

NEW GOVERNMENT PROCUREMENT RULES ANNOUNCED (4TH EDITION)

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The 4th edition of the Government Procurement Rules (Rules) were published this month. They are the good practice standards for government procurement, and were last substantially revised in March 2015.

The Rules apply to all public service departments, police, defence force and state services agencies, with a number of other central and local government agencies expected or encouraged to have regard to the Rules.

Government agencies spend approximately \$41 billion dollars (around 18 percent of New Zealand's GDP) annually on goods and services from external suppliers. The Rules are key to the Government's effort to deliver better public value and public services.

Government agencies have until 1 October this year to prepare for the new Rules, although they are able to adopt the Rules immediately. Material changes include:

- A wider range of factors to be taken into account during the process of sourcing.
- Changes to construction procurement.
- Increased reporting obligations.

In this FYI, we highlight some of the key changes.

Using procurement to achieve broader social and economic outcomes

The 3rd edition of the Rules broadly referenced the need for agencies to make balanced decisions which considered the social, environmental and economic effects of deals made.

The new Rules are more prescriptive, expressly encouraging and in some cases requiring agencies to consider secondary benefits, including environmental, social, economic and cultural

outcomes when making sourcing decisions.

Implementing Priority Outcomes

The Rules identify four Priority Outcomes, that few would dispute:

- Increase New Zealand businesses' access to government procurement.
- Increase the size and skill level of the domestic construction sector workforce.
- Improve conditions for workers and future-proof the ability of New Zealand businesses to trade.
- Support the transition to a net zero emissions economy and assist the Government to meet its goal of significant reduction in waste by 2020 and beyond.

The priority outcomes are not mandatory for all agencies. The Government will designate particular contracts or sectors where one or more of these priority outcomes must be implemented.

Increasing access for New Zealand businesses

When procuring construction contracts, agencies must consider how they can create opportunities for New Zealand businesses. This recognises that domestic firms may have lower work capacity and are less able to utilise economies of scale than international competitors. Following sourcing, agencies are required to monitor the commitments made by contracted parties relating to increasing access for NZ businesses.

Examples include structuring procurement into separate parts and publishing as a tender with separate subcategories, allowing smaller New Zealand firms to compete. Where such division is not possible, agencies are encouraged to engage with contracted parties to consider how New Zealand businesses could be included in the supply chain.

This requirement must be read against rule 3, which requires agencies to "treat suppliers from another country no less favourably than New Zealand suppliers", which in turn reflects obligations in many FTAs.

Construction skills and training, improving conditions for workers (rules 18 and 19)

Agencies must include questions about the skills development and training practices of the supplier and their subcontractors when procuring construction works over \$9 million. This reflects the Government's stated priority of growing the capability and capacity of the construction workforce.

The Rules also require that all designated contracts set out expectations as to supplier compliance with safety standards and associated MBIE guidance. Agencies cannot simply assume that contractors will comply and are required to monitor them.

Move towards zero emissions and designing waste out of the system (rule 20)

Agencies entering into designated contracts are required to support procurement of low-emissions and low-waste goods, services and works, and encourage innovation to significantly reduce emission and waste impacts from goods and services.

All agencies are encouraged to support these goals, although it is not mandatory.

The rules specifically note the All of Government motor vehicle contract (a designated contract) and the guidance that MBIE has produced relating to low-emissions fleet options.

Construction procurement (rules 18, 64,

The Rules will apply to a greater number of new



construction works, with the relevant value threshold lowered from \$10 million to \$9 million (with provision for an annual review).

A rule referring to Private Public Partnerships procurement and the requirement to consult with the Treasury PPP team has been removed. There is a new requirement that all procurements of infrastructure with a total ownership cost of \$50 million must consult with Treasury's Interim Infrastructure Transactions Unit, established in November 2018 and soon to shift to the new NZ Infrastructure Commission/Te Waihangā.

"Where appropriate", agencies are required to apply the good practices set out in the Construction Procurement guides when procuring construction works. There are four Guides published by MBIE website, including "matching capability to complexity" and "risk and value management". Where the guides are not used, agencies must be able to produce documented evidence of the rationale for doing so.

Exceptions

Cases for exceptions can be made. In the same week as the Rules came out, the Minister of Defence announced a decision to spend over \$1bn on SuperHercules aircraft to be acquired through a non-competitive process; and gave credible reasons why that was done.

Additional reporting obligations (rules 53, 70 and 71)

Greater reporting obligations have been implemented in the new Rules. Agencies are required to:

- Provide data and information to the Chief Executive of MBIE on procurement activity including the Broader Outcomes discussed above.
- Submit a completed Procurement Capability Index (PCI) self-assessment to MBIE annually as part of reviewing their own capability;
- Maintain a Significant Service Contracts Framework (SSCF) report, and update it every six months. This framework records contracts that are critically important to the business and pose a significant risk and / or impact in the event of supplier failure.

Uncertainty regarding permissible considerations and weighting

An issue our local authority clients often encounter is whether or not a local authority can favour local suppliers ahead of those outside the district or region in making procurement decisions. This issue can also arise for central Government agencies wanting to prefer local providers.

While the Rules forbid discrimination against international firms, they do not expressly address how a "local verses national" assessment should be approached, nor whether it is even a permissible consideration.

Different industries have different considerations in this area:

• The 2019 Defence Capability Plan contains a chapter on "Working with Industry" with a clear focus on favouring local suppliers and the bold statement "value for money is enhanced when New Zealand based suppliers are engaged in the supply and support of military capacity". This is laudable, and not uncommon in defence procurement (the Australian submarine purchase programme appeared to have a significant focus where they should be built). However, in the CPTPPA environment foreign suppliers will no doubt watch our procurement processes carefully.

• Local authority approved activities funded by NZTA, and those provided by NZTA itself (such as State highways) must be procured using a procurement procedure approved by NZTA. NZTA has a 250 page manual of procurement procedures designed to meet the statutory objective of "best value for money".

Being a statutory requirement, the NZTA Procurement Manual will prevail if there is inconsistency with the MBIE Rules.

The NZTA Procurement Manual unambiguously states (in a 2017 amendment) "*Purchasers need to be careful not to favour a 'local' supplier over one from another district, region or county [sic 'country'?] on the basis of a factor that is not relevant to delivery of the required outputs or outcome*".

If you would like advice on the application of these news rules or on updating your procurement practices, please get in touch with one of contacts below.

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