C.R. 546.

104 *Parkdale Custom Built Furniture Pty. Ltd. v. Puxu Pty. Ltd.* (1982) 149 C.L.R. 191.

105 Competitive Tendering and Contracting Branch: "Questions and Answers: Legal Issues — Accountability and Privacy".

106 Freedom of Information Act 1982 (Cth.), section 11(1) and (2).

Although the Act does not provide the applicant with any substantive remedy, by providing access to documents concerning the evaluation process in particular, it may allow the unsuccessful bidder to better determine whether it has any sustainable basis for complaint about the manner in which the tender evaluation took place.¹⁰⁷

The *prima facie* right is subject to a series of exemption provisions in the Act, one of which relates to information about business affairs.¹⁰⁸ A body claiming this exemption must first prove that the information sought to be protected satisfies all the elements of confidentiality at Common Law.

However, clearing that hurdle of itself does not mean the exemption stands. It must then be established that the public interest in disclosing the information does not outweigh the private interests in keeping it secret. If the public interest is heavily in favor of disclosure, then the exemption does not apply. Clearly, given principles of accountability applicable to government, it is often difficult for a government body to counter the public interest element.

A detailed discussion of the procedure for making an application under the Act is beyond the scope of this chapter. Briefly, the request must be in writing, provide enough information to enable the officers of the department or agency to identify the requested documents, and specify an Australian address for notification purposes, and the fee prescribed in the regulations under the Act must accompany the application.¹⁰⁹ Prospective applicants also should be aware that a number of departments and agencies, as well as particular categories of document, are exempt from the operation of the Act.

Where the procuring department or agency is agreeable to supplying an unsuccessful tenderer with information, a freedom of information application would be largely unnecessary.

Review of Procurement Decisions under the Administrative Decisions (Judicial Review) Act A person aggrieved by a decision of an administrative character made under an enactment may apply to the Federal Court for an order of review in respect of the decision on one or more of the grounds set out in section 5(1) of the Administrative Decisions (Judicial Review) Act 1977 (Cth.).¹¹⁰ This review does not consider the relative merits of the decision,

107 Of course, the discovery process during litigation has the same effect. The advantage of a Freedom of Information request is that necessary information is available before deciding to commence litigation and is available at little or no cost to the requesting party. In this context, it is pertinent to note that claims of public interest immunity by government bodies seeking to avoid discovery obligations are difficult to sustain; *Commonwealth v. John Fairfax & Sons Ltd.* (1980) 147 C.L.R. 39.

108 Freedom of Information Act 1982 (Cth.), section 43.

109 Freedom of Information Act 1982, section 15.

110 Administrative Decisions (Judicial Review) Act 1977 (Cth.), sections 3 and 5(1).

rather, it is confined to consideration of whether the action or decision was taken lawfully. What this means is that the court will not substitute its own decision for that of the Commonwealth officer or officers who made the procurement decision, but may only direct that officer to remake the decision, according to law.

In the procurement context, the difficulty facing a person who wants to challenge a decision in the course of awarding the contract made by an officer of the procuring department or agency is to show that the decision in question was made "under an enactment". A decision to contract made in exercise of the Commonwealth's executive power under section 61 of the Constitution does not satisfy this requirement as the Constitution is not regarded as an enactment in this context;¹¹¹ nor is a decision made under an enactment merely because all Commonwealth procurement is governed by an overarching Act such as the Financial Management and Accountability Act 1997.¹¹² Consequently, failure to comply with the dictates of the Commonwealth Procurement Guidelines is not reviewable.

An analogous case at state level is *Concord Data Solutions Pty. Ltd. v. Director-General of Education*,¹¹³ where Thomas J held that the Queensland State Purchasing Policy was not a statutory instrument as defined in section 7(1) of the Statutory Instruments Act 1992 (Qld) and, thus, was not an enactment within section 4 of the Judicial Review Act 1991 (Qld). Consequently, an unsuccessful tenderer could not seek judicial review of a tender award on the basis (among other grounds) that the tender award was not made in conformity with the State Purchasing Policy.

In summary, unless a specific decision-making power is expressly conferred by statute or such power can be implied, and there is a sufficiently close connection between the decision and the enactment, a procurement decision will not be made "under an enactment" as required and thus not be reviewable under the Administrative Decisions (Judicial Review) Act 1977.

Review under the Judiciary Act, Section 39B, Declarations and Injunctions

As will be evident from the preceding discussion, many government decisions in the procurement context cannot be reviewed under the Administrative Decisions (Judicial Review) Act 1977. However, they may be reviewed by means of the prerogative writs or, alternatively, declaratory or injunctive relief may be sought. Under section 39B of the Judiciary Act 1903, the original jurisdiction of the Federal Court of Australia includes jurisdiction with respect to any matter in which a writ of mandamus or prohibition or an injunction is sought against an officer or officers of the Commonwealth.

