3

Preparing to approach the market

Some basics

Drafting request documentation (tenders, expressions of interest, etc.) is much easier if you are clear about what you need. Talking to someone who regularly engages consultants can also help one to understand the finer points of the procurement process and avoid pitfalls.

In particular, it always pays to check draft documentation with legal and probity advisers, or subject experts. For example, release of request documentation may in itself generate an obligation on the relevant entity, in the form of a so-called Process Contract. The relevant entity may be bound to observe the procedures (e.g. evaluation criteria or timelines) exactly as specified in the request documentation. Without a doubt, legal advice should be sought before the issue of any documents.

A word of caution is warranted; however, no set of dot points can adequately cover the full gamut of considerations involved in arranging a successful tender process. The need to ensure fair and ethical dealing, for example, can involve various unforeseen issues that may not be immediately obvious to even an experienced procurement official.

Although it may seem to involve unnecessary additional work, it is worthwhile during the preparatory stage to produce a rough outline plan or running sheet of the proposed procurement process, detailing the steps required, indicative timelines, resources needed,

etc. Time spent considering such issues at an early stage can reduce risk and make life easier later, because some action taken now (or not taken) will affect the process in the future.

For example, if sufficient contingency time is not built into the planning process for checking legal aspects, any later unavailability of the relevant legal personnel (due perhaps to illness or other duties) may delay or impede required policy outcomes. Will there be someone available all the time to monitor and answer questions from potential suppliers on AusTender? Similarly, it is worth checking on the availability of members of the submission evaluation committee at an early stage, as well as checking that members are comfortable with the evaluation criteria before the approach to market.

An advantage that may not be immediately obvious is that drawing up a plan makes it easier to recall developments later, when preparing a written record of the procurement process. In other words, it can also be used as a memory-jogger, or even as a basic draft for reporting purposes.

Australian Government requirements

The 2014 Commonwealth Procurement Rules

There is no substitute for making oneself familiar with the detail of the Commonwealth Procurement Rules (CPRs) which replaced the 2005 Commonwealth Procurement Guidelines (CPGs) from 1 July 2014. The core principle of the CPRs is 'value for money', a concept that is explained in just over a page of Chapter 4 of the CPRs. In essence, 'value for money' does not just mean 'lowest cost'. Criteria such as the quality of the goods and services, the supplier's experience, and the fostering of competition, for example, provide sufficient flexibility in an evaluation process to enable an entity to choose a supplier that is likely to provide the best value for money.

The CPRs apply to Non-Corporate Commonwealth Entities (NCCEs) and to those Corporate Commonwealth Entities (CCEs) listed in section 30 of the *Public Governance, Performance and Accountability Rule 2014* (PGPAR).

The CPRs are neatly divided into two sections. Both divisions contain mandatory rules (identifiable by use of the word 'must' in bold text in a sentence) and so-called 'best practice' provisions that are generally identifiable by the use of the word 'should'. Relevant entities to which the CPRs apply must comply with the provisions of Division 1, regardless of procurement value.

If the procurement value exceeds a specified threshold, the rules in Division 1 must be followed, but the additional rules in Division 2 of the CPRs also apply. For example, Division 2 permits limited tenders only in certain circumstances (CPR clause 10.3). However, Appendix A of the CPRs also provides for a range of exemptions from Division 2 rules. Procurement of goods and services from a Small and Medium Enterprise (SME) with at least 50 per cent Indigenous ownership, procurement for providing foreign assistance, or for procuring government advertising services, are examples of exemptions.

For NCCEs, the procurement threshold is $80,000 (including GST) and for CCEs subject to the CPRs, it is $400,000 (including GST). There is also a threshold of $7.5 million for construction services (CPR clause 9.7), but these are not considered here.

It is also advisable to check the Resource Management Guides (RMGs) available on the Department of Finance website: www.finance.gov.au/resource-management/index. For example, with limited exceptions it is now mandatory for NCCEs to use the Commonwealth Contracting Suite (CCS) for procurements under $200,000 (including GST). However, RMG no. 420 also lists exceptions to this requirement; such as procurement of Information Communication Technology. In a number of other cases, use of the CCS is optional.

