



## FREE TRADE AGREEMENT - GUIDELINES

### INTRODUCTION

As of 1 December 2017, the Commonwealth Government is a signatory to the Australia-United States Free Trade Agreement (AUSFTA), the Australia-Chile Free Trade Agreement (ACIFTA), the Korea-Australia Free Trade Agreement (KAFTA), the Japan-Australia Economic Partnership Agreement (JAEPA) and the Singapore-Australia Free Trade Agreement (SAFTA). The Government Procurement chapters of each free trade agreement<sup>1</sup> contain legally binding requirements relating to procurement activities conducted by particular government agencies, including Western Australian government agencies.

The purpose of these guidelines is to provide government agencies with information on conducting procurement in accordance with the Government Procurement chapters of the free trade agreements. These guidelines do not substitute for a familiarity with the Government Procurement chapters of the free trade agreements.

Advice and assistance regarding the free trade agreements may be obtained from:

State Supply Commission  
4th Floor, Optima Centre  
16 Parkland Road  
OSBORNE PARK WA 6017  
Telephone: (08) 6551 1500

### WESTERN AUSTRALIAN GOVERNMENT ENTITIES TO WHICH THE FREE TRADE AGREEMENTS APPLY

Each free trade agreement contains a schedule which stipulates which public authorities are subject to the agreements. The schedules are available in the full text of the Government Procurement chapters of each agreement. The agreements are available on the Department of Foreign Affairs and Trade website at [www.dfat.gov.au](http://www.dfat.gov.au).

A public authority that is stipulated in a schedule but has since undergone machinery of government changes is still subject to the agreement(s).

### STATE SUPPLY COMMISSION ACT 1991

The requirements of the free trade agreements are in addition to the requirements of supply policies issued under the *State Supply Commission Act 1991*. Government agencies which are public authorities for the purposes of the *Act* must comply with those supply policies as well as with the free trade agreements.

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<sup>1</sup> The term "free trade agreements", in these guidelines, includes references to the Australia-United States Free Trade Agreement (AUSFTA), Australia-Chile Free Trade Agreement (ACIFTA), Korea-Australia Free Trade Agreement (KAFTA), the Japan-Australia Economic Partnership Agreement (JAEPA) and the Singapore-Australia Free Trade Agreement (SAFTA). While Australia is signatory to other international free trade agreements, these are the only agreements which currently contain obligations relating to government procurement.

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### COVERED PROCUREMENTS

The free trade agreements apply to “covered procurements” undertaken by government agencies.

A “covered procurement” means a procurement of goods and/or services by any contractual means, including purchase, rental, or lease, with or without an option to buy, build-operate-transfer contracts, and public works concessions contracts, for which:

- the total contract value is estimated to equal or exceed \$657,000 for the procurement of goods and/or services; and
- the total contract value is estimated to equal or exceed \$9,247,000 for the procurement of construction services.

Appendix 1 contains a list of procurements to which the free trade agreements do not apply.

### TOTAL CONTRACT VALUE

The free trade agreements require that a procurement must be valued on a total estimated contract value basis to determine whether it is a covered procurement.

In determining the total estimated contract value for a procurement, a government agency must take into account:

- all forms of remuneration, including any premiums, fees, commissions, interest and other revenue streams that may be provided for in the proposed contract and, where the procurement provides for the possibility of option clauses, the total maximum value of the procurement, inclusive of optional purchases; and
- any taxes or charges (including Goods and Services Tax).

Where a procurement is to be conducted in multiple parts, with contracts to be awarded at the same time or over a given period to one or more suppliers, a government agency must base its calculation on the total maximum value of the procurement over its entire duration.

A government agency must not divide a procurement into separate parts nor use a particular method to estimate the value of the procurement to circumvent the requirements of the free trade agreements.

In the case of procurement by lease or rental, or a procurement that does not specify a total price, the basis for estimating the value of the procurement is as follows:

- (a) in the case of a fixed term contract,
  - (i) where the term is twelve months or less, the total estimated contract value for the contract’s duration; or
  - (ii) where the term exceeds twelve months, the total estimated contract value, including the estimated residual value; or
- (b) in the case of a contract for an indefinite period, the estimated monthly instalment multiplied by 48.

