



Australian Government
Department of Defence

**Senate Finance and Public Administration Legislation Committee
Inquiry into the provisions of the Government Procurement
(Judicial Review) Bill 2017**

Department of Defence

Written Submission

July 2017

Introduction

The Department of Defence (Defence) is pleased to provide this submission on the Government Procurement (Judicial Review) Bill 2017. Defence supports an effective and efficient system for managing procurement complaints and believes the introduction of a clear legal mechanism through the courts will add to our already robust complaint handling mechanism. The comments in this submission are provided to support the effective implementation of such a system achieves its aims in a manner that does not create unintended adverse consequences for industry or agencies.

In particular, this submission notes:

- the need for consultation on the implementation guidance and sufficient time to effectively implement the changes required by the Bill;
- the potential impact of funding successful compensation payments from departmental budgets; and
- the potential for unintended adverse consequences for industry and agencies arising from the suspension of procurements.

Consultation, implementation guidance and sufficient time is needed to implement changes

As with any piece of legislation, and even more so with a new legal process to address complaints and remedies, the operational details are critically important. Defence has a number of questions regarding the operation of the Bill and is awaiting the provision of draft implementation guidance from the Department of Finance in order to address these changes in its procurement policy framework. Defence therefore requires sufficient time to adjust and promulgate its policies, guidance and contracting templates.

To consider and address the impacts of the Bill, Defence has established an internal departmental working group to liaise with the Department of Finance to clarify a range of legal and procurement related issues ahead of commencement of the legislation. We note the Department of Finance has advised that commencement is likely to occur at least six months after royal assent.

Defence notes that the Department of Finance is considering further refinements to the Commonwealth Procurement Rules and that these may be informed by the Joint Select Committee's report on Government Procurement. Defence recommends that consideration be given to consolidating the changes and the implementation of the Bill should it receive royal assent.

Payment of claims may adversely impact Defence capability

We note the Bill only applies to covered procurements. Defence notes that the funding of successful compensation claims under the Bill is proposed to be paid from departmental budgets. This may have significant adverse impacts on capability as tender preparation costs for Defence projects can be substantial and if payable may reduce the budgets available for Defence projects. We suggest central whole-of-Government funding of claims be considered.

Compensation costs could be substantial (if awarded) and complex to determine

Defence notes that courts will determine the amount of compensation payable based on the reasonable expenditure incurred by a supplier in preparing a tender, in making the complaint and in connection with a reasonable attempt to resolve such a complaint. Given the scale and complexity of Defence procurements, these costs could be substantial. In Defence's view, in order to ensure consistency across agencies when settling complaints, clear whole-of-Government guidance will be required on how to calculate compensation.

Further, when handling procurement complaints, Defence deals with the tenderer, typically a 'prime', and not individually with other members of a tender team (such as potential subcontractors). In Defence's view, complaints from multiple suppliers in a tender team may create significant complexity regarding the management of complaints and in determining compensation costs. Defence therefore recommends that complaints be progressed through the prime and that the complaints handling process responds to the prime.

Defence also notes other tenderers may also seek to lodge their own complaints for compensation on the basis of costs arising as a result of a suspended procurement. Additional complaints may also be received in the event a complainant is successful regarding a breach of the Commonwealth Procurement Rules. This could make the process very complex and difficult to manage.

Internal management of complaints and court review

Defence notes that complainants have ten days (or a longer period as determined by the court) to file an application for injunction. This gives agencies little opportunity to investigate and address the complaint prior to escalation to the courts, driving an adversarial rather than a collaborative relationship with industry.

It is possible that an application for injunction by the complainant will be made in parallel with an attempt to resolve the issue with the agency. In such an event, complainants should be encouraged to first raise the complaint with the department and have the review process run its course prior to seeking an injunction. Defence recommends that Department of Finance implementation guidance clearly articulate the process, timelines and the interaction mechanism between the agency complaints resolution process and application to the court.

Unintended adverse consequences may arise

Defence and industry recognise that a major driver of tendering costs is the length of the procurement process. The ability to suspend a procurement may cause significant delays and therefore increase costs to all participants in the process. Defence recommends that suspension only apply to contract execution, rather than suspend all work on the procurement. In relation to multi-stage procurements, Defence recommends that suspension be defined as not proceeding to a subsequent stage rather than ceasing all work on the current stage.

In order to reduce the cost of tendering, Defence endeavours to advise unsuccessful tenderers as early as possible. The Bill may inadvertently drive risk averse behaviours by encouraging notification of tenderers only after the contract has been signed. This may result in increased costs to tenderers as a result of keeping their project teams on stand by.

Suspension periods may require tender validity to be extended, potentially resulting in the need for tenderers to update/review their pricing. This may result in tender price increases.

Noting the above potential adverse impact of unintended consequences of the Bill, Defence recommends that consideration be given to the ability of departments and the courts to screen out complaints lacking merit or that are vexatious or frivolous in nature.

Lack of clarity regarding timing and use of Public Interest Certificates

Operational guidance and clarity is needed regarding the issuing of public interest certificates, including the conditions for the public interest test, the process for issuing a certificate and whether the certificate needs to be on an agency's website or AusTender.

Defence notes that section 20(e) of the Bill suggests that a public interest certificate can be issued after a complaint has been lodged. This is appropriate as it would be more efficient to issue public interest certificates as necessary rather than requiring them to be issued at the commencement of a procurement process. Defence recommends that consideration be given to enable departments to issue blanket public interest certificates for certain classes or categories of procurements where it is against the public interest for the procurement to be suspended.

Conclusion

If the Bill is to function as an efficient and effective legal mechanism to assist in the resolution of complaints it may require some amendment to avoid unintended adverse consequences to industry and agencies, in particular impacts arising from suspension of a procurement, including determining and funding compensation.

In addition, clear implementation guidance from the Department of Finance will be required in advance of commencement of the Bill to ensure the new regime can be operationalised and reflected in departmental policy and guidance. Consultation and consideration of the issues raised is recommended in order to maintain collaborative relationships with industry and ensure that the cost of tendering is not increased.