



## **Australian Government**

### **Australian Government response to the Senate Finance and Public Administration References Committee Report:**

### **Commonwealth procurement procedures**

APRIL 2015

# Senate Finance and Public Administration References Committee Report on Commonwealth procurement procedures

The Government is committed to building a stronger, more prosperous and resilient economy where Australian businesses can be competitive on a domestic and international level. With this in mind, the Government is focussed on reducing the cost of doing business with the Commonwealth.

Procurement is a mechanism that allows Commonwealth entities to deliver the Government's policies, programmes and services. Commonwealth entities are responsible for achieving value for money in their procurement activities through consideration of both the financial and non-financial costs and benefits of each submission. This requires Australian businesses to be successful on the basis of genuine competitiveness.

The Government is focused on reducing red tape, improving the operating environment, and enhancing government engagement with business, especially small business, to build capability. It is by establishing the policy settings that remove the impediments to efficient business operation that the Government can most effectively encourage businesses to build competitive advantage and help position them to be successful in accessing government contracts.

The Commonwealth Procurement Rules (CPRs) are not intended to target specific categories of goods or services, nor specific industries. A core principle for the Government is to ensure that it provides full, fair and reasonable opportunities to businesses to bid for Commonwealth contracts. The CPRs specifically require Government entities to apply procurement practices that do not unfairly discriminate against small and medium size enterprises (SMEs) and provide appropriate opportunities for them to compete. The CPRs also outline the Government's commitment to source at least 10 per cent of procurement by value from SMEs. This benchmark has consistently been met – in 2013-14, 34.4 per cent of contracts valued at or above \$10,000 were awarded to SMEs to the value of \$16.8 billion (55.2 per cent of the 66,047 contracts by volume). Further, small businesses were awarded 11.6 per cent of contracts by value (\$5.7 billion) and 30.1 per cent of contracts by volume (19,887 contracts).

The Government strongly supports the committee's recommendation that the Department of Finance (Finance) work with Commonwealth entities to raise the general awareness of good procurement processes and improve the capability of officers that provide procurement advice to line areas. The Government supports auditing practices and regularly reviewing initiatives implemented as well as learning from best practice of other jurisdictions. In addition, the Government is committed to stakeholder engagement and regularly engages with external stakeholders via various forums such as the Australian Government Procurement Coordinator's blog available at [www.finance.gov.au/category/procurement-coordinator/](http://www.finance.gov.au/category/procurement-coordinator/).

The Government also supports in-principle the committee's recommendation that Finance work with the lead agencies for procurement-connected policies and the Department of the Prime Minister and Cabinet to develop a whole of government annual reporting framework for monitoring of and compliance with these policies. The Government is currently

reviewing all procurement-connected policies to test their currency and suitability to remain linked to the procurement framework. PCPs are government policies which Commonwealth entities must take into account when undertaking certain procurement activities. They are specific policies for which procurement has been identified as a means of delivering broad social commitments and other objectives indirectly related to procurement. Further, a robust framework will be established for the approval of any new procurement-connected policies with a focus on minimising the impost to business and the not-for-profit sector and ensuring effective monitoring of and compliance with these policies.

The Government cannot support the committee's recommendations to implement initiatives that preference local suppliers when procuring goods and services valued above the procurement thresholds (\$80,000 for general goods and services and \$7.5 million for construction services). Any recommendation to treat suppliers inequitably through schemes that preference local suppliers, beyond those that are specifically included in the 17 exemptions listed at Appendix A of the CPRs, would be inconsistent with Australia's international obligations.

