



New South Wales

Procurement (Enforceable Procurement Provisions) Direction 2019

under the

Public Works and Procurement Act 1912

The New South Wales Procurement Board, in pursuance of section 175 of the *Public Works and Procurement Act 1912*, issues the following Direction.

New South Wales Procurement Board

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Procurement (Enforceable Procurement Provisions) Direction 2019

under the Public Works and Procurement Act 1912

Part 1 Preliminary

1 Name of Direction

This Direction is the Procurement (Enforceable Procurement Provisions) Direction 2019.

2 Commencement

This Direction commences on the day on which section 175 (2B) of the Act commences.

3 Interpretation

(1) In this Direction:

annual procurement plan means a document published on NSW eTendering through which a government agency provides a short summary of its procurement intentions for the coming year and information regarding significant procurements it plans to undertake. **conditions for participation**—see clause 16.

construction services means services relating to the construction of buildings or works, including:

- (a) pre-erection works, and
- (b) construction work, and
- (c) repairs, alterations and restorations. **day** means calendar day.

goods means rights, interests or things which are legally capable of being owned, and includes, but is not limited to, physical goods and real property as well as intangibles such as intellectual property, contract options and goodwill.

GST means the Goods and Services Tax within the meaning of the *A New Tax System (Goods and Services Tax) Act 1999* of the Commonwealth.

limited tendering means a procurement (other than a procurement through a procurement list) that involves a government agency directly inviting one or more suppliers of the agency's choice to lodge a submission.

NSW eTendering means the web-based facility (hosted at <https://tenders.nsw.gov.au>) for the publication of New South Wales Government procurement information, including business opportunities, annual procurement plans and information about contracts awarded.

procurement documentation means documentation provided to suppliers to enable them to understand and assess the requirements of the procuring government agency and to prepare appropriate and responsive submissions.

relevant procurement threshold—see clause 6.

submission means a formally submitted response made by a supplier to any invitation (however described) to participate in a procurement, but does not include an application to be included on a procurement list.

supplier, in relation to a procurement, means an entity that, or person who, provides or could provide the goods or services concerned to a government agency.

tenderer means a supplier who has made a submission.

the Act means the *Public Works and Procurement Act 1912*.

value for money—see subclause (2).

Note. The Act and the *Interpretation Act 1987* contain definitions and other provisions that affect the interpretation and application of this Direction.

Section 162 of the Act is to be amended by the *Public Works and Procurement Amendment (Enforcement) Act 2018* to include the following definitions:

- (a) **procurement list** which is defined to mean a list of suitable suppliers (including suppliers selected using a prequalification scheme) intended to be used more than once for procurements by or for one or more government agencies, but does not include a procurement panel,
 - (b) **procurement panel** which is defined to mean a panel of suppliers for procurements by or for one or more government agencies who, following successful tenders, have entered into contracts for inclusion on the panel.
- (2) In determining whether a procurement represents **value for money**, a government agency is to have regard to the following matters (as the government agency considers relevant to the procurement):
- (a) the financial and non-financial costs and benefits of making the procurement,
 - (b) the quality and quantity of the goods or services,
 - (c) whether the goods or services are fit for purpose,
 - (d) the tenderer's relevant experience and performance history,
 - (e) the environmental sustainability of the proposed goods and services (such as, energy efficiency, environmental impact and use of recycled products),
 - (f) the whole-of-life costs of the goods or services, including the following (if relevant):
 - (i) the initial purchase price of the goods and services,
 - (ii) maintenance and operating costs,
 - (iii) transition-out costs,
 - (iv) licensing costs,
 - (v) the cost of any additional features procured after initial procurement, (vi) consumable costs, (vii) disposal costs.
- (3) Subject to this clause, words and expressions in this Direction have the same meanings as they have in Part 11 of the Act.
- (4) Notes included in this Direction do not form part of this Direction.

4 Enforceable procurement provisions

The following provisions of this Direction are enforceable procurement provisions (except where compliance with the provision is not required by the provision or another provision of this Direction):

- (a) clause 6 (Procurements covered by Direction),
- (b) clause 7 (Meaning of “estimated value” of procurement),

- (c) clause 8 (Non-discrimination),
- (d) clause 9 (Offsets prohibited),
- (e) clause 10 (Third party procurement),
- (f) clause 11 (Government agency not to avoid obligation of this Direction),
- (g) clause 12 (Basis to exclude suppliers from procurement),
- (h) clause 13 (Requirement to use open approaches to market),
- (i) clause 14 (Content of open approaches to market),
- (j) clause 15 (Circumstances where limited tendering is permitted),
- (k) clause 16 (Conditions for participation),
- (l) clause 17 (Specifications),
- (m) clause 18 (Procurement documentation),
- (n) clause 19 (Requests for further information),
- (o) clause 20 (Amended or reissued requirements),
- (p) clause 21 (Negotiations),
- (q) clause 22 (Awarding contracts to be based on criteria),
- (r) clause 23 (Timing for submissions),
- (s) clause 24 (Correction of errors),
- (t) clause 25 (3) (j), (5), (6), (7) and (8) (Procurement lists),
- (u) clause 27 (2) (a) (Notification of procurement documentation on agency websites),
- (v) clause 28 (Debriefings).

