

MANDATORY RULES FOR PROCUREMENT BY DEPARTMENTS

Introduction

1. These Rules set out mandatory standards and procedural requirements for the conduct of procurement by government departments (defined for this purpose as the “public service departments” listed in the Schedule to the State Sector Act 1988, plus NZ Defence Force and NZ Police). The Rules reflect and reinforce New Zealand’s established policy of openness and transparency in government procurement. They are based on, but not limited to, the treaty obligations of New Zealand under Chapter 11 of the Trans-Pacific Strategic Economic Partnership Agreement with Brunei, Chile and Singapore (TPSEPA, also known as the P4 Free Trade Agreement). The Rules are to be applied by departments in their procurement globally to facilitate competitive participation by domestic and foreign suppliers in New Zealand’s government procurement market.

Pre-existing commitments to Australia and Singapore

2. The Australia New Zealand Government Procurement Agreement (ANZGPA) establishes a single ANZ market for government procurement, without limitation by value threshold. While these Rules have general application, they must not be interpreted as reducing the scope of departments’ wider obligation under the ANZGPA to accord Australian suppliers non-discriminatory treatment and equal opportunity to compete, on a value for money basis in their procurement generally.
3. New Zealand has similar non-discriminatory obligations to Singapore under the existing bilateral Closer Economic Partnership Agreement (CEP). In this case however, a value threshold applies, as under these Rules. Departments conducting their procurement within the existing policy and good practice framework (see paragraph 4 below) and applying these Rules will generally meet our CEP obligations to Singapore. Should any conflict arise in practice, advice should be sought from the Ministry of Economic Development.

Continuing policy and good practice framework

4. The Government continues to expect its departments to conduct all their procurement within the framework of the policy principles¹ set out in the “Policy Guide for Purchasers” issued by the Ministry of Economic Development, and the good practice guidelines set out in “Procurement: a Statement of Good Practice” issued by the Office of the Auditor-General. For construction procurement, departments should note that the Auditor-General also encourages use of the document “Principles of Best Practice: Construction Procurement in New Zealand”, issued by the New Zealand Construction Industry Council.

¹ Including the principles of: best value for money over whole of life; open and effective competition; and full and fair opportunity for domestic suppliers.

5. Although these Rules are more prescriptive, they are designed to be generally consistent with the policy and good practice principles mentioned above. Should any points of conflict arise, however, the Rules must prevail.
6. Departments are also reminded that in all their procurement activities they continue to be accountable for observing the relevant minimum standards of behaviour (e.g. in relation to integrity and confidentiality of information) required by law or government direction (e.g. the Code of Conduct issued by the State Services Commissioner).

Mandatory Coverage of these Rules

7. These Rules must be applied by government departments, as listed in the Schedule to the State Sector Act 1988, plus NZ Police and NZ Defence Force, to procurement:
 - a. by any contractual means, including purchase and rental or lease, with or without an option to buy, build-operate-transfer contracts, public works concessions contracts, and contracts accessed via third party commercial supply brokerage arrangements.
 - b. with contract values at or above the following thresholds:
 - i. Goods and services: NZ\$100,000²;
 - ii. Construction services³; NZ\$10 million, except that a NZ\$100,000 threshold applies for the purposes of paragraph 48 (GETS post-award notice) and paragraph 51 (Annual Procurement Plans).
8. Notwithstanding the higher threshold for mandatory application of these Rules to construction services procurement, departments are reminded that the Government expects them to conduct all their construction services procurement within the policy and good practice framework as stated in paragraph 4 above.
9. Mandatory coverage of these Rules is further defined and limited by the Exclusions and Exceptions listed in Appendix 1.
10. Notwithstanding the fact that only the entities referred to in paragraph 7 above are required to apply these Rules, the Government encourages their application in the wider public sector as appropriate.

Valuation of contracts

11. In determining whether contract values are at or above the thresholds, departments must base the contract valuation on the maximum total estimated value of the procurement over its entire duration, including optional purchases, premiums, fees, commissions, interest and revenue streams or other forms of remuneration provided for in the contract. All forms of remuneration, including payments to an agent or supply broker, must be declared in the contract.

² All references to value thresholds are to be read as excluding GST.

