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The International Comparative Legal Guide to:
Public Procurement 2012

A practical cross-border insight into public procurement

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1 Relevant Legislation

1.1 What is the relevant legislation and in outline what does each piece of legislation cover?

This section:

- provides an introduction to the more detailed questions later in this chapter; and
- provides an overview of the complex legal and probity position in New Zealand as there is no single source.

New Zealand has a patchwork quilt of procurement legal rules and other requirements and guidelines. There are some difficulties in enforcing breaches (for example, the courts are generally reluctant to get involved, based on New Zealand's public law). Sub-standard procurement by government agencies is not uncommon. There are moves to improve this but there is a long way to go. Aggrieved suppliers (our experience is that they often have concerns about the procurement approach) rarely take action as:

- In particular, they are concerned not to prejudice getting government work in the future as they believe, rightly or wrongly, they would be treated as troublesome suppliers.
- In addition to the limited remedies available, they are not aware of some of the remedies that are possible.

In November 2011, the government's auditor, in a discussion paper on PPPs in New Zealand, noted:

"This country's established common law tradition, based on respect for contracts, reputation for transparency, and good standards of governance, gives the international market confidence."

In our experience in acting on many procurement matters, there are significant failures by government agencies to give that confidence, inability on the part of the legal and other rules to ensure that confidence is adequately given, and concerns on the part of too many international and domestic suppliers that they are not being correctly treated. Suppliers are hesitant to complain for the reasons noted above. While the statement in the discussion paper addresses PPPs, PPPs are a sub-set of government procurement generally, and the same concerns noted above apply to all government procurement aspects. A significant number of suppliers in a PPP context are unlikely to agree with the quotation above. Likewise, if the statement is applied more widely to suppliers' views as to government procurement.

Summary

In summary, for each public sector agency and each type of procurement, it is necessary to consider several key relevant sources to ascertain the applicable procurement rules. The sources include:

- Legislation specifically applicable to the agency, the procurement, or both. Typically, the courts and the government's auditor (the auditor-general) can review compliance with legislation. There is generic legislation such as the Ombudsmen Act 1975 and the Official Information Act, in relation, for example, to decision-making with inadequate information, and disclosure of government information. The ombudsman has intervened rarely in procurement processes, although that may be because vendors are not aware of the ability of the ombudsman to review aspects of procurement (and because vendors are reluctant to take steps that could negatively affect getting government contracts in the future).
- The Mandatory Rules and the MED Guidelines (which are mandatory for central government and advisory for other agencies).
- The courts may have review powers as to central government's application of the Mandatory Rules. The Ministry of Economic Development and the auditor-general have review powers as to these Rules and Guidelines.
- The Auditor-General Guidelines, in particular the 2008 Guidance on Procurement and the 2007 Guidelines, Managing Conflicts of Interest: Guidance for Public Entities. Both those documents are particularly important among the various sources of information. The auditor-general has the power to investigate and provide a public report. This raises reputational issues for the procuring agency. See also the auditor-general's November 2011 discussion paper on PPPs, managing the implications of public private partnerships.
- In limited instances, judicial review is available.
- The agency's own procurement manual and related material. An agency's compliance with the manual and the required processes may be subject to review by the courts, the Ministry of Economic Development and the auditor-general.

For a government overview of government procurement generally, see http://www.business.govt.nz/procurement.

Several procurement frameworks

While there are overlapping procurement principles for each public sector agency, New Zealand does not have a uniform procurement regime for all agencies. This reflects the decentralised decision-making for each agency.

A key element of the procurement regime is obtaining value-for-money outcomes. While fair treatment of vendors is appropriate, the ultimate objective is value-for-money and good outcomes for the public sector and its stakeholders.