5 Relationship with other policies or directions

If there is any conflict between a provision of this Direction and any other policy or direction of the Procurement Board, the provision of this Direction prevails to the extent of the inconsistency except where a policy or Direction of the Procurement Board expressly provides otherwise.

Part 2 Application of Direction

6 Procurements covered by Direction

- (1) This Direction applies to a procurement of goods or services by a government agency listed in Schedule 1 if:
 - (a) the procurement is effected by any form of contract, and
 - (b) the estimated value of the procurement is or exceeds the relevant procurement threshold for the procurement (or no reasonable attempt at estimating the value of the procurement has been made).
- (2) Despite subclause (1), this Direction does not apply to the following:
 - (a) a procurement that is specified in Schedule 2,
 - (b) that part of a procurement that is a measure or preference specified in Schedule 3.
- (3) Without limiting subclause (1), this Direction applies to a procurement of goods or services by a government agency listed in Schedule 1 that is effected by a build-operate-transfer contract or a public works concession contract (within the meaning of Article 15.1 of the *Trans-Pacific Partnership Agreement* as incorporated into the *Comprehensive and Progressive Agreement for Trans-Pacific Partnership (TPP-11)*).

Note. Article 15.1 of the *Trans-Pacific Partnership Agreement* as incorporated into the *Comprehensive and Progressive Agreement for Trans-Pacific Partnership (TPP-11)* defines a build-operate-transfer contract or a public works concession contract as a contractual arrangement the primary purpose of which is to provide for the construction or rehabilitation of physical infrastructure, plants, buildings, facilities or other government-owned works and under which, as consideration for a supplier's execution of a contractual arrangement, a procuring entity grants to the supplier, for a specified period of time, temporary ownership or a right to control and operate, and demand payment for the use of those works for the duration of the contract.

- (4) In this clause, the ***relevant procurement threshold*** for a procurement means:
 - (a) where a government agency makes an estimate, on or after 2 September 2020 of the estimated value of a procurement:
 - (i) \$9.584 million, for a procurement of construction services, and
 - (ii) \$680,000, for a procurement of goods or any other services, or
 - (b) where a government agency makes an estimate, before 2 September 2020 of the estimated value of a procurement:
 - (i) \$9.247 million, for a procurement of construction services; and
 - (ii) \$657,000, for a procurement of goods or any other services.

7 Meaning of “estimated value” of procurement

- (1) The ***estimated value*** of a procurement is an estimate of the maximum value (excluding GST) of the proposed procurement contract made by the government agency concerned, and is to include the value of the following:
 - (a) the goods or services to be procured,
 - (b) all forms of remuneration payable by the government agency, including any premiums, fees, commissions, interest and other revenue streams that may be provided for in the proposed contract,
 - (c) any options, extensions, renewals or other mechanisms that may be executed over the life of the contract.

- (2) If a procurement is to be conducted in multiple parts with a number of proposed procurement contracts awarded either at the same time or over a period of time, with one or more suppliers, the estimated value of the procurement must include the estimated value of all of the proposed procurement contracts.
- (3) A procurement must not be divided into separate parts if a purpose of the division is to avoid a relevant procurement threshold.
- (4) Despite subclauses (1)–(3), if the maximum value of a proposed procurement cannot be estimated, the procurement is taken to have an estimated value that exceeds the relevant procurement threshold for the procurement.

Part 3 General principles for procurement

8 Non-discrimination

Government agencies, subject to this Direction, must not discriminate against any supplier due to its degree of foreign affiliation or ownership, location, or the origin of its goods and services.

9 Offsets prohibited

- (1) A government agency must not seek, take account of, impose or enforce any offset at any stage of a procurement.

Note. Clause 6 (2) and Schedules 2 and 3 provide for exemptions from the provisions of this Direction. For example, the prohibition against using offsets does not prevent a government agency from implementing a preferencing arrangement to benefit small and medium enterprises (see item 3 of Schedule 3).

- (2) In this clause, an *offset* is any condition or undertaking that requires the use of domestic content, a domestic supplier, the licensing of technology, technology transfer, investment, counter-trade or similar actions to encourage local development in Australia or to improve Australia's balance of payments accounts.

10 Third party procurement

A government agency may arrange for another party to make a procurement of goods and services on its behalf, but only if the government agency ensures that the provisions of this Direction relating to the procurement are complied with.

11 Government agency not to avoid obligation of this Direction

A government agency must not use contract extension options, cancel a procurement, or modify or terminate awarded contracts in order to avoid the operation of this Direction.

