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Department of Finance

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RULES

Commonwealth Procurement Rules

Achieving value for money

WORKING DRAFT 13 MARCH

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Foreword

Finance Minister's foreword to be inserted.

WORKING DRAFT 13 MARCH

1. Summary of Commonwealth Procurement Rules

1.1 Figures 1 and 2 highlight the location of the rules in the Commonwealth Procurement Rules (CPRs).

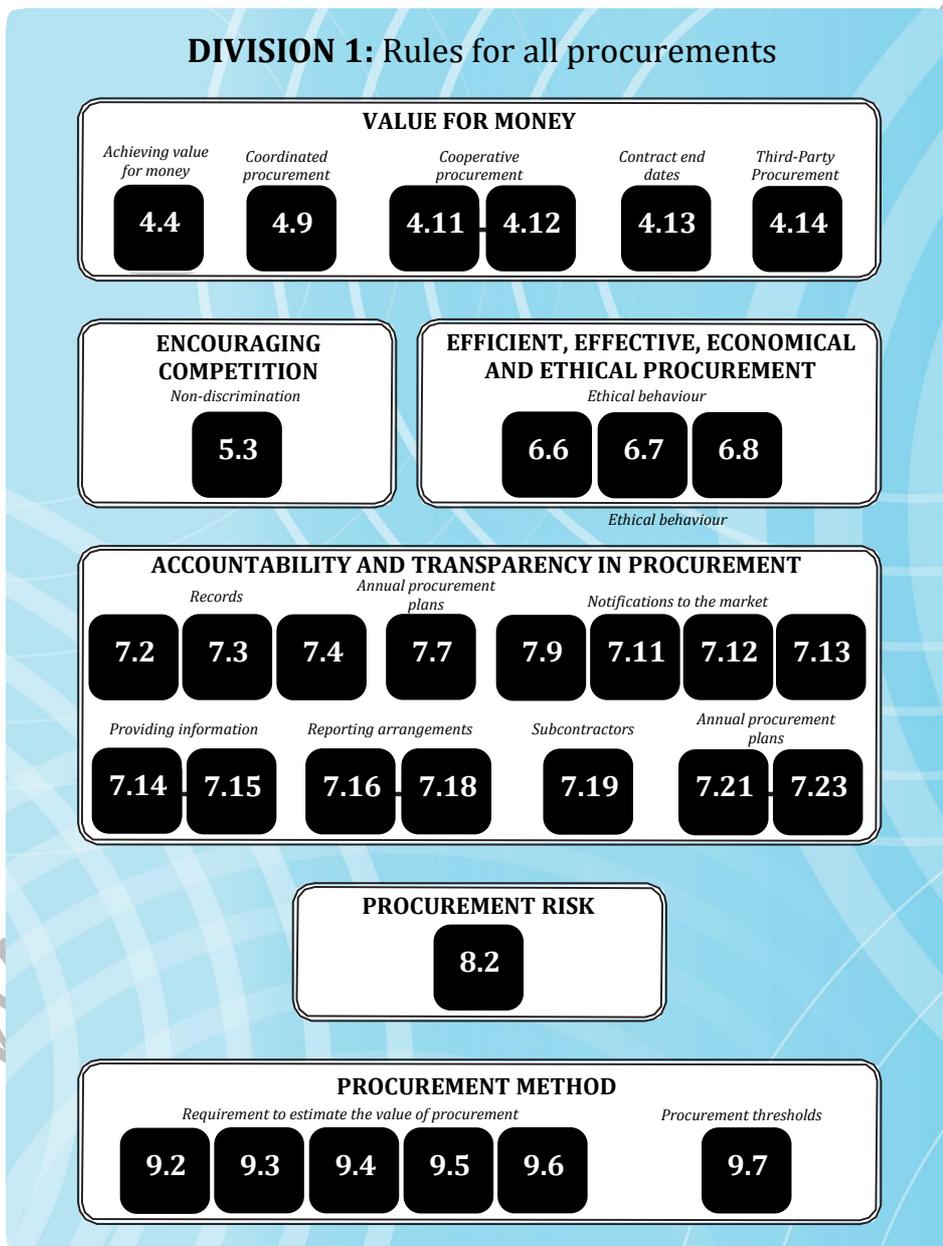


Figure 1: Division 1 - Rules for all procurements

DIVISION 2: Additional rules for procurements at or above the relevant procurement threshold

