Monitor and Review
This Manual will be reviewed whenever relevant sections of any of the identified references are updated or amended. All feedback and suggestions for improvement should be sent to: Procurement.Policy@Defence.gov.au

Note to External Agencies
External agencies intending to use this template will need to tailor it in order to meet their specific procurement requirements (including relevant internal guidance) and should seek appropriate professional guidance as required.

Disclaimer
The information in this publication is provided by Defence for the purpose of disseminating procurement guidance to its staff. While every effort has been made to ensure the guidance in this publication is accurate and up-to-date, independent skill and judgment should be exercised before relying upon it.

This publication is not a substitute for specialist legal and contracting advice, and users should obtain advice where appropriate. Defence does not make any representation or warranty about the accuracy, reliability, currency or completeness of any material contained in this publication and nothing in this publication should be considered a representation by the Commonwealth. In publishing this information, Defence does not warrant that the information will be used in any particular procurement process. Defence is not liable for any loss resulting from any action taken or reliance made on any information or material in this publication (including, without limitation, third party information).

Please note that while the Procurement Policy Help Desk can respond to DPPM policy questions, this service is not available to those outside of Defence. Contractors should, in the first instance, seek guidance from the relevant Contact Officer for their specific procurement.

Copyright Notice
Commonwealth of Australia 2020
With the exception of the Commonwealth Coat of Arms, this publication is licensed under a Creative Commons Attribution-Non Commercial 4.0 International Licence.



Use of the Coat of Arms
The terms under which the Coat of Arms can be used are detailed on the Commonwealth Coat of Arms website.

This publication should be attributed as the *Defence Procurement Policy Manual 1 July 2020.*

DPPM Amendment List

Version Number	Change	Date
Version 1.0	Original	1 April 2017
Version 1.1	Version 1.1 Matrix of Changes	19 December 2017
Version 1.2	Version 1.2 Matrix of Changes	8 November 2018
Version 1.3	Table of Changes to CPRs	1 January 2019
Version 1.4	Version 1.4 Matrix of Changes	20 April 2019
Version 1.5	Version 1.5 Matrix of Changes	1 July 2019
Version 1.6	Version 1.6 Matrix of Changes	1 June 2020

Table of Contents

DPPM Amendment List **1**
Table of Contents **1**
Chapter 1 ..... **4**
Introduction to the Defence Procurement Policy Manual 4
Overview 4
Policy Statement 4
Scope and applicability of this manual 4
What is the purpose of this manual? 4
How do I read the DPPM? 5
'2. Procurement Framework *5*
Commonwealth legislative and policy framework 6
Resource management framework 6
Compliance with the DPPM 8
Why do we have *procurement* rules? 9
Why are the CPRs and the DPPM drafted the way they are? 9
What is the *procurement* life cycle? 10
Guidance, tools, templates and resources 11
Chapter 2 ..... **12**
An overview of the CPRs and the procurement life cycle 12
CPRs – an overview 12
Government Procurement (Judicial Review) Act 2018 19
Defence Procurement Complaints Scheme 19
The procurement life cycle - core principles 19
The procurement life cycle – overview of how to plan and undertake a procurement 26
The procurement life cycle – procurement complaints 31
CPR Paragraphs subject to the Government Procurement (Judicial Review) Act 2018 32
Chapter 3 ..... **33**
The procurement framework 33
2. Procurement framework 33
CPR 2.1 – 2.6 33
Procurement framework *33*
Services *34*
CPR 2.7 – 2.10 35
Procurement *35*
CPR 2.11 – 2.14 36
Resource management framework *36*
CPR 2.15 37
International obligations *37*
3. How to use the Commonwealth Procurement Rules 37
CPR 3.1 – 3.4 37
How to use the Commonwealth Procurement Rules *37*
CPR 3.5 – 3.8 38
Compliance with the two divisions of the CPRs *38*
CPR 3.9 38
Using an Appendix A exemption *38*
Chapter 4 ..... **40**
Achieving value for money in procurement 40
4. Value for Money 40
CPR 4.1 – 4.3 40
Considering value for money *40*
CPR 4.4 – 4.6 41
Achieving value for money *41*
CPR 4.7 – 4.8 42
Broader benefits to the Australian economy *42*
CPR 4.9 – 4.10 42
Procurement-connected policies *42*
Black Economy *43*
Trade sanctions *43*

Indigenous Procurement Policy *43*
CPR 4.11 – 4.12 44
Coordinated procurement 44
CPR 4.13 – 4.15 45
Cooperative procurement 45
CPR 4.16 – 4.18 45
Contract end dates 45
Third-party procurement 45
5. Encouraging Competition 47
CPR 5.1 – 5.2 47
Encouraging competition *47*
CPR 5.3 – 5.4 47
Non-discrimination *47*
CPR 5.5 – 5.7 47
Small and Medium Enterprises 47
6. Efficient, effective, economical and ethical procurement 48
CPR 6.1 – 6.9 48
Efficient, effective, economical and ethical procurement *48*
Ethical behaviour *48*
7. Accountability and transparency 49
CPR 7.1 – 7.5 49
Accountability and transparency *49*
Records *50*
CPR 7.6 – 7.9 50
AusTender *50*
Annual procurement plans 50
CPR 7.10 – 7.15 51
Notifications to the market 51
CPR 7.16 – 7.17 51
Providing information *51*
CPR 7.18 – 7.20 51
Reporting arrangements 51
CPR 7.21 52
Subcontractors 52
CPR 7.22 – 7.25 52
Treatment of confidential information *52*
CPR 7.26 53
Contract management/Standard verification *53*
CPR 7.27 53
Other obligations *53*
8. Procurement risk 54
CPR 8.1 – 8.4 54
Procurement risk *54*
9. Procurement method 54
CPR 9.1 54
Procurement method *54*
CPR 9.2 – 9.7 55
Requirement to estimate value of procurement *55*
Procurement thresholds *55*
CPR 9.8 57
Procurement methods *57*
Method 1 – Open tender 57
CPR 9.9 – 9.11 57
Method 2 – Limited tender 57
CPR 9.12 – 9.13 58
Procurement from existing arrangements *58*

Procurements from standing offers 58
Chapter 5 59
Procurements valued at or above the procurement thresholds 59
10. Additional rules 59
CPR 10.1 – 10.8 59
Additional rules 59
Conditions for limited tender 59
Request documentation 60
CPR 10.9 – 10.13 61
Specifications 61
CPR 10.14 – 10.19 62
Modification of evaluation criteria or specifications 62
Conditions for participation 62
CPR 10.20 – 10.27 63
Minimum time limits 63
CPR 10.28 – 10.31 63
Late submissions 63
CPR 10.32 – 10.34 64
Receipt and opening of submissions 64
CPR 10.35 – 10.36 65
Awarding contracts 65
Appendices 66
CPR Appendix A – Appendix B 66
Appendix A: Exemptions from Division 2 of the CPRs 66
***Appendix B: Definitions** 67*

Chapter 1

Introduction to the Defence Procurement Policy Manual

Overview

1. Welcome to the new version of the Defence Procurement Policy Manual (DPPM). The DPPM has been completely re-written to more clearly set out for Defence *officials* the mandatory policy that **must** be complied with when undertaking *procurement*.

2. The DPPM has also adopted a completely new structure and format. In particular, the DPPM now incorporates the Commonwealth Procurement Rules (CPRs) so that *officials* can find in one place the Commonwealth and Defence *procurement* related policy that applies to them.

3. There are many terms in *italics*. This normally means that the term is a defined term. Appendix B to the CPRs (and the DPPM) sets out the definitions of these terms.

Policy Statement

4. The DPPM incorporates both the CPRs and additional Defence Procurement Policy Directives that **must** be complied with by Defence *officials* in relation to *procurement*. Defence Procurement Policy Directives supplement specific CPRs in the context of the particular circumstances and needs of the Department of Defence ('Defence').

Defence Procurement Policy Directive

D1. In addition to complying with the CPRs, Defence *officials* must comply with the Defence Procurement Policy Directives in the DPPM when undertaking *procurement*. Defence Procurement Policy Directives are generally denoted by the term 'must' (or 'must not').[1]

5. Together with the guidance, templates, tools and other resources referred to in the DPPM, the DPPM is an internal control system that forms part of the framework that applies the principles and requirements of the resource management and *procurement* frameworks (focusing on Defence's operations). The DPPM provides primary operational instructions to Defence *officials* in carrying out their duties related to *procurement*, in a way that is tailored to Defence's particular circumstances and needs.

Scope and applicability of this manual

6. The DPPM applies to all Defence *officials*. In addition, a *contract* may extend the application of this manual to a *contract*or,[2] or a *contract*or may be prescribed to be a Defence *official* in accordance with Defence's Accountable Authority Instructions.

What is the purpose of this manual?

7. The purpose of the DPPM is to:

   a. assist Defence *officials* to implement the requirements of the CPRs and Defence policy when undertaking *procurement*;

   b. provide Defence *officials* with a plain English document that is simple to understand and use when undertaking *procurement*;

   c. update Defence's approach to *procurement* to reduce red tape and costs to industry;

   d. encourage *officials* to use more strategic approaches, commercial expertise and good practice, when procuring for Defence; and

[1] Where the term 'should' or 'may' is used in the DPPM, this generally indicates good practice. See also the section 'How do I read the DPPM' in this Chapter for more information.
[2] See further paragraph 4.15 of the CPRs and the related Note.

e. encourage *officials* to engage early with Defence industry to stimulate competition and innovation, and work with industry to develop better solutions and outcomes for Defence.

How do I read the DPPM?

8. The DPPM is divided into five chapters and has two appendices, as follows:

Chapter 1 – Introduction to the Defence Procurement Policy Manual – this chapter provides an overview of the role of the DPPM and how it is designed to be used;

Chapter 2 – An overview of the CPRs and the *procurement* lifecycle – this chapter provides an overview of the CPRs, including the key policy requirements as they apply to the *procurement* lifecycle, and provides a summary of the *procurement* life cycle to get into *contract*,

Chapter 3 – The procurement framework - this chapter incorporates all of the preliminary rules and guidance contained in the CPRs;

Chapter 4 – Achieving Value for Money in *procurement* – this chapter incorporates all the rules from Division 1 of the CPRs, as well as additional Defence Procurement Policy Directives;

Chapter 5 - *Procurements* above the *procurement thresholds* – this chapter incorporates all of the rules from Division 2 of the CPRs, as well as additional Defence Procurement Policy Directives;

Appendix A – Exemptions from Division 2 of the CPRs – this is Appendix A from the CPRs which sets out the list of *procurements* that are exempt from Division 2 of the CPRs;

Appendix B – Definitions – this is Appendix B from the CPRs which sets out the definitions of the terms used in the CPRs. These terms also have the same meaning when used in the DPPM.