# Senate Finance and Public Administration References Committee Report on Commonwealth procurement procedures

No.	Recommendation	Government Response
1.	<p>2.34 - The committee recommends that the Department of Finance (Australian Government Procurement Coordinator) consult with Australian industry, and in particular Australian manufacturers, to develop an alternate test which can provide more meaningful information on the quantity of Australian content in goods and services procured by the Commonwealth government, and how to build this information into data collected in AusTender.</p>	<p><b>Not supported.</b> From a practical perspective, any alternate test for capturing data on the quantity of Australian goods and services procured would be impractical to implement and impose significant compliance costs. In particular, a consensus definition of what is 'Australian' is difficult to achieve. For example, 'Australian' businesses may be resellers of goods manufactured entirely or partially overseas; equally, non-Australian businesses may deliver services that are developed and delivered within Australia, by Australians.</p> <p>In addition, the creation and maintenance of a supplier register, along with the associated authorisation and data quality controls, would impose significant red tape on suppliers for limited benefit.</p>
2.	<p>3.19 - The committee recommends that the Department of Finance provide a detailed explanation of the barriers to developing a preferencing scheme, which takes into account Australia's free trade obligations.</p>	<p><b>Not supported.</b> The Department of Finance (Finance) has previously advised that international agreements limit the extent to which the Government can preference local suppliers. Finance has also advised that the CPRs incorporate relevant provisions from the Australia and New Zealand Government Procurement Agreement, Australia Chile Free Trade Agreement, Australia United States Free Trade Agreement, and Singapore Australia Free Trade Agreement. The texts of these agreements are publicly available and detail the commitments entered into by Australia.</p> <p>Free trade agreements (FTAs) give Australian producers and manufacturers access to a market of billions of consumers rather than just Australia's 23 million. To achieve the full potential of our trade, we must overcome any barriers that face our exporters, whether tariffs or other impediments, which are attached to our goods and services. Reduced tariffs give Australian companies greater opportunities for expansion into previously protected markets.</p>
3.	<p>3.56 - The committee recommends that the government review the application of the non-discrimination principle to ensure that it does not inadvertently discriminate against Australian manufacturers.</p>	<p><b>Not supported.</b> Paragraph 5.3 of the CPRs states that all potential suppliers to government must be treated equitably. If a supplier has concerns regarding the application of this requirement during a tender process, they should advise the procuring entity of their concerns.</p> <p>It is important that objective, rules-based criteria are used in all government procurement processes, which are required to achieve value for money through non-discriminatory, competitive, open, transparent, efficient and publicly-accountable processes. However, as a general rule procurements under the procurement thresholds (\$80,000 for general goods and services and \$7.5 million for construction) can be contracted via direct approaches to suppliers without the need to openly approach the market as long as value for money is achieved.</p>

No.	Recommendation	Government Response
4.	3.61 - The committee recommends that the government continue to fund the Australian Industry Participation policies and programs and reinstitute funding for the Enterprise Solutions Program.	<p><b>Not supported.</b> The Government is simplifying and streamlining industry support to improve productivity and competitiveness. The new Entrepreneurs' Infrastructure Programme aims to improve the capabilities of small and medium enterprises (SMEs) to become more productive, competitive and growth focused. In addition, the Government has commissioned an independent review into costs, benefits, and effectiveness of Australian Industry Participation policies and programmes.</p> <p>Further, the Australian Small Business Advisory Services (ASBAS) programme funds not-for-profit registered business organisations to improve their capacity to deliver low-cost advice and information services to new and established small businesses. The Business Solutions 2014 round focuses on five streams of assistance. Of those five, the <i>Building your business</i> and <i>Management capabilities</i> streams may assist small businesses to improve their capability to bid for government work.</p>
5.	3.64 - The committee recommends that the Commonwealth Procurement Rules be redrafted to provide an explicit exemption for practices to benefit or preference small and medium businesses.	<p><b>Not supported.</b> The Government is committed to making it easier for businesses to access the Commonwealth procurement market. A key principle of the Commonwealth procurement framework is to provide full, fair and reasonable opportunities to businesses to bid for Commonwealth work. The CPRs require officials to apply procurement practices that do not unfairly discriminate against SMEs, as well as a commitment for non-corporate Commonwealth entities to source at least 10% of procurement by value from SMEs. This target has consistently been met - SME participation in 2013-14 was 34.4% by total contract value and 55.2% by total number of contracts.</p> <p>The Government's productivity agenda encompasses a specific small business policy agenda, focused on reducing red tape burdens, improving the operating environment, and enhancing government engagement with small business to build capability. It is by establishing the policy settings that remove the impediments to efficient business operation that the Government can most effectively assist small businesses build competitive advantage and help position them to bid for government work.</p>
6.	3.67 - The committee recommends the Department of Finance provide education and training to agencies and their staff regarding the inclusion of Australian standards, or the equivalent, in tender documentation.	<p><b>Supported.</b> Finance has included a specific requirement in the Commonwealth Contracting Suite to include relevant standards in any approach to market.</p> <p>Finance will also include information on the use of standards in procurement in any future training programmes developed by the Department.</p>

