



New procurement rules in Australia to give better protections to contractors

Summary

Australia's federal, state and territory governments are in the process of adjusting their procurement systems to give effect to Australia's obligations under international free trade agreements (FTAs). Each government has its own procurement system, so the approach to implementing the FTAs differs in each jurisdiction. That said, in each case the government needs its agencies that are 'covered' by international FTAs to:

- comply with the procurement requirements of the relevant FTAs; and
- provide suppliers with a process for resolving complaints and protests regarding non-compliance with procurement rules that requires agencies to consider complaints impartially and in a timely manner, and that give suppliers the right to have their complaint reviewed by an impartial external body if it is not resolved.

Why should I read on?

- If you supply goods or services to governments in Australia, procurement rules are changing to make procurement processes fairer for you, and give you stronger complaint/protest rights if the rules are breached.
- If you are a government agency in Australia, you will want to ensure that your procurement processes and associated complaints processes comply with the rules.

Some jurisdictions are taking a legislative approach, whereas other are adopting a policy approach

Australia's Federal government, and State governments in New South Wales (NSW) and Tasmania, have given legislative effect to the procurement requirements arising from international agreements. In doing so, they have significantly strengthened the ability of suppliers to enforce the FTA procurement requirements and/or seek compensation if they are breached. They have also provided greater clarity on the FTA procurement requirements, which vary slightly between different FTAs, that are legally enforceable in the relevant jurisdiction.

Other Australian State and Territory governments have not yet given effect to the FTAs through legislation, but have established policies that require – to varying degrees – procuring agencies to comply with applicable FTA procurement requirements. However, breach of a government policy typically leaves tenderers with little recourse against the procuring agency.

There is a tension in some jurisdictions, such as Queensland and Victoria, between the government's desire to give preference to local contractors and suppliers and the FTA prohibitions against offsets and other actions designed to encourage local development. The Victorian government has dealt with this tension by enacting legislation making its Local Jobs First Policy part of the law of Victoria.

FTA procurement requirements do not, however, affect the ability of Australian governments to give preference to small and medium businesses, or to take action for the economic advancement of indigenous people.

Which government agencies are covered?

The FTA procurement requirements do not apply to all government agencies. Rather, they only apply to agencies that are 'covered' by the new legislation or policies. Each jurisdiction publishes a list of the covered government agencies and entities, which generally include the principal government departments and agencies. However, there are exceptions. For example, the NSW legislation does not apply to the NSW government agency with the biggest procurement budget – Transport for NSW – in the exercise of its transport infrastructure function.

The Australian Department of Defence is covered by the Federal legislative process for complaints and protests.

What procurements are covered?

The FTA requirements apply to procurements by a covered agency if the estimated value of the procurement exceeds specified thresholds.

For Commonwealth entities, the thresholds are (including GST):

- AUD\$80,000 for non-corporate Commonwealth entities, other than for procurements of construction services;
- AUD\$400,000 for prescribed corporate Commonwealth entities, other than for procurements of construction services; and
- AUD\$7.5 million for procurements of construction services by relevant entities.

For State and Territory agencies, the thresholds are generally (excluding GST):

- AUD\$9.247 million for a procurement of construction works; and
- AUD\$657,000 for a procurement of any other goods or services.

These thresholds are subject to change every two years and were last set on 1 January 2018.

Exempt procurements

Some procurements are exempt from the FTA procurement requirements, for example:

- public employment contracts and labour hire contracts (but procurements for the engagement of consultants are covered);
- the procurement of health and welfare services;
- the procurement of motor vehicles;
- the procurement of government advertising services or research and development services;
- the engagement of experts or natural persons, including barristers;
- the procurement of disability services;
- a procurement that is any form of assistance that a government agency provides, such as a grant, loan, subsidy etc.
- procurements by the Defence Intelligence Organisation, the Australian Signals Directorate, or the Australian Geospatial-Intelligence Organisation.

FTA procurement requirements

The procurement requirements differ slightly between FTAs, but generally include:

Non-discrimination	government agencies must not discriminate against any supplier due to its degree of foreign affiliation or ownership;
Local development off-sets	conditions that require the use of domestic content, technology transfer or similar actions to encourage local development in Australia must not be used;
No avoidance	agencies must not use contract extension options, or modify awarded contracts in order to avoid the operation of the statutory direction;
Excluding suppliers	government agencies may only exclude a supplier from a procurement if the agency reasonably believes it is insolvent; has made a false declaration; has significantly breached substantive obligations under a prior contract; has had a finding of corrupt conduct made against it within the previous 10 years; has failed to pay taxes; has been convicted of a serious offence; or been found guilty of professional misconduct;
Requirement to use open approaches	an open approach to market must be used for all covered procurements, other than where the procurement is from a panel or list of suppliers that was established by an open tender and other circumstances where limited tendering is permitted;
Content of open approaches	open approaches to market must include specified minimum information. If the government agency proposes to invite further submissions from a shortlist of those tenderers that lodged an initial submission, it must provide the criteria for shortlisting and a justification for limiting the number of tenderers who will be invited to lodge a further submission;
Limited tendering	<p>is only permitted in limited circumstances, for example:</p> <ul style="list-style-type: none"> • if, for reasons of extreme urgency brought about by events unforeseen by the government agency, the goods or services could not be obtained in time under an open approach; • the goods can only be supplied by a particular supplier and there is no reasonably alternative due to patents, copyrights etc or an absence of competition for technical reasons; • for additional deliveries by the original supplier, if a change of supplier cannot be made for technical reasons, such as requirements for interoperability, or due to conditions under original supplier warranties, and a change of supplier would cause significant inconvenience or substantial duplication of costs for the procuring government agency; or • it follows an open tender that failed because no submissions, or no compliant submissions, or no submissions providing value for money, were received;