Where there is doubt as to whether the contract is to be a fixed term contract, a procuring entity must use this method for estimating the value of the procurement.

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Where the total contract value of a procurement cannot be estimated, the procurement must be treated as a covered procurement.

### PROCUREMENT METHODS

Under the free trade agreements, a government agency may procure via one of the following three methods:

- (a) open tendering procedures;
- (b) selective tendering procedures in accordance with the rules described below; and
- (c) limited tendering procedures in accordance with the rules described below.

Selective tendering and limited tendering are allowed only in specific conditions.

#### Open Tendering

Open tendering is a procurement method where all interested suppliers may submit a tender.

#### Selective Tendering

All selective tendering processes must be conducted using either:

1. a multi-use list (pre-qualified suppliers);
2. a list of suppliers that have responded to a notice inviting suppliers to submit applications for participation in a procurement;
3. a list of potential suppliers that have responded to a request for expressions of interest (EOI); or
4. a list of all potential suppliers that have been granted a specific licence or which have been determined to comply with specific legal requirements that exist independent of the procurement process, where the licence or compliance with the legal requirement is essential to the conduct of the procurement.

For methods 2 and 3, an initial open approach to the market must be undertaken to identify potential suppliers eligible and interested in participating in the selective tender process.

For **all** methods:

- government agencies must invite tenders from the largest number of Australian, United States, Chilean, Korean, Japanese and Singaporean suppliers that is consistent with the efficient operation of the procurement system; and
- the time limits described later in these guidelines apply.

#### Selective Tendering from a Multi-Use List (Pre-qualified Suppliers)

A government agency may invite all or some of the suppliers listed in the multi-use list to submit tenders. The government agency must invite tenders from the largest number of Australian, United States, Chilean, Korean, Japanese and Singaporean suppliers that is consistent with the efficient operation of the procurement process.

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### Selective Tendering from a notice inviting applications for participation, or from an EOI.

A government agency may use the list of suppliers that lodge a compliant response to a notice inviting applications for participation, or to an EOI, as the basis for inviting potential suppliers to submit tenders.

The government agency's invitation to submit tenders must be sent to all suppliers that lodged a compliant response unless the notice inviting applications for participation or the EOI expressly stated that limited suppliers would be invited to bid.

Providing that relevant requirements and evaluation criteria have been specified in the notice inviting applications for participation, or the EOI, or the associated request documentation, a government agency may:

- in assessing technical ability, assess the extent to which a submission meets the technical and performance specifications of the procurement; and
- limit the number of suppliers that it invites to tender, based on its rating of submissions, provided that the largest number of potential Australian, United States, Chilean, Korean, Japanese and Singaporean suppliers is invited that is consistent with the efficient operation of the procurement process.

In all other cases, the government agency must invite all suppliers that have responded to the request for expressions of interest and that meet the conditions for participation to submit a tender.

### Selecting on the Basis of a Licence or Specific Legal Requirement

Government agencies may conduct a selective tender from a list of all potential suppliers that have been granted a licence, or that have been determined to comply with specific legal requirements that exist independent of the procurement process, provided that:

- the requirement for a licence or compliance with specific legal requirements is essential to the conduct of the procurement; and
- the complete list of such potential suppliers is maintained by the appropriate agency.

Otherwise, the government agency must invite all suppliers on the list to submit tenders.

### Information on Decisions Relating to a Participation in a Covered Procurement

Where a supplier applies for participation in a covered procurement, the government agency must promptly advise the supplier of its decision with respect to its application.

Where a government agency:

- rejects an application for participation in a covered procurement;
- rejects a request for inclusion on a multi-use list; or
- ceases to recognise a supplier as having satisfied the conditions for participation,

the government agency must promptly inform the supplier and provide, on request by the supplier, a written explanation of its decision.

### Establishing and Maintaining Multi-Use Lists (Pre-qualified Suppliers)

A multi-use list is a list of suppliers that:

- a government agency has determined satisfy the conditions for participation in that list; and
- the government agency intends to use more than once.