9. Chapters 3 – 5 of the DPPM set out the individual CPR rules that **must** be complied with by all *officials* (including Defence *officials*) undertaking *procurement* for the Commonwealth. The CPR rules have been numbered as they appear in the CPRs, and are easily identifiable as having been drafted in the following format:

EXAMPLE ONLY

'2. Procurement Framework

2.1 The Commonwealth Procurement Rules (CPRs) are issued by the Minister for Finance (Finance Minister) under section 105B(1) of the *Public Governance, Performance and Accountability Act 2013* (PGPA Act).

2.2 *Officials* from *non-corporate Commonwealth entities* and prescribed *Corporate Commonwealth entities* listed in section 30 of the Public Governance, Performance and Accountability Rule 2014 must comply with the CPRs when performing duties related to *procurement*. These entities will collectively be referred to as *relevant entities* throughout the CPRs.'

10. Many of the CPR rules stand by themselves and need no further explanation or context. Also, in many cases, there are no additional Defence Procurement Policy Directives over and above the individual CPR rule.

11. In other cases, however, there may be one or more additional Defence Procurement Policy Directives that **must** also be complied with by Defence *officials*. These are also easily identifiable as they appear below the particular CPR rules to which they most closely relate, have been numbered with 'D' as an identifier, and have been drafted in the following format:

EXAMPLE ONLY

'Defence Procurement Policy Directive

D3. If a Defence *official* determines that an exemption given under paragraph 2.6 of the CPRs applies to a *procurement*, the *official* must ensure that the reasons supporting that determination are appropriately documented.'

12. Also accompanying a CPR rule or Defence Procurement Policy Directive in many cases are 'Notes'. These Notes assist with the interpretation of, or provide more context for readers about, a particular CPR or Defence Procurement Policy Directives, and how they apply in the Defence *procurement* environment. An example of a Note is as follows:

EXAMPLE ONLY

'Note: The DPPM also sets out the Defence Procurement Policy Directives that Defence *officials* must comply with when they procure *goods* and services for or on behalf of Defence. The DPPM also indicates *good* practice.'

13. These Notes do not form part of the mandatory policy that **must** be complied with under the DPPM. However, they can be used, along with the material in Chapters 1 and 2 of the DPPM, to assist with interpretation and to give greater context for the DPPM user.

14. The headings in the DPPM are usually the headings from the CPRs. However, other headings have also been included where appropriate to help guide the reader.

Commonwealth legislative and policy framework

15. As paragraph 2.10 of the CPRs notes, Defence and its *officials* operate in an environment of legislation and Commonwealth policy. Defence has numerous business policy owners that are responsible for ensuring Defence complies with applicable Commonwealth legislation and policy requirements, as well as with particular State and Territory legislation that may also apply to Defence activities. This legislation and policy often interacts with Defence *procurement* and in many cases is given effect to through *contract*s.

16. The DPPM refers to and incorporates by reference relevant Commonwealth legislation and policy, and other Defence policy, relating to *procurement*. Also, the endorsed Defence contracting templates have been drafted and are regularly updated to give effect to applicable Commonwealth legislation and policy (including the CPRs), and applicable Defence policy. These templates have been developed to assist Defence *officials* to comply with applicable legislation and policy requirements if used for the purposes for which they are intended. Where the *procurement* involves a unique or unusual requirement not within the contemplation of the endorsed templates, specialist advice should be sought to ensure any specific legislation and policy is addressed. The endorsed Defence contracting templates may be found on the Commercial Division Tools and Templates intranet page.

17. There are also many policy or support areas in Defence that can assist in relation to specific aspects of *procurement* or on legislation and policy that intersect with *procurement* (eg contracting, legal, finance, environment, work health and safety, security, technical regulatory frameworks etc). These resources can be found by the *procurement* support areas link on the Commercial Division Help Desk Kiosk intranet page.

18. The Department of Finance's *Buying for the Australian Government* website provides further assistance on policies that interact with *procurement* (called 'Procurement-Connected Policies'). The Department of Finance also releases Resource Management Guides and Finance Circulars that provide additional guidance and interim policy updates. These resources may be found on the Department of Finance webpage.

Resource management framework

19. The resource management framework is part of the broader Commonwealth legislative and policy environment, and consists of the legislation and policy (including the CPRs) governing the management of the Commonwealth's resources. The main elements of this framework are set out in Figure 3 of the CPRs.

20. The resource management framework is primarily comprised of the PGPA Act and associated *Public Governance Performance and Accountability Rule 2014* (PGPA Rule 2014). The PGPA Act authorises the Secretary, as Defence's *Accountable Authority*, to issue Accountable Authority Instructions (AAIs) (PGPA Act, section 20A; see also paragraph 2.5 of the CPRs). The Secretary has issued the Defence AAIs under this authorisation. The PGPA Act also contains provisions dealing with the commitment of *relevant money* and *officials* entering into arrangements such as *contracts* and deeds (PGPA Act, section 23). Section 60 of the PGPA Act governs the granting by the Commonwealth of indemnities, warranties and guarantees ('contingent liabilities'). Sections 23 and 60 of the PGPA Act are key provisions relating to *procurement*.

21. The PGPA Framework requires Defence officials to:

a not be inconsistent with the policies of the Australian Government (PGPA Act, section 21);

b. use and manage *public resources* in an efficient, effective, economical and ethical manner (PGPA Act section 8 and 15);

c. exercise 'care and diligence' in performing their duties (PGPA Act, section 25);

d. exercise powers, perform functions and discharge duties "honestly, in good faith and for a proper purpose" (PGPA Act, section 26);

e. not improperly use their position in performing their duties (PGPA Act, section 27);

f. not improperly use information (PGPA Act, section 28); and

g. disclose interests in relation to the performance of their duties (PGPA Act, section 29).

22. Section 21 of the PGPA Act requires the Secretary to govern Defence in a way that is 'not inconsistent with the policies of the Australian Government'. The 'policies of the Australian Government' is not a defined term and should be interpreted broadly, applying its ordinary dictionary meaning. Among other things, the term will likely include things like Cabinet decisions, or other Government approvals relating to a commitment of *relevant money*, to the extent that the decision or approval establishes a course or line of action.

23. Accordingly, Defence *officials* exercising delegations (especially those for the purposes of section 23 of the PGPA Act) should ensure that they do so consistent with the terms of any Australian Government decisions or approvals relevant to the *procurement*.

24. For a Defence *official* (including a contractor who is prescribed as a Defence *official*) to exercise a power conferred on or delegated to the Secretary under the PGPA Act in relation to *procurement*, they are required to have the delegated authority. These delegations are described in the Defence AAIs and issued in the Defence Financial Delegations (DFDs).

25. For the purposes of section 23(3) of the PGPA Act, delegated Defence *officials* may approve the commitment of *relevant money* (Commitment Approval delegation). This delegation is required to be exercised before the Commonwealth enters into the arrangement that commits *relevant money*. For the purposes of section 23(1) of the PGPA Act, Defence *officials* may enter into an arrangement on behalf of the Commonwealth (Enter into an Arrangement delegation). The Defence *official* exercises this delegation by the physical act of entering into an arrangement, after the proposed commitment has been approved by a Commitment Approval delegate. These delegations are mentioned in Defence Procurement Policy Directive D5.[3] Defence *officials* should be aware that the section 23 PGPA Act delegations apply to all kinds of *procurements*. For example, both delegations will be required for each order placed under a *standing offer* arrangement.[4]

26. Also, a change to a *contract* (whether called a *contract* change, amendment or variation or some other terminology) may itself technically constitute a *procurement*. In any event, both delegations will be required to be exercised for each *contract* change, if the change involves the commitment of *relevant money*.[5] If the *contract* change does not involve the commitment of *relevant*

[3] If a *procurement* includes a contingent liability, Defence Procurement Policy Directive D6 requires the relevant delegate to authorise the granting of the contingent liability for the purposes of section 60 PGPA Act. In Defence, the Commitment Approval delegate may do this as part of exercising this delegation

[4] The Establishing and Using Standing Offers Fact Sheet provides further information regarding delegations required for the establishment and use of *standing offer* arrangements.

[5] When calculating the value of a contract change for the purposes of exercising a delegation, the Secretary's Directions in Schedules 1 and 2 of the Defence Financial Delegations states that the limit of delegation is determined by adding the proposed

money (that is, it is a 'nil-cost' *contract* change), only the Enter into an Arrangement delegation is required.[6] However, even in this situation, the delegate should be satisfied that the proposed change represents proper use and management of *public resources* and is not inconsistent with the policies of the Australian Government (see further paragraph 6.1 of the CPRs).

27. In addition to these delegations under the PGPA Act, and in accordance with AAI 3, Defence *officials* are also required to obtain an 'Endorsement to Proceed' before undertaking certain *procurements* (see Defence Procurement Policy Directive D9). An Endorsement to Proceed process is part of Defence's internal controls (which are required by section 16 of the PGPA Act) to better ensure the proper use and management of *public resources*. Having a Defence *official* provide an Endorsement to Proceed for *procurements* above a certain value provides additional internal scrutiny through which Defence can satisfy itself that proceeding with the *procurement* would be an efficient, effective, economical and ethical use of *public resources*, and that it will not be inconsistent with the policies of the Australian Government. An Endorsement to Proceed Fact Sheet and template have been developed to assist Defence *officials* to deal with all the matters they need to consider when exercising this function.[7]

28. Defence has also developed templates to assist and guide Commitment Approval and Enter into Arrangement delegates (as well as any separate delegate authorising the granting of a contingent liability under section 60 of the PGPA Act) through all the considerations they need to be aware of when exercising their delegations.

Compliance with the DPPM

29. The DPPM sits within the procurement policy framework as set out in Figure 1.

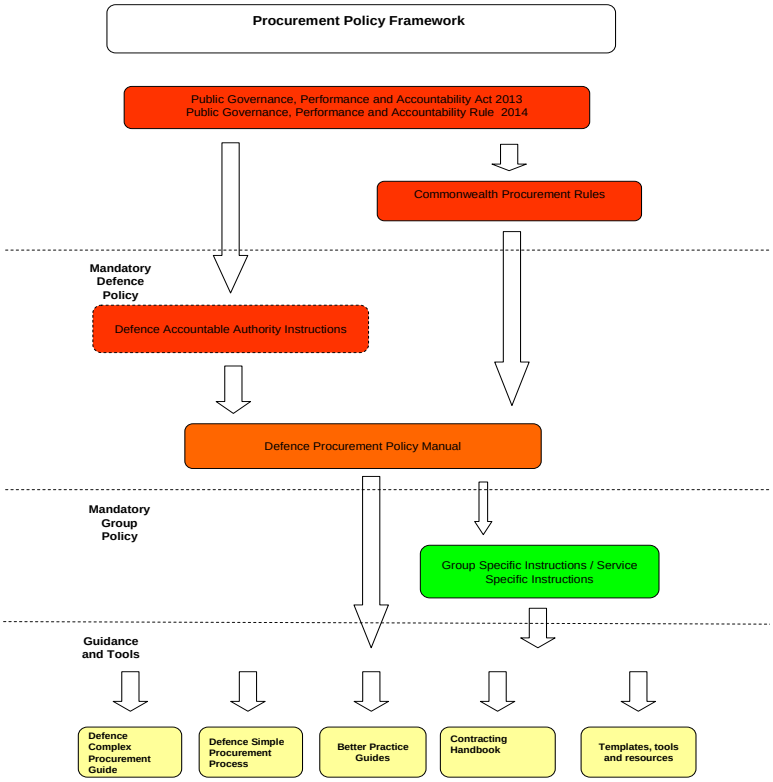


Figure 1

additional commitment to the existing value of the commitment of *relevant money* (that is, the original value plus any amendments already approved).