No.	Recommendation	Government Response
7.	<p>4.36 - The committee recommends that the government develop a methodology to quantify the factors used to assess whole-of-life costs.</p>	<p><b>Not supported.</b> Achieving value for money is the core rule in the CPRs requiring Commonwealth entities to consider the relevant financial and non-financial costs and benefits of each submission and document how value for money was considered and achieved.</p> <p>Due to the large range of goods and services procured by Commonwealth entities, a one-size fits all cost benefit analysis methodology would not be feasible to implement.</p> <p>Further, the CPRs require Commonwealth entities to include in request documentation a complete description of the evaluation criteria to be considered in assessing submissions.</p> <p>The CPRs (paragraph 4.6) detail the types of whole-of-life costs to be considered as part of the value for money assessment when undertaking a procurement. Whole of life costs include:</p> <ul style="list-style-type: none"> <li>a. the initial purchase price of goods and services;</li> <li>b. maintenance costs;</li> <li>c. transition out costs;</li> <li>d. licencing costs (when applicable);</li> <li>e. the cost of additional features procured after the initial procurement;</li> <li>f. consumable costs; and</li> <li>g. disposal costs.</li> </ul>
8.	<p>4.39 - The committee recommends that during its next procurement-related audit, the Australian National Audit Office review the operation of the revised Commonwealth Procurement Rules, particularly the revisions relating to the assessment of financial and non-financial costs and benefits, and provide an evaluation.</p>	<p>The Auditor General has responded directly to the committee indicating his support of this recommendation.</p>

No.	Recommendation	Government Response
9.	<p>5.23 - The committee recommends that during the early implementation stages of the new suite of contract documents for procurements under \$200,000, the Department of Finance will address the concerns about complexity of documentation raised during the inquiry and make any necessary adjustments.</p>	<p><b>Supported.</b> Finance is constantly seeking input from non-corporate Commonwealth entities as they implement the Commonwealth Contracting Suite. Finance is also working with the Australian Small Business Commissioner to take into account issues raised by small business relating to tender processes and with other industry bodies to reduce complexity and reduce red tape.</p> <p>The Government has committed to transform and enhance the existing Australian Small Business Commissioner role into a Small Business and Family Enterprise Ombudsman (Ombudsman) with real power. A key role of the Ombudsman is to be a Commonwealth-wide advocate for small business. The Ombudsman will be well positioned to advise the Government on procurement practices that reduce complexity and assist businesses to find opportunities and competitively bid for work.</p> <p>The Government is committed to making it easier for business to access the Commonwealth procurement market and engage with the Government. The introduction of the Commonwealth Contracting Suite is one example of how contract documentation and insurance requirements have been significantly simplified. The use of colour-coding in contract documentation makes it easier for businesses to understand their rights and obligations, saving businesses time and money.</p>
10.	<p>5.25 - The committee recommends that, as part of its longer term process to review and reform the procurement framework, the government consider best practice examples from other jurisdictions to further simplify the tender process.</p>	<p><b>Supported.</b> Finance constantly reviews better practice examples from other jurisdictions and from international organisations such as the OECD and the IMF to assess their applicability to the Australian environment, particularly in relation to simplifying the tender process.</p>

No.	Recommendation	Government Response
11.	<p>5.52 - The committee recommends that, following consultation with stakeholders, the Department of Finance establish an independent and effective complaints mechanism for procurement processes.</p>	<p><b>Not supported.</b> There is an existing framework for suppliers to raise complaints regarding procurement processes. The CPRs require Commonwealth entities to apply equitable and non-discriminatory complaints-handling procedures. Entities should aim to manage the complaint process internally, when possible, through communication and conciliation.</p> <p>Suppliers should, in the first instance, take their concerns to the procurement officer undertaking the tender process. If a supplier's concerns are not resolved, the supplier can put their concerns in writing to the entity's Chief Executive Officer for a formal review. If the complaint is still not resolved, the supplier can refer the complaint to the Australian Government Procurement Coordinator who can act as an intermediary between the supplier and the entity. Information on how to lodge a complaint is provided on the Finance website (refer <a href="http://www.finance.gov.au/procurement/procurement-coordinator/complaints-handling-charter.html">http://www.finance.gov.au/procurement/procurement-coordinator/complaints-handling-charter.html</a>).</p> <p>If a supplier is not satisfied with the outcome, they can approach the Commonwealth Ombudsman, who has extensive powers to investigate procurement related complaints.</p> <p>Additionally, the Australian Small Business Commissioner offers information and advice to small businesses, including referral to dispute resolution services. Once established, the Small Business and Family Enterprise Ombudsman will be a concierge to help smaller businesses with issues, complaints and disputes, find the best organisation to deal with their complaint, and will offer its own alternative dispute resolution service in limited circumstances.</p>



