Australian Government
Department of Finance

Due Diligence in Procurement

1. The Commonwealth Procurement Framework (Framework) includes the Commonwealth Procurement Rules (CPRs), Resource Management Guides, content published on the Department of Finance's Procurement internet site, a range of procurement-connected policies and tools and resources which require due diligence to be undertaken throughout the procurement lifecycle. This end-to-end approach requires checks and balances to help entities and procuring officials identify and reduce risks and promote transparency, assurance and accountability throughout procurement planning, evaluation, contract execution and in the delivery of contracted goods and services.

2. The Framework embeds elements of the Commonwealth Risk Management Policy which non-corporate Commonwealth entities are required to comply with, in order to establish an appropriate system of risk oversight and management. Corporate Commonwealth entities are not required to comply with this policy but should align their risk management frameworks and systems with this policy as a matter of good practice.

Due diligence refers to a broad range of checks and analysis that an entity or procuring official should consider when undertaking a procurement and engaging suppliers to satisfy themselves that:

- **the procurement can meet the entity's intended outcomes**
- **the procurement is conducted properly, including being consistent with the policies of the Commonwealth**
- **relevant legal, technical, financial, and regulatory requirements are applied and met**
- **tenderer's claims are verified, including their business characteristics or status. For example, where the supplier claims to be a Small and Medium Enterprise or Indigenous owned business**
- **the procurement (including execution of a contract with the preferred supplier) does not place the Commonwealth in a position of increased or unacceptable risk**
- **preferred suppliers meet ethical, performance and diligence standards expected of them as suppliers of the Commonwealth**

- **preferred suppliers have the capability and capacity to deliver and perform in accordance with the agreed contract terms and conditions.**

Entities should determine the extent to which due diligence activities should be undertaken for a procurement, based on the scale, scope, risk profile and complexity of the procurement. This should be done in conjunction with risk management to increase understanding of the risks related to a given procurement or supplier. This may help inform the level of due diligence checks that should be conducted for the given risk rating.

All due diligence activities should be documented.

Why due diligence is important

The Procurement

3. Achieving value for money is the core rule of the CPRs (paragraph 4.4). Value for money is the culmination of a considered assessment of financial and non-financial costs and benefits arising from the procurement. To ensure value for money is delivered, procurements should:

    - ensure appropriate use of Commonwealth funds
    - be clearly documented, including records of accountable and transparent decision making
    - encourage competition and be non-discriminatory
    - ensure goods and services procured are fit for purpose, and deliver on identified objectives
    - use public resources in an efficient, effective, economical and ethical manner that is not inconsistent with the policies of the Commonwealth
    - encourage appropriate engagement with risk
    - integrate ethical business practices to maintain public trust in government and the appropriate administration of public funds
    - ensure the entity meets legislative and regulatory requirements
    - ensure the positive contributions of procurement on the Australian economy are maximised by preventing and mitigating fraud and corruption impacts on procurement activity.

The Supplier

4. It is the responsibility of entities and procuring officials to satisfy themselves that tender responses are thoroughly and equitably assessed, and information provided by suppliers is verified.

5. Some due diligence checks may need to be conducted on all prospective tenderers (as part of procurement planning and methodology) while others may only apply to preferred supplier(s) (as part of the tender evaluation assessment). This decision

should be commensurate to the scale, scope, risk profile and complexity of the procurement.

6. As part of the procurement planning and/or tender evaluation process (as relevant), procuring official should conduct sufficient due diligence of tenderers to provide verification and assurance around tenderers' claims and whether it is appropriate for the entity to enter into a contract with the supplier. This includes obtaining:

    - confidence in a supplier's intention, capacity and capability to deliver the goods and services sought
    - confirmation of the supplier's identity and ownership and any key business characteristics or status, including, but not limited to, where the supplier has claimed to be a Small and Medium Enterprise, Australian Disability Enterprise or Indigenous owned business
    - evidence of the supplier's financial history and financial and corporate viability
    - verification of references
    - visibility of the supplier's employment, labour, contracting, manufacturing and workplace practices
    - sufficient information that the pricing and delivery assumptions in the proposal are achievable
    - confirmation of a supplier's past performance history
    - information which assists build a risk profile for the supplier
    - evidence that the supplier is compliant with any relevant legislation and regulations
    - confidence that the supplier has the appropriate capability of systems and processes in place to deliver the contracted goods and services
    - assurance that the supplier has appropriate personnel, systems and processes to satisfy relevant confidentiality and security requirements
    - information about a supplier's intended use of subcontractors and supply chains, including processes for their appointment and management
    - valid insurances (noting that, as per CPR paragraphs 8.4 (a) and 8.4 (b), insurance requirements should reflect the actual risk borne by suppliers and suppliers should not be directed to take out insurance until a contract is to be awarded)
    - an improved understanding of markets and supply chains
    - confirmation of the supplier's relevant licences and qualifications
    - confirmation of notice of any Significant Events (as defined under 'Commonwealth Contracting Suite Glossary and Interpretation'), including any adverse comments or findings against a supplier made by a court or similar body, as well as information about any remedial action taken by a supplier in relation to the Significant Event
    - information to build a risk profile for the supplier that can also be used to identify potential fraud, corruption, bid rigging, price fixing and other forms of supplier collusion.

The Contract

7. The contract specifies the terms and conditions under which the contracted goods or services are to be delivered and accepted. Due diligence for the contract will provide assurance that the contract facilitates the delivery of the specified goods or services, consistent with relevant legislation and policy, and the achievement of a value for money outcome.

8. Effective due diligence will also enable procuring officials and entities to ensure that the risks are borne by the party best placed to manage them. This means that the contract should not place undue risk on the Commonwealth, nor should the Commonwealth attempt to transfer risk to the supplier, where the Commonwealth is better placed to manage the risk.

9. Where applicable, entities should incorporate relevant contractual obligations that facilitate the ongoing monitoring and verification of a supplier's claims, and performance against the contract, over the life of an arrangement.

10. Entities should manage contracts and supplier relationships in an ethical and professional manner, consistent with the terms of the contract.

Conducting due diligence

Commonwealth Procurement Framework

11. While achieving value for money is the core rule of the CPRs (paragraph 4.4) and should drive due diligence activities related to procurement, officials must also consider the relevant financial and non-financial costs and benefits of submissions when undertaking procurements. This includes undertaking due diligence as necessary across the lifecycle of the procurement and delivery of goods and services under a contract. There are specific paragraphs within the CPRs that refer to various due diligence considerations. Some examples include:

    - CPR paragraphs that apply to procurements regardless of the procurement value:
        - Paragraph 4.9: Relevant entities must comply with procurement connected policies where the policies indicate that they are applicable to the procurement process
        - Paragraph 6.7: Relevant entities must not seek to benefit from supplier practices that may be dishonest, unethical or unsafe
        - Paragraph 7.26: Entities must make reasonable enquiries to determine compliance with an applicable standard
        - Paragraph 8.2: Relevant entities must establish processes to identify, analyse, allocate and treat risk when conducting a procurement, and should be commensurate with the scale, scope and risk of the procurement
        - Paragraph 8.3: Relevant entities should consider and manage their procurement security risk, including in relation to cyber security risk, in accordance with the Australian Government's Protective Security Risk Framework.

- CPR paragraphs that apply to procurements at or above the relevant procurement threshold (except where an Appendix A exemption applies):
  - Paragraph 10.6: Request documentation must include a complete description of any terms or conditions relevant to the evaluation of submissions including any financial guarantees, information and documents that potential suppliers are required to submit[1]
  - Paragraph 10.11: Tender responses must demonstrate the tenderer's capability to meet a relevant Australian standard (where applicable), and contracts must contain evidence of the applicable standards
  - Paragraph 10.15: Potential suppliers must be able to meet specified conditions for participation, which are those that will ensure a potential supplier has the legal, commercial, technical and financial abilities to fulfil requirements of the procurement
  - Paragraph 10.18: An entity may exclude a tenderer on grounds such as bankruptcy, insolvency, false declarations, or significant deficiencies in performance of any substantive requirement or obligation under a prior contract
  - Paragraph 10.19: Officials must make reasonable enquiries that the procurement is carried out considering relevant regulations and/or regulatory frameworks.

Planning due diligence

12. Due diligence should be considered during the planning stage of a procurement. It can be useful to plan the activities to be completed and the delivery timeline and ask potential suppliers to include any relevant information that may be required to conduct appropriate due diligence checks in their tender response.

13. Officials should also consider what criteria may need monitoring during contract management and should draft related contract clauses accordingly. The Commonwealth Contracting Suite and ClauseBank include pre-drafted contract terms that are available for use.