[6] While only the Enter into an Arrangement delegation is required, AAI 2 and DFDs Schedule 4 have the effect that not all Defence *officials* have the delegated authority to agree to enter into arrangements that are nil-cost contract changes. Defence *officials* should refer to AAI 2.4.1.9 and FINMAN 2 Schedule 2 Note 5 to make sure that these contract changes are authorised at the right level.

[7] For further guidance, see Chapter 4 of the Complex Procurement Guide.

30. If a Defence *official* departs from the DPPM in a way that results in a departure from the CPRs, (or the PGPA Act or PGPA Rule 2014), then the *official* will have contravened the law.

31. When considering a possible departure from a Defence Procurement Policy Directive contained in the DPPM, Defence *officials* should:

a consider whether a proposed departure from the policy requirement is reasonable and justified in the circumstances and would produce the same or better outcome for Defence;

b. consult their supervisor, wherever practicable, about a proposed departure – a properly informed decision may involve consulting the policy owner; and

c. be responsible and accountable for the consequences of departing from, or not adhering to, the content of a manual, including where such departure or non-adherence results in a breach of applicable laws or leads to adverse outcomes for Defence.

32. Officials are not permitted to depart from the mandatory requirements of the PGPA Act, PGPA rule, CPRs, AAIs and the DFDs.

33. Defence *officials* should consider whether contractors should be required to comply with the DPPM when undertaking *procurement* on behalf of Defence and communicate this requirement to the contractors, including the incorporation of appropriate provisions in *contracts*.[8]

Why do we have *procurement* rules?

34. The CPRs and Defence Procurement Policy Directives in the DPPM exist to assist Defence *officials* make proper use of *public resources* when undertaking *procurement* related activities for the Commonwealth. Defence *officials*, like *officials* from other Commonwealth agencies, are accountable for how they spend *relevant money* (also known as 'public money').

35. The DPPM provides a framework that promotes responsible and accountable spending by Defence *officials* when procuring *goods* and services for Defence. This framework supports the proactive management of the risks relating to *procurement*, as required by the CPRs.

Why are the CPRs and the DPPM drafted the way they are?

36. As noted at paragraph 2.15 of the CPRs, the CPRs give effect to Australia's international treaty obligations. Access to overseas markets is secured through Free Trade Agreements (FTAs). Under FTAs, countries offer reciprocal access to their government *procurements*. The CPRs reflect Australia's FTA commitments, and in particular are substantially based on the text of Chapter 15 of the Australia-USA FTA. The CPRs also align with the World Trade Organisation's Agreement on Government Procurement (GPA). Accordingly, the CPRs include *procurement* related rules that give effect to Australia's international obligations.

37. The CPRs also seek to ensure that Commonwealth agencies achieve value for money in their *procurement* activities, however they have not been specifically drafted to follow the logical order or timeline of the *procurement* life cycle, and it is very difficult to simply translate or allocate the CPR rules to the various parts of the life cycle. The Defence Procurement Policy Directives have been drafted to align with the structure of the CPRs, and therefore also do not follow the *procurement* life cycle. Chapter 2 of the DPPM provides an overview of the CPRs, including a discussion of the core principles underpinning Commonwealth *procurement.* Chapter 2 also provides an overview of how to plan and undertake a *procurement*.

38. By contrast, the Simple Procurement Process Tool and Complex Procurement Guide, which accompany the DPPM, have been based on the *procurement* life cycle so that Defence *officials* have a more intuitive sequenced guidance document to follow when planning for and undertaking *procurements*. The documents do not contain mandatory policy requirements, rather, along with the practitioner level Better Practice Guides and Handbooks on specific *procurement* topics, they provide more detailed 'how to' guidance to undertake good *procurement*, whether for a low risk, low value ('simple') *procurement* or for the more highly complex *procurements* that are often undertaken in Defence, whether in the materiel or non-materiel environment.

[8] For more information about when it might be appropriate to require contractors to comply with the DPPM, see paragraph 4.17 of the CPRs and the related Note.

What is the *procurement* life cycle?

39. The *procurement* life cycle is simply the breakdown of the end-to-end *procurement* process into logical phases and stages. If each stage of the life cycle is planned for and executed well, Defence *officials* are more likely to achieve good outcomes from their *procurement* activities. The *procurement* lifecycle separates *procurement* into three phases: planning, sourcing and managing. These phases are further divided into seven distinct, but interrelated stages, which are:

Planning

1. Plan the *procurement*
2. Request documentation

Sourcing

3. Approach the market
4. Evaluation
5. Negotiation and contract signature

Managing

6. Contract management[9]
7. Disposal.

40. The *procurement* life cycle is represented by the following 'procurement wheel' (see figure 2).



Figure 2

41. While the *procurement* life cycle includes a Disposal stage, the actual disposal of *goods* (for example, Defence materiel at the end of its life of type) is not a *procurement* within the meaning of the CPRs. This is so even though paragraph 2.10 of the CPRs mentions a 'consideration of disposal of *goods*' as being part of *procurement*. Hence, disposal of *goods* is neither subject to the CPRs nor the Defence Procurement Policy Directives in the DPPM. For example, if the disposal strategy for a ship involves selling the ship by tender (see paragraph 2.9c of the CPRs) or through an auction, that process would not be a *procurement* and hence not subject to the CPRs.

[9] Defence Officials should refer to the Defence Contract Management Framework and the Defence Contract Management Handbook for guidance about the contract management stage of the procurement life cycle.

42. However, there may be occasions where Defence *officials* wish to engage services to assist with the planning or conduct of a disposal activity. The engagement of these services may constitute a *procurement* under the CPRs. For instance, in the example of a ship disposal, if the strategy involves engaging services to decommission and scrap the ship, then the *procurement* of these services would constitute a *procurement* for the purposes of the CPRs.

43. What paragraph 2.10 of the CPRs requires is that Defence *officials* undertaking a *procurement* of *goods* consider how the *goods* will be disposed of at the end of life (including any potential costs) as part of the decision about whether and how to proceed with the *procurement*[10].

44. In Defence, the policy governing disposal of *goods* is set out in AAI 10.12, the Defence Logistics Manual (see DEFLOGMAN, Part 2, Volume 5, Chapter 10) and the Electronic Supply Chain Manual ('ESCM'). For guidance and templates on contracting processes for disposals, including sale by tender and gifting or transfer by deed, Defence *officials* should refer to Materiel Logistics, Disposals and Sales Branch.

Guidance, tools, templates and resources

45. The Complex Procurement Guide has been developed to align with the *procurement* life cycle. Each section of the *procurement* life cycle is represented by a Chapter of the Complex Procurement Guide.

46. The Simple Procurement Process Tool also follows the *procurement* lifecycle and guides users undertaking a simple *procurement* activity through a step by step process. By following the process, Defence *officials* can rely on this as satisfying their obligations under the CPRs and DPPM.

47. The DPPM also refers to and contains links to further guidance, templates and tools to assist Defence *officials* to meet the requirements of the DPPM and to facilitate better *procurement* outcomes. These materials can be found on the Commercial Division Commercial Policy Framework intranet page.

48. Collectively, the DPPM and the related guidance, templates, tools and other resources, provide a framework that supports accountability for spending, sound commercial practice and better outcomes for Defence, the Australian Government and the taxpayer.

[10] The intention of paragraph 2.10 of the CPRs is to ensure disposal costs and related matters are adequately considered and understood (where predictable) to inform the acquiring of goods through the procurement process. For example, Defence may need to factor into the original procurement decision the need for additional funding to cover the costs of making the goods safe for disposal.

Chapter 2

An overview of the CPRs and the procurement life cycle

1. As noted in Chapter 1, the CPRs have not been specifically drafted to follow the logical order or timeline of the *procurement* life cycle. Paragraphs 2.7 and 2.10 of the CPRs describes the *procurement* life cycle as covering all aspects of acquiring and delivering *goods* and services - it starts with identifying the need for a *procurement* and finishes with either the end of the related services *contract* or the end of the useful life and disposal of the *goods* that were procured. While the CPRs do not follow the *procurement* life cycle, the CPRs include a number of core principles that underpin Commonwealth *procurement* across the life cycle.

2. This Chapter provides a brief overview of the CPRs and the *procurement* life cycle, and discusses these core principles in the context of Defence *procurement*. This Chapter is not intended to replicate the CPRs and does not attempt to discuss all the CPR rules. Also, even though this Chapter discusses the CPRs, the terms '**must'** and **'must not**' are not used in this Chapter to avoid any confusion about whether this Chapter gives rise to additional mandatory policy requirements. The CPR rules and Defence Procurement Policy Directives in Chapters 3-5 of the DPPM (and Defence Procurement Policy Directive D1 in Chapter 1) stand on their own and apply according to their terms.[11]

CPRs – an overview

3. The CPRs provide all entities governed by the PGPA Act – which includes the Department of Defence - with the policy framework and associated rules for conducting *procurement* activities. The CPRs are a 'legislative instrument', which means that they are part of the law of the Commonwealth.

4. The CPRs are divided into an introductory section and two Divisions - which are set out in Chapters 3, 4 and 5 respectively of the DPPM - and two Appendices (which are included as the Appendices to the DPPM). Division 1 of the CPRs applies to all Commonwealth *procurements* and Division 2 sets out 'additional rules' which apply to *procurements* that are valued at or above the relevant *procurement threshold* - unless a *procurement* is exempted from having to comply with these additional rules. Many Defence *procurements* are exempt from Division 2. The main obligation of the additional rules is to require *officials* to undertake *procurements* by way of an *open tender* in most circumstances, as well as setting out particular requirements for how the tender is undertaken.

5. The introductory section of the CPRs (in Chapter 3 of the DPPM) covers the purpose, scope and legislative and policy framework of the CPRs.

6. Division 1 of the CPRs (in Chapter 4 of the DPPM) sets out rules that apply to all *procurements*. This means that all Defence *procurements* are required to comply with Division 1 (and the additional Defence Procurement Policy Directives in Chapter 4 of the DPPM). This Division establishes 'value for money' as the core requirement of Commonwealth *procurement*. Defence *officials* responsible for a *procurement* need to be satisfied, after reasonable inquiries, that the *procurement* achieves value for money.

Value for money framework

7. Division 1 provides a framework for determining 'value for money'.[12] Under this framework, *procurements* should:

- encourage competition and be non-discriminatory;
- use *public resources* in an efficient, effective, economical and ethical manner that is not inconsistent with the policies of the Commonwealth;
- facilitate accountable and transparent decision making;
- encourage appropriate engagement with risk; and
- be commensurate with the scale and scope of the business requirement.