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Where a government agency wishes to establish a multi-use list (pre-qualified suppliers), a notice must be issued in electronic form inviting interested suppliers to apply for inclusion on the list. The notice must include:

- a description of the procurement, or procurement categories, for which the list may be used;
- the conditions for participation to be satisfied by potential suppliers and the methods that will be used to verify or determine a potential supplier's compliance with or satisfaction of the conditions for participation;
- the name and address of the government agency and other information necessary to contact the government agency and obtain all relevant documents relating to the list; and
- any time limit for applications for inclusion in the list.

The notice should be made available continuously.

Where a supplier applies for inclusion in a multi-use list, the government agency must promptly advise the supplier of its decision with respect to its application.

Government agencies must include all potential suppliers that satisfy the conditions for participation in a multi-use list within a reasonably short time.

### Limited Tendering

Provided that it does not do so in order to avoid competition or to protect domestic suppliers or in a manner that discriminates against United States, Chilean, Korean, Japanese or Singaporean suppliers, a government agency may contact a supplier or suppliers of its choice in the following circumstances:

- In response to a prior notice, invitation to participate, or invitation to tender, no conforming tenders were submitted, no suppliers satisfied the conditions for participation or the tenders submitted were collusive, and the government agency does not substantially modify the essential requirements of the procurement.
- The goods or services to be procured can only be supplied as a bona fide sole source of supply and no reasonable alternative or substitute goods or services exist for the following reasons:
  - (i) The requirement is for works of art;
  - (ii) The protection of patents, copyrights, or other exclusive rights;
  - (iii) Due to an absence of competition for technical reasons.
- For additional deliveries by the original supplier or its authorised agents, of goods or services that were not included in the initial procurement if a change of supplier for such additional goods or services:
  - (i) cannot be made for technical reasons such as requirements of interchangeability or interoperability with existing equipment, software, services or installations procured under the initial procurement, or due to conditions under original supplier warranties; and
  - (ii) would cause significant inconvenience or substantial duplication of costs for the procuring entity;
- For goods purchased on a commodity market.

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- If a procuring entity procures a prototype or a first good or service that is intended for limited trial or that is developed at its request in the course of, and for, a particular contract for research, experiment, study or original development. Original development of a prototype or a first good or service may include limited production or supply in order to incorporate the results of field testing and to demonstrate that the prototype or the first good or service is suitable for production or supply in quantity to acceptable quality standards, but does not include quantity production or supply to establish commercial viability or to recover research and development costs. Subsequent procurements of these newly developed goods or services, however, shall be subject to the Government Procurement chapters of the free trade agreements.
- For reasons of extreme urgency brought about by events unforeseen by the government agency, the goods or services could not be obtained in time under tendering procedures consistent with the free trade agreements.
- If additional construction services that were not included in the initial contract but that were within the objectives of the original tender documentation have, due to unforeseeable circumstances, become necessary to complete the construction services described therein. However, the total value of contracts awarded for additional construction services may not exceed 50 per cent of the value of the initial contract.
- Purchases made under exceptionally advantageous conditions that only arise in the very short term, such as from unusual disposals, unsolicited innovative proposals, liquidation, bankruptcy, or receivership, and not for routine purchases from regular suppliers.
- A contract awarded to the winner of a design contest, provided that the contest has been organised in a manner that is consistent with the Government Procurement chapters of the free trade agreements and the contest is judged by an independent jury with a view to a design contract being awarded to the winner.

### **CONDITIONS FOR PARTICIPATION**

Under the free trade agreements, government agencies must limit any conditions for participation in a covered procurement to those that ensure that a supplier has the legal, commercial, technical and financial abilities to fulfil the requirement of the procurement.

In assessing whether a supplier satisfies the conditions for participation, a government agency:

- shall evaluate the financial, commercial, and technical abilities of a supplier on the basis of that supplier's business activities both inside and outside Australia;
- may not impose the condition that, in order for a supplier to participate in a procurement, the supplier has previously been awarded one or more contracts by any Australian government agency or that the supplier has prior work experience in Australia;
- shall base its determination of whether a supplier has satisfied the conditions for participation solely on the conditions specified in advance in notices or tender documentation; and
- may require relevant prior experience where essential to meet the requirements of the procurement.