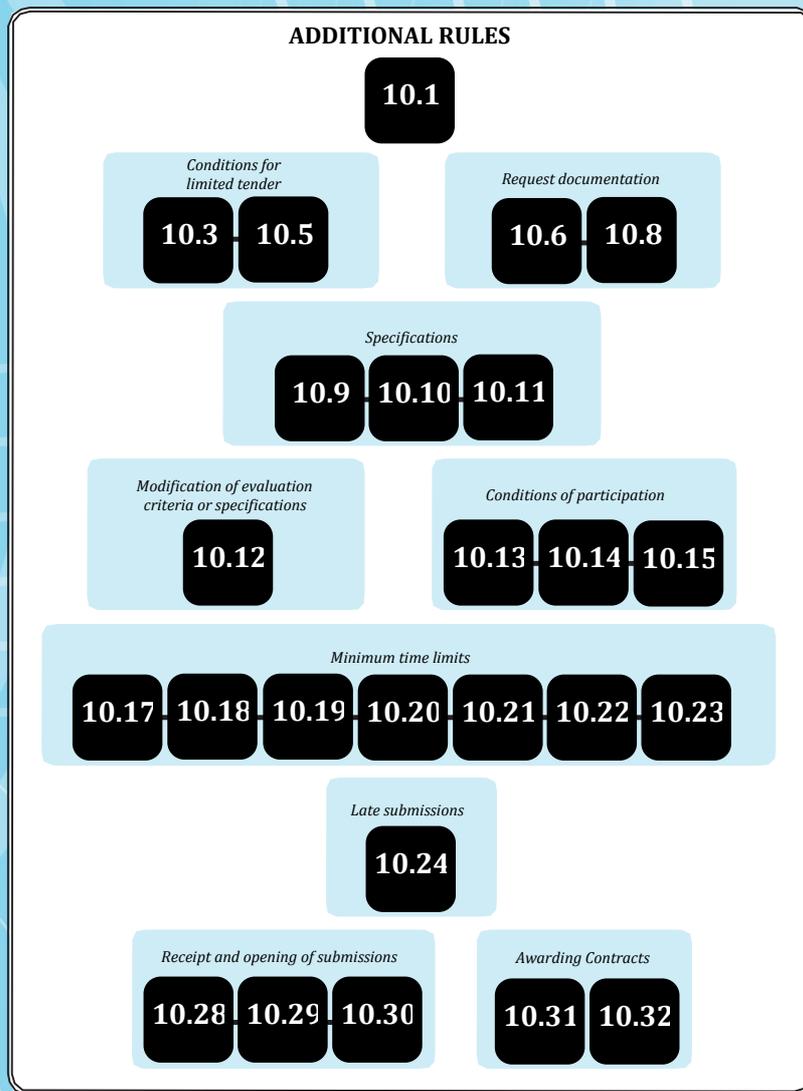


Figure 2: Division 2 – Additional rules

2. Procurement framework

- 2.1 The Commonwealth *Procurement Rules* (CPRs) are issued by the Minister for Finance (Finance Minister) under Section 101(1) of the *Public Governance, Performance and Accountability Act 2013* (PGPA Act).
- 2.2 Officials from *non-corporate Commonwealth entities* and prescribed *corporate Commonwealth entities* (listed at Appendix B) **must** comply with the CPRs when performing duties related to *procurement*. *Non-corporate Commonwealth entities* and prescribed *corporate Commonwealth entities* will collectively be referred to as *relevant entities* throughout the CPRs.
- 2.3 Rules that **must** be complied with in undertaking *procurement* are denoted by the term '**must**'. *Non-corporate Commonwealth entities* **must** report non-compliance with the rules of the CPRs through the Commonwealth's compliance reporting process. The term 'should' indicates good practice.
- 2.4 The CPRs are the core of the procurement framework, which also includes:
- web-based guidance, developed by the Department of Finance (Finance) to assist agencies to implement the procurement framework;
 - Finance guidance, which advise of key changes and developments in the procurement framework; and
 - Resource Management Instructions, which an *accountable authority* may use to set out agency-specific operational rules to ensure compliance with the rules of the procurement framework.
- 2.5 The rule for the commitment or expenditure of *relevant money* requires an *official* of a relevant entity to **not** approve proposed expenditure of *relevant money* arising from a procurement unless the *official* is satisfied that the expenditure would be a proper use of *relevant money*.
- 2.6 Nothing in any part of these CPRs prevents an *official* from applying measures determined by their *Accountable authority* to be necessary for the maintenance or restoration of international peace and security, to protect human health, for the protection of essential security interests, or to protect national treasures of artistic, historic or archaeological value.

Procurement

- 2.7 *Procurement* encompasses the whole process of procuring *goods* and services. It begins when a need has been identified and a decision has been made on the procurement requirement. *Procurement* continues through the processes of risk assessment, seeking and evaluating alternative solutions, the awarding of a *contract*, the delivery of and payment for the *goods* and services and, where relevant, the ongoing management of the *contract* and consideration of disposal of *goods*.
- 2.8 In addition to the acquisition of *goods* and services by a relevant entity for its own use, *procurement* includes the acquisition of *goods* and services on behalf of another relevant entity or a third party.
- 2.9 *Procurement* does not include:
- a. grants (whether in the form of a *contract*, conditional gift or deed);¹
 - b. investments (or divestments);
 - c. sales by tender;
 - d. loans;
 - e. *procurement* of *goods* and services for resale or *procurement* of *goods* and services used in the production of *goods* for resale;
 - f. any property right not acquired through the expenditure of *relevant money* (for example, a right to pursue a legal claim for negligence);
 - g. statutory appointments;
 - h. appointments made by a Minister using the executive power (for example, the appointment of a person to an advisory board); or
 - i. the engagement of employees, such as under the *Public Service Act 1999*, the *Parliamentary Services Act 1999*, an relevant entity's enabling legislation or the common law concept of employment.

¹ As defined in the PGPA (Grants) Rule.

Resource management framework

2.10 *Relevant entities and officials* operate in an environment of legislation and Commonwealth policy. Within that broad context, the resource management framework consists of the legislation and policy governing the management of the Commonwealth's resources. Figure 3 sets out the main elements of this environment related to *procurement*.



Figure 3: Legislation and policy governing Commonwealth Procurement.

- 2.11** The procurement framework is a subset of the resource management framework related to the *procurement of goods* and services.
- 2.12** Section 16 of the PGPA Act outlines an *Accountable authority's* duty to establish appropriate control systems for their relevant entity. The CPRs provide the necessary framework for Accountable authorities when issuing instructions and operational requirements in relation to *procurement*. In the area of *procurement*, an *Accountable authority* should provide a mechanism to:
- a. apply the principles and requirements of the resource management and *procurement* frameworks, focusing on the relevant entity's operations; and
 - b. provide primary operational instructions to relevant entity *officials* in carrying out their duties related to *procurement*, in a way that is tailored to a relevant entity's particular circumstances and needs.
- 2.13** Non-compliance with the requirements of the resource management framework, including in relation to *procurement*, may attract a range of criminal, civil or administrative remedies including under the *Public Service Act 1999* and the *Crimes Act 1914*.

International obligations

- 2.14** Australia is party to a range of bilateral free trade arrangements. These arrangements are implemented domestically by legislation and/or Commonwealth policy. Relevant international obligations have been incorporated in these CPRs. Therefore, an *official* undertaking a *procurement* is not required to refer directly to international agreements.

3. How to use the Commonwealth Procurement Rules

- 3.1 The CPRs set out the rules that *officials* **must** comply with when they procure *goods* and services. The CPRs also indicate good practice. The CPRs have been designed to provide *officials* with flexibility in developing and implementing *procurement* processes that reflect their relevant entity's needs.
- 3.2 Achieving value for money is the core rule of the CPRs. This requires the consideration of the financial and non-financial costs and benefits associated with *procurement*.
- 3.3 Further information and guidance on applying the CPRs are available on Finance's procurement policy website at www.finance.gov.au/procurement.
- 3.4 *Relevant entities* may have additional rules, guidance, templates or tools that apply when conducting *procurements*.

Compliance with the two divisions of the CPRs

- 3.5 *Officials of non-corporate Commonwealth entities* **must** comply with the 'rules for all procurements' listed in Division 1, regardless of the *procurement's* value. *Officials* **must** also comply with the 'additional rules' listed in Division 2 where the expected value of the *procurement* is at or above the relevant *procurement threshold* and where an Appendix A exemption has not been relied on.
- 3.6 *Officials of prescribed corporate Commonwealth entities* **must** comply with the 'rules for all procurements' listed in Division 1 and the 'additional rules' listed in Division 2 where the expected value of the *procurement* is at or above the relevant *procurement threshold* and where an Appendix A exemption has not been relied on.