No.	Recommendation	Government Response
12.	5.54 - The committee recommends that the government provide an explanation as to whether there are any reasons why the operation of the <i>Competition and Consumer Act 2010</i> should not apply to Commonwealth procurement.	<p><b>Supported.</b> A schedule to the <i>Competition and Consumer Act 2010</i> (CCA), the Australian Consumer Law (ACL), prohibits certain conduct, such as engaging in conduct that is misleading and deceptive, which may be relevant in the procurement context. However, the courts have held that the Commonwealth is not ordinarily 'carrying on business' when procuring goods and services (<i>JS McMillan Pty Ltd v Commonwealth</i> (1997) 77 FCR 337). Accordingly, the CCA would not generally apply to the Commonwealth in its procurement activities (see section 2A of the CCA).</p> <p>Although not bound by the Act, Commonwealth officials are still prevented from engaging in misleading and deceptive conduct when undertaking procurement. The CPRs require officials to act ethically and for procuring entities to apply equitable and non-discriminatory complaint-handling procedures if a complaint is received about the conduct of a procurement.</p> <p>The Competition Policy Review Final Report was released on 31 March 2015 and discussed similar issues. The Government will consider this recommendation alongside recommendations and views contained in the Competition Review Final Report, after which time the Government will assess its response.</p>
13.	5.73 - The committee recommends that the Australian National Audit Office, in the course of its next procurement-related audit, undertake an assessment of the application and implementation of relevant procurement-connected policies.	The Auditor General has responded directly to the committee indicating his support of this recommendation.
14.	5.76 - The committee recommends that the Department of Finance work with the lead agencies for procurement-connected policies and the Department of Prime Minister and Cabinet to develop a whole of government annual reporting framework for monitoring of and compliance with these policies.	<b>Supported in-principle.</b> As part of the Government's Spring red tape repeal day initiatives announced on 22 October 2014, all procurement-connected policies are actively being reviewed to test their currency and suitability to remain linked to the procurement framework. Further, a robust framework will be established for the approval of any new procurement-connected policies with a focus on minimising the impost to business and the not-for-profit sector and ensuring effective monitoring of and compliance with these policies.
15.	5.89 - The committee recommends that the procurement-related audit by the Australian National Audit Office to assess the application and implementation of procurement-connected policies also include an assessment of the competencies of agencies' procurement officers.	The Auditor General has responded directly to the committee indicating his support of this recommendation.

**Additional recommendations from Senators Xenophon and Madigan**

No.	Recommendation	Government Response
1.	That the Government urgently redraw the CPRs specifying a range of 'whole-of-life' factors that must be addressed in a procurement, including the social and economic benefits of locally sourced procurement.	<p><b>Not supported.</b> Refer response to recommendation 7 above.</p> <p>The CPRs are not intended to target specific categories of goods or services, nor specific industries. The CPRs require procuring officials to treat suppliers equitably and not discriminate in relation to the degree of foreign affiliation or ownership, location, or the origin of the goods and services being procured.</p> <p>Achieving value for money is the core principle of the CPRs, however price is not the sole determining factor in assessing value for money. A comparative analysis of the relevant financial and non-financial costs and benefits inform a value for money assessment. These factors include quality of goods and services, fitness for purpose, innovation and adaptability over the life of lifecycle of the procurement, environmental impact and whole of life costs.</p> <p>From a practical perspective, any proposal to include social and economic benefits of locally sourced procurement would require procuring officials to consider many uncertain variables in each procurement evaluation which would demand very specific expertise and impose significant compliance costs.</p>
2.	That the Government, as an appendix to the CPRs, specify a methodology as to how a procurer must quantify or 'score' these 'whole-of-life' factors in procurement decisions and how they are to be assessed in comparison to quality and cost measures as part of the overall procurement decision.	<p><b>Not supported.</b> Refer response to recommendation 7 above.</p>
3.	That the Government consider the adoption or integration into the methodology from recommendation 2 a 'holistic, whole of life, cost benefit analysis'. This form of analysis is used commonly in the mining, resources, energy and infrastructure sectors.	<p><b>Not supported.</b> Refer response to recommendation 7 above.</p>