Ways of approaching the market

Three procurement methods are permitted under Chapter 9 (Division 1) of the CPRs:

1. *Open tender:* as the term suggests, an open tender is published and invites submissions in response from all interested potential suppliers. All open tenders must be advertised as an approach to market (ATM) on AusTender: www.tenders.gov.au (CPR clause 7.9).

2. *Pre-qualified tender:* a pre-qualified tender is published, but involves an invitation only to selected potential suppliers (CPR clause 9.9). Shortlisted potential suppliers who responded to an open approach to market on AusTender; those who were selected from a multi-use list using an open approach to market; and those with specific licences or who comply with a specific legal requirement, would qualify for this form of selection.
3. *Limited tender:* it is not uncommon for a relevant entity to approach one or more potential suppliers to make submissions. Where the procurement threshold is exceeded, however, the rules of Division 2 apply. If the threshold is exceeded, then under CPR clause 10.3, for example, a relevant entity may only use a limited tender where no submissions that represented value for money were received in an open approach to market, when only one business can supply goods or services (e.g. because of a patent), in cases of extreme urgency brought on by unforeseen events, etc.

Irrespective of which method is used to approach the market, or whether the procurement threshold is exceeded or not, the core requirement of achieving value for money must be satisfied. CPR clauses 4.4 and 4.5 outline relevant criteria.

Request documentation

It is now mandatory, with some exceptions, for NCCEs to use the CCS when purchasing goods or services valued under $200,000 (including GST). The CCS contains the Commonwealth Approach to Market Terms, the Commonwealth Contract Terms and the Commonwealth Purchase Order Terms, whose terms are non-negotiable.

In approaching the marketplace to obtain goods or services, it is obviously necessary to inform potential suppliers of the relevant entity's requirements. To ensure avoidance of ambiguity or misunderstanding, this information is transmitted through so-called request documentation. Clause 10.6 of the CPRs specifies that request documentation must include a complete description of:

a. the procurement, including the nature, scope and, when 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.

Confidential or security-sensitive information need not be released (CPR clauses 7.20 and 10.7), but the overarching principle is that potential suppliers are dealt with fairly and in a non-discriminatory manner. Requests for information must be addressed in a way that avoids giving an unfair advantage to any potential supplier or group. If evaluation criteria or specifications for goods and services are modified during the course of the procurement, for example, full information must be transmitted to all potential suppliers, and adequate time provided for modification of submissions.

Technical specifications must be based on international standards unless they fail to meet a relevant entity's requirements or would impose greater burdens than the use of recognised Australian standards. Request documentation must also not specify that potential suppliers have previous experience with the relevant entity or with the Australian Government or in a particular location. Chapter 10 of the CPRs details other conditions as well, including minimum time limits for the lodgement of submissions. It is sometimes the case that potential suppliers request or require that the content of their submissions remain confidential; that is, not released to the public.

Except for the successful tenderer, submissions must be kept confidential. Once a contract has been awarded, any claim by the successful supplier to confidentiality needs to be assessed by the relevant entity. According to CPR clause 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'. For this reason it is prudent for request documentation to alert potential suppliers to government and parliamentary practice.

Relevant entities are required to give potential suppliers sufficient time to prepare and lodge submissions in response to an approach to market. The minimum time limit of 25 days specified in the CPRs may be shortened (clause 10.19) or extended (clause 10.20) in particular circumstances.

Workers' compensation insurance is compulsory in all states and territories of Australia. However, a risk assessment conducted in conjunction with a proposed procurement may indicate the desirability of a potential supplier also holding public liability, product liability, professional indemnity, general business, or other forms of insurance in order to minimise the risks borne by a relevant entity. Any requirements to hold insurance can be included in request documentation, with provision for specific confirmation by the potential supplier incorporated into the selection process.

A supplier's financial viability can deteriorate or improve quickly with changes to the economic or operating environment. It is therefore prudent to screen out high-risk potential suppliers. Request documentation should specify the documents that are required in submissions to undertake a financial viability assessment of potential suppliers. Tenderers can also be required to provide contact details for referees who can comment on the competence of an individual tenderer or the business history of the firm. Instances of past bankruptcy, and performance in fulfilling previous contracts, can also be used to assess reliability.

