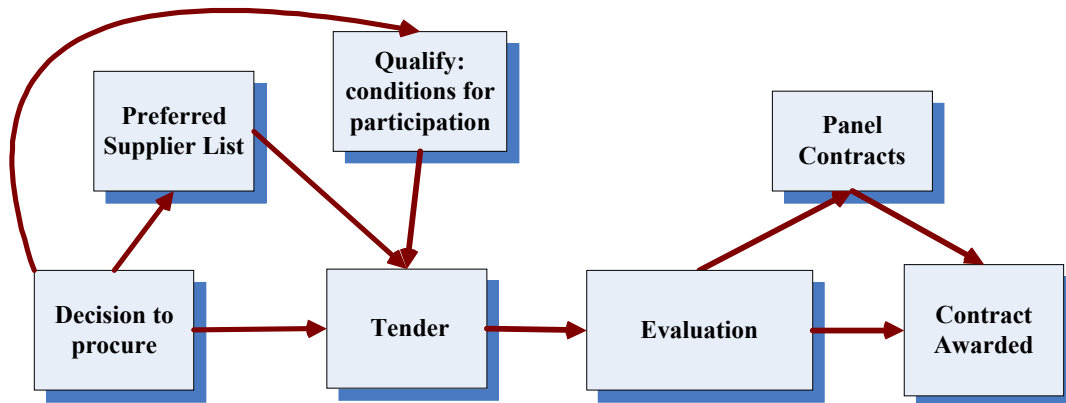


Government Procurement's biggest shake-up in years



The new **Mandatory Rules for Procurement by Departments** are the biggest change in Government purchasing for years, with significantly increased compliance issues. At issue also is how existing law applies in relation to the new rules.

Affected agencies should move quickly to update practices and processes relevant to their specific risks and needs. Suppliers to government agencies will also benefit from knowing how the new rules will affect their businesses.

The new **Mandatory Rules for Procurement by Departments**¹ apply to:

- All Departments and Ministries, including Defence Force and Police (and other public agencies are encouraged to apply the new rules); and
- Most² purchases of goods and services with a whole-of-life value over \$100K+gst (\$10M+gst for construction services³).

Existing guidelines continue to apply⁴, whether the purchases are above or below

those thresholds. But where there is a difference, the new rules trump the old.

This represents a major change. While the rules adopt some existing practices, they also introduce changes; crystallising processes and adding further requirements. There is much in the detail as well, and issues around how existing law fits with the new rules. They greatly increase exposure for non-compliance.

Legal risk

The rules implement the new Trans-Pacific Free Trade Agreement, which we outlined earlier⁵. They are endorsed by Cabinet. Prior to these new rules, an optimally structured tender could effectively eliminate contract and tort risk, and minimise judicial review risk. On the reviewability continuum, few procurement actions were reviewable; as the Privy Council had confirmed.⁶ Because these new rules apply across-the-board, are directed by Cabinet, implement New Zealand's international commitments,

¹ Available from MED, or contact us.

² Exceptions, such as grants and getting continued services in appropriate cases due to inter-changeability requirements, are covered in the Rules' appendices.

³ For construction services below \$10M, there are still some compliance issues: eg para 7(b) (ii) of the Rules

⁴ MED Policy Guide for Purchasers and Auditor-General's guidelines

⁵ See our article, *Government Purchasing Processes set for the Biggest Change in Years*, at www.wigleylaw.com/Articles

⁶ *Mercury Energy and Pratt v Transit New Zealand*. See our article, *Tenders, RFPs and Competitive Purchasing: Traps for Unwary Buyers & Sellers*, at www.wigleylaw.com/Articles

and reinforce principles of equality and fairness, there is now a greater prospect that procurement will attract the attention of disgruntled parties and the Courts.

There are also issues of detail to work through, including whether someone with prior adverse experience of a tenderer can participate on the evaluation panel (that is, whether authorities such as *Pratt v Transit* continue to apply).

In any event, in addition to legal risk, there are reputational and probity issues (which could lead, for example, to an Auditor-General enquiry).

Key Principles

Key principles behind the rules (reflected in the diagram above) include:

Open tendering is required except in exceptional circumstances:

- All suppliers can tender and the request for tender is advertised on GETS; or
- All suppliers can participate in an open qualification process (notified on GETS) in line with the existing Registration of Interest (RoI) process. This would select a limited number of suppliers to go forward to a closed tender.