12 Basis to exclude suppliers from procurement

- (1) A government agency may exclude a supplier from a procurement if the agency has a reasonable belief regarding the following:
 - (a) that the supplier is bankrupt or insolvent,
 - (b) that the supplier has made one or more false declarations,
 - (c) that there has been a significant deficiency or persistent deficiencies in the performance by the supplier of any substantive requirement or obligation under a prior contract,
 - (d) the Independent Commission Against Corruption (or an equivalent body in a jurisdiction in Australia), within the previous 10 years, has made a finding or has been of the opinion that the supplier has engaged in corrupt conduct,
 - (e) that the supplier has failed to pay taxes,
 - (f) that the supplier has been convicted of an offence punishable by imprisonment for a term of 2 years or more, or by a fine of \$200,000 or more,
 - (g) that the supplier has been found guilty of professional misconduct or unprofessional conduct in a jurisdiction in Australia.
- (2) In this clause, a reference to the supplier includes, if the supplier is a body corporate, a director and any other person involved in the management of the affairs of the body corporate.

Part 4 Open approaches to market

13 Requirement to use open approaches to market

A government agency must use an open approach to market for all procurements to which this Direction applies, other than the following:

- (a) a procurement that is:
 - (i) from a supplier on a procurement panel that was established by an open approach to market that complied with this Part, and
 - (ii) for goods or services for which that procurement panel may be used,
- (b) a procurement by means of limited tendering permitted by this Direction,
- (c) a procurement that is:
 - (i) from a supplier on a procurement list that was established in accordance with Part 6, and
 - (ii) for goods or services for which that procurement list may be used.

Note. The notice inviting applications to be included as a supplier on a procurement list sets out a description of the goods and services for which the procurement list may be used—see clause 25 (3).

14 Content of open approaches to market

- (1) An open approach to market for a procurement must include an invitation to suppliers to lodge a submission.
- (2) An open approach to market for a procurement must include the following information:
 - (a) the name and address of the government agency and other information necessary to contact the agency and obtain all relevant documents relating to the procurement,
 - (b) a description of the procurement, including, if appropriate, the nature and quantity of the goods or services to be procured or, where the quantity is not known, the estimated quantity,
 - (c) an explanation of the process that will be followed for the procurement,
 - (d) a summary of any conditions for participation of suppliers, including any specific documents or certifications that suppliers must provide,
 - (e) if applicable, the period within which the goods or services must be delivered or the duration of the contract,
 - (f) the address and the date for lodging the submission,
 - (g) an indication that the procurement is a procurement to which this Direction applies.
- (3) If the open approach to market by a government agency for a procurement includes:
 - (a) an invitation to lodge a submission (an *initial submission*), and
 - (b) a statement that the government agency intends to invite further submissions regarding the procurement from a limited number of those tenderers who lodged an initial submission,
 the open approach to market must state:
 - (c) that the government agency will only invite further submissions from a limited number of tenderers who lodged initial submissions, and
 - (d) the criteria for selecting those limited number of tenderers, and

- (e) the justification for limiting the number of tenderers who will be invited to lodge a further submission.
 - (4) An open approach to market may include a statement that the government agency intends to conduct negotiations.
 - (5) A government agency must publish open approaches to market for free on NSW eTendering and, to the extent practicable, make all relevant procurement documentation available to suppliers for free by electronic means at the same time.
- Note.** See clause 27 regarding publication of procurement documentation on other websites.

15 Circumstances where limited tendering is permitted

- (1) A government agency may conduct a procurement by limited tendering only in the following circumstances:
 - (a) if, in response to an open approach to market:
 - (i) no submissions were received, or
 - (ii) no supplier satisfied the conditions for participation, or
 - (iii) the government agency reasonably believes no submission provides value for money (which is not limited to price), in accordance with evaluation criteria for the procurement, or
 - (iv) the government agency has determined in accordance with clause 22 not to award a contract, or
 - (v) the government agency reasonably believes a tenderer has colluded with another person in the procurement process,
 and the government agency does not substantially modify the requirements of the procurement,
 - (b) if, for reasons of extreme urgency brought about by events unforeseen by the government agency, the goods and services could not be obtained in time under an open approach to market,
 - (c) for procurements made under exceptionally advantageous conditions that arise only in the very short term (such as from unusual disposals, unsolicited innovative proposals, liquidation, bankruptcy, or receivership), and which are not routine procurements from regular suppliers,
 - (d) if the goods and services can be supplied only by a particular supplier and there is no reasonable alternative or substitute for one of the following reasons:
 - (i) the procurement is for a work of art,
 - (ii) to protect patents, copyrights, or other exclusive rights, or proprietary information,
 - (iii) due to an absence of competition for technical reasons,
 - (e) for additional deliveries of goods and services by the original supplier, or the authorised representative of the original supplier, that were not included in an initial procurement, if a change of supplier for the additional goods or services:
 - (i) cannot be made for technical reasons, such as requirements of interchangeability or interoperability with existing equipment, software, services or installations procured under the initial procurement, or due to conditions under original supplier warranties, and