Unless already included in a draft contract, request documentation should also indicate that the contract will include clauses providing for payment to the supplier no later than 30 days after the date of receipt by the NCCE of a correctly rendered invoice (Department of Finance 2014, RMG no. 417). Under certain conditions, late payment by the NCCE involves a penalty of an interest payment on the outstanding amount.

The potential for unethical behaviour by a consultant is also worth exploring. Request documentation can be used in this regard by requiring contact details of referees and previous clients, with explicit advice that they may be contacted by officials. However, any adverse reports obtained from referees should be checked with legal advisers before use to ensure that natural justice principles are observed.

Officials should also heed CPR clause 6.7, which requires that:

> 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 satisfied any resulting order. Officials should seek declarations from all tenderers confirming that they have no such unsettled orders against them.

Once begun, a procurement process cannot be terminated if satisfactory submissions have been received, unless the agency determines that it is not in the public interest to continue (clause 10.31 of the CPRs). A contract must be awarded, provided that at least one of the tenderers meets the requirements of the approach to market, including the provision of value for money. The step of issuing request documentation is therefore one that warrants close attention.

Accountable Authority Instructions

A relevant entity's Accountable Authority Instructions (AAIs) are an essential starting point in preparing request documentation because they may contain entity-specific guidance or requirements that are additional to those in the CPRs.

Model AAIs are published by the Department of Finance in RMG no. 206 (for NCCEs) and RMG no. 213 (for CCEs). As their name suggests, they deal with the whole gamut of resource management issues relevant to Commonwealth entities, including procurement. Some relevant entities publish their AAIs, or at least the table of contents, online.

Commonwealth procurement-connected policies

Sections 15 and 21 of the PGPA Act require that procurement by NCCEs be conducted 'in a way that is not inconsistent with the policies of the Australian Government'. The Department of Finance RMG no. 415 provides guidance to Commonwealth entities on how approval is to be obtained to designate a policy as being procurement-related. Approvals lapse after five years, so it is important for officials undertaking procurements to check the currency of any policies.

The Department of Finance website provides a list of policies: www.dpmc.gov.au/indigenous-affairs/economic-development/indigenous-procurement-policy-ipp (accessed January 2016). With the exception of a Building Code requirement, the policies and associated policy departments listed on the Department of Finance website are shown in Table 2 below:

Table 2. Policies related to Commonwealth procurement

Policy	Description	Policy department
Indigenous procurement policy www.dpmc.gov.au/indigenous-affairs/about/jobs-land-and-economy-programme/ipp	Three per cent of Commonwealth entity contracts to be awarded to Indigenous businesses by 2020, within interim targets. In addition, certain contracts are to be set aside for Indigenous businesses, as well as other requirements.	Department of the Prime Minister and Cabinet IndigenousProcurement@pmc.gov.au
Workplace Gender Equality www.wgea.gov.au/about-wgea/workplace-gender-equality-procurement-principles	The Workplace Gender Equality Procurement Principles require entities to obtain a letter of compliance from certain tenderers (employers with 100 or more employees) indicating compliance with the *Workplace Gender Equality Act 2012*.	Department of Employment. Workplace Gender Equality Agency. wgea@wgea.gov.au
Australian Industry Participation (AIP) www.industry.gov.au/industry/IndustryInitiatives/AustralianIndustryParticipation/Pages/default.aspx	The AIP Framework applies to procurements of $20 million and more. Potential suppliers may be required to prepare and implement an Australian Industry Participation (AIP) plan.	Department of Industry and Science. Officials should check specific requirements with the Australian Industry Participation Policy Team aip@industry.gov.au

Under sections 22 and 93 of the PGPA Act, CCEs are only subject to policies of the Australian Government if directed by a government policy order issued by the Minister of Finance (see RMG no. 207). Before making an order, the Finance Minister must be satisfied that the minister responsible for the policy has consulted the CCE on its application as part of an effective consultation process. As at 15 June 2015, there were no government policy orders in effect: www.wgea.gov.au/about-legislation/workplace-gender-equality-procurement-principles (accessed January 2016).