[11] See also the section 'How do I read the DPPM' in Chapter 1 for more information.
[12] See section 4 of the CPRs (in Chapter 4 of the DPPM).

8. In addition to these considerations, for *procurements* valued above $4 million, *officials* are also required to consider the economic benefit of the *procurement* to the Australian economy as part of the framework for determining value for money.[13] Consideration of economic benefit occurs through the evaluation of the Defence Industry Participation 2019 requirements of the *procurement*.[14] In particular, *tenderers* are required to submit Australian Industry Capability (AIC) Schedule (for procurements valued between $4 million and $20 million (including GST)), an AIC Plan (for procurements valued over $20 million (including GST)), or a Local Industry Capability Plan (for procurements of construction services valued over 7.5 million (including GST)). Such industry schedules and plans set out the benefits to Australian industry. For example, AIC Schedules and Plans sets out the *tenderers'* Australian Industry Activities (AIAs) to meet the specified Industry Requirements of the *procurement*. In relation to AIC Plans *tenderers* are required to describe the benefits of their AIAs, including the significance of the work, the skills and knowledge that will be transferred, the training that will be provided, the new technologies or innovations that will be introduced, and the contribution to Australian company competitiveness, including access to global supply chains, technical data and intellectual property. Similarly, Local Industry Capability Plans require the provision of information such as an estimate of the employment numbers, work packages and trade types, and industry sectors involved in the delivery of the contract.

9. Price is not the sole factor when assessing value for money, value for money does not automatically mean the lowest price *goods* or services. When conducting a *procurement*, *officials* are required to consider the relevant financial and non-financial costs and benefits of each *submission*, including matters such as:[15]

- the quality of the *goods* and services;
- fitness for purpose of the proposal;
- the *potential supplier*'s relevant experience and performance history;
- flexibility of the proposal (including innovation and adaptability over the lifecycle of the *procurement*);
- environmental sustainability of the proposed *goods* and services (such as energy efficiency, environmental impact and use of recycled products); and
- whole-of life costs.

Valuing a procurement – relevant procurement thresholds

10. The additional rules in Division 2 (and the Defence Procurement Policy Directives in Chapter 5 of the DPPM) apply only to *procurements* that are valued at or above a certain threshold (see paragraph 14 below). This means that Defence *officials* need to estimate the value of their *procurement* to know whether it has to comply with the additional rules.

11. The *procurement* value is the maximum anticipated value of the proposed *contract*, including options, extensions, renewals or other mechanisms that may be executed over the life of a *contract*. The estimated value includes:[16]

- all forms of remuneration, including any premiums, fees, commissions, interest, allowances and other revenue streams that may be provided for in the proposed *contract*;
- the total maximum value of the property or services being procured, including the value of any options in the proposed *contract*; and
- any taxes or charges (including *GST*).

12. If a *procurement* is being conducted in multiple parts with *contracts* awarded either at the same time or over a period of time, with one or more *supplier*s (for example, a *standing offer* panel arrangement), the expected value of the *goods* and services being procured has to include the

[13] See paragraphs 4.7 and 4.8 of the CPRs, and the guidance on the Department of Finance webpage.
[14] See Defence Industry Policy Statement 2016 and Defence Industrial Capability Plan 2018 for materiel procurements above $20 million. See Defence Procurement Policy Directive D16 and the related Note.
[15] See paragraphs 4.5 and 4.6 of the CPRs.
[16] Defence *officials* should be aware that the way in which they value a *procurement* for the purposes of the CPRs is different to the way they need to value it for the purposes of completing the AE643 form to record a contract in ROMAN. See Complex Procurement Guide, Chapter 6 Appendix A for further details.

maximum value of all of the *contracts*. Further, Defence *officials* cannot split a *procurement* into separate parts just to try and avoid the relevant *procurement threshold*.

13. In any case, where the maximum value of a *procurement* over its entire duration cannot be estimated (for example, a *standing offer* panel arrangement), Defence *officials* are required to treat the *procurement* as being valued above the relevant *procurement threshold*.

14. The value thresholds are:

- for *procurements* other than for *construction services* - $80,000 (including *GST*);
- for *procurements* of *construction services* by *relevant entities* the *procurement threshold* is $7.5 million (including *GST*).

15. The term 'covered procurement' is an additional term used to refer to a class of procurements which are subject to the *Government Procurement (Judicial Review) Act 2018*, see paragraphs 48 - 51 of the DPPM below.

Exemptions from the additional rules in Division 2

16. As noted above, some *procurements* may be exempt from having to comply with the additional rules in Division 2 of the CPRs. There are two ways in which a Defence *procurement* may be exempt:

- first, the *procurement* may be covered by one of the general exemptions listed in Appendix A of the CPRs (discussed further below); or
- second, a Defence specific exemption may apply as a result of a measure made by the Secretary under paragraph 2.6 of the CPRs. This is discussed further in Chapter 4 of the DPPM. These Defence specific exemptions relate mainly to the acquisition and sustainment of Defence materiel.

17. However, even if exempt from Division 2 of the CPRs, Defence *officials* still have to make sure that they undertake their *procurements* in accordance with Division 1 of the CPRs. Also, Defence *officials* still have to comply with all applicable Defence Procurement Policy Directives contained in this manual.

18. While the full list of general exemptions is set out in Appendix A to the CPRs (see Appendix A to the DPPM), some of the main exemptions relevant to Defence business include:

- leasing or purchase of real property or accommodation (noting that the *procurement* of *construction services* is not exempt);
- *procurement* of *goods* or services from another Commonwealth entity, or a state, territory or local government entities where no commercial market exists or where legislation or Commonwealth policy requires the use of a government provider (for example, legal services which are tied to the Australian Government Solicitor);
- *procurement* for the direct purpose of providing foreign assistance;
- *procurement* of *research and development* services, but not the *procurement* of inputs to *research and development* undertaken by Defence;[17]
- the engagement of an expert or neutral person, including engaging counsel or barristers, for any current or anticipated litigation or dispute;
- *procurement* of *goods* or services (including construction) outside Australian territory, for consumption outside Australian territory;[18]
- *procurement* of *goods* or services by, or on behalf of, the Defence Intelligence Organisation, the Australian Signals Directorate, or the Australian Geospatial-Intelligence Organisation;
- *contracts for labour hire* (noting that this does not include the engagement of consultants);[19]

[17] This exemption would be relevant mainly for Defence Science and Technology Group.
[18] This exemption would cover *procurements* of *goods* or services by the Offices of the Counsellor Defence Materiel in Washington and London that are needed for the ongoing operation of those Offices.
[19] A '*contract for labour hire*' is a contract under which Defence engages an individual to provide labour, when the individual is engaged either directly or through a firm which primarily exists to provide the services of only that individual (that is, the

- *procurement* of *goods* or services from a business that primarily exists to provide the services of persons with a disability; and
- *procurement* of *goods* or services from a Small to Medium Enterprise with at least 50 per cent Indigenous ownership.

Indigenous business exemption and the Indigenous Procurement Policy

19. The purpose of the Indigenous Procurement Policy (IPP) is to stimulate indigenous entrepreneurship and business development, providing indigenous Australians with more opportunities to participate in the economy through the awarding of Australian Government *contracts*.

20. Appendix A of the CPRs (item 16) permits Defence to procure *goods* or services directly from a small to medium enterprise with at least 50 per cent indigenous ownership ('indigenous enterprise'), without running an *open tender* process, if the proposed *procurement* represents value for money.

21. The IPP builds on the Appendix A exemption and has two components that apply to *procurement*:

- a mandatory 'set-aside' that applies to certain *procurements* conducted on or after 1 July 2015 and which may result in *contracts* being directly sourced to indigenous enterprises; and
- mandatory minimum requirements that apply to certain high value *procurements* aimed at enhancing indigenous participation for certain Commonwealth *contracts.*

22. Supply Nation maintains a non-exhaustive list of indigenous enterprises that meet this definition. If an enterprise states that it is an indigenous enterprise and is not listed with Supply Nation, Defence *officials* will need to make sufficient inquiries to satisfy themselves that the enterprise satisfies the IPP definition of an indigenous enterprise.

23. In general terms, the mandatory set-aside part of the IPP applies to *procurements* where the majority (by value) of the *goods* or services will be delivered in a Remote Area (except for transactions paid for by credit cards), and other domestic *procurements* where the estimated value is between $80,000 and $200,000 (*GST* inclusive). The set-aside requirement does not apply to Defence exempt *procurements* (under paragraph 2.6 of the CPRs) and some other specific *procurements*.[20]

24. If the set-aside requirement applies, Defence *officials* are required to first determine whether an indigenous enterprise could deliver the required *goods* or services on a value for money basis before making any approach to the market. If satisfied that value for money can be achieved, then the Defence *official* should procure the *goods* or services from the indigenous enterprise (as permitted by Appendix A of the CPRs, item 16). If not, then the Defence *official* may procure through non-indigenous enterprises.

25. In general terms, the mandatory minimum requirements apply to *procurements* (except Defence exempt *procurements*) where the *contract* will be performed in Australia and has an estimated value of $7.5 million (*GST* inclusive) or more, and where more than half of the value of the *contract* is anticipated to be spent in one or more of the following industry sectors:

- Building, construction and maintenance services;
- Transportation, storage and mail services;
- Education and training services;
- Industrial cleaning services;
- Farming and fishing and forestry and wildlife contracting services;
- Editorial and design and graphic and fine art services;
- Travel and food and lodging and entertainment services;
- Politics and civic affairs services;
- Financial instruments, products, contracts and agreements;

---

individual's own company). This includes the appointment of an eminent individual to a special role by the Secretary, or the Secretary's appointment of individuals to a governance committee (for example, an audit committee, ethics committee or steering committee), but does not include the engagement of consultants.

[20] For more information about the kinds of *procurements* to which the IPP does not apply, refer to the IPP resources at the Commercial Division Mandatory Set-Aside intranet page.

- Mining and oil and gas services;
- Industrial production and manufacturing services;
- Environmental services;
- Management and business professionals and administrative services (sub-category exemptions apply);
- Engineering and research and technology-based services;
- Financial and insurance services (sub-category exemptions apply);
- Healthcare services;
- Personal and domestic services;
- National defence and public order and security and safety services (sub-category exemption applies);
- Organisations and clubs.

26. The policy requires that the *request documentation* for *procurements* that are subject to the 'mandatory minimum requirements' include clauses (in both the conditions of tender and *contract*) that meet the IPP requirements. Model clauses that meet these requirements are available on the Commercial Division IPP Minimum Requirements intranet page.

27. Defence *officials* can find further information and resources, including links to IPP fact sheets and Remote Area maps, on the Commercial Division Indigenous Procurement intranet page.

Disability business exemption

28. The Australian Government's National Disability Strategy 2010 - 2020 sets out a ten year national policy framework for improving the lives of Australians with disability, their families and carers, including by providing people with a disability with more opportunities to participate in the economy through the awarding of Australian Government *contracts*.