Due diligence checks

14. There are a number of potential supplier due diligence checks that can be undertaken, such as confirming:

    - a potential supplier is not subject to any sanction laws[2]

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[1] In accordance with paragraph 10.4 of the CPRs, a procurement at or above the relevant procurement threshold conducted by limited tender is not required to meet the rules in paragraphs 10.6 - 10.8 (Request documentation), 10.20 – 10.31 (Minimum time limits), or 10.35 (Awarding contracts).

[2] Consolidated List | Australian Government Department of Foreign Affairs and Trade (dfat.gov.au)
The Consolidated List is a list of all persons and entities listed under Australian sanctions laws. Listed persons and entities are subject to targeted financial sanctions.

- a potential supplier's exposure to risk, including taking into consideration factors such as the industry and supply chain complexity
- key personnel and conducting background business checks to identify undeclared conflicts of interest
- the business characteristics or status of a supplier. This is particularly important where a CPR Appendix A Exemption is being applied
- that background business checks have been conducted for records or indication of dishonest, unethical or unsafe supplier practices (e.g. tax avoidance, fraud, bribery and corruption, exploitation, unmanaged conflicts of interests, and modern slavery practices) – this may include searching the relevant regulatory body's website for notification, business registers and media articles
- a potential supplier's identity and ownership – you can use search tools including the Australian Business Register and the Australian Security and Investment Commission
- a potential supplier's past performance history via thorough referee checks and identifying past and existing contracts which can be found by searching AusTender and engaging with the relevant contract manager
- there are no significant, unresolved legal findings that may impact the potential supplier's ability to deliver the contract
- verification of the delivery of goods and services during contract management before paying invoices.

15. Many Commonwealth contract terms require that suppliers hold subcontractors to the same contractual obligations as the suppliers. These requirements also extend to compliance with applicable legislation and Commonwealth policies. Where this is the case, it is important that processes are in place to ensure compliance with this requirement.

16. Procurements that include significant levels of subcontracting or more complex supply chains may require due diligence down the supply chain to subcontractors. Where this occurs, procuring officials and entities should ensure the primary supplier has appropriate processes and procedures in place to monitor supply chain or contractor compliance, conduct and performance.

17. Officials must treat potential suppliers equitably and not discriminate based on a supplier's size, degree of foreign affiliation or ownership, location, or the origin of their goods and services (CPR paragraph 5.4). This does not prevent officials from implementing a tiered approach to managing due diligence checks that applies initial checks to tenderers based on the type of procurement, jurisdiction (which may be relevant if the supplier operates in an overseas territory that has elevated risk of bribery and corruption, for example) and industry. Additional checks can be made following an assessment of risk of tenderers and their submissions.

18. A relevant entity may need to consider conducting additional due diligence during contract management due to events or new information being made available, such as:

    - unexpected invoices or changes to bank account details
    - verification of invoices against acceptance criteria specified in the contract
    - tracking against contractual or agreed milestones
    - changes in a supplier's ownership – this includes undertaking the same degree of due diligence checks for the new ownership, that were conducted for the original supplier
    - changes to subcontracting arrangements
    - changes to key personnel
    - changes in the security clearance status of key personnel or individuals or organisations contracted to the Australian Government. This may also apply to supply chains and contractors
    - monitoring a supplier's ongoing compliance with relevant legislative and regulatory requirements
    - ongoing verification of compliance with applicable standards
    - supplier performance issues or evidence of financial distress
    - notification of Significant Events
    - negative media attention or audit findings relating to a supplier
    - tip-offs or complaints.

It is good practice to obtain information from multiple sources in order to appropriately verify claims. This can be done through research, site visits, requesting additional information from a supplier or third parties, and references.

The requirement for site visits and the potential request for additional information from tenderers and suppliers, or any other outputs required for due diligence must be included in the approach to market documentation and the contract.

Treatment of due diligence outcomes

19. Findings from due diligence checks that could impact the outcome of a procurement should be documented and shared with the evaluation panel for their consideration, or the contract delegate where a contract has been entered into. Actions taken by the evaluation panel or contract delegate should be commensurate with the identified risks and be clearly documented.

