



Procurement  
Board

**NSW PROCUREMENT  
POLICY FRAMEWORK  
FOR  
NSW GOVERNMENT AGENCIES**

**ISSUED BY THE NSW PROCUREMENT BOARD  
July 2015  
Version 4**

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## Introduction

This Policy Framework (the 'Framework') sets out the policy and operating framework for the NSW public sector procurement system, and provides a single source of guidance on the rules for procurement. It includes links to other relevant policies and material including standard form documentation.

The principles-based Framework has been developed by the NSW Procurement Board (the 'Board') in consultation with agencies for use by agencies and suppliers to government. Feedback is welcomed, and contact details are provided at the end of this document.

This Framework sets out mandatory requirements that must be followed by all agencies. It may be mandatory because it is the law<sup>1</sup>, or mandated at a policy level by government, the Board, or other administrators within government (for example, Treasury Circulars). References to the source or authority have been included.

The mandatory sections of this Framework are 'policy' for the purposes of section 176 of the *Public Works and Procurement Act 1912*, which requires agencies to exercise procurement functions in accordance with:

- any policies and Directions of the Board
- the terms of its accreditation
- the principles of probity and fairness.

Agencies are also required to:

- ensure that the agency achieves value for money in the exercise of its functions
- provide information to the Board at its request
- monitor compliance with this Framework.

Agencies should ensure that their procurement activities align with their business needs, and work towards service improvements. Agencies should also ensure that their internal policies and controls are consistent with any obligations under this Framework, including financial management obligations and policies relating to fraud and corruption control.

Under this Framework:

- agencies are responsible for their own procurement, for compliance with procurement law and this Framework
- accreditation is a key element in the devolution of responsibility
- less red tape and prescriptive rules apply to procurement, and the requirements that do apply to procurement are principle-based
- there is greater competition for supply to government, with small and medium enterprises (SMEs) in particular encouraged to participate in procurement processes
- the default open tender model has been replaced with the option of using a broader range of procurement methods

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<sup>1</sup> Agencies should note that, for brevity, not all legislative obligations affecting the way an agency conducts procurement are repeated within this Framework. This Framework focuses on the legislative obligations in Part 11 of the *Public Works and Procurement Act 1912*, and references other key obligations such as those within the *Public Finance and Audit Act 1983* and the *Independent Commission Against Corruption Act 1988*.

- the default long-term panel contracts, which lock out suppliers and innovation, are replaced with more flexible supplier arrangements, such as prequalified schemes and lists
- government contracts for procurement are being brought in line with commercial and private sector standards
- there is more effective planning for procurement through category management approaches and principles
- probity and fairness are highly significant and essential elements of procurement, however they should not be used as a shield to stifle competition, value for money, or innovative outcomes.

## How to use this document

To assist agencies to apply this Framework, where relevant at the beginning of each section there is a summary of mandatory procurement requirements and key documents:

### Mandatory requirement

### Documents and templates

Guidance material represents the NSW public sector's best practice for procurement which agencies are encouraged to adopt. Further advice is provided on the [ProcurePoint website](#).

A glossary of commonly used terms is contained at the end of this Framework.

## Review and updating this policy

This policy is reviewed periodically in response to feedback from the Board, agencies, changes in government policy or law, or to correct errors or omissions.

This version (version 4.0) updates the version issued in October 2014 (version 3.1). The substantive policy changes from version 3.1 are:

- recognising that agencies may decide to retain intellectual property of products created as a result of a procurement activity
- noting that from 1 September 2015 onwards, all agencies should cease print advertising of government tenders and only advertise tenders electronically.

## Further information and support

The NSW Procurement Service Centre can provide assistance and information on a wide range of procurement services, contracts and products. The Service Centre may be reached via phone on 1800 679 289, or via email at [nswbuy@finance.nsw.gov.au](mailto:nswbuy@finance.nsw.gov.au).

## Legal, administrative, and governance frameworks

### Mandatory requirement

Officer(s) must be appointed to exercise the functions of a Chief Procurement Officer

Procurement governance refers to the policies and processes by which an organisation holds itself accountable for its procurement activities.

The Board is responsible for the governance structure of the procurement framework, and the rules and policies made under it.

Agency heads are responsible for managing their own agency procurement, and in some circumstances, procurement for other agencies. Agency heads typically delegate responsibility for all types of goods and services procurement, including ICT, construction and asset management, to separate parts of their agency. Where this occurs, agency heads should ensure that they have appropriate governance mechanisms in place to manage all categories of goods and services procurement.

Critical to this governance is the appointment of a cluster or agency Chief Procurement Officer, effective procurement planning, robust internal purchasing systems, efficient approval processes, and the appropriate delegation of authority.

Agencies are required to prepare procurement strategy and plans that reflect the procurement needs of the agency. These should be consistent with the Board's category management plans and relevant government policies, such as the ICT Strategy.

### Legislative framework

#### ***Public Works and Procurement Act 1912***

Part 11 of the [\*Public Works and Procurement Act 1912 \(PWP Act\)\*](#) provides the legislative framework for procurement across the NSW public sector. It creates the NSW Procurement Board. The Board can issue directions to agencies about the conduct of procurements or authorise them to carry out procurements, but does not have power to enter contracts.