- (ii) would cause significant inconvenience or substantial duplication of costs for the procuring government agency,
 - (f) for procurements in a commodity market (being a recognised exchange dealing in generic, largely unprocessed, goods that can be processed and resold),
 - (g) if a government agency procures a prototype or a first good or service that is intended for limited trial or that is developed at the government agency's request in the course of, and for, a particular contract for research, experiment, study, or original development,
 - (h) in the case of a contract awarded to the winner of a design contest, but only if:
 - (i) the contest has been organised in a manner that is consistent with this Direction, and
 - (ii) the contest is judged by an independent jury with a view to a design contract being awarded to the winner,
 - (i) if additional construction services that were not included in an initial contract for construction services, but that were within the objectives of original procurement documentation have, due to unforeseeable circumstances, become necessary to complete those original construction services, but only if the total value of contracts awarded for additional construction services does not exceed 50 per cent of the value of the initial contract.
- (2) A procurement by limited tendering is not required to comply with the following provisions of this Direction:
- (a) clause 16 (Conditions for participation),
 - (b) clause 17 (Specifications),
 - (c) clause 18 (Procurement documentation),
 - (d) clause 21 (Negotiations),
 - (e) clause 22 (Awarding contracts to be based on criteria), (f) clause 23 (Timing for submissions).
- (3) For each contract awarded by limited tendering, the government agency must prepare and keep a written report that includes:
- (a) the value and type of goods and services procured, and
 - (b) a statement indicating the circumstances and conditions that justified the use of the limited tendering.

Part 5 General rules for procurements

16 Conditions for participation

- (1) A government agency may specify conditions for participation, being minimum conditions that suppliers must demonstrate compliance with, in order to participate in a procurement process or, if applicable, to be included on a procurement list.
- (2) Conditions for participation may include requirements to undertake a certification or validation procedure.
- (3) Conditions for participation must be limited to those that will ensure that a supplier has the legal and financial capacity, and the commercial and technical abilities, to fulfil the requirements of the procurement.
- (4) Conditions for participation may require relevant prior experience when that experience is essential to meet the requirements of the procurement but must not specify, as a requirement, that suppliers have:
 - (a) prior experience in Australia, or
 - (b) previously been awarded one or more contracts by a government agency in Australia.
- (5) In assessing whether a supplier satisfies the conditions for participation, a government agency must:
 - (a) evaluate financial capacity, and commercial and technical abilities, on the basis of the supplier's business activities, wherever they have occurred, and
 - (b) base its assessment solely on the conditions for participation that the government agency has specified.

17 Specifications

- (1) A government agency must not use specifications or prescribe any conformity assessment procedure in order to create an unnecessary obstacle to trade.
- (2) In determining specifications for the procurement of goods and services, a government agency must (if appropriate):
 - (a) set out the specifications in terms of performance and functional requirements, and
 - (b) base technical specifications on international standards, if they exist, except when the use of international standards would fail to meet the government agency's requirements.
- (3) A specification must not require or refer to a particular trademark or trade name, patent, copyright, design or type, specific origin, producer, or supplier, unless:
 - (a) the specification includes words such as "or equivalent", and
 - (b) there is no other sufficiently precise or intelligible way of describing the procurement requirement.
- (4) A government agency may conduct market research and other activities in developing specifications for a particular procurement and allow a supplier that has been engaged to provide those services to participate in procurements related to those services.
- (5) A government agency must ensure that a supplier referred to in subclause (4) will not have an unfair advantage over other suppliers.

18 Procurement documentation

- (1) Procurement documentation must include a complete description of the following:
 - (a) the procurement, including the nature, scope and the quantity of the goods and services to be procured or, where the quantity is not known, the estimated quantity, and any requirements to be fulfilled, including any technical specifications, conformity certification, plans, drawings, or instructional materials,
 - (b) any conditions for participation, including any financial guarantees, information and documents that suppliers are required to submit,
 - (c) the evaluation criteria to be considered in assessing submissions and, if applicable to the evaluation, the relative importance of those criteria,
 - (d) any dates for the delivery of goods or supply of services, taking into account the complexity of the procurement,
 - (e) any other terms or conditions relevant to the evaluation of submissions.
- (2) Subject to clause 19, a government agency must, on request, promptly provide, to any supplier invited to participate in a procurement, relevant procurement documentation held by the government agency that includes all information reasonably necessary to permit the supplier to prepare and lodge submissions.
Note. See clause 14 (5) for other provisions regarding provision of procurement documentation.

19 Requests for further information

- (1) A government agency must promptly reply to any reasonable request from a supplier for relevant information about a procurement, provided that the provision of the requested information:
 - (a) is not contrary to any Australian law, and
 - (b) does not give the supplier requesting the relevant information any unfair advantage over other suppliers in a competitive procurement process.
- (2) Despite any other provision of this Direction, a government agency is not required to disclose government information if there is an overriding public interest against disclosure of the information.
- (3) For the purposes of subclause (2), **government information** and **overriding public interest against disclosure** have the same meanings as in the *Government Information (Public Access) Act 2009*.

20 Amended or reissued requirements

If, during the course of a procurement, a government agency amends or reissues an open approach to market or procurement documentation, the government agency must transmit all amended or reissued documents:

- (a) to all the suppliers that are participating at the time the information is amended, if known, and, in all other cases, in the same manner as the original information, and
- (b) within a reasonable time to allow suppliers to modify and re-lodge submissions, if required.