Division 1

MARCH

RULES FOR ALL PROCUREMENTS



4. Value for money

Considering value for money

- 4.1 A thorough consideration of value for money begins by *officials* clearly understanding and expressing the goals and purpose of the *procurement*.
- 4.2 Where a business requirement arises, *officials* should consider whether a *procurement* will deliver the best value for money. It is important to take into consideration:
- non-procurement alternatives;
 - consultation with stakeholders;
 - the business need;
 - resourcing;
 - pre-existing arrangements; and
 - Commonwealth policies.
- 4.3 Where a relevant entity determines that *procurement* represents the best value for money, those considerations will inform the development and implementation of the *procurement*.

Achieving value for money

- 4.4 Achieving value for money is the core rule of the CPRs. *Officials* responsible for a *procurement* **must** be satisfied, after reasonable enquires, that the *procurement* achieves a value for money outcome. Value for money in *procurement* requires:
- encouraging competitive and non-discriminatory processes;
 - using public resources in an efficient, effective, economical and ethical manner that is not inconsistent with the policies of the Commonwealth;²
 - making decisions in an accountable and transparent manner;
 - considering the risks; and
 - conducting a process commensurate with the scale and scope of the *procurement*.

² See sections 15 and 21 of the PGPA Act

- 4.5 The price of the *goods* and services is not the sole determining factor in assessing value for money. A comparative analysis of the relevant financial and non-financial costs and benefits of alternative solutions throughout the *procurement* will inform a value for money assessment. Factors to consider include, but are not limited to:
- a. fitness for purpose;
 - b. a *potential supplier's* experience and performance history;
 - c. flexibility (including innovation and adaptability over the lifecycle of the *procurement*);
 - d. environmental sustainability (such as energy efficiency and environmental impact);
and
 - e. whole-of-life costs.

Procurement-connected policies

- 4.6 Procurement-connected policies are policies of the Commonwealth for which *procurement* has been identified as a means of delivery. To assist *relevant entities* in complying with policies of the Commonwealth, Finance maintains a list of procurement-connected policies, which can be found at www.finance.gov.au/procurement.
- 4.7 Many of these procurement-connected policies are the responsibility of entities other than Finance. The policy entity is responsible for administering, reviewing and providing information on the policy as required.

Coordinated procurement

- 4.8 Coordinated procurement refers to whole-of-government arrangements for procuring *goods* and services. A list of coordinated procurements can be found at www.finance.gov.au/procurement.
- 4.9 *Non-corporate Commonwealth entities* **must** use coordinated procurements. Exemptions from coordinated procurements can only be granted jointly by the requesting *non-corporate Commonwealth entity's* Portfolio Minister and the Finance Minister where a *non-corporate Commonwealth entity* can demonstrate a special need for an alternative arrangement.³ Prescribed *corporate Commonwealth entities* may opt in to coordinated procurements.

³ Or where the coordinated procurement specifies an alternative approach for obtaining exemptions.

Cooperative procurement

- 4.10** Cooperative procurements involve more than one relevant entity as the buyer. *Relevant entities* can procure cooperatively by approaching the market together or by joining an existing *contract* of another relevant entity.
- 4.11** If a relevant entity intends to join an existing *contract* of another relevant entity, the initial *request documentation* and the *contract* **must** have already specified potential use by other *relevant entities*.
- 4.12** *Relevant entities* joining an existing *contract* **must** ensure that:
- a. value for money is achieved;
 - b. the *goods* and services being procured are the same as provided for within the *contract*; and
 - c. the terms and conditions of the *contract* are not being materially altered.

Contract end dates

- 4.13** Where a *contract* does not specify an *end date* it **must** allow for periodic review and subsequent termination of the *contract* by the relevant entity, if the relevant entity determines that it does not continue to represent value for money.

Third-party procurement

- 4.14** *Procurement* by third parties on behalf of a relevant entity can be a valid way to procure *goods* and services, provided it achieves value for money. *Relevant entities* **must** not use third-party arrangements to avoid the rules in the CPRs when procuring *goods* and services.

5. Encouraging competition

- 5.1 Competition is a key element of the Australian Government's *procurement* framework. Effective competition requires non-discrimination and the use of competitive procurement processes.
- 5.2 Participation in *procurement* imposes costs on *relevant entities* and *potential suppliers*. Those costs should be considered when designing a process that is commensurate with the scale, scope and risk of the proposed *procurement*.

Non-discrimination

- 5.3 The Australian Government's procurement framework is non-discriminatory. All *potential suppliers* to government **must**, subject to these CPRs, be treated equitably based on their commercial, legal, technical and financial abilities and not be discriminated against due to their size, degree of foreign affiliation or ownership, location, or the origin of their *goods* and services.

Small and Medium Enterprises

- 5.4 To ensure that *Small and Medium Enterprises (SMEs)* can engage in fair competition for Australian Government business, *officials* should apply *procurement* practices that do not unfairly discriminate against *SMEs* and provide appropriate opportunities for *SMEs* to compete. *Officials* should consider, in the context of value for money:
- the benefits of doing business with competitive *SMEs* when specifying requirements and evaluating value for money;
 - barriers to entry, such as costly preparation of *submissions*, that may prevent *SMEs* from competing;
 - SMEs'* capabilities and their commitment to local or regional markets; and
 - the potential benefits of having a larger, more competitive supplier base.
- 5.5 The Australian Government is committed to *non-corporate Commonwealth entities* sourcing at least 10 per cent of *procurement* by value from *SMEs*.

6. Efficient, effective, economical and ethical procurement

- 6.1 The Australian Government promotes the proper use of public resources. Proper use means efficient, effective, economical and ethical use that is not inconsistent with the policies of the Commonwealth.
- 6.2 Efficient relates to the achievement of the maximum value for the resources used. In *procurement*, it includes the selection of a *procurement* method that is not inconsistent with policies of the Commonwealth and that is the most appropriate for the *procurement* activity, given the scale, scope and risk of the *procurement*.
- 6.3 Effective relates to the extent to which intended outcomes or results are achieved. It concerns the immediate characteristics, especially price, quality and quantity, and the degree to which these contribute to specified outcomes.
- 6.4 Economical relates to minimising cost. It emphasises the requirement to avoid waste and sharpens the focus on the level of resources that the Commonwealth applies to achieve outcomes.
- 6.5 Ethical relates to honesty, integrity, probity, diligence, fairness and consistency. Ethical behaviour identifies and manages conflicts of interests, and does not make improper use of an individual's position.