The Board's objectives are set out in section 171 of the PWP Act, which are to:

- develop and implement a government-wide strategic approach to procurement
- ensure best value for money in procurement by and for agencies
- improve competition and facilitate access to government procurement business by the private sector, especially by SMEs and regional enterprises
- reduce administrative costs for agencies associated with procurement
- simplify procurement processes while ensuring probity and fairness.

The PWP Act applies to all procurement by all agencies, excluding state-owned corporations (unless prescribed). Procurement has a broad end-to-end definition from 'needs identification' to 'contracting and placing orders'. It also includes procurement of goods and services (including construction) by or for an agency to either exercise statutory functions or pursuant to statutory powers of procurement.

Section 176 of the PWP Act places the following obligations on agencies:

- exercise functions in accordance with Board policies and Directions
- adhere to the principles of probity and fairness
- obtain value for money in the exercise of procurement functions
- provide information on procurement functions to the Board as requested.

## ***Independent Commission Against Corruption Act 1988***

The [Independent Commission Against Corruption Act 1988](#) creates the Independent Commission Against Corruption (ICAC) to investigate and expose corrupt conduct in the NSW public sector, to actively prevent corruption through advice and assistance, and to educate the NSW community and public sector about corruption and its effects. Agencies, public officials and suppliers all have obligations in relation to preventing and addressing corruption. More information is in the *Probity and Fairness* section.

## ***Public Finance and Audit Act 1983***

The Framework for the procurement of goods and services is closely linked to the legislative and administrative arrangements for the expenditure of public funds. Procurement activities are subject to the requirements of the [Public Finance and Audit Act 1983](#), Treasurer's Directions, agency delegation schemes, and internal agency policies for managing expenditure.

## ***Government Information (Public Access) Act 2009***

The [Government Information \(Public Access\) Act 2009](#) sets out the requirements for the disclosure of government contracts. More information is in the *Contract Disclosure* section.

## **Administrative framework**

Supporting the legislative framework are administrative policies that assist agencies in areas such as probity, procurement method, use of standard form contracts, prequalification schemes and lists, international agreements, insurance and risk assessment. [Procurement, goods and services and construction](#) information is available on ProcurePoint. ICT information is available at <http://www.finance.nsw.gov.au/ict/>.

## ***Procurement Board Directions***

Agencies must comply with Directions issued by the Board relating to procurement. Directions issued by the Board are published on [ProcurePoint](#).

## ***Agency Accreditation Scheme(s) for procurement***

The Board has established an [Agency Accreditation Scheme](#) for government procurement to assess agency capability to undertake different levels and/or types of good and services procurement (the Scheme). The Scheme is currently incorporating the Agency Accreditation Scheme for Construction into itself, as well.

Agencies only have authority to enter into any procurement arrangement consistent with its terms of accreditation. Where an agency intends to enter into any procurement arrangement which is inconsistent with its terms of accreditation, it must follow the processes established by the Board from time to time (currently [Board Direction 2013-03](#)).

## ***ICT procurement***

The Board has delegated its functions set out in section 172 of the PWP Act with respect to ICT related goods and services procurement to the ICT Board, using section 169 of the PWP Act. This allows the ICT Board to oversee the procurement of ICT goods and services, and support its role in improving ICT enabled service delivery and financial outcomes.

## ***Charter of Construction Procurement Principles***

This Charter sets out the expected standards of behaviour of agencies from points of engagement with industry, the sourcing process, as well as the management of contracts. The principles set out in the Charter are consistent with the objectives of the Board and the responsibilities of agencies under the Framework. The Charter can be accessed through [ProcurePoint](#).

## ***Other procurement-related government policies***

Links to other government policies which affect procurement are published on [ProcurePoint](#).

## Agency policies affecting procurement

Agencies should ensure that internal policies and guidance on probity, fraud and financial controls are in place, that staff members involved in procurement activities are aware of the policies, and that they are reviewed as appropriate.

## Free Trade Agreements

NSW participates in the procurement chapters of a number of [Free Trade Agreements \(FTAs\)](#). For example, the Australia-United States FTA (AUSFTA) applies to construction procurements valued above \$7.769 million and goods and services procurement valued above \$551,000. Some goods procurement is exempt, such as health and welfare services, education services, and motor vehicles. For procurement covered under the FTAs, agencies must treat a supplier from the other country the same as a domestic supplier.

## Australia and New Zealand Government Procurement Agreement

The state of NSW is party to the [Australia and New Zealand Government Procurement Agreement \(ANZGPA\)](#), which promotes opportunities for Australian and New Zealand service providers to compete for government business on the basis of value for money in a single competitive market.

## Policies

### Authority to procure

#### Mandatory requirements

All procurement by government agencies is to be conducted in accordance with the overarching requirements set out in section 176 of the [Public Works and Procurement Act 1912](#)

Agencies must comply with all Board Directions ([Board Direction 2013-03](#) and [Board Direction C2014-01](#) currently set out the rules for procurement)

'Order splitting', with the intention of avoiding upper procurement threshold levels, is inconsistent with the objectives of the procurement system and is prohibited

Agencies are to apply the [Statement on Value for Money](#) and ensure it obtains value for money in relation to its procurement

Agencies must apply the [Small and Medium Enterprises Policy Framework](#)

Agencies must comply with International obligations and disclosure requirements

All procurement by agencies is governed by section 176 of the [Public Works and Procurement Act 1912](#). The responsibility for procurement lies with the agency. The Board has permitted some agencies to establish and control whole-of-government arrangements.