Additionally, there are important procurement requirements that are not directly legal or legislative in nature. For example, the auditor-general audits almost all public sector agencies (contracted out to

other auditors but ultimately undertaken by the auditor-general). The auditor-general has major requirements for procurement, conflict of interest, etc. The auditor-general obligations are often overlooked by lawyers when giving advice on public procurement and this can lead to poor outcomes for both public sector agencies and also suppliers. There are notable examples of where large procurement has gone wrong due to focus on legal and not other obligations.

Distinguish central government from other public sector agencies

In deciding what principles apply to particular purchases and agencies, the first step is to distinguish between:

- entities within central government, namely ministries, departments, defence and police (collectively, the central government); and
- the wider public sector, namely other entities such as Crown-owned companies (including commercially driven state-owned enterprises), local government and their commercial operations, Crown entities, etc.

Central government

Central government must apply:

- Mandatory Rules for Procurement by Departments (2006) (the Mandatory Rules); and
- Ministry of Economic Development - Government Procurement in New Zealand - Policy Guide for Purchasers (the MED Guidelines).

The Mandatory Rules drive central government procurement. They contain processes and principles that must be followed. The focus is on open competition, non-discrimination between local and overseas suppliers and fair opportunity for all suppliers.

The Mandatory Rules implement the government procurement requirements of the Free Trade Agreement between Brunei, Chile, Singapore and New Zealand. In early 2010, the United States commenced negotiations based on joining this FTA, and these negotiations are on-going at the start of 2012.

Other public sector agencies

Applying the Mandatory Rules is not a requirement for other public sector agencies. However, both the Mandatory Rules and the auditor-general encourage other agencies to follow those Rules in their own procurement activities. The degree of implementation of the Mandatory Rules so far by agencies outside central government is low.

Sector-specific legislation

A public sector agency may have specific legislation relevant to its processes. For example:

- local government has specific obligations under the Local Government Act 2002;
- many stand-alone Crown entities and companies have requirements under the Crown Entities Act 2004 (and the State-Owned Enterprises Act 1986 in the case of Crown-owned commercially-operated companies); and
- some sectors have specific requirements. For example there is the detailed regime that applies to land transport issues (road, rail, etc.) under the Land Transport Management Act 2003.

Both the local government and the land transport regimes are particularly relevant to PPPs and other public-private models.

Legal enforcement

The courts have the ability to judicially review procurement processes and decisions, arising out of public sector obligations as to specific legislation obligations, duties as to fairness, etc. The court decisions, however, indicate that judicial review will be fairly light-handed and difficult to obtain unless the circumstances are relatively extreme. Most procurements are seen as commercial (and therefore at the less reviewable end of the judicial review spectrum). This can be unsatisfactory as suppliers can find it difficult to get legal relief, even though there is the ability to raise the issues with the auditor-general (who does not give legal relief).

However, a key unresolved issue is the degree to which a breach of the Mandatory Rules by central government could be legally reviewable by the courts. Central government has received legal advice that a breach of the Mandatory Rules by central government would be illegal. This implies that the courts may be able to judicially review compliance with the Mandatory Rules. That would be significant as it would give much stronger grounds to dissatisfied vendors to seek remedies for procurement breaches (such as the setting aside of the award of the contract to another supplier).

Non-compliance with aspects of the Mandatory Rules remains relatively commonplace. The approach is likely to tighten over time, particularly with the government's current initiative to drive stronger procurement outcomes into government purchasing.

Each agency is required to have processes (typically set out in a procurement manual) that reflect its obligations and the way in which it will undertake procurement.

Creating and maintaining records for the procurement

There are important obligations on public sector agencies in relation to decision-making and record-keeping under the Official Information Act 1975 (OIA), its local government equivalent (the Local Government Official Information and Meetings Act (LGOIMA)) and the Public Records Act 2005. Sufficient records of the procurement process must be created and maintained. Failure to do so can be reviewed by the ombudsman or the chief archivist, or both. In some instances, judicial review by the courts may be possible. Overlapping obligations are in the auditor-general's guidelines on procurement, and the Mandatory Rules.