This does not preclude a supplier from being excluded on grounds such as:

- bankruptcy;
- false declarations; or

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- significant deficiencies in performance of any substantive requirement or obligation under a prior contract.

### **TENDER DOCUMENTATION**

Under the free trade agreements, a government agency must promptly provide, on request, to any supplier participating in a covered procurement, tender documentation that includes all information necessary to permit suppliers to prepare and submit responsive tenders. Unless already provided in the notice of intended procurement, such documentation must include a complete description of:

- the procurement, including the nature, scope and, if known, the quantity of the good or service to be procured or, if the quantity is not known, the estimated quantity and any requirements to be fulfilled, including any technical specifications, conformity certification, plans, drawings or instructional materials;
- an indication that the procurement is a covered procurement under the free trade agreements;
- any conditions for participation, including any financial guarantees, information and documents that suppliers are required to submit;
- all criteria to be considered in the awarding of the contract;
- where there will be a public opening of tenders, the date, time, and place for the opening of tenders;
- if relevant, an indication of the government agency's intent to conduct negotiations; and
- any other terms or conditions relevant to the evaluation of tenders.

The government agency must promptly reply to any reasonable request for relevant information by a supplier participating in the covered procurement. However, a government agency may not provide information that would give a supplier or group of suppliers an advantage over competitors in the procurement.

### **TECHNICAL SPECIFICATIONS FOR COVERED PROCUREMENTS**

Under the free trade agreements, a government agency may not prepare, adopt or apply any technical specification or prescribe any assessment of conformity that has the purpose or the effect of creating unnecessary obstacles to trade between Australia, the United States, Chile, Korea, Japan or Singapore.

In prescribing technical specifications for goods or services to be purchased under a covered procurement, a government agency must:

- where possible, specify the technical specifications in terms of performance and functional requirements, rather than design or descriptive characteristics; and
- base technical specifications on international standards, where they exist; otherwise, on national technical regulations, recognised standards or building codes.

Unless there is no other sufficiently precise or intelligible way of describing the requirement, a specification must not require or refer to a particular trademark or trade name, patent, copyright, design or type, specific origin, producer, or supplier. Where this type of specification is absolutely necessary, words such as 'or equivalent' must be included in the specification.

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A government agency may not seek or accept in a manner that would have the effect of precluding competition, advice that may be used in the preparation or adoption of any technical specification from a person that may have a commercial interest in that procurement. For greater certainty:

- a procuring entity may conduct market research in developing specifications for a particular procurement;
- these rules are not intended to preclude a procuring entity from preparing, adopting or applying technical specifications to promote the conservation of natural resources or the protection of the environment; and
- these rules are not intended to preclude a procuring entity from preparing, adopting or applying technical specifications required to protect sensitive government information, including specifications that may affect or limit the storage, hosting or processing of such information outside the territory of the procuring entity.

### **MODIFICATIONS TO TENDER DOCUMENTATION**

The free trade agreements require that where, during the course of a covered procurement, a government agency modifies the criteria or technical requirements set out in a notice or tender documentation provided to participating suppliers, or amends or reissues a notice or tender documentation, it shall transmit all such modifications or amended or reissued notice or tender documentation:

- to all the 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
- in adequate time to allow such suppliers to modify and resubmit their initial tenders, as appropriate.

### **PUBLICATION OF NOTICE OF INTENDED PROCUREMENT**

Under the free trade agreements, government agencies undertaking a covered procurement must publish a notice inviting interested suppliers to submit tenders or applications for participation in a procurement. The notice must be published in electronic or paper media that are widely disseminated and remain readily accessible to the public for the entire period established for tendering.

The following information must be included in each notice of intended procurement:

- The name and address of the government agency, relevant contact information, and information necessary to obtain all relevant documents relating to the procurement.
- A description of the procurement and any conditions for participation.
- The address and time limit for the submission of tenders and, where appropriate, any time limit for the submission of an application for participation in a procurement, and the time frame for the delivery of goods and/or services.