³ As defined in WTO document MTN.GNS/W/120 (1991) under the sector heading "Construction and Related Engineering Services", covering the following groups in the UN Provisional Central Product Classification system (1991): CPC 511-518.

Non-avoidance

12. Departments must not prepare, design or otherwise structure or divide at any stage any procurement in order to avoid the application of these Rules.

Procurement managed by a third party

13. Use of a third party as an agent or consultant (not being the prime contractor) to advise on, arrange or manage a procurement process does not remove from departments the requirement to comply with these Rules, where applicable.

Integrity in Procurement Practices

14. Departments must have in place policies and procedures to eliminate any potential conflict of interest on the part of those engaged in or having influence over a procurement.

Non-Disclosure of Confidential Information

15. Departments must not, except to the extent required by law⁴, disclose confidential information that would prejudice legitimate commercial interests of a particular supplier or might prejudice fair competition between suppliers, without the written authorisation of the supplier that provided the information.

Non-discrimination⁵

16. Departments must accord all potential suppliers equal opportunity and equitable treatment on the basis of their financial, technical and commercial capacity.
17. Departments must make procurement decisions on the basis of value for money of goods and services to be supplied, and not on the basis of their place of origin or the degree of foreign ownership or affiliation of the supplier.

Offsets

18. Departments must not consider, seek or impose offsets at any stage of a procurement.⁶

Technical Specifications⁷

⁴ Departments will be aware that information not disclosed according to these Rules will nevertheless be subject to the Official Information Act 1982 on an ongoing basis.

⁵ Departments are reminded that under the ANZGPA the non-discrimination obligation applies to procurement in the ANZ "single government procurement market" without limitation by value threshold.

⁶ Offsets are conditions or undertakings relating to domestic content, licensing of technology, investment, counter-trade or similar requirements to encourage local development or improve the balance of payments accounts.

⁷ Technical specification means a tendering requirement that:

(a) sets out the characteristics of:

(i) goods to be procured, such as quality, performance, safety and dimensions, or the process and methods for their production; or

(ii) services to be procured, or the processes or methods for their provision, including any applicable administrative provisions;

19. Departments must not prepare, adopt or apply any technical specification with the purpose or effect of creating unnecessary obstacles to international trade or domestic supply.
20. Technical specifications prescribed by a department must, where appropriate:
 - a. be specified in terms of performance and functional requirements, rather than design or descriptive characteristics; and
 - b. be based on international standards, where applicable, or otherwise on national technical regulations, recognised national standards, or building codes.
21. Departments must not prescribe technical specifications that require or refer to a particular trademark or trade name, patent, design or type, specific origin or producer or supplier, unless there is no sufficiently precise or intelligible way of describing the procurement requirements and provided that, in such cases, words such as “or equivalent” are included in the tender documentation.
22. Departments must not seek or accept advice to be used in the preparation or adoption of any technical specification for a particular procurement from a person that may have an interest in that procurement, if to do so would prejudice fair competition.

Tendering Procedures⁸

Open tendering to be the “default” method

23. Procurement covered by these Rules is normally⁹ to be conducted by way of open tendering procedures in the course of which any interested supplier may submit a tender or apply to meet conditions for participation¹⁰ in a procurement process.

Notice of intended procurement to be published on GETS¹¹

24. Departments must publish on GETS a notice inviting interested suppliers to submit a tender or apply to meet conditions of participation in the procurement process. The notice must be accessible on GETS during the entire period established for tendering or submission of an application (whether or not also published in other print or electronic media).

(b) addresses terminology, symbols, packaging, marking or labeling requirements, as they apply to a good or service; or

(c) sets out conformity assessment procedures prescribed by a department

8 Departments choosing to make procurements under a “syndicated” contract containing a common use provision (CUP) (which provides that goods and services will be available to other government agencies on the same terms and conditions as the original contract) will be considered to have met the requirements of the Tendering Procedures section (paragraphs 23 -46), provided the syndicated contract has been awarded by a department or departments consistently with these Rules, including Valuation of Contracts (paragraph 11 above) and has been reviewed and endorsed by the Syndicated Contracts Review Board. Departments choosing to use a syndicated contract option must take steps to satisfy themselves that this represents the best value for money for their particular needs in the current market circumstances.

9 For a list of the circumstances in which open tendering need not be used, see Appendix 2: Exceptions to Open Tendering Requirement.