20. Entities should ensure guidance and advice is available and accessible to procuring officials on the treatment of due diligence outcomes. Depending on the severity of the outcomes, officials should determine if risks can be mitigated or transferred, whether

additional information is needed or consider excluding the supplier from the procurement process or not awarding a contract. Where a due diligence check finds outcomes that indicate a breach of an applicable law or regulation, entities should report the findings to the responsible law enforcement or a regulatory authority and may elect to seek legal advice.

21. Supplier engagement by officials can assist suppliers in acting responsibly and improve future compliance. Officials should address relevant due diligence considerations when debriefing tenderers or reviewing existing supplier arrangements, ensuring that any engagement with tenderers or suppliers would not prejudice any potential or ongoing investigations by the responsible law enforcement or regulatory authority.

Other due diligence considerations

Procurement-Connected Policies

22. Procurement-Connected Policies (PCPs) seek to support government policy objectives through the Commonwealth's use of procurement activities and must be considered during a procurement process. Entities and procuring officials should refer to the policies to confirm whether they are applicable to the entity and individual procurements.

23. PCPs will typically require due diligence activities specific to the desired policy objective, such as:

Payment Times Procurement Connected Policy (PT PCP)

24. The policy requires large businesses (*Reporting Entities* under the *Payment Times Reporting Act 2020*) that are awarded Australian Government procurement contracts valued over $4 million (GST inclusive) to pay their subcontracts valued up to $1 million within 20 calendar days.

25. Due diligence checks under the policy include, but are not limited to:

- for procurements estimated to be valued above $4 million, including PT PCP approach to market declaration in the documentation and any applicable draft contract clauses in draft form contracts where applicable
- determining if tenderers have correctly declared their Reporting Entity status (Reporting Entity as defined in the Payment Times Reporting Act 2020)
- ensuring that if a contract is to be awarded to a Reporting Entity and the value is above $4 million, the PT PCP clauses are in the final contract prior to execution.

Shadow Economy

26. The policy requires businesses tendering for government contracts valued over $4 million to provide a satisfactory statement of tax record. The policy helps to prevent the Commonwealth's use of suppliers who do not comply with their tax obligations.

27. Due diligence checks under the policy include, but are not limited to:

    - ensuring suppliers include a valid satisfactory statement of tax record or request receipt with their tender response documentation, and if required, throughout the life of the arrangement.

Indigenous Procurement Policy

28. The policy is intended to stimulate Indigenous entrepreneurship and business development, providing Indigenous Australians with more opportunities to participate in the economy. The policy includes:

    - percentage targets by both volume and value of Commonwealth procurement contracts being awarded to Indigenous enterprises
    - Mandatory Set-Aside Contracts for Indigenous Businesses, applying to contracts valued between $80,000 to $200,000 and all remote contracts
    - Mandatory Minimum Indigenous Participation Requirements for procurements valued at or above $7.5 million in designated industries.

29. Due diligence checks under the policy include, but are not limited to:

    - officials ensuring that a business meets the definition of an Indigenous business in the policy, such as by checking whether the business is on Supply Nation or the Office of the Registrar for Indigenous Corporations
    - internal compliance checks on whether officials are seeking to source from Indigenous businesses for mandatory set-aside contracts before approaching non-Indigenous businesses
    - checks during contract management of supplier compliance with agreed Indigenous participation requirements.

Workplace Gender Equality Procurement Principles and User Guide

30. The policy intends to promote gender equitable policies and practices in the private sector. It requires tenderers for contracts valued above the relevant threshold with 100 employees or more to demonstrate that they are compliant with the Workplace Gender Equality Act 2012 (WGE Act) by supplying a letter of compliance, issued by the Workplace Gender Equality Agency.

31. Due diligence checks under this policy include, but are not limited to:

    - ensuring appropriate provisions and clauses are incorporated in approach to market documents and contracts
    - obtaining a letter of compliance from tenderers who are relevant employers under the WGE Act
    - ensuring suppliers re-submit a current letter of compliance where the term of the contract exceeds 18 months, from the Contract Commencement Date and following this, annually.

Australian Industry Participation (AIP) Plans

32. The policy is intended to encourage Australian industry participation in the supply chains of eligible Australian Government procurements valued at $20 million or more, and ensure full, fair and reasonable opportunity for Australian industry to compete for work. The plans detail actions that a project proponent and/or operator will undertake to ensure that its procurement entities provide Australian entities with full, fair and reasonable opportunity to participate in the project.