29. Appendix A of the CPRs (item 15) permits Defence to procure *goods* or services directly from a business that primarily exists to provide the services of persons with a disability ('disability business'), without running an *open tender* process, if the proposed *procurement* represents value for money.

30. Similar to the IPP, Defence *officials* should determine whether a disability business could deliver the required *goods* or services on a value for money basis before making any approach to the market. If satisfied that value for money can be achieved, then the Defence *official* should procure the *goods* or services from the disability business. If not, then the Defence *official* may procure through a non-disability enterprise. A list of Australian disability businesses can be found at the Australian Disability Enterprises website www.ade.org.au.

Procurement methods

31. Under the CPRs, there are two *procurement* methods:

- an *open tender* – where Defence approaches the open market and invites *submissions*; and
- a *limited tender* - where Defence approaches only **one or more** *potential suppliers* to make *submissions*.

32. Identifying the *procurement* method does no more than categorise the *procurement* for the purposes of the CPRs, with some different rules applying depending on whether the *procurement* is categorised as an *open tender* or *limited tender*. Under the CPRs, the default position is that *procurement* should be undertaken by way of *open tender*. If it is not an *open tender*, then by definition it will be categorised as a *limited tender,* even if the *procurement* is undertaken with only one *supplier* (often called a 'sole source'[21] *procurement*). Similarly, a *procurement* process undertaken between two or more (but not all) *potential supplier*s will be a *limited tender* process, even if Defence does not release a formal request for tender to approach the market and instead seeks a different form of response from industry. If Defence establishes a *standing offer* panel arrangement through an *open*

[21] When the term 'sole source' is used in the DPPM, it is not being used to indicate a *procurement* method, rather to indicate a situation where Defence is proposing to approach only one supplier for a *procurement*.

tender, then each *procurement* from the panel is categorised as an *open tender*, irrespective of whether the Defence *official* seeks quotes from one, some or all members of the panel.[22]

33. The categorisation of a *procurement* as an *open tender* or *limited tender* does not determine what *approach to market* Defence *officials* may wish to use (which could be done through a request for tender, request for proposal, request for quote under a *standing offer* panel, competitive evaluation, some other form of iterative engagement process, or other form of documentation), nor the project delivery model (for example, prime *contract*, managing contractor, design and construct *contract*, alliance *contract* and so on). Defence *officials* should determine the appropriate *approach to market* strategy and project delivery model during the planning stage of the *procurement*.

34. Also, and as discussed below, a *limited tender* will still be a competitive process as long as it involves more than one *supplier*.

35. While the CPRs generally require an *open tender* process for *procurements* valued at or above the relevant *procurement threshold*, many Defence *procurements* are exempt from this requirement.[23] Accordingly, in circumstances where an *open tender* is not mandatory, the following factors are generally relevant to the selection of a *procurement* method:

- the nature and structure of the market;
- the extent of competition (that is, the number of genuinely competitive *supplier*s);
- schedule, cost or other constraints (for example, intellectual property, security etc).

36. Based on an assessment of these factors, Defence *officials* may still determine that an *open tender* process should be conducted as the best mechanism to deliver a value for money outcome.

Limited tenders

37. *Limited tenders* may only be undertaken in circumstances where the value of the *procurement*:

- is below the relevant *procurement threshold* – see Chapter 2 paragraph 4 above; ;
- is at or above the relevant *procurement threshold* but exempt from the additional rules in Division 2 of the CPRs (see Chapter 2 paragraphs 16 – 18); or
- is above the relevant *procurement threshold* and subject to the additional rules in Division 2 of the CPRs, but satisfies the Conditions for *limited tender* in paragraph 10.3 of the CPRs.

38. If a *procurement* is subject to the additional rules in Division 2 of the CPRs, Defence *officials* will normally be required to use an *open tender* for the *procurement*. There are only very limited circumstances in which a Defence *official* may decide to use a *limited tender*. These are set out in paragraph 10.3 of the CPRs. Of these, there are probably four main circumstances on which a Defence *official* may rely to conduct a *limited tender*.

39. First, there is the circumstance of 'reasons of extreme urgency' (paragraph 10.3b of the CPRs). A *limited tender* can be undertaken if there are reasons of extreme urgency that have been brought about by events unforeseen by Defence, such that the *goods* and services could not be obtained in time under *open tender* A good example of where this provision might be used is where a natural disaster or other unexpected event has occurred and Government has directed Defence to procure *goods* or services in support of its emergency response.

40. However, paragraph 10.3b of the CPRs cannot validly be used in circumstances where Defence *officials* have not planned well enough in advance and now find themselves in a situation where they may not be able to undertake an *open tender* process in time to obtain the *goods* or services when they are needed. Defence *officials* cannot use poor *procurement* planning as a valid justification for running a *limited tender* process. The underlying principle is that the event giving rise to the need to undertake a *procurement* should have arisen at short notice and could not have reasonably been foreseen by Defence.

41. The second main circumstance is for 'unsolicited innovative proposals' where the *procurement* can be categorised as having been made under 'exceptionally advantageous conditions that arise only in the very short term' and which is not 'routine *procurement* from regular *suppliers'*. (paragraph 10.3c

[22] See CPRs, paragraph 9.13.
[23] See DPPM, Defence Procurement Policy Directive D2. Appendix A to the CPRs also provides for other exemptions.

of the CPRs). Sometimes industry will have an innovative idea that offers real value to Defence, even though it is not something that Defence has identified as a current need or priority. Paragraph 10.3c of the CPRs offers a mechanism for encouraging industry to put forward these ideas and, if Defence considers the idea of benefit, to procure directly from the relevant company without having to openly test the market.

42. However, Defence companies may sometimes seek to use this mechanism as a way of pitching their *goods* or services to Government without having to compete for a *contract*. If Defence *officials* act on these proposals without testing the market, then it may be unfair to other suppliers of similar *goods* or services, as well as being difficult to demonstrate value for money. Accordingly, Defence *officials* need to be cautious when using this circumstance to justify undertaking a *limited tender*. It is difficult to give definitive guidance about the kind of proposals that will meet this circumstance, however, as a general rule, it would cover most proposals that are unique or otherwise not readily obtainable in the market place. By contrast, the circumstance should not be used where the proposal is effectively an advance proposal for a requirement that Defence has already identified for *procurement* in the market. Defence *officials* should seek specialist contracting or legal advice before accepting an unsolicited proposal.

43. While Defence business units should be open to receiving and considering unsolicited innovative proposals from industry, Defence has also put in place a formal mechanism to manage these kinds of proposals from industry. This is the Centre for Defence Industry Capability (CDIC) which hosts the Defence Innovation Portal, the primary gateway for companies seeking to submit innovation proposals or ideas to the Defence Innovation Hub and Next Generation Technology Fund. For further information about the CDIC and the Defence Innovation Hub, Defence *officials* should refer to www.business.gov.au/cdic.

44. The third main circumstance is where there is no real alternative because of an 'absence of competition for technical reasons' (Paragraph 10.3d of the CPRs). Normally, this circumstance is used where only one *supplier* can provide the relevant *goods* or services because of intellectual property or other restrictions. This circumstance cannot validly be used by a Defence *official* based simply on the *official's* perceived overall knowledge of the market. An 'absence of competition for technical reasons' has to be something more than an *official's* mere assertion that there is only one *supplier* in the market who is capable of providing the *goods* or services. It requires objective, demonstrable evidence. An example could be a situation where Defence is seeking to procure specialised medical equipment, and there are only two manufacturers of the equipment in the world because of its specialised nature. Defence could defensibly undertake a *limited tender* between the two manufacturers because there would be an absence of competition for technical reasons.

45. The fourth main circumstance is for additional deliveries of *goods* and services by the original *supplier* or authorised representative that are for replacement parts or continuing services for existing equipment, software, services or installations, when a change of *supplier* would mean the *goods* or services would be incompatible with the existing equipment or services' (Paragraph 10.3e of the CPRs). This circumstance is often used in the context of ICT *procurements* where Defence needs spare parts for the installed ICT system, or wants to upgrade the system. The parts or upgrades may be available only from the original *supplier* of the system. The underlying matters giving rise to this circumstance will often also support the circumstance discussed above dealing with an absence of competition for technical reasons.

46. Defence *officials* may sometimes seek to use this circumstance to justify the extension or continuation of consultancy or other professional services, whether or not related to ICT systems, equipment, software or support services. As a general rule, this would normally not be a valid use of this circumstance to justify (as a *limited tender*) the extension or continuation of these kinds of services, and would be an example of where the relevant Defence *officials* have not planned their *procurement* well enough in advance. For instance, *officials* should have built into the original *approach to market* the necessary options to extend the service period, or for the contractor to provide additional services. As noted above, *Defence officials* cannot use poor *procurement* planning as a valid justification for running a *limited tender* process.

47. Justifications for using a *limited tender procurement* method will be reported on *AusTender*, and made publically available in accordance with Defence's *AusTender* reporting requirements. Consequently, Defence officials should ensure that the decision to use a *limited tender procurement*

method complies with the CPRs, is approved by an appropriate delegate, is defensible and the justification is recorded[24].

Government Procurement (Judicial Review) Act 2018

48. The *Government Procurement (Judicial Review) Act 2018* (JR Act) was introduced to address obligations under relevant free trade agreements and establishes a statutory framework for suppliers (being, under the JR Act, one or more persons who supplies or could supply, *goods* or services and would include *potential suppliers* or *tenderers*)[25] to make complaints to Defence about non-compliance with specific provisions of the CPRs. These complaints are managed through the Defence Procurement Complaints Scheme (DPCS). In broad terms, a valid complaint under the JR Act requires Defence to suspend the relevant *procurement* (except where a public interest certificate (PIC) has been issued) and to investigate and report on the complaint. If the complaint is not considered resolved or otherwise withdrawn by the *supplier*, the *supplier* may seek an injunction in the Federal Circuit Court or the Federal Court of Australia.

49. *Procurements* are subject to the JR Act if they are 'covered procurements'. A 'covered procurement', for the purposes of the JR Act, is a *procurement*:

- to which both Divisions 1 and 2 of the CPRs apply (ie, they are above the relevant *procurement thresholds*);
- to which no exemption has been applied; and
- not included in a class of *procurements* specified in a determination under s5(2) of the JR Act[26].

50. A complaint is a valid complaint under the JR Act if:

- it is made by a supplier as defined under the JR Act;
- it is in writing;
- it relates to a covered procurement;
- it relates to a contravention of the CPRs (Division 2 or nominated Division 1 requirement); and
- the supplier's interests have been affected by the contravention of the CPRs.

51. A list of CPRs which are subject to the JR Act is set out at Appendix A to this Chapter. Chapters 3 and 4 of the DPPM provide further information relating to the specific CPRs that are subject to the JR Act. The *Defence Procurement Complaints Scheme – Complaints Management Guide* and the Department of Finance's *Resource Management Guide 422 – Handling complaints under the Government Procurement (Judicial Review) Act 2018* contain additional information relating to the JR Act.