111 *Dixon v. Attorney-General* (1987) 75 A.L.R. 300, at p. 306, per Jenkinson J.

112 *Hawker Pacific Pty. Ltd. v. Freeland* (1983) 52 A.L.R. 185.

113 *Concord Data Solutions Pty. Ltd. v. Director-General of Education* [1994] 1 Qd.R. 343.

The High Court of Australia has identical jurisdiction under section 75(v) of the Constitution but will almost always remit the matter to the Federal Court for decision under section 75(iii) of the Constitution. This statutory encapsulation of Common Law review effectively fills in the gaps where the Administrative Decisions (Judicial Review) Act 1977 does not apply. In fact, the grounds which may form the basis of the writ are nearly identical to those available under the Administrative Decisions (Judicial Review) Act 1977 and include lack of procedural fairness, that the particular exercise of power was improper or, more relevant in the procurement context, that the decision was biased or made in bad faith.

Complaint to the Ombudsman The Office of Commonwealth Ombudsman was established by statute to investigate complaints made to it about certain actions taken by a department or prescribed authority.¹¹⁴ Disgruntled tenderers may complain to the Ombudsman if they feel the conduct of the tender process was flawed. With certain exceptions,¹¹⁵ the Ombudsman's jurisdiction extends to investigation of the activities of most government departments and agencies. One important exception is that the activities of many Commonwealth-controlled companies cannot be investigated.¹¹⁶

The Ombudsman may, to a certain degree, review the merits of a decision taken by the officers of a procuring department or agency. Although the power to review decisions does not extend to matters of commercial judgment or commercial disputes,¹¹⁷ the Ombudsman has investigated administrative matters concerning contracts, such as the exclusion of interested parties from selective tenders, conflicts of interest, the giving of inconsistent information to tenderers, failure to assess matters on an equal basis, inappropriate use of ideas, and information submitted during the tender process and the non-fulfillment of verbal promises.¹¹⁸

The Ombudsman cannot make any coercive order requiring that the decision be changed. Rather, the office of the Ombudsman will conduct its own investigation into the complaint and report to the relevant department and the complainant.¹¹⁹

The department or agency will be given an opportunity to respond to the Ombudsman's report on the activity the subject of complaint, for example, the manner in which a tender evaluation was conducted and, if the

114 Ombudsman Act, section 5(1).

115 The exceptions are contained primarily in section 5(2) of the Ombudsman Act.

116 Ombudsman Act, section 3AB.

117 Commonwealth Ombudsman, Annual Report 1996-1997, A.G.P.S., at p. 68.

118 Commonwealth Ombudsman, Annual Report 1996-1997, A.G.P.S., at p. 68; Seddon, *Government Contracts: Federal, State, and Local* (2nd ed., 1999), at pp. 318 and 319.

119 Ombudsman Act, section 12(3).

departmental or agency response is inadequate, the Ombudsman may inform the Prime Minister or make a special report to Parliament.¹²⁰ Such action would be extremely rare as most departments or agencies would immediately rectify any demonstrable defect in their decision-making processes, particularly where procurement is concerned due to the expenditure of Commonwealth funds involved.

G. PROCEDURE FOR GOVERNMENT AGENCY AWARD OF PUBLIC UTILITY CONTRACTS

i. In General

Control over the provision of public utilities, such as gas, water, electricity, and transportation, is vested in state and local governments and, therefore, it falls outside the scope of this chapter. However, the Constitution vests control of "postal, telegraphic, telephonic, and other like services" within the concurrent power of both the states and the Commonwealth.¹²¹ Although provision and control of these utilities may be the subject of both state and Commonwealth legislation, any inconsistency between the two laws would be resolved in the Commonwealth's favor with the state law being held to be invalid to the extent of the inconsistency and the Commonwealth provision prevailing.¹²²

The Australian Postal Corporation and Telstra Corporation Limited, which are concerned with the provision of postal and telephonic communication services, respectively, were the two major Commonwealth government-controlled bodies involved in the provision of utilities. However, the Commonwealth government has recently sold one-third of Telstra by way of public float and plans to fully privatize it in the near future.

ii. Application of Relevant Legislation and Regulations

Both Australia Post and Telstra are Government Business Enterprises,¹²³ i.e., corporate entities established by the Commonwealth to operate commercially in the marketplace. Although these organizations each have their own establishing legislation, the Australian Postal Corporation Act 1989 (Cth.) and the Telstra Corporation Act 1991 (Cth.), respectively, neither Act specifically deals with the procurement procedures to be followed.