This section does not apply to:

- the use of multi-use lists;
- selecting suppliers on the basis of a licence or specific legal requirements; or
- when using limited tendering.



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### TIME LIMIT FOR ADVERTISING TENDERS

The free trade agreements require that government agencies must provide potential suppliers with time limits for tendering that allow adequate time to submit applications or requests to participate in a covered procurement, and to prepare and submit responses to tender requests. The time limit must take into account the nature and complexity of the procurement. If electronic tender submission is not permitted, the time necessary for submitting tenders by non-electronic means from foreign as well as domestic locations must be considered.

Government agencies must provide potential suppliers with a minimum of 25 days<sup>1</sup> to prepare and lodge a submission in response to a tender request. Under the following circumstances a government agency may establish a time limit that is less than 25 days but is not less than 10 days:

- where a government agency has published details of the proposed procurement using the Early Tender Advice facility on Tenders WA, at least 40 days and not more than 12 months in advance, and these details include a description of the procurement, the estimated timing of the approach to the market, the estimated time limit for the submission of tenders and the procedure to obtain request documentation;
- where the government agency procures commercial property or services<sup>2</sup>; or
- where a state of urgency substantiated by the government agency renders impracticable the required time limit,

but in all cases, provided that the time limit is sufficiently long to enable suppliers to prepare and submit responsive tenders.

The time limit minimum of 25 days is:

- from the date on which the notice of intended procurement is published; or
- where a government agency has used selective tendering, from the date on which the agency invites suppliers to submit tenders.

The 25 day minimum lodgement period must be extended by 5 days for each of the following circumstances:

- where a government agency has not published invitations to tender electronically;
- where a government agency does not make tender documentation available electronically; or
- where a government agency does not accept tenders electronically.

For example, where a government agency has not published invitations to tender electronically, has not made tender documentation available electronically, and will not accept tenders electronically, then the lodgement period must be a minimum of 40 days.

Where a government agency plans to undertake a procurement using suppliers that have satisfied particular conditions for participation, the invitation to tender must include the time limit for submitting applications. When using this process, the conditions for participation must be advertised sufficiently in advance to give all potential suppliers time to initiate and, to the extent that it is compatible with the efficient operation of the procurement process, to complete the registration and qualification procedures. This does not apply in the case where notice of a multi-use list has been readily accessible in electronic form for a reasonable period.

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<sup>1</sup> Throughout this document, references to 'days' mean calendar days.

<sup>2</sup> Goods and services of a type that are sold or offered for sale to, and customarily purchased by, non-government buyers for non-government purposes, it includes goods and services with modifications customary in the commercial marketplace as well as minor modifications not customarily available in the commercial marketplace.

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Government agencies must establish a common deadline for all potential suppliers to respond to a request. This also applies when:

- as a result of a need to amend information provided to suppliers, the government agency extends the time limit for qualification or tendering procedures; or
- negotiations are terminated and suppliers are permitted to submit new tenders.

### **FORWARD PROCUREMENT PLANNING**

The free trade agreements encourage government agencies to publish, as early as possible each financial year, a notice regarding their procurement plans in relation to goods and services. The notice should include the subject matter of any planned procurement and the estimated date of the publication of the notice of intended procurement. Government agencies may publish this information through the Early Tender Advice facility on Tenders WA.

### **RECEIPT AND OPENING OF TENDERS**

Under the free trade agreements, a government agency must:

- receive and open all tenders under procedures that guarantee the fairness and impartiality of the procurement process;
- treat tenders in confidence. In particular, it shall not provide information to particular suppliers that might prejudice fair competition between suppliers; and
- not penalise any supplier whose tender is received after the time specified for receiving tenders if the delay is due solely to mishandling on the part of the government agency.

Where a government agency provides suppliers with opportunities to correct unintentional errors of form between the opening of tenders and the awarding of the contract, the government agency must provide the same opportunities to all participating suppliers.