Defence Procurement Complaints Scheme

52. The DPCS has been established in Defence to manage the administration and investigation of all *procurement* complaints, including those submitted under the JR Act. The DPCS meets the requirement under the CPRs to apply timely, equitable and non-discriminatory complaint handling procedures[27]. In accordance with Defence Procurement Policy Directive D21, all *procurement* complaints must be submitted to the procurement complaints mailbox which is managed by the Central Procurement Complaints Function. Further information on the DPCS can be obtained on the DPCS intranet page.

The procurement life cycle - core principles

53. The CPRs have some core principles that Defence *officials* need to consider when planning and undertaking their *procurement* activities. These are discussed below.

[24] The choice to use a limited tender method may be subject to a complaint under the JR Act.
[25] The JR Act defines the term 'supplier' with a broader meaning than the definition provided in the CPRs.
[26] At this stage (20 April 2019), no determination has been made under s5(2) of the JR Act. This document will be updated if a determination is made.
[27] See paragraph 6.8 of the CPRs.

Value for money

54. As noted above, value for money does not necessarily mean the lowest price. In most Defence *procurements* of any complexity, determining value for money will mean assessing tenders against all the *evaluation criteria* stated in the *request documentation* and determining on the balance of all the assessments which one delivers best value for the Commonwealth. In undertaking this assessment, *officials* need to look at the total cost of ownership of the solutions. Value for money is about getting the best possible outcome over the whole-of-life of the *goods* or services.[28]

55. The standard conditions of tender in the endorsed Defence contracting templates include *evaluation criteria* that meet the requirements of the CPRs for determining value for money, and in particular enable Defence *officials* to properly consider the relevant financial and non-financial costs and benefits of tenders. For example, in major Defence *procurements*, particularly materiel *procurements*, one of the criteria to be considered in determining value for money is Australian Industry Capability (AIC). This is an explicit criterion in ASDEFCON tendering and contracting templates. The ability for the Australian Government to maintain an AIC program is provided for under our free trade agreements as an express exception to the non-discrimination principle (which is discussed below). Indeed, even before Defence releases *request documentation*, Defence *officials* are required to consider at the early stages of the Defence Capability Life Cycle and during the planning stage of the *procurement* the requirement or potential for Australian industry involvement in the *procurement*, consistent with the Government's defence and industry policy[29].

56. During the evaluation stage of a *procurement*, Defence *officials* will evaluate tenders against the stated *evaluation criteria* in accordance with the process and methodology set out in the tender evaluation plan. If the assessment of tenders against the non-price *evaluation criteria* leaves little or no discrimination between the tenders, then it is likely that the lowest priced tender will be the best value for money. However, the assessment of value for money can become more difficult where, for example, one *tenderer* offers a high level of capability or performance at a higher price, than other tenders which meet the minimum requirements but offer a lower level of capability or performance at a lower price. Effectively, the question for Defence *officials* becomes whether the higher level of capability or performance at the higher price is 'worth' more or less to Defence than the lower level of capability or performance at the lower price. This is a subjective assessment and *officials* need to make sure that they can properly articulate the reasons for why they make their decision. As long as the reasons are sensible and logical and in accordance with the PGPA Act framework requirements and duties, then the decision itself will be defensible.

57. Defence *officials* also need to make sure that when making these decisions, they are comparing 'apples with apples'. *Officials* need to ensure that all omissions and risks relating to a tender have been properly understood, considered, and if necessary quantified and 'priced in' to that tender, so as to ensure that when comparing with another tender that does not have those omissions or risks, the comparison is being done on an equivalent basis. For more guidance about how to undertake tender evaluation, Defence *officials* should refer to the Complex Procurement Guide[30].

58. Selecting the most appropriate *procurement* process that is commensurate with the scope, scale and risk of the *procurement* will also help Defence *officials* achieve value for money. This will normally involve some form of competition.

Competition

59. As paragraph 5.1 of the CPRs notes, competition is a key element of the Australian Government's *procurement* framework. A competitive *procurement* process is normally the mechanism by which Defence ensures that it is receiving value for money. Competition is important because time and again it has been shown to be the most effective motivator for industry to reduce costs and improve performance. Whilst early contractor selection and sole source *procurement* can also be an effective and efficient execution strategy in appropriate cases, it should not be used solely to avoid the need for competitive tendering, especially when a viable competition can be held. Sound commercial judgment, not convenience, should determine the right approach.

[28] See paragraphs 4.5 and 4.6 of the CPRs.
[29] See Paragraph 8 of Chapter 2 for further information on the Defence Policy for Industry Participation which incorporates the AIC. See also DPPM Directive D16 and the related note following
[30] See Chapter 5 of the Guide.

60. However, competition does not necessarily mean an *open tender*. Any process involving more than one *supplier* will be competitive. Accordingly, if an open competition is not feasible, Defence *officials* should explore opportunities for a limited competition (known under the CPRs as a *limited tender)*. However, as discussed earlier in this Chapter, for a *procurement* that is subject to Division 2 of the CPRs, unless it is exempt, there are only very limited grounds on which Defence *officials* are permitted to conduct a *limited tender* (whether sole source or competitive).[31]

61. Competition is important as under competitive processes (whether *open tender* or *limited tender*), *supplier*s put forward their best solution and price. *Supplier*s know that if they don't do so then it is likely that one of their competitors will win the work instead. Effective competition creates the incentive for *supplier*s to deliver quality *goods* or services at more competitive prices. In other words, value for money is driven by the market.

62. This is so even when Defence *officials* are procuring from *standing offer* panel arrangements. If the *standing offer* is established through an *open tender* process, then Defence *officials* may procure from the panel by approaching one, some or all of the *supplier*s on the panel for a quote or proposal. It is often tempting for Defence *officials* to seek a quote from just one panellist, particularly if the panellist is known to them. However, it is also important to provide opportunities for all capable *supplier*s, particularly small to medium enterprises, as this helps maintain a strong Defence industrial base, as well as incentivising best value performance. Accordingly, the right approach to procuring from a panel will depend on the circumstances of each case. For more information about establishing and using *standing offer* panel arrangements, Defence *officials* should refer to the factsheet on the Commercial Division Fact Sheets and Guidance intranet page.

63. Also, the Defence panel manager will usually have established the business rules for the panel to ensure that it is accessed and used appropriately, *supplier*s on the panel have a fair and equitable chance of being engaged through the arrangement, and Defence is able to demonstrate the panel is delivering value for money. Defence *officials* should make themselves aware of and comply with these business rules to ensure that Defence panels are used appropriately.

64. While awarding *contracts* through full and open competition is key to ensuring that the Government efficiently acquires *goods* and services to best meet its needs, there are certain circumstances when competition may not be practical. This can especially be the case given the nature of major Defence *procurement*, and particularly (but not exclusively) in complex materiel related *procurement*s. For instance, a competitive process will be unable to be undertaken if Defence requires a unique product or service such that there is only one *supplier* that offers the required capability or solution. This will be the case where, for example, a *supplier* has the patent for a particular product, or because of other intellectual property rights a *supplier* is the only one that is able to install or maintain a particular system or network.

65. A sole source *procurement* may also arise because it is a follow-on *contract* and only the incumbent contractor can continue the work due to intellectual property restrictions or because the contractor is the only one with the necessary skills and expertise. This kind of '*supplier* lock in' may be able to be avoided if Defence has acquired sufficient technical data and associated intellectual property rights to enable a competition to be undertaken. Avoiding '*supplier* lock in' promotes value for money by establishing competitive tension across the lifecycle of the procured *goods* or services.

66. Accordingly, Defence *officials* should consider during the planning stage of the *procurement* how to maintain the competitive environment not only at the outset of the *procurement*, but over the life of the program or activity. Conducting market research to understand the market and the scope for competition is critical. In addition, early and ongoing engagement with industry around Defence's requirements is also important, particularly as this may allow new entrants to enter the market in time to meet those requirements. The importance of market research and ongoing industry engagement is discussed in the Complex Procurement Guide.[32]

67. For major Defence *procurements*, a key to being able to avoid *supplier* lock in of the kind mentioned above and to remove barriers to future competition, is for Defence *officials* to have an effective intellectual property and technical data strategy the covers the whole of the lifecycle of the *goods* being procured. For example, for a major ICT project or major materiel acquisition, securing the necessary technical data and associated intellectual property rights (in particular, the ability to licence to third parties) in the initial *procurement* process will maximise competitive alternatives across the

[31] See paragraph 10.3 of the CPRs.
[32] See Chapter 2 of the Guide. See also the Early Industry Engagement Better Practice Guide.

whole of life of the capability, including future *procurement* of additional systems or spares, operation and training, maintenance and repair, integration with other systems, and future updates, upgrades or modifications.

68. If proposing to undertake a sole source *procurement*, Defence *officials* will need to justify this in their *procurement* plan or Endorsement to Proceed, noting that the Commitment Approval delegate (see section 23(3) of the PGPA Act) will also need to be satisfied as to the *procurement* method (which would be a *limited tender*). Defence *officials* should consider what mechanisms are available to drive value for money outcomes from their engagement with industry, especially if this is done in a non-competitive environment. In particular, in this context Defence *officials* will need to be able to demonstrate how the price has been determined to be fair and reasonable for the required *goods* or services, and should consider seeking specialist financial advice to determine this.

69. Achieving value for money in a non-competitive environment can be particularly challenging, and specialist procurement advice should be sought to develop appropriate sourcing strategies to achieve a value for money outcome across the life of the *goods* or services being procured.

Non-discrimination

70. Effective competition also requires non-discrimination.[33] This principle means that Defence is normally unable to require in its *request documentation* that particular work be done in Australia, or done by Australian based *supplier*s, or that *supplier*s use Australian materials, and this is consistent with Australia's FTA obligations[34]. The intent behind the principle is that the market will work out how best to meet the requirement being sought by Defence. In many cases, the work will need to be performed in Australia, and indeed at particular locations in Australia, however, this should not prevent foreign companies from being able to bid to undertake the work as long as they are able to meet Defence's service delivery requirements in those locations.

71. Specific exemptions can be sought from the non-discrimination principle in appropriate cases (for example, through a measure under paragraph 2.6 of the CPRs), or through other mechanisms such as the AIC policy (mentioned above), or other specific Government policy decisions. These exemptions are most likely to be found in major capital equipment acquisition decisions (for example, naval shipbuilding).[35] Defence Procurement Policy Directive D16 requires Defence *officials* to comply with the Defence Policy for Industry Participation including the AIC policy (see also the Note following paragraph 5.7 of the CPRs as extracted in Chapter 4 of the DPPM). Importantly, these exemptions have to be consistent with Australia's obligations under its FTAs.[36]

Ethical behaviour – the balance between probity and industry engagement

72. Section 6 of the CPRs (see Chapter 4 of the DPPM) sets out the requirement for Defence *officials* to properly use and manage *public resources*. 'Proper' means efficient, effective, economical and ethical.[37]

73. Attention to probity is integral to ensuring the defensibility, transparency and success of Defence *procurements*. Defence *procurements*, particularly those relating to major capital acquisitions, ICT projects and major facilities, are under increasing scrutiny by *tenderers*, the Australian National Audit Office, Senate Estimates and other Parliamentary Committees, and the media.