Australia is a signatory to bilateral free trade arrangements with a number of countries. These arrangements are implemented domestically by legislation and/or Commonwealth policy. All relevant international obligations have been incorporated into the CPRs. According to CPR clause 2.14, 'an official undertaking a procurement is [therefore] not required to refer directly to international agreements'.

Competition is a key element of the Australian Government's procurement framework. It is mandatory under CPR clause 5.3 to avoid discrimination against potential suppliers 'due to their size, degree of foreign affiliation or ownership, location, or the origin of their goods and services'. In addition, officials are encouraged in CPR Chapter 5 to avoid requiring the preparation of costly submissions and other barriers to entry that would unfairly discriminate against SMEs. CPR clause 5.5 states that 'the Australian Government is committed to NCCEs sourcing at least 10 per cent of procurement by value from SMEs', but, as at January 2016, this did not appear to be a required procurement-connected policy.

Accountability and transparency

Parliamentary committees have in the past expressed concern and frustration about the apparent lack of transparency and accountability involved in procurement activity undertaken by Commonwealth entities.

A key feature of the CPRs (in particular, Chapter 7) is the emphasis on maintaining appropriate records during each phase of a procurement process. Officials are required 'to maintain for each procurement a level of documentation commensurate with the scale, scope and risk of the procurement. Documentation is expected to provide information on matters such as the requirement for the procurement, the process followed, how value for money was considered and achieved, and decisions taken. Documentation must be retained in accordance with the *Archives Act 1983*.

AusTender provides a convenient platform for maintaining records in a manner that is easily accessible to the public. Relevant entities are required to maintain a current procurement plan on AusTender, in order to provide advance notice to potential suppliers of their strategic

procurement outlook. It is mandatory to publish all open tenders on AusTender, although it may also be used for pre-qualified and limited tender approaches to market.

A range of information must also be recorded on AusTender. Contracts above $10,000 (including GST) concluded by NCCEs (and $400,000 for prescribed CCEs), and any amendments must be entered on AusTender within 42 days of execution. Mandatory Chapter 7 requirements also apply to standing offers, provision on request of information about sub-contractors, disclosure of procurements in annual reports, disclosure of non-compliance with the CPRs, etc. Officials are also encouraged to 'alert potential suppliers to the public accountability and transparency requirements of the Australian Government, including disclosure to the Parliament and its committees'. Contracts should enable the Australian National Audit Office (ANAO) to access a supplier's records and premises to carry out appropriate audits; reflected in clause C.C.20 of the CCS.

With limited exceptions, use by NCCEs of the CCS (RMG no. 420) is mandatory for procurements below $200,000 (including GST). The suite codifies some of the accountability and transparency requirements. For example, the Commonwealth Contract Terms include provisions dealing with supplier compliance with Commonwealth laws and policies, ranging from record keeping, access for the ANAO, Indigenous procurement policy, etc.

Under the so-called 2001 Murray Motion, the Senate of the Australian Parliament imposes an additional transparency requirement in the form of a Senate Order. The Order requires each NCCE to develop an internet listing twice a year that identifies contracts entered into during the preceding calendar or financial year, valued at or above $100,000 (GST inclusive), along with details relating to each of those contracts. On the basis of subsequent amendments, the Department of Finance now publishes the reports on AusTender on behalf of NCCEs. However, ministers are still required to table in the Senate letters of advice that the NCCEs that they administer have placed a list on the internet. RMG no. 403 provides a letter template as well as detailed administrative information regarding the Senate Order. Letters must be tabled within two months of the end of the reporting period to which they refer.

Finally, accountable authorities are required by sections 19 and 91 of the PGPA Act (and clause 7.24 of the CPRs) to provide an annual report on compliance (and non-compliance) with the PGPA framework. The report must be provided to the Finance Minister as well as the entity's responsible minister. Detailed requirements are set out in the Department of Finance (2015) RMG no. 208.