Ethical behaviour

- 6.6 In particular, *officials* undertaking *procurement* for the Australian Government **must** act ethically throughout the *procurement*. Ethical behaviour includes:
- recognising and dealing with actual, potential and perceived conflicts of interest;
 - dealing with *potential suppliers*, *tenderers* and *suppliers* equitably, including by
 - seeking appropriate internal or external advice where probity issues arise, and
 - not accepting inappropriate gifts or hospitality;
 - carefully considering the use of public resources; and
 - complying with all directions, including relevant entity requirements, in relation to gifts or hospitality, the information privacy principles of the *Privacy Act 1988* and the security provisions of the *Crimes Act 1914*.
- 6.7 *Relevant entities* **must** not seek to benefit from *supplier* practices that may be dishonest, unethical or unsafe. This includes not entering into *contracts* with *tenderers* who have had a judicial decision against them (not including decisions under appeal) relating to employee entitlements and who have not paid the claim. *Officials* should seek declarations from all *tenderers* confirming that they have no such unsettled judgments against them.
- 6.8 If a complaint about *procurement* is received, *relevant entities* **must** apply equitable and non-discriminatory complaint-handling procedures. *Relevant entities* should aim to manage the complaint process internally, where possible, through communication and conciliation.

7. Accountability and transparency in procurement

7.1 The Australian Government is committed to ensuring accountability and transparency in its procurement activities. Accountability means that *officials* are responsible for the actions and decisions that they take in relation to *procurement* and for the resulting outcomes. Transparency involves *relevant entities* taking steps to enable appropriate scrutiny of their procurement activity. The fundamental elements of accountability and transparency in *procurement* are outlined in this section.

Records

7.2 *Officials* **must** maintain appropriate documentation for each *procurement*. The appropriate detail of documentation should be commensurate with the scale, scope and risk of the *procurement*. Documentation should provide accurate and concise information on:

- a. the requirement for the *procurement*;
- b. the process that was followed;
- c. how value for money was considered and achieved; and
- d. relevant decisions and the basis of those decisions.

7.3 *Relevant entities* **must** have appropriate documentation with the *supplier*, such as a written *contract* or purchase order.

7.4 Documentation **must** be retained in accordance with the *Archives Act 1983*.

AusTender

7.5 *AusTender*,⁴ the Australian Government's *procurement* information system, is a centralised web-based facility that publishes a range of information, including *relevant entities'* planned *procurements*, *open tenders* and *contracts* awarded. It also supports secure electronic tendering to deliver integrity and efficiency for *relevant entities* and *potential suppliers*.

7.6 *AusTender* is the system used to enable *relevant entities* to meet their publishing obligations under the CPRs. It also enables *relevant entities* to monitor and review their *AusTender*-based *procurements*, including approaches to market, publication of *contracts* and *multi-use lists*, and amendments to *contracts* and *multi-use lists*.

⁴ *AusTender* is available at www.tenders.gov.au

Annual procurement plans

- 7.7 In order to draw the market's early attention to potential procurement opportunities, each relevant entity **must** publish by 1 July each year on *AusTender* an *annual procurement plan* containing a short strategic procurement outlook.
- 7.8 The *annual procurement plan* should include the subject matter of any significant planned *procurement* and the estimated publication date of the *approach to market*. *Relevant entities* should update their plans regularly throughout each financial year.

Notifications to the market

- 7.9 *Relevant entities must* use *AusTender* to publish *open tenders* and, to the extent practicable, to make relevant *request documentation* available. *Relevant entities* may use *AusTender* to publish *prequalified tender* or *limited tender approaches to market* and make relevant *request documentation* available.
- 7.10 *Relevant entities* should include relevant *evaluation criteria* in *request documentation* to enable the proper identification, assessment and comparison of *submissions* on a fair, common and appropriately transparent basis.
- 7.11 In any additional notification through other avenues, such as printed media, the details selected for inclusion in the notification **must** be the same as those published on *AusTender*.
- 7.12 Where a relevant entity provides *request documentation* or any other document, already published on *AusTender* in any other form (for example, a printed version) that documentation **must** be the same as that published on *AusTender*.
- 7.13 A notice of a *multi-use list* **must** be published on *AusTender*. Where a *multi-use list* is open to applications at any time, an *approach to market* inviting applications **must** be published continuously on *AusTender* for the entire period of the *multi-use list's* operation. Alternatively, where a *multi-use list* will be updated only at specific times and according to set deadlines for application, an *approach to market* inviting applications **must** be re-published at least once every 12 months.

Providing information

- 7.14 *Officials must*, on request, promptly provide, to eligible *potential suppliers*, documentation that includes all information necessary to permit the *potential supplier* to prepare and lodge *submissions*.
- 7.15 Following the rejection of a *submission* or the award of a *contract*, *officials must* promptly inform affected *tenderers* of the decision. Debriefings **must** be made available, on request, to unsuccessful *tenderers* outlining the reasons the *submission* was unsuccessful. Debriefings **must** also be made available, on request, to the successful *supplier(s)*.

Reporting arrangements

7.16 *Relevant entities must* report *contracts* and amendments on *AusTender* within 42 days of entering into (or amending) a *contract* if they are valued at or above the *reporting threshold*.

7.17 The *reporting thresholds* (including *GST*) are:

- a. \$20,000 for non-corporate *Commonwealth entities*; and
- b. for prescribed corporate *Commonwealth entities*,
 - i. \$400,000 for *procurements* other than *procurement* of construction services, or
 - ii. \$7.5 million for *procurement* of construction services.

7.18 Regardless of value, *standing offers must* be reported on *AusTender* within 42 days of the relevant entity entering into or amending such arrangements. Relevant details in the *standing offer* notice, such as *supplier* details and the names of other *relevant entities* participating in the arrangement, **must** be reported and kept current.

Subcontractors

7.19 *Relevant entities must* make available on request, the names of any subcontractor(s) engaged by a contractor in respect of a *contract*.

- a. *Relevant entities must* require contractors to agree to the public disclosure of the names of any subcontractors engaged to perform services in relation to a *contract*.
- b. Contractors **must** be required to inform relevant subcontractors that the subcontractor's participation in fulfilling a *contract* may be publicly disclosed.

Treatment of confidential information

7.20 When conducting a *procurement* and awarding a *contract*, *relevant entities* should take appropriate steps to protect the Commonwealth's confidential information. This includes observing legal obligations, such as those under the *Privacy Act 1988*, and statutory secrecy provisions.

7.21 *Submissions must* be treated as confidential before and after the award of a *contract*. Once a *contract* has been awarded the terms of the *contract*, including parts of the *contract* drawn from the *supplier's submission*, are not confidential unless the relevant entity has determined and identified in the *contract* that specific information is to be kept confidential in accordance with the guidance on *Confidentiality Throughout the Procurement Cycle* at www.finance.gov.au/procurement.