Conditions for participation	minimum conditions for participation can be specified, but must be limited to those that will ensure a supplier has the legal and financial capacity, and the commercial and technical abilities, to fulfil the requirements of the procurement. They can include requirements for prior experience when that experience is essential, but may not require that suppliers have prior experience in Australia or have previously been awarded a contract by a government agency in Australia;
Specifications	specifications must not create an unnecessary obstacle to trade. They must be set out in terms of performance and functional requirements, and be based on international standards, if they exist, except when the use of international standards would fail to meet the government agency's requirements. Trademarks, trade names and the like must not be used unless followed by "or equivalent" and there is no other sufficiently precise way of describing the procurement requirement. Suppliers with whom the government agency has conducted market research and the like, in developing the specification, must not have an unfair advantage over other suppliers;
Procurement documentation	must include specified information including the evaluation criteria and their relative importance (if applicable);
Requests for information	agencies must promptly reply to any reasonable request from a supplier for relevant information, provided its provision is not contrary to Australian law and does not give the supplier any unfair advantage;
Amended requirements	must be transmitted by the agency to all suppliers that are participating at that time, and within a reasonable time to allow supplier to modify and re-lodge submissions, if required;
Negotiations	may only be conducted by the agency if the agency indicated its intent to do so in the open approach to market, or it appears from the evaluation that no submission will provide the best value for money;
Awarding contracts to be based on criteria	the government agency must award the contract to the tenderer that the government agency has determined satisfies the minimum conditions for participation; is fully capable of undertaking the contract, and will provide the best value for money (which is not limited to price), in accordance with the evaluation criteria. The only exception to this is where the government agency determines that no tenderer has satisfied the evaluation criteria, or it is not in the public interest to award a contract;
Timing for submissions	the agency must require submissions to be lodged in accordance with a common deadline, which must, consistent with the agency's needs, provide sufficient time for suppliers to prepare and lodge submissions. The minimum time period is generally 25 days (although in very limited circumstances the minimum period can be reduced to 10 days);
Correction of errors	if any tenderer is given an opportunity to correct unintentional errors between the time of opening of submissions and the awarding of the relevant procurement contract, the agency must provide the opportunity equitably to all tenderers;

Procurement lists	agencies can establish procurement lists (sometimes referred to as procurement panels or multi-use lists), and only invite suppliers, or a limited number of suppliers, included on the procurement list to make a submission for a procurement. However, such lists, if not continuously open for applications by suppliers, must be opened at least once a year, and any supplier that meets the minimum conditions for participation must be included on the list. Also, agencies that want the ability to only invite some but not all of the suppliers on the list to make a submission relating to a procurement must provide a justification for the limitation, and the criteria for selecting the limited number of suppliers; and
Debriefings	rejected tenderers must be promptly informed of the decision, and debriefings must be made available, upon request, to unsuccessful tenderers outlining the reasons the submission was unsuccessful

Many of these requirements are not new to Australian procurement systems, but some are new to some jurisdictions, such as the prohibition against local content requirements, the strict conditions on limited tenders, the requirement to open procurement lists at least once per year, the requirement to specify the relative importance of evaluation criteria, and the limited circumstances in which the government agency can decide not to award a contract. The ability to seek a court order for compensation or an injunction if the requirements are breached is new to those jurisdictions that have adopted the legislative approach.

Complaints and Protests

In those jurisdictions that have adopted a legislative approach, the supplier “complaints” process – akin to the “protest” process in the US – is similar. Generally speaking, a supplier that believes a covered procuring agency plans to breach, or has breached, an FTA procurement requirement can lodge a complaint with the head of the agency or other accountable authority. The accountable authority must then:

- suspend the procurement, unless the accountable authority certifies that suspending the process is not in the public interest; and
- promptly investigate and attempt to resolve the complaint, and prepare a written report on the investigation.

A supplier can also apply to the relevant court for an injunction requiring the agency to comply with the FTA procurement requirement. The supplier can also apply for a compensation order covering:

- the reasonable costs incurred by the supplier to participate in the procurement process, and

- the reasonable costs incurred by the supplier in connection with making the complaint and attempting to resolve it.

A supplier cannot, however, recover lost profits due to not being awarded the contract.

As mentioned above, jurisdictions that have adopted a policy-based approach to implementing FTA procurement requirements generally permit the supplier to lodge a complaint, which is to be investigated by a government officer. But these jurisdictions generally don't provide a specific mechanism by which a supplier can seek an injunction or court order for compensation.

The exception is Victoria, which has included a contractual complaints mechanism in its policy approach. The Victoria procurement policy requires covered agencies to include a legally binding dispute resolution clause in the procurement documentation. The clause must provide for complaints by a tenderer of non-compliance with FTA procurement requirements to be resolved by a process of:

- negotiation and then mediation between the tenderer and the agency; and
- if this is not successful, determination by an independent arbitral tribunal with the power to make an award of compensation or award corrective action.

The template arbitration clause of the Victorian government limits the compensation which may be awarded to the supplier to costs reasonably incurred by the supplier in preparing its tender or costs reasonably incurred by the supplier in bringing the complaint.

What do you need to do?

- Suppliers, contractors and consultants to Australian governments should familiarise themselves with the new procurement requirements and consider exercising their new rights if they believe they are being disadvantaged due to any non-compliance with the new requirements.
- Covered government agencies in Australia should review their procurement procedures and complaint management arrangements to ensure they comply with the new procurement requirements arising from the international agreements.

Contacts

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