Tips and traps

- Lack of clarity may lead the successful tenderer to seek profitable variations once the contract has been signed and the client begins to specify 'additional' needs. Such **variations can be expensive**, so don't begrudge time spent on preparing a procurement plan and the request documentation. If it is not clear what additional work might be required, it is best to include in the request documentation 'options' for such work, and to ask for separate quotes for it. Options should form part of the final contract.
- There are no hard and fast rules, but **a statement of requirements of between one and three pages** of information may be suitable for straightforward consultancies. Background material in particular will enable consultants to see the bigger picture and help them prepare proposals that are ultimately of more benefit to the client.
- A long list of **evaluation criteria** can complicate the selection process unnecessarily. Consultants will need to provide lengthier bids, so that more time is spent by officials in reading and understanding submissions. The effort involved in documenting the evaluation committee's assessments against the criteria also increases.
- Too many evaluation criteria can also dissuade consultants from bidding. In one case, an agency listed over 30 selection criteria, many of them partially repetitive. Although the job was a six-figure one, a large firm decided not to bid because it was not confident that it could recover the estimated four weeks of work involved in preparing a proposal. **Framing an appropriate number of evaluation criteria** in a logical order, with minimum duplication, assists tenderers to present better submissions. It also makes it easier for you in the selection process stage. So don't skimp on time spent drawing up the evaluation criteria.

- Selection committees can save time and effort by signalling their needs with respect to the **length of submissions**. For example: 'We expect proposals to be no longer than about five to seven pages … (excluding attachments such as CVs)'. Agencies that are significantly more prescriptive than this (for example, by specifying the exact number of pages, font size, etc.) are likely to reduce the field of bidders. Like most people, consultants prefer to work in an environment that is not overly directive or restrictive. Except for the marginal operators, many consultants are not so desperate for work that they will bid for jobs if they think that working with a particular agency will be a frustrating experience. So don't send the wrong signals in your tender documents.
- Preparing a bid costs money. Most consultants won't mind responding to a tender if they know that there is **a reasonable chance** of winning the job. Apart from the fact that tenders should always be fair, entities that frustrate bidders are likely to receive fewer bids in the longer term. This is not an academic point: some top-tier firms have in the past avoided bidding for jobs tendered by certain government agencies.
- Many experienced consultants are less keen to respond to open tenders because of the low expected value (probability of winning, multiplied by contract value) to them. An alternative is to first seek **Expressions of Interest** (EOI) as part of an open tender process. A response to an EOI requires less work than a tender submission, so that a larger field of consultants can be attracted. Only the shortlisted ones will subsequently face the cost of submitting a full proposal.
- Many consultants will not bid if they have tendered unsuccessfully several times with specific agencies. If your aim is to maintain a **pool of interested consultants** who have a knowledge of your area (to avoid becoming overly dependent on one supplier), then each must have a reasonable probability, but no certainty, of winning any specific tender. One consultant's rule of thumb is that, unless his firm wins at least one out of three invitations to tender, it refuses to incur further tendering costs in the future.
- It is possible to **signal an entity's requirements** without necessarily restricting the field of bidders. For example, if an agency places a premium on minimising the risk of disruption to a project due to departure or illness of consulting staff, then request documentation should mention this, and use a formulation

something like: 'We expect that the successful tenderer will have satisfactory back-up arrangements to cover any loss of project staff'. This approach does not exclude small or specialist firms (which can form a contingency partnership with other consultants), but does signal a preference for a consultant with readily available back-up staff or ready access to expertise. Where there is a genuine need for urgent personal access to a consultant, it may be possible to specify a response time, or a requirement for face-to-face discussion, but care is required to avoid discriminating against non-local and foreign firms.

- Considerable leverage is available to a government agency at the stage of issuing request documentation, and prior to acceptance of a bid. Good use can be made of this in areas which do not directly affect the integrity of the procurement process. NCCEs can, for example, seek to negotiate additional conditions in the **draft contract** for jobs that exceed $200,000. Willingness to negotiate provides a useful signal of the flexibility and responsiveness of potential suppliers.
- Should the **likely** budget for the consultancy be revealed in the request documentation?
  - Despite the additional work imposed on the public service official, it is probably preferable in most cases to devote resources to better specifying the entity's requirements. (A consultant can be hired to assist with this, if necessary.) Clearly specified requirements will allow competent consultants to better gauge the extent of work required.
  - Consultants argue that, because their bids are based primarily on expected cost, a budget provides an indication of the scope of the job (in terms of consulting days allocated to it). A more realistic proposal—better suited to the client's needs—can be prepared if at least an indicative budget is known. Without any knowledge of the likely value of the project, it is argued, consultants may make very different assumptions about the extent and quality of the work required. Valid comparisons between those bidding then become all but impossible, it is argued. For example, it would be difficult to compare bids from two consultants, one of whom assumed that a project would be worth $500,000, and the other assumed a smaller job of about $40,000 in value. At least an order of magnitude 'ballpark figure' is required.