10 Conditions for participation means any registration, qualification or other pre-requisites that interested suppliers must meet in order to participate in a procurement process i.e. to be invited to tender or to have submissions considered.

11 Government Electronic Tenders Service <http://www.gets.govt.nz>

Content of notices of intended procurement

25. The information in notices of intended procurement must include:
- a. a description of the intended procurement;
 - b. any conditions that suppliers must fulfil to participate in the procurement process;
 - c. the time limits for submission of tenders or applications to participate; and
 - d. contact details for obtaining of all relevant documents.

Time limits

26. Departments must publish notices of intended procurement on GETS sufficiently in advance to provide all interested suppliers with a reasonable period of time, in light of the nature, circumstances and complexity of the procurement, to obtain the full tender documentation and to prepare and submit responsive tenders by the closing date, or to apply to participate in the procurement process, where applicable.
27. The time provided between the date of publication of the notice on GETS and the final date for submission of tenders or applications to participate must in no case be less than 10 working days. (N.B. – this is to be regarded as the absolute minimum, not the norm).

Tender documentation

28. The tender documentation must contain all information necessary for suppliers to prepare and submit responsive tenders, including the essential requirements and evaluation criteria for the award of the procurement contract.
29. Departments must either:
- a. offer direct access to the entire tender documents and any supporting documents by electronic means; or
 - b. promptly make the tender documentation available at the request of a supplier who is invited to submit a tender.

Further information

30. Departments must endeavour to reply promptly to any reasonable request for explanation or relevant information made by a supplier, provided that such information does not give that supplier an advantage over its competitors in the procedure for the award of the contract. The explanation or information provided to a supplier may be provided to all suppliers that are invited to tender.

Modifications

31. Where a department, during the course of a procurement, modifies the essential requirements and evaluation criteria of the tender documentation, it must publish such modifications on GETS or transmit them in writing to all suppliers who have requested tender documentation at the time the criteria are modified, in the same manner the original information was transmitted, and in adequate time to allow such suppliers to modify and resubmit their tenders, as appropriate.

Conditions for Participation in a Procurement Process

32. Publication on GETS of a notice inviting suppliers to apply to satisfy conditions for participation in an intended procurement process, must be sufficiently in advance for interested suppliers to prepare and submit responsive applications, and for the department to evaluate and make its determinations based on such applications.
33. Departments must consider for a particular procurement process those suppliers that request to participate and are not yet registered or qualified, provided there is sufficient time to complete the registration or qualification procedures before the award of the contract.
34. Departments must limit any conditions for participation, including financial guarantees, technical qualifications and information necessary for establishing the financial, commercial and technical capacity of suppliers, as well as the verification of qualifications, to those which are essential to ensure the firm's capability to fulfil the contract in question.
35. Departments must judge the financial, commercial and technical capacity of a supplier on the basis of both that supplier's global business activity and its activity in New Zealand, taking due account of the legal relationship between the supply organisations (e.g. in assessing resources available to the supplier).
36. Nothing in this section of the Rules precludes a department from excluding a supplier from a procurement on grounds such as bankruptcy, liquidation or insolvency, false declarations relating to a procurement, or significant deficiency in the performance of any obligation under a prior contract.

Lists of Registered or Qualified Suppliers ("Preferred Supplier Lists")

37. A department may establish for continuing use a list of suppliers registered or qualified to participate in a procurement process.¹²
38. A department using such a list must:
- a. make the current updated list of registered or qualified suppliers publicly available;
 - b. ensure that suppliers may apply to join the list at any time; and
 - c. include all qualifying applicants within a reasonable period of time, taking into account the conditions for participation and the need for verification.

¹² NB: use of such a list does not remove the requirement to publish a notice of intended procurement inviting interested suppliers not already listed to apply to meet conditions of participation in the procurement process, as in paragraph 24 above.

39. Where a department requires suppliers to qualify for such a list before being permitted to participate in a particular procurement process, and a supplier that has not previously qualified submits an application, the department must promptly start the registration or qualification procedures and must allow such supplier to participate in the procurement process, provided there is sufficient time to complete the procedures within the time period established for the award.
40. The department must make available continuously on GETS a notice inviting interested suppliers to apply for inclusion on the list. The notice must include:
 - a. a description of the goods and services for which the list of suppliers may be used; and
 - b. the conditions to be satisfied by suppliers for inclusion on the list of registered or qualified suppliers.
41. Departments must notify registered or qualified suppliers of the termination of, or of their removal from the list, and state the reason for this action.