33. Due diligence checks under the policy include, but are not limited to:

    - internal entity checks that relevant procurements valued at or above $20 million are requiring winning tenderers to submit an AIP plan
    - compliance checks and enforcement by contract managers that suppliers are implementing the actions detailed in their AIP plan
    - checks that projects are being undertaken in accordance with relevant Australian standards, specifications, engineering codes, regulations and government planning guidelines.

Other Commonwealth legislation, policies and tools

Modern Slavery Act 2018

34. The Modern Slavery Act 2018 requires the following businesses and other entities in Australia to report annually to the Australian Government on how they are addressing modern slavery risks in their domestic and global operations and supply chains:

    - Entities based, or operating, in Australia, which have an annual consolidated revenue of more than $100 million
    - The Commonwealth, including on behalf of non-corporate Commonwealth entities
    - Corporate Commonwealth entities or Commonwealth companies with a consolidated revenue of at least $100 million for the reporting period
    - Other entities based, or operating, in Australia may report voluntarily.

35. The reports are placed on an online public register called the Modern Slavery Statements Register. The Modern Slavery Act 2018 aims to increase business and government's identification, assessment, action, and reporting on modern slavery risks. It also aims to encourage mitigation of modern slavery risks through market influence, such as through investor or consumer demand, as well as reputation and competition considerations.

36. Further guidance on conducting due diligence in the modern slavery context can be found in the United Nations Guiding Principles on Business and Human Rights and the Organisation for Economic Co-operation and Development (OECD) Due Diligence Guidance for Responsible Business Conduct[3].

[3] OECD Due Diligence Guidance for Responsible Business Conduct - OECD

Sustainable Procurement Guide

37. The Sustainable Procurement Guide provides guidance to officials on including options for sustainability in procurement decisions, and how to include sustainability considerations in all stages of the procurement process. Due diligence activities related to the guide vary based on what is being procured. Two examples include:

    - checking whether a supplier holds, or has the ability to obtain, the required certifications or standards before they are engaged, and can continue to maintain the certification or standards throughout the term of the contract
    - monitoring the supplier's compliance with sustainability requirements agreed in the contract.

Obligations to counter fraud and corruption and the bribery of foreign public officials

38. General guidance on countering fraud can be found on the Commonwealth Fraud Prevention Centre's website.

Foreign bribery

39. Australia is a signatory to the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions which requires enforcement of the offence for bribery of foreign public officials (foreign bribery) and implementation of related measures to prevent, detect, investigate and prosecute foreign bribery.

40. Suppliers that operate overseas, or which have supply chains located overseas, are more likely to be exposed to foreign bribery risk, including through bribe solicitation, compared with suppliers operating in Australia.

41. For example, if a supplier is operating overseas in a high-risk jurisdiction for bribery and corruption, additional due diligence checks will be warranted.

42. In order to prevent foreign bribery from occurring in relation to Commonwealth procurement contracts, procuring officials should:

    - consider whether an assessment of foreign bribery risk is required
    - where appropriate, ensure that suppliers have effective internal controls, business ethics, and compliance programs in place in order to prevent, detect and address foreign bribery, as part of their due diligence inquires.

43. The following resources can assist procuring officials in considering foreign bribery risk and conducting due diligence inquiries:

    - Attorney-General's Department foreign bribery webpage
    - AUSTRAC guidance on high-risk countries, regions and groups
    - Transparency International's Corruption Perceptions Index.

Competition and Consumer Act 2010

44. Competition is a key element of the Framework. The Competition and Consumer Act 2010 prohibits collusive tendering whereby suppliers communicate before lodging their bids and agree among themselves who will win the tender and at what price.

45. Entities should include clauses in their tender documents which indicate they are alert to collusion. These clauses may include:

    - warning bidders that entities will report all suspected instances of collusion to the Australian Competition and Consumer Commission (ACCC)
    - requiring disclosure by bidders of all subcontracting arrangements that involve dealings with competitors, including those made after awarding the contract
    - requiring bidders to sign a warranty confirming that their bid has been developed independently from their competitors and that no consultation, communication, contract, arrangement or understanding with any competitor has occurred
    - requiring bidders to disclose any proceedings involving anti-competitive conduct, in Australia or overseas.

46. Further guidance on detecting collusive behaviour in public procurement is available on the ACCC's website.