21 Negotiations

- (1) A government agency may conduct negotiations regarding a procurement if:

- (a) the agency has indicated its intent to conduct negotiations in the open approach to market for the procurement concerned, or
 - (b) it appears from the evaluation of submissions that no submission will provide the best value for money in terms of the evaluation criteria for the procurement.
- (2) A government agency must ensure that any elimination of suppliers participating in negotiations is carried out in accordance with the evaluation criteria.

22 Awarding contracts to be based on criteria

Unless a government agency determines that:

- (a) no tenderer has satisfied the evaluation criteria for the procurement, or
 - (b) it is not in the public interest to award a contract,
- the government agency must award a contract to the tenderer that the government agency has determined:
- (c) satisfies the conditions for participation, and
 - (d) is fully capable of undertaking the contract, and
 - (e) will provide the best value for money (which is not limited to price), in accordance with evaluation criteria for the procurement.

23 Timing for submissions

- (1) **General**
 A government agency must require submissions to be lodged in accordance with a common deadline.
- (2) A government agency must, consistent with its own reasonable needs, provide sufficient time for suppliers to prepare and lodge submissions.
- (3) Without limiting subclause (2), the time limit for suppliers to lodge submissions in the following circumstances must be not less than 10 days:
- (a) where notice of the procurement was published in an annual procurement plan on NSW eTendering at least 40 days and not more than 12 months before the date of the procurement,
 - (b) where an open approach to market was undertaken during the period of 12 months before the date of the procurement and that open approach to market stated that substantially similar procurements will be the subject of further open approaches to market,
 - (c) the procurement is for commercial goods or services,
 - (d) the government agency determines that the goods or services are required urgently.
- (4) Without limiting subclause (2), the time limit for suppliers to lodge submissions in circumstances other than those specified in subclause (3) must be not less than 25 days.
- (5) If a government agency extends the time limit for a submission, or if negotiations are concluded and suppliers are permitted to lodge new submissions, the new time limit must apply equitably.
- (6) In this clause, **commercial goods and services** means goods and services that are of a type that are offered for sale to, and routinely purchased by, non-government buyers for non-government purposes.

24 Correction of errors

If a government agency provides a tenderer with an opportunity to correct unintentional errors between the time of opening of submissions and the awarding of the relevant procurement contract, the government agency must provide the opportunity equitably to all tenderers.

Part 6 Procurement lists

25 Procurement lists

- (1) A government agency may:
 - (a) establish and maintain a procurement list in accordance with this clause, and
 - (b) use a procurement list established by it or another government agency under this clause.
- (2) The government agency is to invite suppliers to make an application to be included on a procurement list by notice published on NSW eTendering.
- (3) The notice inviting applications to be included on a procurement list must include the following information:
 - (a) a description of the goods and services for which the procurement list may be used,
 - (b) the conditions for participation that suppliers must satisfy for inclusion on the procurement list,
 - (c) the name and address of the government agency and other information necessary to contact the government agency and to obtain all relevant documents relating to the procurement list,
 - (d) the methods that the government agency will use to verify that a supplier satisfies the conditions for participation,
 - (e) the period that the procurement list will operate (unless the period is indefinite) and the means for its renewal or termination,
 - (f) if the period of the procurement list is indefinite, an indication of the method by which notice will be given of the termination of use of the procurement list,
 - (g) an indication that the procurement list may be used for a procurement to which this Direction applies,
 - (h) the deadline for making an application to be included on the procurement list, if applicable,
 - (i) a statement that only suppliers, or a limited number of suppliers, included on the procurement list may receive invitations from a government agency to make submissions relating to procurements for which the list was established,
 - (j) if the statement referred to in paragraph (i) states that only a limited number of suppliers included on the procurement list may receive invitations from a government agency to make submissions relating to procurements, a statement of:
 - (i) the justification for that limitation, and

Note. For example, the justification for a limitation in the statement may be based on the business efficacy and efficiency of procuring from the procurement list.
 - (ii) the criteria for selecting those limited number of suppliers.
- (4) **Note.** For example, the criteria for selecting those limited number of suppliers might include capacity, subject matter expertise, availability and experience. A notice inviting suppliers to make an application to be included on a procurement list may include a statement that the government agency may seek to conduct negotiations relating to any procurements from suppliers on the list.
- (5) If a government agency, in response to an application, is satisfied that a supplier meets the conditions for participation for the procurement list, it must include the supplier on the list.

- (6) A government agency must notify a supplier if it rejects the supplier's application to be included on a procurement list.
- (7) Unless a procurement list is continuously open for applications by suppliers to be included on the list, the government agency concerned must, at least once a year, publish further notices inviting suppliers to make applications to be included on the list.
- (8) If:
 - (a) a government agency has established a procurement list, and
 - (b) the notice inviting suppliers to make an application to be included on the procurement list included the statement referred to in subclause (3) (i) stating that only a limited number of suppliers included on the procurement list may receive invitations from a government agency to make submissions relating to procurements, and
 - (c) another government agency proposes to use the procurement list to conduct a procurement,the other government agency must, in determining a limited number of suppliers who may receive the invitations to make a submission in relation to a procurement, apply the criteria set out in the statement under subclause (3) (j) (ii) in selecting those limited number of suppliers.