1.2 Are there other areas of national law, such as government transparency rules, that are relevant to public procurement?

These are covered in question 1.1.

1.3 How does the regime relate to supra-national regimes including the GPA, EU rules and other international agreements?

New Zealand has not adopted the GPA. The EU rules do not apply. The Mandatory Rules implement the Free Trade Agreement between Brunei, Chile, Singapore and New Zealand which the US is negotiating to join (see question 1.1). New Zealand is party to WTO instruments such as GATS, and they can impact government procurement.

1.4 What are the basic underlying principles of the regime (e.g. value for money, equal treatment, transparency) and are these principles relevant to the interpretation of the legislation?

Value-for-money and fairness are basic underlying principles. In theory, transparency is a principle as well but in practice much happens confidentially. This leaves suppliers often without an ability to pursue concerns, and also means that purchasing agencies practices are not subjected to scrutiny.

These underlying principles are relevant to interpretation of relevant rules, etc.

1.5 Are there special rules in relation to defence procurement or any other area?

There are no special legal rules.

2 Application of the Law to Entities and Contracts

2.1 Which public entities are covered by the law (as purchasers)?

See question 1.1: almost all public entities including central and local government, crown entities and state-owned commercial enterprises. The law's application varies according to circumstance and the type of entity.

2.2 Which private entities are covered by the law (as purchasers)?

None, unless they are involved in the public sector (for example as the agent of a public sector entity).

2.3 Which types of contracts are covered?

The contracts covered are all supply contracts.

2.4 Are there financial thresholds for determining individual contract coverage?

No, except for central government under the Mandatory Rules (for example, the Rules apply to NZ $100K-plus purchases of goods and services (higher for buildings)).

2.5 Are there aggregation and/or anti-avoidance rules?

Yes. All rules seek to prevent inappropriate aggregation, breaking contracts into several components to defeat obligations, etc.

2.6 Are there special rules for concession contracts and, if so, how are such contracts defined?

There are no specific rules for concession contracts. However, New Zealand is relatively new to PPPs and sophisticated concession contracts. Guidance is being developed, available from the National Infrastructure Unit (http://www.infrastructure.govt.nz/). See also the auditor-general discussion paper noted at question 1.1.

3 Award Procedures

3.1 What types of award procedures are available? Please specify the main stages of each procedure and whether there is a free choice amongst them.

There is considerable flexibility in terms of procedure, even where the Mandatory Rules apply. Typically, public sector entities use RFIs, EOIs, RFPs, and/or RFTs, depending on context. The approach is similar to that used internationally. For much smaller purchases, quotes and estimates are acceptable.

There is a frequent failure to use strategic planning and pre-RFP market analysis which has led to problems in subsequent procurement action. This has led to high profile problems. Guidelines such as the auditor-general's guidance strongly encourage a strategic approach from the outset.

3.2 What are the minimum timescales?

There are some minimum dates, but they are generally shorter than the broader consistent requirement to allow sufficient time to enable adequate responses from suppliers, etc.

3.3 What are the rules on excluding/short-listing tenderers?

As to excluding tenderers, the Mandatory Rules require compliance with the RFP or equivalent document. Tenders are to be excluded if that does not happen, although there can be room for flexibility. If a tender might be excluded on grounds which might be rectified, the tenderer often should be given the chance to fix the deficiency. That follows from a decision by the ombudsman.

Other rules take a similar approach, but can be more flexible.

Sometimes, rather than excluding tenderers, the public sector entity can start the process again, or vary it, to enable non-compliant bids to qualify. Care is needed in taking that course.

As to short-listing, there are no specific rules; each situation can be designed to meet the needs of the situation as the rules are substance, not form-based. See question 3.3 above: similar issues apply.

An important feature of, particularly, the auditor-general's guidance is flexibility to design the procurement process to meet specific needs of particular situations.