7.22 The need to maintain the confidentiality of information should always be balanced against the public accountability and transparency requirements of the Australian Government. It is therefore important for *officials* to plan for, and facilitate, appropriate disclosure of procurement information. In particular, *officials* should:

- a. include provisions in *request documentation* and *contracts* that alert *potential suppliers* to the public accountability requirements of the Australian Government, including disclosure to the Parliament and its committees;
- b. where relevant, include a provision in *contracts* to enable the Australian National Audit Office to access contractors' records and premises to carry out appropriate audits; and
- c. consider, on a case-by-case basis, any request by a *supplier* for material to be treated confidentially after the award of a *contract*, and enter into commitments to maintain confidentiality only where such commitments are appropriate.

7.23 Where confidential information is required to be disclosed, for example following a request from a parliamentary committee, reasonable notice in writing **must** be given to the party from whom the information originated.

Other obligations

7.24 Other reporting and disclosure obligations apply to *officials* undertaking *procurement*, including:

- a. disclosure of procurement information for relevant entity annual reporting purposes;
- b. disclosure of non-compliance with the CPRs through the Commonwealth's compliance reporting process;
- c. disclosure to the Parliament and its committees, as appropriate, in line with the Government Guidelines for *Official Witnesses before Parliamentary Committees and Related Matters*;
- d. disclosure of information consistent with the *Freedom of Information Act 1982*; and
- e. disclosure of discoverable information that is relevant to a case before a court.

8. Procurement risk

- 8.1** Risk management comprises the activities and actions taken by a relevant entity to ensure that it is mindful of the risks it faces, that it makes informed decisions in managing these risks, and identifies and harnesses potential opportunities.⁵
- 8.2** *Relevant entities must* establish processes for the identification, analysis, allocation and treatment of risk when conducting a *procurement*. The effort directed to risk assessment and management should be commensurate with the scale, scope and risk of the *procurement*. *Relevant entities* should consider risks and their potential impact when making decisions relating to value for money assessments, approvals of proposals to spend *relevant money* and the terms of the *contract*.
- 8.3** As a general principle, risks should be borne by the party best placed to manage them; that is, *relevant entities* should generally not accept risk which another party is better placed to manage a particular risk. Similarly, where a relevant entity is best placed to manage a particular risk, it should not seek to inappropriately transfer that risk to the *supplier*.

⁵ Department of Finance, Comcover *Better Practice Guide - Risk Management*

9. Procurement method

9.1 Australian Government *procurement* is conducted by one of three methods *open tender*, *prequalified tender* or *limited tender*. These methods are detailed in this section.

Requirement to estimate value of procurement

9.2 The expected value of a *procurement* **must** be estimated before a decision on the procurement method is made. The expected value is the maximum value (including *GST*) of the proposed *contract*, including options, extensions, renewals or other mechanisms that may be executed over the life of the *contract*.

9.3 The maximum value of the *goods* and services being procured **must** include:

- a. all forms of remuneration, including any premiums, fees, commissions, interest, allowances and other revenue streams that may be provided for in the proposed *contract*;
- b. the value of the *goods* and services being procured, including the value of any options in the proposed *contract*; and
- c. any taxes or charges.

9.4 Where a *procurement* is to be conducted in multiple parts with *contracts* awarded either at the same time or over a period of time, with one or more *suppliers*, the expected value of the *goods* and services being procured **must** include the maximum value of all of the *contracts*.

9.5 A *procurement* **must** not be divided into separate parts solely for the purpose of avoiding a relevant *procurement threshold*.

9.6 Where the maximum value of a *procurement* over its entire duration cannot be estimated the *procurement* **must** be treated as being valued above the relevant *procurement threshold*.

Procurement thresholds

9.7 Where the expected value of a *procurement* is at or above the relevant *procurement threshold* and an exemption in Appendix A does not apply, the rules in Division 2 **must** also be followed. The *procurement thresholds* (including *GST*) are:

- a. for non-corporate *Commonwealth entities*, other than for *procurements* of *construction services*, the *procurement threshold* is \$80,000;
- b. for prescribed *corporate Commonwealth entities*, other than for *procurements* of *construction services*, the *procurement threshold* is \$400,000; or
- c. for *procurements* of *construction services* by *relevant entities*, the *procurement threshold* is \$7.5 million.

Three procurement methods

Method 1 – Open tender

9.8 *Open tender* involves publishing an *open approach to market* and inviting *submissions*.

Method 2 – Prequalified tender

9.9 *Prequalified tender* involves publishing an *approach to market* inviting *submissions* from all *potential suppliers* on:

- a. a shortlist of *potential suppliers* that responded to an initial *open approach to market* on *AusTender*;
- b. a list of *potential suppliers* selected from a *multi-use list* established through an *open approach to market*; or
- c. a list of all *potential suppliers* that have been granted a specific licence or comply with a legal requirement, where the licence or compliance with the legal requirement is essential to the conduct of the *procurement*.

9.10 *Officials* should report the original *procurement* method used to establish the *standing offer* when they report *procurements* from *standing offers*.

Method 3 – Limited tender

9.11 *Limited tender* involves a relevant entity approaching one or more *potential suppliers* to make *submissions*, where the process is neither an *open tender* or *prequalified tender*.

9.12 For *procurements* at or above the relevant *procurement threshold*, *limited tender* can only be conducted in accordance with paragraph 10.3, or where a *procurement* is exempt as detailed in Appendix A.

Division 2

MARCH

ADDITIONAL RULES FOR PROCUREMENTS AT OR ABOVE THE RELEVANT PROCUREMENT THRESHOLD



10. Additional rules

- 10.1** The rules set out in Division 2 are additional to those in Division 1 and **must** not be interpreted or applied in a manner that diminishes or negates Division 1.
- 10.2** A *procurement*, except a *procurement* that is specifically exempt in accordance with Appendix A, is subject to the rules contained in Division 2 if the expected value of the *procurement* is at, or above, the relevant *procurement threshold* (see paragraph 9.7).