Part 7 Miscellaneous

26 Annual procurement plans

- (1) A government agency may maintain on NSW eTendering a current annual procurement plan.
- (2) The purpose of an annual procurement plan is to give the market early notice of potential procurement opportunities.
- (3) The annual procurement plan may include the information regarding significant planned procurements and the estimated publication date of the relevant open approaches to market for those procurements.
- (4) A government agency may update its annual procurement plan during the year.

27 Notification of procurement documentation on agency websites

- (1) A government agency may, instead of publishing procurement documentation on NSW eTendering, use an agency website for the publication of the documentation.
- (2) A government agency must ensure that an agency website used for the publication of procurement documentation:
 - (a) provides that the procurement is conducted using information technology systems and software (including those related to authentication and encryption of information) that are generally available and interoperable with other generally available information technology systems and software, and
 - (b) has mechanisms that ensure the integrity of information provided by suppliers.

28 Debriefings

- (1) After a rejection of a submission or the award of a contract, a government agency must promptly inform affected tenderers of the decision.
- (2) Debriefings must be made available, on request, to unsuccessful tenderers outlining the reasons the submission was unsuccessful.

Schedule 1 Government agencies

(Clause 6 (1))

Aboriginal Housing Office

Advocate for Children and Young People

Art Gallery of New South Wales Trust and Art Gallery of New South Wales Trust Staff Agency

Children's Guardian and Office of the Children's Guardian

Commissioner of Fire and Rescue NSW and Fire and Rescue NSW

Commissioner of the NSW Rural Fire Service and Office of the NSW Rural Fire Service

Commissioner of the NSW State Emergency Service and Office of the NSW State Emergency Service

Crown Solicitor and Crown Solicitor's Office

Department of Communities and Justice

Department of Customer Service

Department of Education

Department of Enterprise, Investment and Trade

Department of Planning and Environment

Department of Premier and Cabinet

Department of Regional NSW

Destination NSW and Destination NSW Staff Agency

Director of Public Prosecutions and Office of the Director of Public Prosecutions

Environment Protection Authority and Environment Protection Authority Staff Agency

Health Care Complaints Commission and Health Care Complaints Commission Staff Agency

Hunter and Central Coast Development Corporation

Independent Planning Commission and Office of the Independent Planning Commission

Information Commissioner and Information and Privacy Commission

Note. Procurements related to functions of the Privacy Commissioner by the Information and Privacy Commission are exempt. See Schedule 2.

Infrastructure NSW and Infrastructure NSW Staff Agency

Inspector of the Law Enforcement Conduct Commission and Office of the Inspector of the Law Enforcement Conduct Commission

Insurance and Care NSW (icare)

Law Enforcement Conduct Commission and Office of the Law Enforcement Conduct Commission

Legal Aid Commission and Legal Aid Commission Staff Agency

Library Council of New South Wales and Library Council of New South Wales Staff Agency

Ministry of Health

Multicultural NSW and Multicultural NSW Staff Agency

New South Wales Crime Commission and New South Wales Crime Commission Staff Agency

New South Wales Land and Housing Corporation (Housing NSW)

New South Wales Rural Assistance Authority

NSW Education Standards Authority and NSW Education Standards Authority Staff Agency

NSW Electoral Commission and NSW Electoral Commission Staff Agency

NSW Food Authority

NSW Trustee and Guardian

Office of Sport

Ombudsman and Ombudsman's Office

Parliamentary Counsel and Parliamentary Counsel's Office

Place Management NSW

Property NSW

Public Service Commissioner and Public Service Commission

Resilience NSW

Service NSW (but only insofar as the procurement is carried out for NSW Business Connect)

State Insurance Regulatory Authority (SIRA) Sydney Olympic Park Authority

Taronga Conservation Society Australia

Technical and Further Education Commission and TAFE Commission (Senior Executives) Staff Agency
 The Audit Office of New South Wales

The Treasury

Transport for NSW

Note. A procurement by Transport for NSW relating to the following is an exempt procurement:

- (a) the transport infrastructure function of Transport for NSW (including the function of procurement of transport infrastructure, transport vehicles and rolling stock),
- (b) the transport infrastructure development function of Transport for NSW, but only as that extends to procurement associated with the development and establishment of transport infrastructure,
- (c) managing and maintaining that part of the NSW rail network vested in Transport for NSW,
- (d) the function of Transport for NSW of providing rail access,
- (e) a procurement conducted by Transport for NSW:
 - (i) as a successor to any other agency, other than the former Roads and Maritime Services, where that other agency was not a covered agency at the time of the succession, or
 - (ii) as a delegate of, agent of or on behalf of any other government agency, where that other agency is not listed in this Schedule at the time the procurement commenced,
- (f1) the construction or infrastructure maintenance functions of the former Roads and Maritime Services, including under the *Roads Act 1993*.
- (f) a passenger service contract that is entered into pursuant to Division 1 of Part 3 of the Passenger Transport Act 2014 (NSW).