#### Buying from or using existing government contracts

Agencies should consider whether there is an existing whole-of-government contract for the procurement of the good or service needed. Where an existing whole-of-government contract exists, agencies are required to use that contract where that contract applies ([Board Direction 2012-02](#)), unless there are local sourcing arrangements available (see below). Information about current whole-of-government contracts is available on [ProcurePoint](#).

#### An agency's authority to procure is linked to its accreditation status

Agencies have authority to enter into any procurement arrangement consistent with its terms of accreditation. Where an agency intends to enter into any procurement arrangement which is inconsistent with its terms of accreditation, it must follow the processes established by the Board from

time to time (currently [Board Direction 2013-03](#)). As a first step, the agency should consider whether an accredited agency within its cluster can make the purchase.

Except for construction, if procurement by an accredited agency within a cluster is not possible, an agency is required to refer a proposed procurement to the Department of Finance, Services and Innovation (DFSI). Usually the agency will be requested to submit a procurement strategy, including full details and any specifications of the procurement. DFSI will consider the submission and, if endorsed, provide concurrence or approval for the proposed approach. Approval may be sought from the Board where DFSI considers it appropriate to do so.

### Local procurement arrangements

An agency located in a non-metropolitan area may purchase goods and services up to the value of \$5,000 (including GST) from local sources, provided that the supplier's rates for the goods or services are reasonable and consistent with normal market rates. Non-metropolitan and metropolitan areas are explained further in [Board Direction 2012-02](#).

Principals of Department of Education schools can also purchase goods and services up to the value of \$5,000 (including GST), despite those goods and services being available on whole-of-government contracts (except excluded contracts on a list maintained by DEC as amended from time to time). The [Department of Education website](#) provides further details.

### Procurement approved by Cabinet and ERC

Where the procurement of goods and services by an agency has been considered and approved by Cabinet or the Cabinet Standing Committee on Expenditure Review (ERC), this Framework, and [Board Direction 2013-03](#), does not apply to the extent of any inconsistency. This includes where Cabinet or ERC approves the procurement of goods or services to implement its decision.

In undertaking the procurement approved by Cabinet or ERC, the agency is to have regard to this Framework (for example, when selecting the method of procurement).

### Procurement for statutory functions

Except where specifically exempted, this Framework applies to procurement required by an agency to exercise its statutory functions, and the procurement by an agency using its specific statutory powers of procurement (together known as 'statutory procurement').

## Construction policy – arrangements for 2015/16

### Documents and templates

[Construction procurement](#) on ProcurePoint

### Mandatory requirements

[Implementation Guidelines to the NSW Code of Practice for Procurement: Building and Construction](#) (July 2013)

[Board Direction C2014-01](#)

[Board Direction C2014-04](#)

[Aboriginal Participation in Construction Policy 2015](#) (From 1 July 2016)

The Board has agreed to review, consolidate and update all sector-wide relevant construction procurement policies and procedures. While this review is underway, existing policies and procedures continue to apply, as set out in [Board Direction C2014-01](#). By the completion of the review, construction procurement policies will be fully integrated into this Framework. It is also envisaged that the Board will issue updated and consolidated policies and/or guidance on:

Security of payment	Work health and safety	Training/skills development
Performance management	Aboriginal Participation	Environmental management
Code of Practice for Construction & Guidelines	Quality systems	

## Construction procurement accreditation

Agencies accredited under the Agency Accreditation Scheme for Construction may conduct procurement valued over \$1.3 million using their own systems, in accordance with the terms of their accreditation ([Board Direction C2014-03](#)). By March 2018, all accreditations granted under this Scheme will be phased out, as the Board adopts a single agency accreditation scheme.

Agencies that are not accredited under the Agency Accreditation Scheme for Construction are required to use the [procurement system for construction](#). The system contains contract templates, procurement practice guides and tools to assist agencies. Accredited agencies may also use the system.

## Procuring for an agency or for whole-of-government

### Mandatory requirement

Agencies are required to apply [Board Direction 2014-06](#) and [Board Direction 2012-07](#)

### Documents and templates

[Category Management Planning Guidelines](#)

[Multi-agency access contracts](#)

### Procurement objectives

Agency heads are responsible for procurement for their agency (and, in some cases, for other agencies), so must ensure that procurements meet the value for money, business alignment and service improvement objectives. Key principles that underpin the procurement framework, such as utilising contemporary sourcing mechanisms and up-to-date contracting arrangements, are set out in the Board's [Strategic Directions](#) on ProcurePoint.

### Agency procuring on behalf of other agencies or on behalf of whole-of-government

Generally, an agency can only procure for its own purposes. The Board may authorise an agency to carry out specific whole-of-government procurement or be given responsibility for management of categories of goods and services. [Board Direction 2014-06](#) applies.