74. Probity is the evidence of ethical behaviour, and can be defined as complete and confirmed integrity, uprightness and honesty in a particular process. The Department of Finance website lists a number of principles which underpin ethics and probity in Australian Government *procurement*.

75. Defence *officials* need to put in place appropriate and sensible mechanisms to assure the probity of Defence *procurement* processes in line with the scope, scale, risk and sensitivity of the particular *procurement*. External legal process or probity advisers can be engaged when necessary. Occasionally, Defence may also wish to appoint an external probity auditor, either at the conclusion of the *procurement* process or at a key point during the process, to audit whether Defence *officials*

[33] See paragraph 5.1 of the CPRs.
[34] Paragraph 5.4 of the CPRs is subject to the JR Act, For further information regarding the JR Act, Defence officials should refer to Chapter 2 paragraphs 48 – 51 of the DPPM.
[35] As noted in Chapter 1 of the DPPM, specific Government policy decisions may be found in Cabinet decisions, or other Government approvals relevant to a commitment of *relevant money*, to the extent that the decision or approval establishes a course or line of action.
[36] This is why paragraph 4.8 of the CPRs provides that the economic benefit requirement set out in paragraph 4.7 of the CPRs has to operate 'within the context of' (that is, subject to) Australia's FTAs.
[37] See paragraph 6.1 of the CPRs.

followed the process and probity requirements set out in the documentation governing the *procurement*.

76. However, it is very important that Defence *officials* do not use probity as a reason or excuse not to engage appropriately with the market or *tenderers* throughout a *procurement* process. As long as it is done fairly and consistently, there is no reason why a *procurement* process cannot build in mechanisms (in the *request documentation*) for ongoing engagement with industry and *tenderers* throughout a *procurement* process. This might include engagement before tender release around Defence's requirements or to understand the market's capacity or capability, or engagement during the tender process, such as through *tenderer* clarification activities or mechanisms to allow *tenderers* to update and improve their offers (sometimes called 'offer definition and improvement activities').

77. A key factor in delivering good *procurement* outcomes is early market engagement and continued open dialogue with *suppliers* throughout the *procurement* process. Understanding *suppliers* and the market is part of the planning necessary to develop the right *approach to market*. Defence *procurement* should be supported by robust *procurement* plans that have a level of detail commensurate with the scope, scale and risk of the *procurement*. This is the first stage of the *procurement* life cycle.[38] Good *procurement* also results from proactively managing *supplier* and other key stakeholder relationships throughout the *procurement* process and for the duration of the *contract*.

78. Defence *officials* may sometimes be approached by *tenderers* or contractors to sign a confidentiality agreement or deed (sometimes called a Non-Disclosure Agreement) either on behalf of the Commonwealth or in their personal capacity prior to receiving information from the *tenderer* or contractor. Defence *officials* are already subject to legal obligations to protect and not misuse information obtained as a result of their employment with Defence (for example, under the *Public Service Act 1999*; see also PGPA Act, section 28). Therefore, Defence *officials* are under no obligation to sign such agreements and should not do so without first seeking legal advice from Defence Legal. In particular, *officials* should be aware that confidentiality agreements will often contain an indemnity from the *official* (or Commonwealth) in favour of the person disclosing the information.

79. As part of Defence's probity framework for major *procurement* processes, Defence *officials* may be requested (for example, by the legal process or probity adviser) to sign a statement confirming that they are aware of their legislative and policy obligations to properly protect confidential information (and to declare any actual or perceived conflicts of interests). It is appropriate for Defence *officials* to sign such a confirmation in these circumstances, noting that the statement does not constitute a formal agreement.

80. There are some senior Defence officials who will have regular access to sensitive information related to Defence *procurements*, in particular the members of the Defence Committee, Investment Committee and Enterprise Business Committee. In addition, Defence's Contestability organisation may also be required to have access to this information to perform its function. As part of Defence's probity framework, members of these Committees and the Contestability organisation acknowledge under their respective business rules the legislative and policy obligations that apply in relation to confidential information and conflicts of interests. Accordingly, these Defence *officials* are not required to receive *procurement* specific probity briefings or sign individual probity statements.

81. The legislative and policy obligations related to probity include:

- the general duties of *officials* set out in sections 25 to 29 of the PGPA Act (dealing with due care, diligence, good faith, declaring interests etc);
- the APS Values and APS Code of Conduct (see *Public Service Act 1999*, sections 10 and 13);
- Integrity Policy Framework
- Defence Instruction (General) - PERS 25-7 - *Gifts, Hospitality and Sponsorship* (see also AAI 10 - Managing Relevant Property).

82. Legal process and probity advisers can be engaged to help ensure that the processes, procedures and documentation used in implementing a major Defence *procurement* are robust, transparent and capable of external audit. However, there is no requirement for Defence *officials* to engage an external probity or process adviser, or that they be independent of another adviser (for

[38] More guidance on industry engagement and *procurement* planning is set out in Chapter 2 of the Complex Procurement Guide and the Early Industry Engagement Better Practice Guide.

example, the legal adviser). Depending on the nature of the *procurement*, internal personnel (for example, contracting officers or Defence Legal officers) can potentially perform the role of a probity adviser for a Defence *procurement*.

83. In relation to 'high risk' *procurements*, the Australian National Audit Office takes the view that a probity adviser should not have any actual or perceived conflicts of interest that could compromise their duty to give candid advice about the probity aspects of the project. A perceived conflict could include simultaneously serving as both probity and legal adviser. The decision about whether to have an independent probity or legal process adviser should be made based on the individual circumstances of the case, and in particular, whether the *procurement* is likely to be high profile, high value, controversial or sensitive.

84. The main reason to have a 'legal process adviser' as opposed to a 'probity adviser' is to maintain legal professional privilege in relation to the 'probity' advice. Non-lawyers cannot provide legal advice, so no legal professional privilege would apply to their advice if there is a challenge to the *procurement* process. Advice from a lawyer in relation to probity/process would be covered by the same rules as other legal advice.[39]

85. A template probity/legal process plan can be found on the Commercial Division Tools and Templates intranet page.

[39] For more information about legal professional privilege (LPP), Defence *officials* should refer to the Defence Legal LPP Fact Sheet.

Risk management

86. A key principle of the CPRs is risk management, and in particular that risks should be borne by the party best placed to manage them.[40] Depending on the nature of the *procurement*, the risks that may need to be considered could include technical, operational, industrial, managerial, work health and safety, financial, legal, commercial, or probity risks. These risks need to be considered across the *procurement* lifecycle. For instance, the Complex Procurement Guide discusses the importance of risk identification and management in the planning stage of the *procurement* life cycle, as well as risk assessment during the tender evaluation stage.[41]

87. In the planning stage, Defence *officials* will consider the risks relating to the conduct of the *procurement* process itself and what is being procured, and how these can be addressed through the *procurement* strategy. During evaluation and *contract* negotiation, Defence *officials* will be more focussed on assessing and addressing the risks in relation to the requirements of the *contract*, and the allocation of commercial and other risk under the *contract*, and considering how these risks can best be managed through setting up the contract management arrangements for the *contract*[42].

88. In relation to *procurements* that are required to be considered by the Defence Investment Committee (for example, Major Capital Equipment, and major ICT and infrastructure *procurements*), the 'Smart Buyer' framework sets out various risk categories that should be considered when developing the Project Execution Strategy and the *procurement* and contracting strategies for the *procurement*.

89. Defence also has formalised policy and processes for the assessment and management of risk in the Defence environment. For instance, in relation to materiel *procurement*, Defence *officials* should follow the Defence Materiel Manual (PROJ) (DMM(PROJ)) – 11-0-002- CASG Project Risk Management Manual and DMM(LOG)-04-0- 001- DMO Materiel Logistics Manual.

90. The endorsed Defence contracting templates set out the standard Defence approach to risk allocation between the Commonwealth and its contractors. The templates have been drafted in accordance with the above principle that risks should be borne by the party best placed to managed them. In many cases, this will be the contractor, noting that companies are able to take out insurance (or self-insure) for most *contract* related risks.

91. However, given the scope, scale, value and risk of many Defence *contracts*, it is not unusual for contractors to seek to limit their liability, particularly under ICT *contracts*, and *contracts* for the acquisition or sustainment of major capital equipment. In these circumstances, Defence *officials* need to undertake a risk assessment in relation to the proposed limitation of liability to understand the implications for the Commonwealth and to quantify any potential exposure. For instance, the limitation may mean that the Commonwealth will be unable to sue the contractor for its normal entitlement to damages for breach of *contract*. The Defence contracting templates make clear which categories of liability the Commonwealth may consider limiting and by contrast those categories in relation to which it will not consider limiting the contractor's liability (for example, personal injury or death).

92. Defence has developed tools and guidance to assist Defence *officials* with the conduct of liability risk assessments.

93. The endorsed Defence contracting templates also contain provisions requiring contractors to take out necessary insurances to cover their work for Defence. Again, depending on the nature of the Defence *contract*, the contractor's insurance arrangements can be both complex and costly (noting that the costs will be passed on to Defence through the *contract* price). Defence has developed tools and guidance to assist Defence *officials* with determining and managing *contract* insurance requirements which can be found on the Commercial Division Approved Contractor Insurance Program Initiative intranet page.

94. In relation to materiel *procurement*, Defence has established the Approved Contractor Insurance Program (ACIP) as a joint Defence and Industry *procurement* reform initiative that involves a periodic centralised review of participating Defence companies' global/group and local insurance programs. The purpose of the review is to pre-qualify a participating company's insurance program, if

[40] See section 8 of the CPRs (in Chapter 3 of the DPPM).
[41] See Chapters 2 and 5 of the Complex Procurement Guide.
[42] See the Defence Contract Management Framework. For further guidance on the contract management stage of the procurement lifecycle, Defence *officials* should refer to Chapter 7 of the Complex Procurement Guide and the Defence Contract Management Handbook.

Defence is satisfied with the company's insurances. This helps to reduce the costs of tendering for both industry and Defence as well as improve risk management within Defence in respect of insurable risks that arise in connection with the performance of major Defence *contracts*. Companies granted ACIP status are taken to comply with insurance requirements in individual *contracts* and do not have to provide evidence about their insurances during tendering and *contract* management phases of a *procurement*. The ACIP initiative is open to the 'top' 6-7 major Defence companies and participation by the companies is voluntary. The ACIP Register lists those companies currently holding ACIP status. For more information see the Commercial Division Risk Assessments and Liabilities intranet page.

Accountability and transparency

95. The Australian Government is committed to ensuring accountability and transparency in its *procurement* activities. Accountability involves Defence *officials* being responsible for their *procurement* actions and decisions and related outcomes, while transparency involves Defence enabling appropriate scrutiny of its *procurement* activities.[43] Accordingly, the CPRs require Defence *officials* to meet certain record-keeping, reporting and other requirements before and after entering into a *contract* with a *supplier*, including documenting relevant approvals and other *procurement* related decisions and actions, and *AusTender* and other reporting requirements. *AusTender* is the Australian Government's *procurement* information system.