  - Some officials, however, point out that making the likely budget known beforehand invariably results in virtually all the tenderers quoting much the same price. It is always possible that a highly suitable bidder would have bid much lower because of their existing knowledge or skills. On the other hand, most experienced consultants will have similar views about the cost of a job, as long as a detailed specification is provided in the request documentation.
  - Further, public servants, particularly when they do not have a good knowledge of the market, can seriously under- or over-estimate the value of a project or the extent of work required. One apocryphal anecdote recounts an instance where the value of a project was grossly underestimated. After the project had been expanded to many times its original value, the client finally began to suspect that the consultant (who was relatively far more experienced in the field) had known all along what the value would eventually be, but had put in a very low initial bid to win the contract because of his strong expectation of an increase in scope after commencement.
  - A possible compromise is to make known a fairly broad range (say $50,000 to $80,000) to signal the expected order of magnitude of the contract, without diminishing too much the scope for price competition. However, even this approach may be flawed, unless the client is reasonably knowledgeable about consulting in the subject area or has access to some prior industry advice.
- Apart from probing to gain an insight into the likely budget, consultants will normally be interested in finding out about issues like the underlying or background reasons for the consultancy, the nature and strength of the business case for letting the consultancy, the likely overall scope of work, the amount of support or assistance that the agency envisages as its contribution to the project, the extent to which innovative methodologies or ideas are expected (they cost more than 'vanilla solutions'), the formal and informal decision-making processes within the organisation, and the likelihood that a report or other output will actually be implemented. As well as clear tender specifications, **face-to-face meetings** in the form of industry briefings are usually the best means for presenting such

information, because discussion is possible. But don't forget to record the outcomes and to circulate them formally to attendees.

- Don't forget about the **implications of the GST**. Unless the bidder is registered for GST, your agency will not be able to claim a GST input tax credit for the consultancy fee paid. To maximise cash-flow benefits to your agency, the contract should specify that GST tax invoices are to be issued by the consultant as soon as any payment is due.
- Despite the extra cost involved, a high risk project may warrant the use of a specialist **peer reviewer** to provide confidence in the final product. If it is intended to use a specialist academic or consultant as a peer reviewer, this should be made known in tender documentation to avoid surprises. If a peer reviewer is used, it is also desirable that they be involved from the outset of the project. Peer review at the end of the project may result in disagreement about the quality or validity of outcomes. There is little or no scope for resolution at the stage of finalisation of a project. It is also important that the reviewer work to the entity's project manager; not to the consultant.
- Ownership of **intellectual property** (if any) that is developed during a project should be addressed clearly in the contract.
- Before issuing request documentation, undertake a **sanity check**: would you bid for this work if you were a good consultant who was not desperate for work?

Exhibit 3.1. Consider the following *before* issuing the request documentation

- The clarity of the requirement; it sometimes helps to specify what is *not* required.
- Does the request documentation allow for (rather than discourage) innovative solutions or approaches? Where possible, avoid specifying inputs or analytical approaches; focus on the output or outcome required.
- Is it (inadvertently) written around the capabilities of an identifiably specific consultant (not a good look)?
- Does the draft contract contain clauses that provide sufficient flexibility to alter specified outputs (but without changing the underlying nature of the tender process)?
- Will you be able to judge quality of output? How? You may need to specify existing technical standards (such as the Commonwealth Style Guide) in the contract. Is a peer reviewer desirable?
- The timeframe specified: officials often underestimate the time required to complete work, and consultants may take more time than either party expected.
- Are your specified outputs really important? It can add to costs if you over-specify your needs. Are your outputs and outcomes consistent with your initial Business Case proposing the procurement?
- Have you given your agency's legal and probity advisers or procurement manager enough time to check the documentation?
- Consistency of the project with relevant Australian Government policies; not just those listed in the Department of Finance (2015) RMG no. 415.
- Under the CPRs (clause 10.24) there is no discretion to accept late tenders, unless the tender is late solely because of the agency's own mishandling. If you are using a tender box, make sure that it is emptied exactly at the time specified. Access to a verifiable time-keeping device is essential, and witnesses are always useful.