### Whole-of-government arrangements

Previously, the former State Contracts Control Board (SCCB) entered into mandated panel arrangements with suppliers, under which agencies entered into customer contracts with suppliers. With the decentralisation of procurement responsibility, the Board has decided that mandated whole-of-government procurement arrangements will only be created where the benefits are demonstrated to outweigh the costs, while other whole-of-government procurement arrangements will not be mandatory. View current [NSW Government contracts](#).

### Multi-agency access contracts or 'piggybacking'

Where it is not appropriate to establish a whole-of-government contract, agencies may still be able to procure from the arrangements organised by another agency. This reduces the procurement burden on agencies and suppliers by reducing the number of approaches to market, and allows for price savings through volume discounts. Agencies are authorised to buy from existing arrangements, where agreed by the establishing agency ([Board Direction 2012-07](#) applies). Agencies can use the [Central Contracts Register](#) on ProcurePoint or the Scheme Explorer on [eTendering](#) to identify multi-agency access contracts.

## Category Management

As part of the NSW Government procurement reform process, procurement category management is to occur across all agencies covering significant expenditures. [Category management](#) takes into account the requirements, opportunities and risks of both the supply side and buy side. It involves moving away from a contract-focussed approach, to one focussed on the category of goods and services as a whole.

The priorities within a category are clearly articulated within a category management plan, including appropriate high-level 'go to market' sourcing strategies. It also communicates an effective understanding of external and internal market environments, and involves active management of stakeholder requirements throughout the category lifecycle. Procurement strategy, market engagement, vendor and contract management are all subsets of category management. A 'go to market' strategy details how the supply market will be engaged, the type of contracts that need to be put in place, and how the contract will be managed. Guidance is available from the [Category Management Planning Guidelines](#) on ProcurePoint.

## Treatment of legacy SCCB contracts

The DFSI Secretary is the Principal in all current whole-of-government contracts, which were previously established by the former SCCB. The DFSI Secretary, or delegate, is able to legally make arrangements in relation to existing contracts, such as varying products, prices or suppliers. Extensions of any whole-of-government SCCB contracts and agency specific SCCB contracts require the approval of the Principal. The Principal may determine extensions and duration, having regard to the criteria set out under contract period in this Framework. On expiry of existing whole-of-government contracts, the Board will make decisions as to future procurement arrangements for those categories of goods and services.

## Procurement planning

### Documents and templates

[Market and Industry Engagement](#) guidance, [Industry Engagement Guide](#)

[Procurement Plan list](#)

### Mandatory requirement

Agencies are required to publish procurement plans on the eTendering website ([Board Direction 2013-06](#))

Agencies should adopt a strategic approach that includes industry engagement, integrating procurement planning with their business planning, and publishing planned procurement activities.

## Industry Engagement

Good [industry engagement](#) practices enable suppliers to understand what goods and services agencies may need in the future to deliver public services. The Board's [Industry Engagement Guide](#) provides a high-level view of strategies and approaches for agencies to use.

## Procurement planning and publishing planned procurements

A procurement plan is an effective tool to identify and review an agency's current procurement profile and practices, establish benchmarks to measure performance, and identify improved ways of procurement to meet its future needs.

NSW Government principal departments are required to progressively publish a Strategic Procurement Outlook Statement and Procurement Contact Information on the NSW Government's [eTendering](#) website. A Strategic Procurement Outlook Statement outlines the role of the agency, as well as major or strategic initiatives from which the agency expects procurements may be generated over the next

three years. Procurement Contact Information contains telephone and email contact points for enquiries related to the procurement undertaken by the agency.

As a matter of good practice, agencies are encouraged to consider publishing significant planned procurements, as well as a brief description of anticipated procurements planned for the following three years.

## Effective internal engagement

A critical factor in ensuring that procurement is aligned with business needs is ensuring there is effective internal engagement within agencies. Effective internal engagement consists of:

- early engagement across the organisation (and across multiple agencies/whole of government, if applicable) to ensure business needs are identified, agreed and approved. This includes relevant operational, policy and legal areas, and areas responsible for change management within the organisation. Consideration should be given to non-procurement solutions in the first instance.
- ensuring that procurement supports business plans (and state-wide plans, as required).
- embedding the outcomes of the internal engagement process in needs identification and procurement plans.
- ensuring that identified external stakeholders are consulted, where appropriate.
- specialist procurement expertise early in the procurement process for major projects.

Agencies should consider developing guidance to assist business units in their procurement planning. Amongst other things, this document will provide individual business units with a rundown of how procurement operates within the agency, highlight where money is being spent as well as areas of savings within the agency, and provide a comparison of spending and savings across government.

## Value for money

### Documents and templates

[Statement on Value for Money](#)

[Benefits realisation framework](#)

### Mandatory requirement

An agency is required to ensure it obtains value for money in relation to the procurement of goods and services (section 176 (2) [Public Works and Procurement Act 1912](#))

The overarching requirement for procurement is value for money. In most procurement activities there are at least three broad types of benefits, costs and risks which need to be considered:

- up-front benefits/costs and risks
- after-purchase benefits/costs and risks
- benefits/costs associated with the fitness-for-purpose of the goods or services procured.