Venues NSW and Venues NSW Staff Agency

Schedule 2 Exempt procurements

- 1 The procurement (including leasing) of land, existing buildings or other immoveable property and any associated rights.
Note. The procurement of construction services is not exempt.
- 2 A procurement for the direct purpose of providing foreign assistance.
- 3 A procurement funded by international grants, loans or other assistance, when the provision of such assistance is subject to conditions which are inconsistent with this Direction.
- 4 The procurement or acquisition of the following:
 - (a) fiscal agency or depository services,
 - (b) liquidation and management services for a financial institution regulated by the State of New South Wales or a NSW Government agency,
 - (c) services related to the sale, redemption or distribution of public debt, including loans and government bonds, notes and other securities.
- 5 A procurement funded by grants or sponsorship payments (or both) received from a person or body not specified in Annex 15-A of the *Trans-Pacific Partnership Agreement* as incorporated into the *Comprehensive and Progressive Agreement for Trans-Pacific Partnership (TPP-11)* (unless the person or body is listed in Schedule 1).
- 6 Public employment contracts (including contracts for labour hire).
 In this item, **contract for labour hire** means a contract under which a government agency engages an individual to provide labour, where the individual is engaged either directly or through a firm which primarily exists to provide the services of only that individual, and includes the appointment of an eminent individual to a special role by a government agency, or the appointment of a person or persons by a government agency to a governance committee (for example, an audit committee, ethics committee or steering committee), but does not include the engagement of consultants.
- 7 A procurement of goods and services by a government agency from another government agency or a Commonwealth, State, Territory or local government entity.
- 8 A procurement of goods or services (including construction services) outside Australian territory for consumption outside Australian territory.
- 9 The procurement of health and welfare services.
- 10 The procurement of education services.
- 11 The procurement of motor vehicles.
- 12 A procurement undertaken by a government agency listed in Schedule 1 on behalf of an entity that is not listed in that Schedule.
- 13 A procurement relating to the functions of the Privacy Commissioner by the Information and Privacy Commission.

- 14** A procurement by Transport for NSW relating to the following:
- (a) the transport infrastructure function of Transport for NSW (including the function of procurement of transport infrastructure, transport vehicles and rolling stock)
 - (b) the transport infrastructure development function of Transport for NSW, but only as that extends to procurement associated with the development and establishment of transport infrastructure,
 - (c) managing and maintaining that part of the NSW rail network vested in Transport for NSW,
 - (d) the function of Transport for NSW of providing rail access,
 - (e) a procurement conducted by Transport for NSW:
 - (i) as a successor to any other agency, other than the former Roads and Maritime Services, where that other agency was not a covered agency at the time of the succession, or
 - (ii) as a delegate of, agent of or on behalf of any other government agency, where that other agency is not listed in Schedule 1 at the time the procurement commenced,
 - (f1) the construction or infrastructure maintenance functions of the former Roads and Maritime Services, including under the *Roads Act 1993*.
 - (f) a passenger service contract that is entered into pursuant to Division 1 of Part 3 of the *Passenger Transport Act 2014 (NSW)*.
- 15** A procurement by the NSW Trustee and Guardian other than a procurement conducted in relation to a function previously performed by the Public Trustee under the *Public Trustee Act 1913*.
- 16** A procurement of the following:
- (a) blood and blood-related products, including plasma derived products,
 - (b) plasma fractionation services.
- 17** A procurement of the following:
- (a) government advertising services,
 - (b) research and development services.
- 18** A procurement that is an engagement of an expert or neutral person, including the engagement of counsel or barristers for any current or anticipated litigation or dispute.
- 19** A procurement of goods or services from a business that primarily exists to provide the services of persons with a disability.
- 20** A procurement that is any form of assistance that a government agency provides, including a cooperative agreement, grant, loan, equity infusion, guarantee, subsidy, fiscal incentive or sponsorship arrangement.
- 21** A procurement that is undertaken pursuant to Procurement Board Direction PBD 2020-01 Support of bushfire affected communities.

Schedule 3 Exempt measures and preferences

- 1** A measure:
- (a) necessary to protect public morals, order or safety, or
 - (b) necessary to protect human, animal or plant life or health (including environmental measures necessary to protect human, animal or plant life or health), or
 - (c) necessary to protect intellectual property, or
 - (d) relating to the good or service of a person with disabilities, of philanthropic or not-for-profit institutions, or of prison labour,
- provided the measure is not applied in a manner that would constitute arbitrary or unjustifiable discrimination or a disguised restriction on international trade.
- 2** A measure:
- (a) indispensable for Australian national security or for Australian national defence purposes, or
 - (b) considered necessary for the protection of essential security interests relating to government procurement.
- 3** A preference to benefit small and medium enterprise (being an Australian or New Zealand firm with fewer than 200 full-time equivalent employees).
- 4** A measure to protect national treasures of artistic, historic or archaeological value.
- 5** A measure:
- (a) for the health or welfare of indigenous people, or
 - (b) for the economic and social advancement of indigenous people.
- 6** A measure that requires sensitive government information to be stored, hosted or processed within Australia.