3.4 What are the rules on evaluation of tenders?

The Mandatory Rules require evaluation that complies with all the stated requirements in those Rules including the requirements noted in this chapter.

At a high level this is reflected in the requirement that central government agencies must receive open, and evaluate all, tenders under procedures that guarantee the fairness and impartiality of the procurement process. The Mandatory Rules address that high level requirement in more detail.

The other rules and requirements applicable outside central government, which are more fluid, have similar requirements.

One particular issue that has arisen and caused problems is the excessive use of specifications. The various rules encourage avoidance of specifications which narrow the market and point the solution in a particular direction. There have been high profile cases where technical specification has caused problems. This can still be an issue and vendors, where possible, should raise this with government buyers at an early stage: it must not be assumed that the RFP will be properly specified.

3.5 What are the rules on awarding the contract?

At least under the Mandatory Rules, the agency must follow the rules set out in the RFP, including as to treatment of evaluation criteria. Some flexibility is possible, the more so where the Mandatory Rules do not apply.

Public sector entities often do not disclose the weighting given to criteria, even if the criteria are disclosed.

3.6 What are the rules on debriefing unsuccessful bidders?

Generally, there is a requirement to debrief unsuccessful bidders.

3.7 What methods are available for joint procurements?

There is flexibility in how this is approached, so that, in theory, best outcomes are obtained. Joint procurement, such as syndicated procurement, is becoming increasingly important for public sector procurements. All Government Contracts, generally applicable to central government and often optional for other government entities, are becoming a major feature of the procurement scene.

3.8 What are the rules on alternative bids?

There is flexibility to have alternative bids. Bidders, and procurers, will need to take into account issues such as fiduciary duties as between bidders, and also the risk of anti-trust exposure under our competition legislation (the Commerce Act).

4 Exclusions and Exemptions (including in-house arrangements)

4.1 What are the principal exclusions/exemptions and who determines their application?

The exclusions and exemptions are relatively limited, but the rules do enable a pragmatic approach in most cases. For example, for small purchases, only quotes or estimates are needed. The Mandatory Rules do contain a list of exemptions but it is limited in practical effect. See question 4.2.

4.2 How does the law apply to "in-house" arrangements, including contracts awarded within a single entity, within groups and between public bodies?

Public sector entities can, generally, choose to source in-house instead of going to the market. Sometimes, there will be anti-trust (Commerce Act) issues to consider where the entity is a purchasing monopoly or in a dominant position (a "monopsony").

Departments can buy from other departments without going to the market but they could not do so, generally, with other public sector entities such as buying from state-owned commercial enterprises.

5 Remedies and Enforcement

5.1 Does the legislation provide for remedies/enforcement measures and if so what is the general outline of this?

In rare cases, specific legislation provides remedies. Otherwise, and assuming the public sector entity has set up the process carefully (to avoid contract and other process risk), remedies can often be limited. Judicial review by the courts, as noted at question 1.1, can be limited although the Mandatory Rules give rise to more specific and wider potential legal liability.

Standing to claim will generally be limited to vendors, except where the procurement has a substantial public-facing element (e.g. fulfilling a societal benefit directly rather than "back office" procurement) in which case others may sue too such as affected organisations and members of the public.

5.2 Can remedies/enforcement be sought in other types of proceedings or applications outside the legislation?

Suppliers have complaint avenues through the Ministry responsible for procurement, the auditor-general, the ombudsman and the World Trade Organisation, where a breach of, for example, GATS, is alleged. These avenues may sometimes be limited to complaint only and not substantive remedies.

This is in addition to court remedies.

5.3 Before which body or bodies can remedies/enforcement be sought?

See questions 5.1 and 5.2.

5.4 What are the limitation periods for applying for remedies/enforcement?

While some relevant claims may be able to be brought years after the claim arose, that does not apply to the most prevalent type of court action in relation to government procurement: judicial review. There is no fixed time limit for judicial review applications. As delay can be fatal, if a supplier is considering action, it should get legal advice early on.