Once risks, costs and benefits have been identified, it is necessary to assess the equivalent money value where this is practicable. By making an informed and supportable decision about these benefits, costs and risks, it is more likely that value for money can be achieved.

The Board's [Statement on Value for Money](#) assists decision-makers to make informed and supportable decisions about value for money when planning procurement.

## Promotion of competition

### Documents and templates

*Board Direction 2013-02*

### Mandatory requirement

Agencies are required to apply the Board's Statement on the Promotion of Competition (*Board Direction 2013-02*)

A key objective of the NSW Government is to improve procurement outcomes through enhanced competition, as well as facilitating access to government procurement business by the private sector, especially SMEs and regional based enterprises.

Government procurement that improves competition within markets leads to greater efficiency and encourages innovation within those markets. Greater efficiency produces tangible outcomes such as lower prices, improved quality in products, greater innovation and improved sustainability of markets. The Guidance Note, published as part of *Board Direction 2012-02*, outlines practices which agencies can promote competition.

The contract period is determined by the circumstances of the contract, which should generally not exceed a period of five years, including extensions. However, it is the responsibility of agency heads to determine the contract period, after considering:

- the need to achieve value for money
- the need to facilitate competition
- the nature of the market (and changes over time, in the case of contract renewals)
- nature of the goods or services being procured
- nature of supplier investment such as capital investment
- transitional requirements
- time and cost of approaching the market
- probity, risk, and transparency in approaches made to the market.

## Innovation

### Documents and templates

*Market and industry engagement* guidance

### Mandatory requirement

Agencies are required to apply *Board Direction 2014-05*

The NSW Government recognises that the marketplace is a great source of innovation that can assist government to work smarter and deliver better services. Innovation can be sought and encouraged at three levels of market engagement:

- *at the State economic level* – through effective, early, structured, and open communication of needs to the market to encourage appropriate research and development, and attract the right suppliers for the government customer base
- *at the sourcing level* – there are multiple types of market engagements, some of which have been described in this document
- *at the contract management level* – by incorporating performance-based measurements, such as KPIs, that promote innovation.

Providing a signal to the market of the future high-level needs and priorities of government procurement encourages outcomes-based and innovative procurement.

Innovative procurement proof-of-concept testing for short term contracts up to \$250,000 from SMEs is outlined in [Board Direction 2014-05](#).

## Small and medium enterprises (SMEs)

### Mandatory requirements

[Small and Medium Enterprises Policy Framework](#)

[30 Days to Pay Policy](#)

[Board Direction 2014-02](#)

[Board Direction 2012-02](#)

### Small and Medium Enterprises Policy Framework

The *Small and Medium Enterprises Policy Framework* maximises opportunities for SMEs to gain government business, have greater access to government procurement opportunities, and deal more easily with government.

### 30 Days to Pay Policy

This policy requires agencies to pay small businesses within 30 days of receiving a correctly rendered invoice. This will improve support to small business by ensuring they are paid in a timely manner.

### SME access to Government contracting opportunities

The Board requires agencies to make reasonable efforts to obtain at least one written quotation from a prequalified SME supplier for procurement valued up to \$1 million on certain prequalification schemes ([Board Direction 2014-02](#)).

## Sustainable procurement

### Documents and templates

[Australian and New Zealand Government Framework for Sustainable Procurement](#)

[APCC Sustainable Procurement Practice Note and Guides](#)

### Mandatory requirement

Agencies to ensure value for money in procurement - apply the [Statement on Value for Money](#)

[M2014-08 NSW Government Resource Efficiency Policy](#)

Sustainable procurement achieves the Government's commitment to spend public money efficiently, economically, and ethically. Sustainable procurement considers issues such as:

#### *Environmental management*

- Pollution control, waste minimisation, recycling and disposal options
- Energy efficiency and resource consumption
- Adopting environmental technologies and biodiversity

#### *Ethical procurement*

- Planning laws and asset design use and maintenance, including heritage and culture

- Manufacturing and production

## *Socio/economic benefits*

- Social procurement and social investment
- Skills development, workplace and supply chain diversity
- Employee rights and conditions, unfair competition, and ethical behaviour.

Principles guiding sustainable procurement can be used by agencies to develop sustainable procurement strategies, policies, guidance material, training and tools by:

- Incorporating sustainability practices into every aspect of the business management, from planning through the procurement process to measurement of results
- Adopting strategies to avoid unnecessary consumption and managing demand
- Selecting products and services with lower environmental impact across their lifecycle
- Fostering a viable market for sustainable products and services by supporting businesses that support socially responsible suppliers, adopt ethical practices and demonstrate innovation.

## Fairness and probity

### Related documents and templates

[Corruption risks in NSW Government procurement - The management challenge](#) (ICAC), [Direct negotiations - Guidelines for managing risks in direct negotiations](#) (ICAC)

[Fairness and probity guidance on ProcurePoint](#)

### Mandatory requirements

Agencies and public sector officers and employees must comply with all obligations in relation to the conduct of procurement set out in legislation and agency codes of conduct

Agencies are required to apply [Board Direction 2014-01](#) and [Board Direction 2013-05](#)

[Board Direction C2014-01](#) (Code of Practice for Procurement) and [M2013-04 Implementation guidelines for procurement of publicly funded construction services](#) applies to construction

## General principles

Government has an obligation to ensure its procurement conduct is at all times fair, ethical, transparent and probity-rich. Agencies and public sector officers and employees have statutory obligations which affect the conduct of procurement. Although probity is a critical consideration in procurement, it should not be used as a 'road-block' to procurement, as a rationale for avoiding possible procurement methods that are 'too hard', or for ignoring innovative arrangements with suppliers.

