



government purchasing **processes** set for the biggest **changes** in years

Knowledge of central government procurement processes is important not only for the public sector but also for savvy vendors that want to optimise their chances of winning government business. Government purchasing is a large part of the market available to vendors.

Lawyers on both sides need a strong understanding, and central government agencies should overhaul their procurement manuals and processes in mid-2006; bucking the trend of low level overview of public sector purchasing by the Courts¹, a new free trade agreement will significantly change how central government buys goods and services. While the target is international trade, the agreement impacts government procurement processes generally.

The agreement is the Trans-Pacific Strategic Economic Partnership Agreement (SEP) between New Zealand, Chile, Singapore and Brunei. It's scheduled to come into effect in May 2006, although there may be some delay. The SEP has a section devoted to purchasing by central government. For New Zealand, this means all ministries and departments, Police and Defence (local government, crown entities, etc are excluded).

The aim is to treat suppliers from the other countries no less favourably than local suppliers. This applies to most purchases of goods and services with a whole of life value of around NZ\$100,000 (NZ\$10m in the case of construction).

Despite the apparent view of the Ministry of Foreign Affairs and Trade (MFAT) that the SEP is consistent with current guidelines, there are big changes to the existing regime. For example, most procurements with a whole of life value of \$100k (\$10m for construction projects) will need to go to open tender. The cost to the agency and the vendors of the process itself could exceed \$100k in many cases. The CEO of a large telecommunications organisation said it spends over a million dollars on major RFPs. Closed tenders and sole supplier procurement options are generally no longer available (currently they are permitted in appropriate cases where probity requirements are met).

In this article we'll refer to 'tenders' to cover processes such as RFPs, requests for quotations and estimates.

Changes required by the SEP (for the \$100k-plus purchases (\$5m for construction)) include:

- Open tendering. Any interested supplier can participate.
- A requirement to, where possible, describe services based on outcomes (performance and functionality) instead of technical specifics. This reflects good practice anyway; it avoids one of the big failure points in government procurement, and it meets concerns raised in Auditor-General reports.
- Public notification of the tender on the GETS website. The current requirement is only to tell the agency running GETS about tenders over \$50k (ie there is no requirement to put the tender on the public website unless it is an open tender).
- An obligation to allow enough time for vendors (including vendors from the other countries) to respond. Many current tender timelines would be too tight under the new regime.
- A requirement that tender documents must contain all information necessary for suppliers to submit appropriate tenders, including essential requirements and evaluation criteria for the award of contracts. Many tenders currently wouldn't meet that standard; they aren't that self-contained.
- Procedures that 'guarantee the fairness and impartiality' of the process. While this reflects current requirements, it goes further and states the point more starkly. This is typical of the changes in the SEP.
- Encouragement of electronic receipt of tenders is encouraged. Central government agencies will be expected to move to an Internet model (this is a positive development).

Finally the Government must encourage each ministry and department to publish, on GETS, an indicative procurement plan near the start of each financial year. This is best practice. There are ways, however, to minimise downside impact (such as the cost and complexity of an unrestrained open tender), including:

- The SEP allows selection processes (such as ROLs and RFIs), by which a wider group of suppliers is whittled down to a manageable number. The open tender process can have 2 steps.
- In appropriate cases, public sector agencies can stick with existing types of goods and services, where a change would not meet interchangeability requirements. A good example is that a ministry using HP computer servers is not necessarily compelled to consider Sun servers as an option when buying more servers. However, the ministry would need to document the case for this, and should periodically go to the wider market anyway.

There's been a lot happening in the government procurement space over the last year or two, including major Court, Auditor-General and Ombudsman decisions.² The SEP might cause significant change, combined with the Office of the Auditor-General also looking to bring up to date its excellent guidelines for the development of procurement practices and manuals. **CL**

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1. See paper on RFPs and competitive purchasing at www.wigleylaw.com for more details
2. See www.wigleylaw.com for more details