Nor is Australia Post or Telstra required to act in accordance with the Financial Management and Accountability Act 1997. Consequently, this

120 Ombudsman Act, sections 15-17.

121 Constitution, section 15(v).

122 Constitution, section 109.

123 Commonwealth Authorities and Companies Act 1997, section 5; Commonwealth Authorities and Companies Regulations 1997, regulation 4.

releases them from any obligation to comply with Commonwealth Procurement Guidelines. Both organizations are, of course, accountable to their respective stakeholders.

H. IMPLEMENTATION OF PUBLIC PROCUREMENT CONTRACTS

i. Performance and Reviews

a. *General Principles*

Commonwealth Procurement Guidelines: Core Principle 1 states that agency managers should seek guidance on performance improvement from a publication called the Performance Improvement Cycle published by the Department of Finance and Administration. The evaluation process set out in this document leads to the establishment of objectives for the procurement project and, consequently, the setting of measurement criteria for tracking the achievement of those objectives.

It is federal government policy that all Commonwealth government departments, agencies, and government business enterprises develop a public document called a Service Charter,¹²⁴ detailing the service experience a client can expect. The Service Charter does not confer any legally enforceable rights on an aggrieved client. Service Charters are to apply to the indirect provision of services via a private contractor. Contractors will be judged, in part at least, on the degree to which they meet the service levels expected and published in the Service Charter.

Essentially, managers in the procuring department or agency will monitor a variety of performance indicators such as savings, quality performance, and administrative costs over the life of the procurement. The performance indicators:

. . . should reflect stakeholders' expectations and the wider policy and strategic aims of the government as well as more conventional internal and operational issues such as the achievement of milestones. Measures and indicators should be few in number, visible at all levels of the Competitive Tendering and Contracting Branch process and reflect key performance indicators.¹²⁵

Particular clauses in the contract may introduce performance monitoring mechanisms, such as making payment contingent on performance. The Government Information Technology Conditions 4 Head Agreement provides

124 More Time for Business Statement, 24 March 1997; Competitive Tendering and Contracting Branch Service Charter Principles, June 2000.

125 Competitive Tendering and Contracting Branch, Guidance for Managers, at p. 24; note that this publication is now out of date.

for monitoring of performance in general, but the specific methods to be used are to be negotiated on a contract-by-contract basis.¹²⁶

b. Evaluating Performance of Consultancy Services

Government procurement programs for consultancy services frequently emphasize a requirement for regular monitoring of consultants' performance. A comparison of the outcomes achieved against the stated objectives is central to an effective evaluation of a consultancy. The quality of the professional relationship between the consultant and the department or agency's officers also is relevant.

As consultancies will differ, there is no single performance indicator which is applicable to all situations. However, departments and agencies may develop their own structured procedures and techniques to enable systematic monitoring of consultants' performance.

After a consultancy has finished, there may be later occasions on which the consultant's assistance would be beneficial in implementing necessary changes which may have been identified by the consultant during the term of the consultancy. Cost efficiencies are available where agencies anticipate the need for implementation assistance and include these additional services in the original retainer of the consultant.

c. Impediments

In General As noted, Australia has no specific regulatory scheme controlling government contracts which differs from the private law of contract.

Thus, apart from certain consequences that flow from the fact that suppliers are contracting with the Commonwealth rather than a private person or company, there are no particular obstacles that impede a supplier's contractual relationship with the Commonwealth when compared with a contractual relationship between private individuals.

Government Liability to Suit Under section 64 of the Judiciary Act, in any suit to which the Commonwealth is a party, the rights of the parties are to be as nearly as possible the same as they would be in a suit between two private individuals. However, three forms of Crown immunity remain relevant in the Commonwealth procurement context and are discussed below.

d. Legislation Overriding a Contract

The Commonwealth may pass legislation that either directly or indirectly modifies an existing contract or renders it ineffective. For example, in *Perpetual Executors & Trustees Association of Australia Ltd. v. Federal Commissioner*

126 Clause 4.3 Government Information Technology Conditions 4, Terms and Conditions.

of *Taxation*,¹²⁷ a statute was held valid which rendered Commonwealth bonds liable to taxation in direct conflict with an earlier undertaking that they would not attract such liability.