### Dishonest, unfair, unconscionable, corrupt or otherwise illegal conduct by suppliers

Government expects that agencies and service providers will conduct their business relationships in accordance with the law and accepted standards of behaviour at all times. [Board Direction 2014-01](#) details agency requirements on dishonest, unfair, unconscionable, corrupt or otherwise illegal conduct.

### Probity advisory and probity audit services

[Board Direction 2013-05](#) provides agency requirements for the use and engagement of probity advisory and probity audit services. The use of external probity advisers and auditors should be the exception, rather than the rule.

## Market engagement

### Documents and templates

[Market Approaches Guide](#)

[Market and industry engagement](#) guidance and [Complex market engagement methods](#)

[Direct negotiations - Guidelines for managing risks in direct negotiations](#) (ICAC)

### Mandatory requirements

Agencies must use approved methods for procurement ([Board Direction 2013-03](#))

For direct negotiations, reverse auctions, managed services contracts and sole sourcing procurements agencies must comply with the requirements set out in [complex market engagement methods](#)

The [Procure IT contract framework](#) must be used for ICT procurement ([Board Direction 2012-05](#))

Identify scope for government agencies to support Aboriginal businesses ([Board Direction 2013-04](#)) and opportunities to support businesses that employ people with a disability ([Public Works and Procurement Regulation 2014](#))

### Engaging with industry

Better communication with business and enhanced transparency of government procurement increases industry awareness and supports industry planning to capitalise on government business opportunities. With effective industry engagement, sourcing strategies can be better aligned with market structure and dynamics, and provide government with knowledge about new and innovative approaches, leading to improved procurement outcomes.

There are no longer any specific legislative requirements for approaching and engaging with the market. In particular, agencies should note that changes to the legislative scheme for public sector procurement mean that open public tenders are no longer mandated as the default means for procuring goods and services for the public sector. However, procurement processes must be probity-rich and transparent, suitable to the context of the procurement, with appropriate regard for applicable policy and international agreement requirements.

When designing agency requirements for procurement, agencies must have regard to the nature of the goods and services, the market for them, and applicable policy requirements.

### Principles applying to market engagement

In determining how to approach the market, agencies must ensure that the method selected will achieve value for money and is fair and transparent. Additionally, agencies are required to ensure:

- there will be maximum competition in the market
- the conditions of participation in the process are clear and concise
- potential suppliers have time and capacity to respond to requests to the market
- that the conditions of participation do not directly preclude potential suppliers on the basis that they have not had prior experience supplying to government
- material submitted by potential suppliers can be managed confidentially.

Further guidance on engagement methods is provided in the [Market Approaches Guide](#).

### Complex Market Engagement Methods

At times a government agency may wish to use a market engagement method that has typically been characterised as 'complex' or higher risk than traditional methods of government procurement. These may include reverse auctions, direct negotiations, or managed services contracts. Specific

requirements that apply to the use of these methods are available on [ProcurePoint](#). Unsolicited proposals from the market are dealt with at [www.nsw.gov.au/unsolicitedproposals](http://www.nsw.gov.au/unsolicitedproposals).

Prior to adopting a complex market procurement method, agencies must:

- ensure that the procurement strategy addresses in detail the justification and suitability of the selected procurement method. In the case of direct negotiations/sole sourcing arrangements, a comprehensive analysis of the market and all relevant factors should be undertaken to demonstrate that a competitive process does not need to be conducted
- conduct a risk assessment for the procurement, including an assessment and treatment of procurement process risk arising from the use of the procurement method
- follow internal delegations process, which will ordinarily involve obtaining the approval of the agency's Chief Procurement Officer, and in some instances also require the approval of a more senior person in the agency, depending on the nature or value of the procurement.

As a basis for approval agencies should, at a minimum, ensure compliance with these mandatory requirements. The approving officer must be satisfied that the government agency will satisfy its legislative and policy obligations in relation to the procurement.

### **Supporting businesses that employ people with a disability**

The NSW Government supports purchasing opportunities for businesses that employ people with a disability. Clause 5 of the [Public Works and Procurement Regulation 2014](#) contains provisions to simplify the purchasing of some goods and services by directly engaging disability employment organisations. Value for money must still be achieved for government.

### **Scope for government agencies to support Aboriginal businesses**

[Board Direction 2013-04](#) allows agencies to purchase goods and services valued up to \$150,000 (including GST) from a recognised Aboriginal business provided the supplier's rates are reasonable and consistent with normal market rates, and the agency obtains at least one written quotation.

### **Procurement, engagement and use of consultancy services**

The NSW Government expects that the professional expertise of public employees will be used in preference to engaging external service providers. External consultancy services should be engaged only when the required professional expertise is not available internally, or cannot be provided in a cost effective manner.