No.	Recommendation	Government Response
4.	That the Department of Finance introduce a simple check with suppliers to track the true number and percentage of Australian suppliers to government.	<p><b>Not supported.</b> Self declaration by suppliers is a less robust and accurate mechanism than current processes (using ABN, if available, of each supplier and their business address) to estimate Australian content in Government procurement contracts. Further, a consensus definition of what is 'Australian' is difficult to achieve. For example, 'Australian' businesses may be resellers of goods manufactured entirely or partially overseas; equally, non-Australian businesses may deliver services that are developed and delivered within Australia, by Australians.</p> <p>In addition, the creation and maintenance of a supplier register, along with the associated authorisation and data quality controls, would impose significant red tape on suppliers.</p> <p>In 2012-13<sup>1</sup>, Australian Government entities reported 67,854 procurement contracts valued at \$39.3 billion on AusTender. Analysis of AusTender data indicates that Australian suppliers are competitive on their own merits in winning contracts and are well represented in Commonwealth procurement:</p> <ul style="list-style-type: none"> <li>• 92.0% of services are likely to have been sourced from Australian suppliers;</li> <li>• 70.1% of goods are likely to have been sourced from Australian suppliers; and</li> <li>• Of the 11,460 suppliers contracted, 10,212 (89.1%) were SMEs.</li> </ul>

<sup>1</sup> The most recent analysis undertaken regarding Australian versus overseas sourced contracts was conducted using 2012-13 data.

No.	Recommendation	Government Response
5.	That the Government make it a rule that overseas suppliers must comply with Australian product standards without exception.	<p><b>Not supported.</b> Under the CPRs, which incorporate Australia's international free trade obligations, request documentation must include a complete description of the procurement, including the nature, scope and (where known), the quantity of the goods and services to be procured, and any requirements to be fulfilled, including any technical specification, conformity certification, plans, drawings or instructional materials. When prescribing specifications for goods and services a relevant entity must base technical specifications on international standards, when they exist and apply to the relevant procurement, except when the use of international standards would fail to meet the relevant entity's requirements or would impose greater burdens than the use of recognised Australian standards.</p> <p>When specifications are included in the tender documentation, all suppliers regardless of their origin, must comply with these specifications.</p> <p>Under Australia's current system, standards are voluntary until mandated by law. While voluntary standards are a type of quality assurance and self-regulation that suppliers may use to ensure product safety, mandatory standards are made for products that are likely to be especially hazardous. It would be difficult to make Australian product standards mandatory for all suppliers and this would greatly increase costs for business and the Government. Furthermore, regulation in certain sectors, including the extent to which they mandate Australian Standards, is a matter for state and territory authorities.</p>
6.	That potential overseas suppliers are required to bear a reverse onus of proof, making them responsible to prove to Australian procurement officials that the claims made about their product are correct.	<p><b>Not supported.</b> Under the CPRs, procuring Commonwealth entities must include in request documentation any technical specifications which are required for the procurement. When specifications are included in tender documentation, all suppliers regardless of their origin, must comply with these specifications. The onus of proof of the required specifications applies to all potential suppliers regardless if they are Australian or overseas suppliers.</p>
7.	That the Government apply a comprehensive and transparent system of efficacy testing and quality assurance to verify the claims made by overseas suppliers about their products' quality, environmental sustainability and fitness for purpose.	<p><b>Not supported.</b> Australia's system works on the basis of post-market surveillance and not all products (either imported or domestically produced) are tested before they enter the Australian marketplace. The Australian Consumer Law (ACL - a schedule to the <i>Competition and Consumer Act 2010</i>) provides a system of guarantees for consumers who acquire goods and services from Australian suppliers, importers or manufacturers. This includes a guarantee that goods will be of acceptable quality, fit for a particular purpose and match their description. In addition, it is illegal under the ACL for a supplier to make a false or misleading claim, including stating that their products meet a standard if they do not.</p>

<b>No.</b>	<b>Recommendation</b>	<b>Government Response</b>
8.	That the Government appoint an Australian Industry Participation Advocate, and an office to support him or her, to work with Australian businesses to better position them for bidding for procurement work and with governments to constantly revise procurement rules so as to maximise Australian involvement.	<b>Not supported.</b> Establishment of a new position is unnecessary. The new Entrepreneurs' Infrastructure Programme aims to improve the capabilities of SMEs to become more productive, competitive and growth focused. Also refer to the response to the Committee's main Recommendations 4 and 15 above.