Legislative action having this effect is rare and would even more rarely impact on the Commonwealth's procurement of goods and services. There is a possibility that compensation would be required to be paid by the Commonwealth where legislation destroys a right under a contract, as a section 51(xxxi) mandate is acquired; however, the issue has yet to be determined. The other two immunities, the doctrine of executive necessity and termination for convenience clauses, are discussed below.

ii. Default and Termination

a. In General

Either party may terminate for a fundamental breach where the other is in default under the terms of a government procurement contract in accordance with the ordinary principles of contract law. The particular contract employed by the procuring department or agency will usually contain clauses setting out a non-exhaustive list of particular circumstances in which the Commonwealth may terminate.

The following immunities which attach to the Commonwealth by virtue of its nature as Australia's governing political body are relevant to the issue of default and termination, although they will rarely arise in practice.

b. Doctrine of Executive Necessity

According to this doctrine, if the Commonwealth, subsequent to entering a contract, finds it necessary to break that contract to implement government policy, it may do so with impunity. An example would be breaking of contractual obligations due to the necessities of war. The rationale of the doctrine has been expressed to be that "the Crown cannot by contract hamper its freedom of action in matters which concern the welfare of the state".¹²⁸

Thus, the principle that the government be unfettered in carrying out its policies overrides the competing principle that contracts be enforceable. The effect of invocation of the doctrine is that the contract is void. Therefore, a supplier could not allege a breach of contract on the part of the Commonwealth where a contract was canceled in proper exercise of this doctrine as the effect of the doctrine is that there is no longer a valid contract in existence.

127 *Perpetual Executors & Trustees Association of Australia Ltd. v. Federal Commissioner of Taxation* (1948) 77 C.L.R. 1.

128 *Rederiaktiebolaget "Amphitrite" v. The King* [1921] 3 K.B. 500.

The contractor is not left completely without a remedy, as they will be able to recover for goods delivered or work performed under the restitutionary doctrine of unjust enrichment. If, however, it is merely one or several terms of the contract which purport to fetter government action, then it may be that the offending term or terms can be severed and the remainder of the contract left unaffected.¹²⁹ While severance will not render the government action a breach of the contract, it will at least allow the contract to remain in existence and be performed according to its terms, less those provisions rendered void by the doctrine and severed.

Although application of the doctrine has drastic and unfortunate consequences for those who have contracted with the Commonwealth, it must be borne in mind that, in the vast majority of government contracts, the doctrine will be inapplicable.

c. Termination for Convenience Clauses

Some government contracts, in particular many of those entered by the Department of Defense and its related agencies, contain a termination for convenience clause available only to the Commonwealth. This clause effectively incorporates the doctrine of executive necessity into the contract in recognition of the fact that the Commonwealth may break the contract due to various exigencies. An obligation on the Commonwealth to pay compensation in the event that the clause is exercised is always included.

Although the position is not certain, it seems probable that, when a termination for convenience clause is included in a contract, there would be no room for the operation of the doctrine of executive necessity to be invoked apart from through the clause. The Commonwealth could not, therefore, argue that it broke a contract on the basis of that doctrine in an effort to avoid paying compensation according to the provisions of the termination for convenience clause.

iii. Contractual Penalties

The penalties that apply for breach of a contract with the Commonwealth will be governed by the contract itself within the same contract law framework as regulates private contracts.

iv. Acceptance

Acceptance of a contract to supply goods or services to a Commonwealth department or agency is governed by the ordinary principles of contract law.

129 *Buchanan v. Redcliffe Town Council* [1950] St.R.Qd. 24.

v. Warranty

Warranties given by the contractor to the Commonwealth will vary dependent on the goods or services being procured.

vi. Invoices and Payments

The Commonwealth's policy is that accounts be paid on the due date specified in the agreement with the supplier.¹³⁰

Thirty days after goods are delivered or a correct invoice is received (whichever is later) is the usual period within which payment will be required under government procurement contracts. In the case of a service contract, payment will similarly be within 30 days after receipt of the invoice. In line with its electronic procurement strategy, the Commonwealth was attempting to make all supplier payments by electronic means by the end of 2000.

vii. Security

The provision of security, for example, in the form of a guarantee, by a supplier will rarely be required in a procurement contract.

However, where substantial sums are involved or timely supply of the specified quantity of goods is critical, then a performance guarantee of some kind must be provided by the supplier. The guarantee will be forfeited should the supplier fail to meet its contractual obligations.

viii. Waivers

Waiver of aspects of performance is a matter that is specific to the procurement contract in question.

Waiver of performance of contractual obligations may be negotiated between the supplier and the officers of the procuring department or agency who possess the requisite authority to provide such waivers.

ix. Remedies for Contractors

Apart from in the circumstances noted above, a contractor to the Commonwealth will have the same remedies available in litigation against the Commonwealth as against a private person due to the operation of section 64 of the Judiciary Act as discussed above.

130 Finance Circular Number 1991/14.