Table 3. Preparing tender documentation: Risks and mitigation

Type of risk	Likely consequence	Mitigation strategy
Failure to specify all relevant contract requirements in request documentation	• Possible need to re-seek tenders or negotiate with winning tenderer	• Consult legal and probity advisers at an early stage before issuing documentation • Possibly allow industry expert to preview requirements • Draft documents to provide ability to vary conditions • Draft documents to provide ability to abort process at any time
Failure to conform to Commonwealth Procurement Rules (CPRs)	• Project attracts incommodious interest from parliamentary committees or ANAO • Accountable Authority must provide a non-compliance report to the Finance Minister	• Consult legal and probity advisers early in the process, particularly for complex procurements • Check with legal and probity advisers before any non-standard action such as acceptance of late submissions • Ensure completion of non-compliance report
Biased or unclear specification of requirements	• Claims of unethical or unfair dealing • Possible legal action • Limited response from potential tenderers • Loss of time in the long-term	• Use functional and performance specifications and criteria • Check with legal and probity advisers • Establish submission evaluation committee to check request documentation, including evaluation criteria, prior to issue • In complex cases, engage a consultant to help define or refine request documentation
Terms and conditions which are unattractive to suppliers	• Loading of costs on offers • Absence of submissions • Highly qualified offers • Legal action after commencement of contract • Costly disputes	• Check with the market before formal tender process • Investigate possibilities for sharing risk • Require tenderers to warrant in their submissions that they have assessed risks and allowed for them in tender price

Type of risk	Likely consequence	Mitigation strategy
Inadequate information provided or failure to answer suppliers' queries	• Claims of unethical behaviour, favouritism or unfair practices • Lack of bids • Higher quoted costs or qualified offers • Loss of time in long-term	• Develop a probity plan that includes quality control measures for dissemination of information and for ensuring its accuracy • Additional information provided to any tenderer should be distributed as soon as possible to others • Advise *all* potential tenderers of *all* responses to *all* queries received (but respect confidentiality) • Specify in request documentation the entity's designated staff for all contact with bidders • For separate briefings, ensure that another official is present (even for telephone conversations: use the loudspeaker facility) • Record on file all separate briefings provided, including all telephone conversations
Premature contractual commitment	• Tenderer(s) claim existence of a preliminary or implied contract • Legal action to recover costs from agency	• Avoid encouraging tenderer to begin work in anticipation of award of contract • In staged contracts, avoid giving the consultant working on the current stage any impression or promise of follow-on to the next stage
Breach of commercial confidentiality	• Claims of unethical behaviour, favouritism or unfair practices • Possible legal action	• Develop clear procedures for receipt, registration, storage, opening, filing, and handling of offers • If using a tender box, all offers kept sealed and secure until designated opening time • Staff access to documents on a 'need to know basis' • Request documentation makes clear what is considered to be confidential, including contract conditions
Consultant technically becomes an employee	• Increased legal responsibility • Increased cost	• Check with legal adviser where contract is being extended, on-site facilities are made available, consultant carries out investigation on behalf of Australian Government, leave periods are approved by the agency, etc.

Type of risk	Likely consequence	Mitigation strategy
Change to procedures or conditions specified in request documentation	• Potential breach of process contract • Legal action against entity, or ministerial representations	• Consider contents of request documentation carefully prior to issue • Check request documentation with legal adviser • If change is required after issue, consult probity adviser and ensure fair and equal treatment of all tenderers
Discriminatory selection process	• Breach of process contract • Legal action against entity, or ministerial representations	• Compliance with CPRs, especially Chapter 5 • Regard for competitive neutrality principles when dealing with a government business entity. www.finance.gov.au/archive/publications/finance-circulars/2004/01.html (accessed January 2016)

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