

## Australia

### Legal and institutional framework

Procurement by the Australian federal Government is governed by the Financial Management and Accountability Act 1997 (FMA Act) and Regulations and the Commonwealth Procurement Guidelines, January 2005 (CPGs). Individual procurement agencies are empowered to define their individual procurement rules and practices; they have to comply, however, with the CPGs' mandatory regulations and principles. The CPGs apply only to Departments of State, Departments of Parliament, and approximately 60 agencies designated by regulation. Statutory authorities and companies in which the Commonwealth has a direct controlling interest are generally not bound by, but may have regard to, the CPGs. The CPGs contain both mandatory procurement procedures and nonbinding suggestions. The mandatory procedures apply only to contracts above a certain threshold. In addition to the CPGs, the FMA Act requires chief executives to promote the efficient, effective, and ethical use of resources. Agencies under the FMA Act may also be subject to Chief Executive's Instructions on procurement matters. The Protective Security Manual also contains policies and procedures to protect official resources, including outsourcing and procurement. The State and Territory governments have their own procurement legislation, policies, and procedures, the scope of which is beyond this report.

Australia at the federal level has a decentralized public procurement system with some centralized planning. The Department for Finance and Administration formulates the federal Government's procurement policy and administers the FMA Act and the CPGs. Within the Department, the Procurement Policy Branch develops and publishes procurement policy guidance. The Procurement Agency Advice Branch assists and advises agencies, and conducts seminars on procurement issues. The Procurement Reporting and Systems Branch maintains systems for the Endorsed Supplier Arrangement and AusTender, a central electronic register. AusTender advises suppliers and agencies on procurement matters and policies. The management of specific procurements, however, is substantially decentralized. Each agency is responsible for its own procurement within the framework of the CPGs and its own rules. The Department recommends that agencies set up a committee to evaluate submissions for each procurement process.

## Procurement methods and procedures

The CPGs permit open tendering, select tendering, and, under specified circumstances, direct sourcing. The last method is available only in specified circumstances such as extreme urgency caused by unforeseen events, although the CPGs do not elaborate what amounts to such urgency. After awarding a contract by direct sourcing, the procuring agency must record in writing the circumstances that justified the use of this method. The design of procurement documents is left partly to the procuring entities, with some guidance from the federal Government. With some exceptions (e.g., in emergencies), the minimum deadlines for submitting a tender is 25 days. After calling for a tender, an agency may modify the evaluation criteria or technical requirements upon notice to all potential suppliers. Agencies may create a list of prequalified suppliers. Inclusion on a list may be a precondition for participation in an open or select tender. The Department of Finance and Administration maintains additional lists of suppliers. The CPGs, explanatory manuals, and other documents related to procurement are available on the Government's Web sites.

Wide publication of tenders increases the level of participation by suppliers and thus might contribute to lowering the likelihood of corruption. Under the CPGs, agencies must publish annually their key procurements for the next financial year. In addition, all requests for tender, requests for expressions of interest, and requests for inclusion on a multiuse list must be published on AusTender. The information may also be advertised in other media. Where practicable, request documentation for an open or select tender process must be distributed electronically.

Clear and predetermined criteria for selecting a bid reduce risks of corruption. The CPGs provide some guidance in this regard to the agencies that translate these criteria into their procurement rules. The CPGs state the grounds on which an agency may exclude a potential supplier, but corruption is not specifically mentioned. The core evaluation criterion is "value for money." In addition to price, the CPGs give a non-exhaustive list of seven general factors that a procuring entity may consider. To increase the transparency of the process, once a contract is awarded, an agency must promptly inform all tenderers of the decision and provide reasons for its decision upon request. In addition, tenderers are entitled to a debriefing meeting to review the process. Post-award negotiations are allowed if they fall within the scope of the contract and if they do not affect the "value for money" decision to award the contract.

The award must be recorded on AusTender within six weeks after the contract is signed. In some cases, agencies are further required to post details of contracts on their Web site or AusTender or both. Finally, a failure of tendering under the CPGs occurs when there are no bids that conform to the requirements or when no potential supplier satisfies the conditions for participation. In these cases, an agency may cancel or issue another tender, or resort to direct sourcing. The CPGs do not state when an agency must choose one option over another.

### Safeguarding and enforcing integrity

Measures that promote high ethical standards among procurement officials can help curtail corruption. The Department of Finance and Administration has issued the Guidance on Ethics and Probity in Procurement, January 2005. The Guidance deals with conflicts of interest and acceptance of gifts and hospitality specific to public procurement. It also offers some practical suggestions to help procurement officials, such as how to behave at social events and seminars held by a tenderer. In addition, the Public Service Act 1999 (PS Act) requires employees of the Australian Public Service to comply with the APS Code of Conduct and the APS Values. The Code requires employees to disclose and avoid conflicts of interest. The PS Act provides penalties for breaches of the Code. Moreover, procuring agencies generally have other policies regarding the acceptance of hospitality and gifts. They are also responsible for training their officials.

In addition to measures promoting the integrity of procuring entities, measures targeting corporate integrity can also reduce the risk of corruption. To this end, Australia has issued guidance to potential suppliers promoting ethical behavior.

Effective sanctions can also contribute to promoting integrity among bidders and public servants involved in procurement. Under the Criminal Code, it is an offense to bribe an official or to give a benefit intended to influence an official in the exercise of his or her duties. Criminal liability applies to both legal and natural persons. The Trade Practices Act provides additional remedies for unfair and unconscionable trading practices.

At the federal level, the procurement process is subject to administrative and judicial review. The Purchasing Advisory and Complaints Service provides information relating to procurement policy to a complainant before referring him or her to the procuring agency. Procuring agencies are required to have processes for handling complaints and to give complainants a fair hearing. The complaints are

handled by senior management and officials who are independent of the initial decision. Further, the Commonwealth Ombudsman can hear complaints and recommend remedies such as compensation, changes in the agency's procedures, and amendments to a law. Judicial review is available in the Federal Court of Australia.

A thorough control of the procurement process and its outcome by auditors can help prevent and discover corruption and collusion. The Australian National Audit Office is responsible for conducting mandatory audits. Audit reports are tabled in Parliament and are publicly available. The CPGs require officials to include a contractual provision allowing the National Audit Office to audit a contractor where relevant.

The CPGs require agencies to maintain sufficient documentation to provide an understanding of the reasons for the procurement, the process that was followed, all relevant decisions, and the basis of those decisions. Documentation must be retained for at least three years after the award of a contract. The Commonwealth Freedom of Information Act 1982 gives the public a right to access information held by agencies and ministers.

### A way forward

Australia is invited to consider introducing formal rules on the imposition of administrative sanctions on legal persons and individuals convicted of corruption offenses, so that government procurement contracts can be denied as a sanction for corruption in appropriate cases. Australia is further invited to consider establishing a policy for denying access to government procurement opportunities to individuals and companies convicted of corruption offenses in appropriate cases, besides including provisions for the termination of such contracts in appropriate cases where contractors are convicted of corruption after the contract has been signed.

### Relevant documentation

Commonwealth Procurement Guidelines, January 2005:

[http://www.finance.gov.au/ctc\\_commonwealth\\_procurement\\_guide.html](http://www.finance.gov.au/ctc_commonwealth_procurement_guide.html)

Guidance on Ethics and Probity in Procurement, January 2005:

<http://www.finance.gov.au>

Financial Management and Accountability Act 1997:

<http://www.comlaw.gov.au>

Public Service Act 1999: <http://www.comlaw.gov.au>

AusTender: <https://www.tenders.gov.au/federal/index.shtml>