All suppliers must get equal opportunity and equitable treatment on the basis of their financial, technical and commercial capacity. The rules are dotted with words and concepts such as equality, fairness, etc. While these concepts are a hallmark of decision-making, they are stated with a high level of clarity which calls for careful compliance. It's bold indeed to require procedures that "*guarantee* the fairness and impartiality of the procurement process."

The contract must be awarded (generally) to the supplier that offers best value for money in terms of the essential requirements and evaluation criteria set out in the tender documents. Because the procurement decision **must** directly co-relate with the essential requirements and evaluation criteria, the tender documents should be carefully drawn. Currently, often they are not. It's common experience to find that tender documents don't fit well with what the

purchaser actually needs, or could get from suppliers to best achieve its needs.

Agencies must minimise use of technical specifications and use open ways to describe what they are buying so that potential suppliers are not excluded. Despite Auditor-General reports such as in relation to Light Armoured Vehicles, this remains an issue in some quarters.

Value for money dictates the outcome, not the place of origin or degree of foreign ownership of the supplier.

Any tender that doesn't comply with essential requirements and conditions of participation in the tender documents **must** be rejected. This is a real danger area for purchasing agencies (which could lose the ability to have what might otherwise be their best choice) and for vendors. Experience shows that requests for tenders are often framed in a way that makes non-compliance by vendors close to inevitable. Vendors to date have often taken the risk on this, and purchasers have had some latitude. Overlay this with the Ombudsman's views on the need to go back to vendors to seek further clarity in some instances⁷ and we have quite a risk-laden area that needs careful handling to minimise risk yet achieve best outcomes.

Agencies must document how they implement the processes (such as the evaluation) so the paper trail can be reviewed, eg by the Auditor-General.

Agencies can establish preferred supplier lists yet still need to go out to market each time there is a new qualifying tender.

Panel Contracts are an option: this allows agencies to appoint, after the open tender process, a panel of suppliers for particular goods and services.

The rules also set out how they work with syndicated procurement and purchasing through third parties such as brokers.

⁷ See our article, *Public Sector Purchasing and the Ombudsman: A new decision* at www.wigleylaw.com/Articles

The GETS role is confirmed and expanded, with a view to making public many of the stages of the procurement process.

There's a new requirement for an annual procurement plan, the first of which is to be produced by each Department and Ministry by 14 July 2006; and updated at least every six months. This also goes online on GETS.

What should happen now?

The rules are already in place, so all applicable agencies will need to upgrade their procurement processes and manuals, and finalise their annual procurement plans. While most of the rules clarify existing processes and requirements, in reality the changes are considerable and there is much in the detail. All applicable agencies should look closely at:

- Clarifying and updating processes and manuals, tailored to meet unique needs.
- Setting up processes so that they best meet the practical needs of the purchasing agency; the aim is to get the best goods and services, by fair means.
- Recognising that a full variety of options, such as Requests for Proposals, remain open. Particularly important will be to find ways to handle the obligations in the new rules as cost-effectively as possible. Many vendors and purchasers have experienced a disproportionately high cost of government procurement process; particularly acute for purchases at the lower end of the scale. The \$100K threshold is very low and agencies should address ways of minimising what can be very high cost (handled poorly, that cost can easily exceed the benefits of competitive purchasing).
- Consider the range of available options. Increased use of the "Conditions for Participation Qualification" method may be useful, for example.
- Address the detail in the new rules, as it applies to the agency's needs, such as: (a) who can participate on the evaluation panel; (b) how vendors are to be consulted before the tender is issued (such consultation is often best practice in any event; the rules require this to be carefully handled), and (c) crafting tender

documents to avoid being locked into unsatisfactory outcomes.

- Get the first Annual Procurement Plan lodged on GETS by 14 July 2006.

We welcome your feedback on this article and any enquiries in relation to its contents. This article is intended to provide a summary of the material covered and does not constitute legal advice. We can provide specialist legal advice on the full range of matters contained in this article.

Wigley & Company is a long established specialist law firm. Our focus includes IT, telecommunications, regulatory and competition law, procurement and media/marketing. With broad experience acting for vendors and purchasers, government agencies and corporates, Wigley & Company understands the issues on "both sides of the fence", and helps clients achieve win-win outcomes.

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