Panel Contracts

42. A department may establish, by means of a contract awarded according to these Rules, a panel of alternative suppliers from any of whom the department may at its option purchase, as and when required, identified goods or services meeting minimum requirements, including indicative or set prices or rates as appropriate, specified for provision of the goods or services over the term of the contract.

Awarding of Contracts

43. Departments must receive, open and evaluate all tenders under procedures that guarantee the fairness and impartiality of the procurement process.
44. Departments must consider for award only those tenders which, at the time of opening, conform to the essential requirements of the notice of intended procurement or tender documentation and are submitted by a supplier who complies with the conditions for participation.
45. Unless the department determines that it is not in the public interest to award a contract, it must award the contract to the supplier that has been determined to be fully capable of undertaking the contract and whose tender is determined to offer the best value for money in terms of the essential requirements and evaluation criteria set forth in the tender documentation.
46. A department must not cancel a procurement or terminate or modify an awarded contract in order to circumvent these Rules.

Post-Award Information and Supplier Debriefing

47. Departments must:
 - a. promptly publish or inform suppliers that have submitted a tender of the contract award decision; and

- b. on request from an unsuccessful supplier, promptly provide pertinent information concerning reasons for the rejection of its tender or the relative advantages of the tender that was accepted.

GETS post-award notice

48. Departments must, promptly after the award of a contract (whether or not the procurement was by open tendering), publish on GETS a notice containing at least the following information:
- a. the name and address of the successful supplier;
 - b. a description of the goods or services supplied;
 - c. the term of the contract; and
 - d. the value of the contract award (determined in accordance with paragraph 11 above).

Supplier Complaints

49. Departments must be open to, and accord impartial and timely consideration to any complaints from suppliers regarding an alleged breach of these Rules arising in the context of a procurement in which they have or have had an interest.
50. Departments must make records documenting the procurement process and reasons for decisions available to any authorities competent to hear or review supplier complaints of alleged breaches of these Rules, and cooperate fully in such hearings or reviews.

Annual Procurement Plans

51. Departments must publish on GETS, by 1 July each year, a rolling Annual Procurement Plan (APP) which is to be updated no less frequently than every 6 months.
52. The APP is to contain a short strategic procurement outlook for the department supported by details of any planned procurement, including the estimated date of the publication of a notice of intended procurement on GETS as in paragraph 24 above (where applicable). [Departments will be provided with an electronic template for APPs]

Audit Requirements

53. Departments must keep records documenting all their procurement which are readily accessible for the purposes of audit of compliance with these Rules. [Departments will be given further advice on minimum information required for audit].

EXCLUSIONS AND EXCEPTIONS

Exclusions from Mandatory Coverage of these Rules

1. In exercising their discretion not to apply these Rules to the following categories of procurement, departments must still, where appropriate and to the extent possible, have regard to the principles of the government procurement policy and good practice framework (paragraph 4 above).
2. Departments are not required to apply these Rules to:
 - a. the purchase or acquisition of goods and services by a department from another department, except where tenders are called, in which case these Rules shall apply;
 - b. non-contractual agreements, or any form of assistance to persons or governmental authorities, including foreign assistance, grants, loans, equity infusions, fiscal incentives, subsidies, guarantees, cooperative agreements, sponsorship arrangements and governmental provision of goods and services;
 - c. purchases funded by international grants, loans or other assistance, where the provision of such assistance is subject to conditions inconsistent with these Rules;
 - d. procurement of goods and services (including construction) outside the territory of New Zealand, for consumption outside the territory of New Zealand;
 - e. acquisition of fiscal agency or depository management services, liquidation and management services for regulated financial institutions, and sale and distribution services for government debt;
 - f. hiring of government employees;
 - g. any procurement in respect of contracts for construction, refurbishment or furnishing of chanceries abroad; or
 - h. procurement of public health, education and welfare services.¹³

¹³ Refers to procurement, for provision to the public, of services classified in WTO document MTN.GNS/W/120 under the sector headings "Educational Services", "Health Related and Social Services" , and CPC 913 (Compulsory social security services).