### **NEGOTIATIONS**

A government agency may conduct negotiations if:

- the government agency has indicated its intent to conduct negotiations in the Request; or
- it appears from the evaluation that no tender is obviously the most advantageous in terms of the specific evaluation criteria set out in the notice of intended procurement or tender documentation.

A government agency shall:

- ensure that any elimination of suppliers participating in negotiations is carried out in accordance with the evaluation criteria set out in the notice of intended procurement or tender documentation; and
- when negotiations are concluded, provide a common deadline for the remaining participating suppliers to submit any new or revised tenders.

### **AWARDING OF CONTRACTS**

The free trade agreements require that a government agency may only consider for award tenders that conform to the essential requirements of all tender documentation or notices issued during the course of a covered procurement.

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### **INFORMATION PROVIDED TO SUPPLIERS**

Under the free trade agreements, a government agency must promptly inform suppliers that have submitted tenders of the contract award decision. A government agency must, on request, provide an unsuccessful supplier with the reasons why the entity did not select its tender.

### **PUBLICATION OF AWARD INFORMATION**

The free trade agreements require that not later than 60 days after the award of a contract a government agency must publish a notice in an officially designated publication which may be in an electronic or paper medium. This notice may be published on Tenders WA. The notice shall include at least the following information about the contract:

- The name and address of the government agency.
- A description of the goods or services procured.
- The date of award or the contract date.
- The contract value.
- The name and address of the successful supplier.
- The procurement method used.

### **MAINTENANCE OF RECORDS**

The free trade agreements require that government agencies must maintain records and reports of tendering procedures relating to covered procurements, and must retain such records and reports for a period of at least three years after the award of a contract. This is in addition to any legal or policy requirement which applies to the government agency.

### **REVIEW OF SUPPLIER CHALLENGES**

Under the free trade agreements, in the event of a complaint by a United States, Chilean, Korean, Japanese or Singaporean supplier that a government agency has breached the requirements of the Government Procurement chapters of the free trade agreements in the context of a covered procurement in which the supplier has or had an interest, the government agency must accord timely and impartial consideration to that complaint.

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## APPENDIX 1

### FREE TRADE AGREEMENT EXEMPT PROCUREMENTS

The Government Procurement chapters of the free trade agreements do not apply to:

- a government agency procuring goods or services from other Commonwealth, State, Territory or local government entities and provision of goods or services by or between Commonwealth, State, Territory or local government agencies;
- purchases funded by international grants, loans or other assistance, where the provision of such assistance is subject to conditions inconsistent with the free trade agreements;
- non-contractual agreements or any form of assistance, including loans, equity infusions, fiscal incentives, subsidies, guarantees, cooperative agreements and sponsorship arrangements;
- purchases funded by grants and sponsorship payments from persons not listed in Annex 15-A of the AUSFTA or ACIFTA or Annex 12-A of the KAFTA, Annex 13 of the JAEPA or Annex 3A of the SAFTA;
- procurement for the direct purpose of providing foreign assistance;
- procurement of research and development services, but not the procurement of inputs to research and development undertaken by a government agency;
- purchases of goods or services for resale or of goods or services used in the production of goods for resale;
- engagement of an expert or neutral person, including engaging counsel or barristers, for any current or anticipated litigation or dispute;
- procurement of goods or services, including construction, outside Australian territory, for consumption outside Australian territory;
- acquisition of fiscal agency or depository services, liquidation and management services for regulated financial institutions, and sale and distribution services for government debt;
- procurement of motor vehicles;
- procurement of plasma fractionation services; and
- procurement of government advertising services.
- any form of preference to benefit small and medium enterprises;
- measures to protect national treasures of artistic, historic, or archaeological value;
- measures for the health and welfare of indigenous people; or
- measures for the economic and social advancement of indigenous people.
- the protection of essential security interests; or
- the protection of public morals, order or safety;
- the protection of human, animal or plant life or health; or
- the protection of intellectual property; or
- relating to the goods or services of handicapped persons, of philanthropic or not for profit institutions, or of prison labour.

Exempted procurements are still required to be undertaken in accordance with supply policies and other government policies impacting on procurement.