Conditions for limited tender

- 10.3** A relevant entity **must** only conduct a *procurement* at or above the relevant *procurement threshold* through *limited tender* in the following circumstances:
- a. where, in response to an *approach to market*
 - i. no *submissions*, or no *submissions* that represented value for money, were received,
 - ii. no *submissions* that met the *minimum content and format requirements* for *submission* as stated in the *request documentation* were received, or
 - iii. no *tenderers* satisfied the conditions for participation, and the relevant entity does not substantially modify the essential requirements of the *procurement*; or
 - b. where, for reasons of extreme urgency brought about by events unforeseen by the relevant entity, the *goods* and services could not be obtained in time under *open tender* or *prequalified tender*; or
 - c. for *procurements* made under exceptionally advantageous conditions that arise only in the very short term, such as from unusual disposals, unsolicited innovative proposals, liquidation, bankruptcy, or receivership, and which are not routine *procurement* from regular *suppliers*; or
 - d. where the *goods* and services can be supplied only by a particular business and there is no reasonable alternative or substitute for one of the following reasons
 - i. the requirement is for works of art,
 - ii. to protect patents, copyrights, or other exclusive rights, or proprietary information, or
 - iii. due to an absence of competition for technical reasons; or
 - e. for additional deliveries of *goods* and services by the original *supplier* or authorised representative that are intended either as replacement parts, extensions, or continuing services for existing equipment, software, services, or installations, where a change of *supplier* would compel the relevant entity to procure *goods* and services that do not meet requirements for compatibility with existing equipment or services; or
 - f. for *procurements* in a commodity market; or
 - g. where a relevant entity procures a prototype or a first good or service that is intended for limited trial or that is developed at the relevant entity's request in the course of, and for, a particular *contract* for research, experiment, study, or original development; or
 - h. in the case of a *contract* awarded to the winner of a design contest, provided that
 - i. the contest has been organised in a manner that is consistent with these CPRs, and

- ii. the contest is judged by an independent jury with a view to a design *contract* being awarded to the winner; or
 - i. for new *construction services* consisting of the repetition of similar *construction services* that conform to a basic project for which an initial *contract* was awarded through an *open tender* or *prequalified tender*, and where the initial *approach to market* indicated that *limited tender* might be used for those subsequent *construction services*.
- 10.4** A *procurement* at or above the relevant *procurement threshold* conducted by *limited tender* is not required to meet the rules in paragraphs 10.6 -10.12 (*Request documentation*), 10.17-10.27 (Minimum time limits), or 10.31 (*Awarding contracts*).
- 10.5** In accordance with the general rules for accountability set out in these CPRs, for each *contract* awarded through *limited tender*, an *official* **must** prepare and appropriately file within the relevant entity's records management system a written report that includes:
- a. the value and type of *goods* and services procured;
 - b. a statement indicating the circumstances and conditions that justified the use of *limited tender*; and
 - c. a record demonstrating how the *procurement* represented value for money in the circumstances.

Request documentation

- 10.6** *Request documentation* **must** include a complete description of:
- a. 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 *specifications*, conformity certification, plans, drawings, or instructional materials;
 - b. any conditions for participation, including any financial guarantees, information and documents that *potential suppliers* are required to submit;
 - c. any *minimum content and format requirements*;
 - d. *evaluation criteria* to be considered in assessing *submissions*; and
 - e. any other terms or conditions relevant to the evaluation of *submissions*.
- 10.7** However, *relevant entities* are not obligated to release confidential information, information sensitive to essential security or information that may impede competition.
- 10.8** *Relevant entities* **must** ensure that *potential suppliers* and *tenderers* are dealt with fairly and in a non-discriminatory manner when providing information leading to, or following, an *approach to market*. *Relevant entities* **must** promptly reply to any reasonable request from a *potential supplier* for relevant information about a *procurement*, and when responding to such enquiries **must** avoid a *potential supplier*, or group of *potential suppliers*, gaining an unfair advantage in a competitive procurement process.

Specifications

- 10.9** In prescribing *specifications* for *goods* and services, a relevant entity **must**:
- a. not use *specifications* or prescribe any conformity assessment procedure in order to create an unnecessary obstacle to trade;
 - b. where possible, set out the *specifications* in terms of performance and functional requirements; and
 - c. base technical *specifications* on international standards, where they exist and apply to the relevant *procurement*, except where 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.

10.10 A *specification* **must** not require or refer to a particular trademark or trade name, patent, copyright, design or type, specific origin, producer, or *supplier*, unless there is no other sufficiently precise or intelligible way of describing the requirement. In an exceptional circumstance where this type of *specification* is used, words such as 'or equivalent' **must** be included in the *specification*.

10.11 A relevant entity may conduct market research and other activities in developing *specifications* for a particular *procurement* and allow a *supplier* that has been engaged to provide those services to participate in *procurements* related to those services. *Relevant entities* **must** ensure that such a *supplier* will not have an unfair advantage over other *potential suppliers*.

Modification of evaluation criteria or specifications

10.12 Where, during the course of a *procurement*, a relevant entity modifies the *evaluation criteria* or *specifications* set out in an *approach to market* or in *request documentation*, or amends or reissues an *approach to market* or *request documentation*, it **must** transmit all modifications or amended or reissued documents:

- a. to all the *potential suppliers* that are participating at the time the information is amended, if known, and, in all other cases, in the same manner as the original information; and
- b. in adequate time to allow *potential suppliers* to modify and re-lodge their *submissions*, if required.

Conditions for participation

10.13 *Relevant entities* may specify *conditions for participation* that *potential suppliers* **must** be able to demonstrate compliance with in order to participate in a *procurement* or, if applicable, class of *procurement*. *Conditions for participation* **must** be limited to those that will ensure that a *potential supplier* has the legal, commercial, technical and financial abilities to fulfil the requirements of the *procurement*.

10.14 *Conditions for participation* may require relevant prior experience where that experience is essential to meet the requirements of the *procurement* but **must** not specify, as a requirement, that *potential suppliers* have previous experience with the relevant entity or with the Australian Government or in a particular location.

10.15 In assessing whether a *tenderer* satisfies the conditions for participation, a relevant entity **must**:

- a. evaluate financial, commercial, and technical abilities on the basis of the *tenderer's* business activities, wherever they have occurred; and
- b. base its determination solely on the *conditions for participation* that the relevant entity has specified in either the *approach to market* or the *request documentation*.

10.16 A relevant entity may exclude a *tenderer* on grounds such as bankruptcy, insolvency, false declarations, or significant deficiencies in performance of any substantive requirement or obligation under a prior *contract*.