General Exceptions

Security

3. Nothing in these Rules is to be construed as preventing the New Zealand Government from taking any action or not disclosing any information which it considers necessary for the protection of its essential security interests relating to the procurement of arms, ammunition or war materials, or to procurement indispensable for national security or for national defence purposes.

Other

4. Subject to the requirement that such measures¹⁴ are not applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on trade between countries, nothing in these Rules is to be construed to prevent the New Zealand Government from adopting or maintaining measures:
 - a. necessary to protect public morals, order or safety;
 - b. necessary to protect human, animal or plant life or health (including environmental measures necessary to protect human, animal or plant life or health);
 - c. necessary to protect intellectual property; or
 - d. relating to goods or services of handicapped persons, of philanthropic or not for profit institutions, or of prison labour.
5. Nothing in these Rules is to be construed as requiring departments to disclose confidential information the disclosure of which would impede law enforcement or otherwise be contrary to the public interest.

¹⁴ measure includes any law, regulation, procedure, requirement or practice

EXCEPTIONS TO OPEN TENDERING REQUIREMENT

1. Provided that the procedure is not used to avoid competition¹⁵, protect domestic suppliers or discriminate against any domestic or foreign supplier, departments may award contracts by means other than open tendering procedures in any of the following circumstances¹⁶:
 - a. where, in response to a prior notice, invitation to participate, or invitation to tender under open tendering procedures
 - i. no tenders were submitted,
 - ii. no tenders were submitted that conform to the essential requirements in the tender documentation, or
 - iii. no suppliers satisfied the conditions for participation, and

the department does not substantially modify the essential requirements of the procurement in the contract as awarded;
 - b. where, for works of art, or for reasons connected with the protection of exclusive rights, such as patents or copyrights, or where there is an absence of competition for technical reasons, the goods or services can be supplied only by a particular supplier and no reasonable alternative or substitute exists;
 - c. for additional deliveries by the original supplier which are intended either as replacement parts, extensions or continuing services for or upgrades of existing equipment, software, services or installations, where a change of supplier would compel the procuring department to procure goods or services not meeting requirements of interchangeability with existing equipment, software, services or installations, or conditions under original supplier warranties;
 - d. for goods purchased on a commodity market;¹⁷
 - e. when a department procures a prototype or a first good or service that is developed at its request in the course of, and for, a particular contract for research, experiment, study or original development. When such contracts have been fulfilled, subsequent procurements of such goods or services shall be subject to the principles and procedures laid down in these Rules;
 - f. when additional construction services which were not included in the initial contract but which were within the objectives of the original tender

¹⁵ While it is recognised that competition may not be appropriate in the circumstances listed, departments must use competition-limiting methods only where necessary and justified in accordance with paragraph 2 below)

¹⁶ In exercising their discretion not to use open tendering procedures in these circumstances, departments must still, to the extent possible, have regard to the principles of the government procurement policy and good practice framework.

¹⁷ Commodity market means a market in which commodities are bought and sold for future delivery at a specific price through an exchange.

documentation have, due to unforeseeable circumstances, become necessary to complete the construction services described therein, provided that the total value of contracts awarded for additional construction services does not exceed 50 percent of the amount of the main contract;

- g. in so far as it is strictly necessary where, for reasons of extreme urgency brought about by events unforeseeable by the department, the goods or services could not be obtained in time by means of an open tendering procedure, and the use of such procedure would result in serious injury to the department, the department's programme responsibilities or the New Zealand Government. For purposes of this subparagraph, lack of advance planning by a department or its concerns relating to the amount of funds available to it do not constitute unforeseeable events;
 - h. for purchases made under exceptionally advantageous conditions that only arise in the very short term, including public auction or unusual disposals, such as those resulting from liquidation, bankruptcy or receivership. This provision is not intended to cover routine purchases from regular suppliers; or
 - i. in the case of a contract awarded to the winner of a design contest provided that the contest has been organised in a manner which is consistent with the principles of these Rules and that the contest is judged by an independent jury with a view to a design contract being awarded to the winner.
2. Whenever it is necessary for departments to resort to a procedure other than open tendering procedures based on the circumstances set forth in Paragraph 1, the departments must maintain a record or prepare a written report providing specific justification for the contract.