5.5 What remedies are available after contract signature?

Contract signature will not always preclude remedies but it is harder to pursue remedies in practice after signature. Also delay beyond signature may act against judicial review applications.

A well-known case in New Zealand, in the health system (Medlab), led to a court decision, overturned on appeal, by which the contract to the successful tenderer was overturned.

Obviously, an injunction restraining the signing of an agreement is not available after the agreement is signed.

5.6 What is the likely timescale if an application for remedies/enforcement is made?

The timescale is variable: 3 months to 3 years for the outcome to be decided in a judgment or other decision. See question 5.4 as to the time for initiating a claim.

5.7 Is there a culture of enforcement either by public or private bodies?

No. There is a lack of action although this can be attributed in part to (a) limited legal remedies (although the Mandatory Rules change this), and (b) a concern on the part of suppliers that complaints will negatively affect their position in future tenders to government. The latter is a major dynamic in this market, according to vendors. See question 1.1.

5.8 What are the leading examples of cases in which remedies/enforcement measures have been obtained?

See question 5.5 with regard to a case in which conflict of interest was alleged. The claimant won initially in court but lost on appeal.

There are two major decisions from our then highest court: the Privy Council. In both cases the supplier lost. In one case, Mercury

Energy, the Privy Council confirmed the limited rights of judicial review. In the other, *Pratt v Transit*, the Privy Council confirmed that someone who had dealt with the tenderer before, in negative circumstances, could be on the evaluation panel.

See question 1.1 as to some of the challenges in getting remedies.

5.9 What mitigation measures, if any, are available to contracting authorities?

There are generally no express mitigation measures in the procurement regime. There are some exclusions (see question 4.1). The principal court remedy (judicial review) is a fluid remedy, and can take into account various mitigating factors.

6 Changes During a Procedure and After a Procedure

6.1 Does the legislation govern changes to contract specifications, changes to the timetable, changes to contract conditions (including extensions) pre-contract signature? If not, what are the underlying principles governing these issues?

Yes, and the Mandatory Rules are relatively strict about all such changes. The auditor-general's rules are also firm, but not so strict.

Generally, with some room to move, public sector entities must not make changes without going back to the market. In practice this can be breached.

6.2 To what extent are changes permitted post-contract signature?

The observations at question 6.1 apply. Unless the procurement process stated there might be changes, and those changes are compliant with the rules, post-contract changes should not be made.

7 Privatisations and PPPs

7.1 Are there special rules in relation to privatisations and what are the principal issues that arise in relation to them?

Generally, no. When the Government privatises assets, it is generally not required to apply special rules beyond those applicable to the general commercial market. The government intends to sell major state-owned assets commencing 2012, and there will be particular interests, politically or otherwise, to consider, such as Maori interests. Those interests are unlikely to create legal obligations.

7.2 Are there special rules in relation to PPPs and what are the principal issues that arise in relation to them?

PPPs are relatively new and the law and rules are developing. The latest information is available from the National Infrastructure Unit (at http://www.infrastructure.govt.nz/).

See also the auditor-general discussion paper noted in question 1.1.

8 The Future

8.1 Are there any proposals to change the law and if so what is the timescale for these and what is their likely impact?

Proposed changes are minimal. There may be an amendment of the Mandatory Rules. The current negotiations with the US on free trade may produce government procurement change (see question 1.1).

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Michael Wigley is principal of the firm, and has extensive experience over many years in public law and public sector issues in procurement, acting for government agencies and suppliers to government. He specialises particularly in integrating complex legal, regulatory, commercial and public sector issues with a strategic focus, to achieve results. While he has experience across the board, ICT is a particular focus. Michael writes and speaks frequently on government procurement issues. See for example the numerous articles and notes on public sector procurement at http://www.wigleylaw.com/Articles/LatestArticles/.

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