Minimum time limits

- 10.17** *Potential suppliers must* be required to lodge *submissions* in accordance with a common deadline.
- 10.18** *Relevant entities must* provide sufficient time for *potential suppliers* to prepare and lodge *submissions* in response to an approach to market. Time limits discussed in this section represent minimum time limits to lodge *submissions* and should not be treated as default time limits.
- 10.19** The time limit for *potential suppliers* to lodge a *submission must* be at least 25 days from the date and time that a relevant entity publishes an *approach to market* for an *open tender* or a *prequalified tender*, except under the following circumstances where a relevant entity may establish a time limit that is less than 25 days but no less than 10 days:
- where the relevant entity has published details of the *procurement* in an *annual procurement plan* on *AusTender*, at least 30 days and not more than 12 months in advance, and those details include a description of the *procurement*, the timing of the *approach to market* and the procedure to obtain *request documentation*;
 - where the relevant entity procures commercial goods and services;
 - in the case of second or subsequent approaches to the market for recurring *procurements*; or
 - where a genuine state of urgency renders the normal time limit impracticable.
- 10.20** Where a relevant entity has not electronically issued an *approach to market*, the 25 day period referred to in the preceding paragraph **must** be extended to 30 days.
- 10.21** The time limits stated above apply to each *approach to market*. That is, a single *approach to market must* comply with the time limits or, in the case of a multi-stage *procurement* (such as inviting expressions of interest followed by a *prequalified tender*), each *approach to market must* comply with the time limits stated in paragraph 10.19.
- 10.22** Where a relevant entity intends to specify *conditions for participation* that require *potential suppliers* to undertake a separate registration procedure, the relevant entity **must** state the time limit for responding to the registration in the *approach to market*. Any such *conditions for participation must* be published in sufficient time to enable all *potential suppliers* to complete the registration procedures within the time limit for the *procurement*.
- 10.23** Where a relevant entity extends the time limit for registration or *submission*, or where negotiations are terminated and *potential suppliers* are permitted to lodge new *submissions*, the new time limit **must** apply equitably.

Late submissions

- 10.24** Late *submissions must* not be accepted unless the *submission* is late as a consequence of mishandling by the relevant entity. A relevant entity **must** not penalise any *potential supplier* whose *submission* is received after the specified deadline if the delay is due solely to mishandling by the relevant entity.
- 10.25** Relevant entity mishandling does not include mishandling by a courier or mail service provider engaged by a *potential supplier* to deliver a *submission*. It is the responsibility of the *potential supplier* to ensure that the *submission* is dispatched in sufficient time for it to be received by the relevant entity by the deadline.

10.26 Late *submissions* should be returned unopened to the *potential supplier* who submitted them, to:

- a. ensure that they are not evaluated or compared with *submissions* which were submitted by the due time and date;
- b. demonstrate to other *tenderers* that the process for receiving *submissions* is fair and impartial; and
- c. eliminate scope for any suggestion that the *submission* was rejected for any reason other than because it was late.

10.27 It may be necessary to open a late *submission* if there is no return address or any indication of which *approach to market* the *submission* relates. Where a *submission* has been opened under such circumstances the *potential supplier* should be advised that the *submission* was rejected due to lateness and advised of the reason it was opened.

Receipt and opening of submissions

10.28 Procedures to receive and open *submissions* **must** guarantee fairness and impartiality and **must** ensure that *submissions* are treated in confidence.

10.29 Where a relevant entity provides *tenderers* with opportunities to correct unintentional errors of form between the opening of *submissions* and any decision, the relevant entity **must** provide the opportunity equitably to all *tenderers*.

10.30 Further consideration **must** be given only to *submissions* that meet *minimum content and format requirements*.

Awarding contracts

10.31 Unless a relevant entity determines that it is not in the public interest to award a *contract*⁶, it **must** award a *contract* to the *tenderer* that the relevant entity has determined:

- a. satisfies the *conditions for participation*;
- b. is fully capable of undertaking the *contract*; and
- c. will provide the best value for money, in accordance with the essential requirements and *evaluation criteria* specified in the *approach to market* and *request documentation*.

10.32 A relevant entity **must** not cancel a *procurement*, or terminate or modify an awarded *contract*, so as to avoid the rules of Division 2 of these CPRs.

⁶ Public interest grounds generally arise in response to unforeseen events or new information that materially affects the objectives or reasons underlying the original procurement requirement as specified in the request document.

Appendices and Index

MARCH



Appendix A: Exemptions from Division 2

Procurements that are exempt from the rules of Division 2 by the operation of Appendix A are still required to be undertaken in accordance with value for money and with the rules of Division 1 of these CPRs.

Division 2 does not apply to:

1. leasing or *procurement* of real property or accommodation (note: the *procurement* of *construction services* is not exempt);
2. *procurement* of *goods* and services by a relevant entity from other Commonwealth, state, territory or local government entities where no commercial market exists or where legislation or Commonwealth policy requires the use of a government provider (for example, tied legal services);
3. *procurements* funded by international grants, loans or other assistance, where the provision of such assistance is subject to conditions inconsistent with this document;
4. *procurements* funded by grants and sponsorship payments from non-Commonwealth entities;
5. *procurement* for the direct purpose of providing foreign assistance;
6. *procurement* of *research and development* services, but not the *procurement* of inputs to *research and development* undertaken by a relevant entity;
7. the engagement of an expert or neutral person, including engaging counsel or barristers, for any current or anticipated litigation or dispute;
8. *procurement* of *goods* and services (including construction) outside Australian territory, for consumption outside Australian territory;
9. acquisition of fiscal agency or depository services, liquidation and management services for regulated financial institutions, and sale and distribution services for government debt;
10. *procurement* of motor vehicles;
11. *procurement* by the Future Fund Management Agency of investment management, investment advisory, or master custody and safekeeping services for the purposes of managing and investing the assets of the Future Fund;
12. *procurement* of blood plasma products or plasma fractionation services;
13. *procurement* of government advertising services;⁷
14. *procurement* of *goods* and services by, or on behalf of, the Defence Intelligence Organisation, the Defence Signals Directorate, or the Defence Imagery and Geospatial Organisation;
15. *contracts for labour hire*;
16. *procurement* of *goods* and services from a business that primarily exists to provide the services of persons with a disability; and
17. *procurement* of *goods* and services from an SME with at least 50 per cent Indigenous ownership.⁸

⁷ This includes information and advertising services for the development and implementation of information and advertising campaigns.

⁸ Commonwealth Cleaning Services Guidelines **must** be complied within the use of this exemption for the procurement of cleaning services.

Appendix B: Prescribed Corporate Commonwealth Entities

The following list of *corporate Commonwealth entities* **must** comply with the Commonwealth Procurement Rules:

1. Australian Human Rights Commission*
2. Australian Institute of Health and Welfare
3. Australian Institute of Marine Science
4. Australian Maritime Safety Authority
5. Australian National Maritime Museum
6. Australian Nuclear Science and Technology Organisation
7. Australian War Memorial
8. Comcare
9. Commonwealth Scientific and Industrial Research Organisation
10. Director of National Parks
11. Export Finance and Insurance Corporation
12. Grains Research and Development Corporation
13. Murray-Darling Basin Authority
14. National Gallery of Australia
15. National Museum of Australia
16. Reserve Bank of Australia
17. Sydney Harbour Federation Trust
18. Tourism Australia

* These entities must apply the CPRs as if they were a *non-corporate Commonwealth entity*, including by adopting the *reporting and procurement thresholds for non-corporate Commonwealth entities*.