Schedule 4 Savings, transitional and other provisions

Part 1 Provision consequent on Procurement (Enforceable Procurement Provisions) Direction 2019

1 Savings and transitional

- (1) This Direction does not apply to a procurement that commenced before this Direction commences, but only if the contract for the procurement is awarded within 3 years after the commencement of this Direction.
- (2) For the purposes of subclause (1) and (4)(b), a procurement is taken to have commenced if and when:
 - (a) the business case which contains a strategy for approaching the market for the procurement is:
 - (i) submitted by the government agency to another government entity for review as part of a mandatory process; or
 - (ii) if (i) is not applicable, approved by the government agency, or
 - (b) if (a) is not applicable, the strategy for approaching the market for the procurement is approved by the government agency; and
 - (c) if neither (a) nor (b) is applicable, procurement documentation is first published by the government agency on NSW eTendering or its website.
- (3) A procurement panel in existence immediately before the commencement of this Direction is, for the purposes of clause 13 (a), taken to have been established by an open approach to market that complied with Part 4.
- (4) This Direction does not apply to a procurement conducted through a procurement list that was published on NSW eTendering immediately before the commencement of this Direction, but only if:
 - (a) the contract for the procurement is awarded within 12 months after the commencement of this Direction; or
 - (b) the procurement commenced before the date that is 12 months after the commencement of this Direction and the contract for the procurement is awarded on or before 30 June 2021.
- (5) This Direction does not apply to a contract entered into before the commencement of this Direction, including the exercise of any option to extend under such a contract.
- (6) This Direction does not apply to a procurement under a multi-agency access clause of an existing procurement contract under which a supplier agrees that it will enter into a separate customer contract with other government agencies to supply similar goods and services based on similar terms and conditions of the existing procurement contract, but only during the period ending 3 years after the commencement of this Direction.

Note. More information regarding multi-agency access contracts is available at <https://buy.nsw.gov.au/buyer-guidance/source/negotiate-and-award-contract/multi-agencycontracts>.
- (7) For the purposes of subclause (6), an existing procurement contract means a procurement contract in force immediately before the commencement of this Direction.

Part 2 Provision consequent on Procurement (Enforceable Procurement Provisions) Amendment (Australia-UK Free Trade Agreement) Direction 2023

2 Interpretation

(1) In this Part—

new government agency means the following—

- (a) the Art Gallery of New South Wales Trust,
- (b) the Art Gallery of New South Wales Trust Staff Agency,
- (c) the Hunter and Central Coast Development Corporation,
- (d) Infrastructure NSW,
- (e) Infrastructure NSW Staff Agency,
- (f) the Library Council of New South Wales,
- (g) the Library Council of New South Wales Staff Agency,
- (h) the TAFE Commission (Senior Executives) Staff Agency,
- (i) the Taronga Conservation Society Australia,
- (j) the Technical and Further Education Commission,
- (k) Venues NSW,
- (l) Venues NSW Staff Agency.

relevant TfNSW procurement means a procurement that—

- (a) relates to a function of Transport for NSW that was, immediately before the abolition of Roads and Maritime Services, a function of Roads and Maritime Services, and
- (b) does not relate to the construction or infrastructure maintenance functions of the former Roads and Maritime Services, including under the *Roads Act 1993*.

(2) In this Part—

- (a) a procurement is taken to have commenced in the circumstances set out in this Schedule, clause 1(2), and
- (b) the establishment of a procurement panel is not affected by the exercise of an option to extend a contract for inclusion on the panel.

3 Procurements

- (1) This Direction does not apply to a procurement by a new government agency or a relevant TfNSW procurement if—
 - (a) the procurement commenced before 1 October 2023, and
 - (b) the contract for the procurement is awarded on or before 1 October 2026.
- (2) This Direction does not apply to a contract for a procurement entered into before 1 October 2023, whether or not an option to extend the contract is exercised after that date, by—
 - (a) a new government agency, or
 - (b) if the contract relates to a relevant TfNSW procurement—Transport for NSW.
- (3) This Direction does not apply to a procurement by a new government agency or a relevant TfNSW procurement if the procurement is—

- (a) under a multi-agency access clause of a contract entered into before 1 October 2023, and
- (b) completed on or before 1 October 2026.

4 Procurement panels

A procurement panel is taken to have been established by an open approach to market that complied with Part 4 of this Direction if the procurement panel was established before 1 October 2023 by—

- (a) a new government agency, or
- (b) if the panel is established for a relevant TfNSW procurement—Transport for NSW.

5 Procurement lists

This Direction does not apply to a relevant TfNSW procurement, or a procurement by a new government agency, through a procurement list published on NSW eTendering immediately before 1 October 2023 if—

- (a) the contract for the procurement is awarded on or before 1 October 2024, or
- (b) the procurement commenced before 1 October 2024 and the contract for the procurement is awarded on or before 1 April 2025.