When an agency can justify the engagement and use of external expertise under its own delegations, preference should be given to prequalified service providers for whom a capability assessment has been conducted and who have agreed to a standard set of government terms and conditions. Agencies should refer to these schemes for detailed guidance. Further [guidance](#) is provided on ProcurePoint.

## **Commercial approaches in contracts**

### **Documents and templates**

[Standard procurement contract templates](#)

[Commercial approaches in contracts](#)

[International treaty obligations](#)

Where an agency does not use the standard form contract templates, the Board recommends the commercial approaches to key contract terms provided in the guidance on ProcurePoint. These should be reflected in government contracts, unless the circumstances of the procurement require otherwise.

The guidance includes standard commercial approaches on:

- Types and levels of insurance
- Indemnities
- Dispute resolution
- Intellectual property (IP)
- Guarantees
- Termination
- Subcontractors
- Proportionate liability
- Price refresh mechanisms

## Intellectual property

The default policy position is that the supplier owns the IP in any product that the supplier develops under contract with an agency. Where an agency decides to retain ownership of the IP, it may decide whether the supplier is to be granted a licence to use that IP without charge (including the right to commercially exploit). The agency may also place restrictions on the use of the IP.

### Standard contract templates

#### Documents and templates

Standard procurement contract templates

Procurement System for construction

#### Mandatory requirement

*Board Direction 2012-05*

Except where specified by the Board, the use of standard form contracts is recommended, but is not mandatory.

Standard form templates have been developed in order to:

- make it easier for potential suppliers to respond to market requests
- establish uniform terms and conditions for the procurement of goods and services
- minimise risk for agencies, especially in relation to matters such as giving indemnities and guarantees and setting appropriate insurance requirements.

Where it is necessary to do so, agencies may choose to customise the standard form contract to meet the specific needs of the arrangement or the supplier. However where possible, a customised contract should be consistent with, and reflect the general principles and approach of, the commercial terms of the standard form contract. Legal advice may need to be sought on changes to the standard form contract. Agencies should consult internal agency policy for requirements applying to the review of legal documents.

For the procurement of ICT related goods and services, the use of the Procure IT contract framework is mandatory under *Board Direction 2012-05*.

## Advertising contracting opportunities and disclosing contracts

### Documents and templates

*Market Approaches Guide*

### Mandatory requirements

*Government Information (Public Access) Act 2009*

*Board Direction 2013-06*

Board Direction 2015-01: Cessation of print advertising of government tenders

*M2007-01 Public Disclosure of Information arising from NSW Government Tenders and Contracts*

### Advertising

It is mandatory for each agency to progressively publish a Strategic Procurement Outlook Statement and contact information on the NSW Government's eTendering website from 31 March 2014 onwards. The Statement outlines the role of the agency, and major or strategic initiatives from which the agency expects procurements may be generated, over the next three years.

The NSW eTendering system provides a secure online site for the advertising, distribution, lodgement and opening of tenders. It delivers a single entry point for all government organisations and suppliers to notify, access, and respond to government business opportunities.

From 1 September 2015, all agencies should cease print advertising of government tenders, and only advertise tenders electronically. Where an agency considers that there are exceptional reasons which require print advertising of government tenders, the agency head should inform the Board prior to any advertising.

### Procurement contract disclosure

Government agencies must comply with the *Government Information (Public Access) Act 2009*, which requires proactive disclosure of information, including information relating to procurement.

*M2007-01 Public Disclosure of Information arising from NSW Government Tenders and Contracts* implements these arrangements. Agencies should take steps to disclose pricing information, for example in user guides, unless there are exceptional reasons not to do so.

## Emergencies

### Mandatory requirement

Clause 4 of the *Public Works and Procurement Regulation 2014*

In an emergency situation, the agency head may authorise the procurement of goods and services to a specific value to meet that particular requirement. The authority for the agency head to act in the case of an emergency is provided in clause 4 of the *Public Works and Procurement Regulation 2014*

It is recommended that in the event of emergency procurement the agency may also wish to:

- take into account value for money, accountability, and probity, to the extent that they can be applied given the severity and urgency of the incident
- consider whether to vary, or even reduce, record keeping processes.

## Disposal of goods

### Mandatory requirement

Agencies are to ensure authority, due process and disclosure is undertaken

The *Public Works and Procurement Act 1912* defines procurement to include the disposal of goods that are unserviceable or no longer required. Accordingly, unless the application of such would produce absurd outcomes, any Board Direction or policy that refers to procurement, also applies to the conduct of disposals.

In addition, the following specific rules apply to the disposal of goods:

- Agencies must have authority to conduct the disposal (refer to Authority to Procure)
- Agencies must ensure that the rates for the disposal are reasonable and consistent with normal market rates for such services
- When undertaking disposals by quotation, an agency must ensure:
  - disposal specifications and requirements are disclosed equally to all suppliers invited to quote
  - the supplier selection evaluation criteria are established prior to receiving quotes
  - it follows proper processes of closing, receipt, and opening of quotes.

Agencies must also disclose information in accordance with the contract disclosure requirements. The disposal of motor vehicles is covered by the [Motor Vehicle Policy for NSW Government Agencies](#).