Appendix C: Definitions

The following definitions apply for the purposes of these CPRs:

Accountable authority – as defined in section 8 of the *Public Governance, Performance and Accountability Act 2013* (PGPA Act)

Annual procurement plan – a document published on *AusTender* through which *relevant entities* provide a short summary of their strategic *procurement* outlook for the coming year and information on significant *procurements* they plan to undertake.

Approach to market – any notice inviting *potential suppliers* to participate in a *procurement* which may include a request for tender, request for quote, request for expression of interest, request for application for inclusion on a *multi-use list*, request for information or request for proposal.

Note: the acronym 'ATM' is used on *AusTender* and other *procurement* documents to reference an approach to market.

AusTender – the central web-based facility for the publication of Australian Government *procurement* information, including business opportunities, annual *procurement* plans and *contracts* awarded.

Commercial goods and services – commercial *goods* and services are of a type that are offered for sale to, and routinely purchased by, non-government buyers for non-government purposes, including any modifications common in the commercial marketplace and any minor modifications not common in the commercial marketplace.

Commodity market – a recognised exchange dealing in generic, largely unprocessed, *goods* that can be processed and resold.

Conditions for participation – minimum conditions that *potential suppliers* **must** demonstrate compliance with, in order to participate in a *procurement* process or for *submissions* to be considered. This may include a requirement to undertake an accreditation or validation procedure.

Construction services – *procurements* related to the construction of buildings and *procurements* of works as defined by the *Public Works Committee Act 1969*.

Contract – an arrangement, as defined by s23(2) of the PGPA Act, for the *procurement* of *goods* and services under which *relevant money* is payable or may become payable. Note: this includes *standing offers* and panels.

Contracts for labour hire – a *contract* under which an relevant entity engages an individual to provide labour, where the individual is engaged either directly or through a firm which primarily exists to provide the services of only that individual. This includes the appointment of an eminent individual to a special role by an *Accountable authority*, or the appointment of a person or persons by an *Accountable authority* to a governance committee (for example, an audit committee, ethics committee or steering committee), but does not include the engagement of consultants.

Corporate Commonwealth entities – as defined in section 8 of the *Public Governance, Performance and Accountability Act 2013* (PGPA Act)

Days – means calendar *days*.

End date (in a contract) – can be defined by reference to a specific date or by reference to a specific event.

Evaluation criteria – the criteria that are used to evaluate the compliance and/or relative ranking of *submissions*. *Evaluation criteria* **must** be clearly stated in the *request documentation*.

Goods – every type of right, interest or thing which is legally capable of being owned. This includes, but is not restricted to, physical *goods* and real property as well as intangibles such as intellectual property, *contract options* and goodwill.

GST – As defined by the *A New Tax Systems (Goods and Services Tax) Act 1999*.

Limited tender – involves an relevant entity approaching one or more *potential suppliers* to make *submissions*, where the process does not meet the rules for *open tender* or *prequalified tender*.

Minimum content and format requirements – criteria that a *tenderer's submission* is required to meet, when responding to an approach to market, to be eligible for further consideration in a *procurement* process.

Multi-use list – a list, intended for use in more than one *procurement* process, of pre-registered *suppliers* who have satisfied the *conditions for participation* on the list. Each approach to a *multi-use list* is considered a new *procurement*.

Non-corporate Commonwealth entities – as defined in section 8 of the *Public Governance, Performance and Accountability Act 2013* (PGPA Act).

Officials – *Officials* as defined in section 8 of the *Public Governance, Performance and Accountability Act 2013* (PGPA Act).

Open approach to market – any notice inviting all *potential suppliers* to participate in a *procurement* which may include a request for tender, request for quote, request for expression of interest, request for application for inclusion on a *multi-use list*, request for information and request for proposal.

Open tender – involves publishing an *open approach to market* and inviting *submissions*.

Potential supplier – an entity or person who may respond to an approach to market.

Prequalified tender – involves publishing an *approach to market* inviting *submissions* from all *potential suppliers* on:

- a. a shortlist of *potential suppliers* that responded to an initial *open approach to market* on *AusTender*;
- b. a list of *potential suppliers* selected from a *multi-use list* established through an *open approach to market*; or
- c. a list of all *potential suppliers* that have been granted a specific licence or comply with a legal requirement, where the licence or compliance with the legal requirement is essential to the conduct of the *procurement*.

Procurement – refer to paragraphs 2.7 to 2.9

Procurement thresholds – refer to paragraph 9.7

Public resources – as defined in section 8 of the *Public Governance, Performance and Accountability Act 2013* (PGPA Act).

Relevant money – as defined in section 8 of the *Public Governance, Performance and Accountability Act 2013* (PGPA Act).

Relevant entity – *non-corporate Commonwealth entities* and prescribed *corporate Commonwealth entities* (listed at Appendix B) that **must** comply with the CPRs when performing duties related to *procurement*.

Reporting thresholds – refer to paragraph 9.7

Request documentation – documentation provided to *potential suppliers* to enable them to understand and assess the requirements of the procuring relevant entity and to prepare appropriate and responsive *submissions*. This general term includes documentation for expressions of interest, *multi-use lists*, *open tender*, *prequalified tender* and *limited tender*.

Research and development – research is described as systematic enquiry or investigation into a subject in order to discover facts or principles. Research includes surveys, market research, scientific research and educational research. Development applies to the function of creating/producing new and improved products, devices, processes or services. Development also extends to design, proof of concept and the production of prototypes.

Small and Medium Enterprises (SMEs) – an Australian or New Zealand firm with fewer than 200 full-time equivalent employees.

Specification – a description of the features of the *goods* and services to be procured.

Standing offer – an arrangement setting out the terms and conditions, including a basis for pricing, under which a *supplier* agrees to supply specified *goods* and services to an relevant entity for a specified period.

Submission – any formally submitted response from a *potential supplier* to an approach to market. *Submissions* may include tenders, responses to expressions of interest, applications for inclusion on a *multi-use list* or responses to request for quote.

Supplier – an entity or person who has entered into a *contract* with the Commonwealth.

Tenderer – an entity or person who has responded with a *submission* to an approach to market.

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To be added.

WORKING DRAFT 13 MARCH