## Compliance and monitoring

### Documents and templates

Guidance attached to [Board Direction 2013-01](#) on compliance

### Mandatory requirement

[Board Direction 2013-01](#)

Agencies are responsible for their own procurement and compliance with procurement law and this Policy Framework.

It is recognised that an effective devolved procurement system requires a compliance framework, which is aligned with the probity and other risks identified by an agency arising out of its actual and planned procurement of goods and services.

Agencies are required to test compliance with the mandatory requirements of this Framework on a regular basis through internal audit. The Board has issued [Board Direction 2013-01](#) on this matter, along with guidance to agencies. Public sector external auditing and monitoring bodies will continue to have cause to monitor, assess, and report on compliance with this Framework. Related information can be found at the *Managing Complaints* section in this Framework.

## Conduct by suppliers

### Mandatory requirements

[Independent Commission Against Corruption Act 1988](#)

[Board Direction 2014-01](#)

Agencies value the role of suppliers and their commitment to implementing the requirements of this Framework. Suppliers should note that agencies, as the entities responsible for the expenditure of public moneys, will:

- not do business with suppliers that are bankrupt, insolvent, or are corporate entities with officers who are disqualified under the *Corporations Act 2001*

- not do business with suppliers that are considered by the agency as being unable to meet the requirements of a procurement, such as delivering on time
- not do business with suppliers with a history of poor performance, inappropriate conduct, or fail to meet requirements of suppliers under this Framework.

Suppliers are required to conduct their interactions with agencies in accordance with the spirit and intent of the requirements in this Framework. They are not to impede agencies in meeting their legislative and policy requirements.

Suppliers are expected to:

- conduct business with government in a fair and honest manner
- not engage in conduct or practices that are anti-competitive
- declare all potential conflicts of interest, and ensure they are managed transparently
- comply with all legal obligations, and cooperate with agencies in the resolution of disputes in a non-adversarial manner.

Suppliers are also expected to follow the probity and fairness principles in this Framework. Sanctions are available against suppliers, depending on the arrangement under which they are engaged.

Suppliers are also, in some circumstances, subject to the requirements of the [Independent Commission Against Corruption Act 1988](#) including possible criminal penalties. Whilst this can take many forms, it includes a supplier which influences, or tries to influence, a public official to use his or her position in a way that is dishonest, biased, or breaches public trust. Further information for suppliers on corrupt or potentially corrupt conduct can be sourced from the [Independent Commission Against Corruption](#).

## Managing complaints

### Documents and templates

[Procurement: Complaints Management Guidelines](#)

### Mandatory requirement

Agencies are to ensure an effective complaints management process for procurement is in place

The Board has issued guidance on complaints management, which can be accessed on [ProcurePoint](#).

Section 176 of the [Public Works and Procurement Act 1912](#), requires agencies to undertake procurement in accordance with, among other things, the principles of probity and fairness.

An effective complaints management process assists agencies to deliver on these principles, and in maintaining productive working relationships with suppliers. A robust and transparent complaints process can also be a valuable tool in diagnosing problems in government procurement, working to continuously improve procurement systems and standards.

Agencies have a responsibility to resolve complaints concerning their procurement actions at the appropriate agency level (usually commencing at the area undertaking the procurement), escalating as necessary, and referring to external statutory bodies as appropriate.

Complaints unresolved at the conclusion of this process can be referred to the Board. In this instance, copies of all correspondence with the agency concerned and all other relevant material need to be provided. The Board will review the material and information supplied by the complainant and the agency before making any decision to investigate a complaint. Where the Board considers the agency has dealt with a complaint in an appropriate manner, it will decline to investigate separately.

## Glossary

**Agency head** has been used throughout this Framework to describe the person holding the highest level of delegation within a department or an agency, and includes Secretaries and Chief Executive Officers. The term 'agency head' includes a delegate of the agency head.

**Arrangement** is a description of a contract, standing offer, scheme, or any other form of agreement between a government agency/s and supplier/s, whether or not the arrangement creates a legal relationship between the parties. There are various models of supplier arrangements in place, including:

- contracts between an agency and a supplier
- standing offer agreements between agencies and suppliers, which establish the legal arrangements for contracts relating to the purchase of goods or services
- registration lists and prequalification schemes, under which agencies then enter into contracts.

Whilst these models create different legal relationships between agencies and suppliers, this Framework refers to these as 'arrangements' for the sake of simplicity.

**Procurement** refers to a process that begins with the basic 'make or buy' decision, and then spans the 'whole life' of supplier/construction arrangements. It includes the definition of business needs, designing and implementing arrangements, monitoring and managing performance, and reviewing outcomes to assess the effectiveness of the arrangements.

**Purchasing** is the process of buying or purchasing from those supplier arrangements.

**Value** is the genuine, estimated value over the proposed term of the acquisition (not a value per annum). Unless specified otherwise, value is inclusive of GST. If an agency undertakes more than one procurement activity with the same supplier for the same goods and services within a reasonable period of time, the value of all the procurements should be added together (that is, order splitting is prohibited).

**Whole-of-government contract** is an arrangement under which an agency/s provides for the purchase of goods or services by that agency and all other agencies. An arrangement where an agency/s allows one or more other agencies to piggy-back is referred to as a cooperative contract or multi-agency access contract.