96. Complaints may be made by *suppliers* under the JR Act for breach of the CPR requirement regarding the level of documentation maintained for a covered procurement.[44] The Complex Procurement Guide provides guidance for Defence *officials* about how they can meet their accountability and transparency requirements as they progress through the *procurement* life cycle.

The procurement life cycle – overview of how to plan and undertake a procurement

Introduction

97. Good *procurement* practice is not about just mechanically applying the CPRs or the additional Defence Procurement Policy Directives in the DPPM. It is about developing a strong understanding of all aspects of the *procurement* lifecycle and using judgement to apply this understanding in each case to deliver the best outcomes. While Defence *officials* need to comply with the CPRs and the DPPM, *officials* should design each *procurement* process in a way that is commensurate with the scope, scale and risk of the relevant *procurement*. Application of sound judgement when applying the CPRs and designing a *procurement* process that complies with the CPRs is important for all *procurements*, and failure to do so for *procurements* subject to the JR Act has the potential for consequences such as suspension of a *procurement* process or the grant of an injunction or the award of compensation by the Federal Court.

98. So, for instance, *procurements* that are valued below the relevant *procurement threshold* will normally be low risk, routine *procurements* of *goods* or services. They are often called 'simple *procurements*' in Defence. However, many *procurements* valued at or above the relevant *procurement threshold* may also be simple in nature. For example, a *procurement* of more spare parts from an existing *supplier* may be valued at a lot higher than the *procurement threshold*, but would normally be a simple purchasing exercise. Accordingly, using a *procurement* process that involves significant cost, time and resources for both Defence and *suppliers* would not be sensible or represent value for money for these kinds of *procurements*. The concept of value for money is not limited to the *procurement* outcome, but is also a consideration when designing a *procurement* process.

99. By contrast, many Defence *procurements* are highly complex undertakings because of the nature of the *goods*, works or services being sought. The process for these *procurements* needs to be designed and undertaken in light of the scope, scale and risk of what is being procured.

100. The Complex Procurement Guide provides more in-depth guidance about how these kinds of *procurements* should be planned and executed across the life cycle. The following discussion provides an overview of the guidance for undertaking a *procurement* process.

[43] See section 7 of the CPRs (in Chapter 3 of the DPPM).
[44] Paragraph 7.2 of the CPRs is subject to the JR Act, For further information regarding the JR Act, Defence officials should refer to Chapter 2 paragraphs 48 – 51 of the DPPM.

Guidance overview

101. For more complex *procurements*, Defence *officials* will normally be required to prepare three main documents:

- a *procurement* plan;
- *request documentation*; and
- an evaluation plan.

102. The *procurement* plan details the process that will be undertaken. It differs from a business case in that the business case explains why a *procurement* is being undertaken, including its value proposition, while the *procurement* plan explains how the *procurement* is to be undertaken. However, for convenience, and depending on the scope, scale and risk of the particular *procurement*, Defence *officials* may sometimes include the *procurement* plan as part of, or as an attachment to, the business case.

103. The *procurement* plan will normally cover the following:

- a description of the *procurement*;
- consideration of how the procurement will comply with the CPRs including the selection and justification of the *procurement* method to be used (for example, *open tender*, *limited tender*);
- proposed probity arrangements;
- proposed governance arrangements, such as the need for a steering committee;
- the *procurement* risk assessment; and
- indicative time-lines and resources (including budgeting of funds to support the procurement).

104. The level of detail in the procurement plan should reflect the scope, scale and risk of the *procurement*. For less complex *procurements*, the Endorsement to Proceed document may be sufficient to serve as the procurement plan. For *procurements* that are required to be considered by the Defence Investment Committee (for example, Major Capital Equipment, and major ICT and infrastructure *procurements*), the *procurement* plan will be informed by the Smart Buyer Project Execution Strategy.

105. The *request documentation* sets out the rules for the *procurement*. It describes to *potential supplier*s, the specifics of the *procurement*, the manner in which *submissions* are to be forwarded to Defence (for instance, through *AusTender*) and how *submissions* will be evaluated. If there is a possibility that other agencies will access the resulting *contract* (for example, a *standing offer* arrangement), Defence *officials* need to ensure the *request documentation* includes a statement to that effect.

106. The *request documentation* will usually be the primary information source used by *potential supplier*s when developing a *submission*. After reviewing the *request documentation*, the *potential suppliers* should be able to understand Defence's requirements and how the *procurement* is to provide value for money. This is why the CPRs, in effect, require that *request documentation* include all information necessary to permit *suppliers* to prepare and lodge responsive *submissions*.[45]

107. *Request documentation* will normally include:

- a description of the requirement (for example, the statement of work), including any essential requirements;
- any *conditions for participation* or *minimum content and format requirements*;
- *evaluation criteria* and methodology;
- the other rules of the process; and
- the draft *contract*.

[45] While this discussion about *request documentation* applies to *procurements* to which the additional rules in Division 2 of the CPRs apply, it is also good practice for all *procurements*.

108. The statement of work should describe:

- the nature, scope and, where known, quantity of the *goods*, works or services required;
- specific requirements to be fulfilled or provided, including certification, test and evaluation, plans, drawings and training materials;
- any applicable technical *specifications* (in which case, these should be described in terms of function and performance requirements, rather than specific designs, trademarks, or product descriptions) and the related standards on which the *specifications are based*;[46]
- whether any of the requirements are 'essential requirements' (in which case, if *suppliers* are not able to meet the requirements, they will be excluded from consideration);
- the timeframes expected for the delivery of the required *goods*, works or services.

109. *Conditions for participation*[47] are mandatory requirements which describe minimum standards or essential characteristics that *potential suppliers* have to meet for their *submissions* to be considered. Defence *officials* should take great care when deciding whether to include *conditions for participation* and what these might be, as the CPRs require that where the *procurement* is subject to the additional rules in Division 2 of the CPRs, any *submission* that does not meet the *conditions for participation* be excluded from consideration by Defence. *Conditions for participation* are limited to those assuring the legal, financial, technical or commercial capabilities of the *supplier* to meet the particular requirements of the *procurement*.

110. Defence officials may also decide to set out minimum content and format requirements[48] in their request documentation, for example:

- in relation to minimum content – Defence may require the *tenderer* to provide a certificate of insurance or a particular licence to support the *submission*; or
- in relation to formatting – Defence may require *submissions* to be submitted electronically through *AusTender*.

111. If the *tenderer*'s *submission* for a *procurement* which is subject to the additional rules in Division 2 of the CPRs does not meet the *minimum content and format requirements*, Defence *officials* will normally be required to exclude the *submission* from further consideration, unless the *officials* consider that the failure to meet the requirement has been due to an unintentional error of form in the *submission*. If so, Defence *officials* have the discretion to allow the *submission* to be corrected, subject to ensuring that all *tenderers* are treated fairly and equitably.

112. The *request documentation* will also set out the *evaluation criteria*. These set the foundation for a fair and equitable assessment of *submissions*. What the appropriate criteria are depends on the nature of the particular *procurement* and should flow from the planning stage.

113. Evaluation of *tenderers* should be based on a balance of all the criteria, or if a weighting methodology is used, on the relative importance of each criterion. If a weighting methodology is used, Defence *officials* should consider setting this out in the *request documentation* so that *potential supplier*s can appropriately focus their responses. This will make the process more transparent, which should limit misunderstandings that may result in complaints.

114. The *request documentation* should also set out the rules around lodgement of *submissions*, whether this is through *AusTender* or other means, including the closing time for *submissions*. Adherence to deadlines is important in maintaining the integrity and probity of the tender process. Therefore, Defence *officials* are not normally able to accept late *submissions*, unless there has clearly been a mishandling of the *submission* by Defence.

115. During the time that the tender process is open, Defence *officials* will need to be in a position to answer queries on the *procurement*. This needs to be done fairly and impartially in a manner that does not create an unfair advantage for any *potential supplier*. Therefore, the *request documentation* should explain the rules for answering questions and distributing responses.

---

[46] In relation to specifications and standards, see paragraphs 7.26, 10.9, 10.10, 10.11, and 10.12 of the CPRs
[47] While this discussion about *conditions for participation* applies to *procurements* to which the additional rules in Division 2 of the CPRs apply, it is also good practice for all *procurements*.
[48] While this discussion about *minimum content and format requirements* applies to *procurements* to which the additional rules in Division 2 of the CPRs apply, it is also good practice for all *procurements*.

116. At least in request for tender processes, Defence normally requires *tenderers* to indicate their compliance (or non-compliance) with a draft *contract* which contains the terms and conditions on which Defence is willing to enter into a *contract* for the requirement. Defence *officials* should assess the risk with the *tenderers*' non-compliances with the draft *contract* to enable *tenderers* to be evaluated against a common baseline.

117. The evaluation plan is an internal Defence document that sets out the methodology and processes to be followed by Defence when evaluating *submissions*. To reduce the risks of a perceived or actual bias in the *procurement* process, Defence *officials* should preferably develop and finalise the plan before an approach is made to the market, but in any event before *submissions* are opened.[49]The Complex Procurement Guide provides guidance about the contents of an evaluation plan.[50]

118. The evaluation plan will normally identify the organisation that is responsible for the evaluation, and recommend a preferred *supplier* (or a shortlist of *potential supplier*s). Depending on the nature and complexity of the evaluation, the evaluation organisation may comprise a steering committee, an evaluation board or team and subordinate evaluation working groups. The evaluation organisation may also include internal or external advisers or experts to assist with elements of the evaluation, for example, the technical requirements, financial viability or price.

119. When receiving *submissions*, Defence *officials* need to use a mechanism that assures fairness and impartiality of the *procurement* process. *Submissions* should only be received into a secure environment. This can be through *AusTender* or other secure electronic system, or a physical tender box or tender room. Any *submissions* received after the closing time should be considered late and should generally not be accepted (see paragraph 114 above).

120. The evaluation committee should first check the *submissions* to make sure they satisfy any mandatory requirements, such as *minimum content and format requirements* and *conditions for participation*, and should then proceed to undertake the detailed evaluation of *submissions* against the *evaluation criteria*.

121. The evaluation of *submissions* is the most important aspect of determining value for money in a *procurement*. When evaluating *submissions*, the evaluation committee needs to make sure that it faithfully applies the *evaluation criteria*, methodology and procedures that have been set out in the *request documentation* and the evaluation plan. If the committee does not then this could compromise the evaluation outcome and give rise to a complaint or legal action by an affected *tenderer*, and require Defence to set aside the evaluation and possibly the whole *procurement* process, as well as incurring additional costs in dealing with the complaint.

122. The CPRs[51] require Defence *officials* to maintain appropriate documentation of the decision-making process for each *procurement*. Therefore, the evaluation committee should be accurate and scrupulous in recording the evaluation and the reasons underlying its decisions. As a general rule, officials should ensure that there is sufficient documentation to provide an understanding of why the *procurement* was necessary, the process that was followed and all relevant decisions made, including approvals, and the basis of those decisions.

123. The evaluation committee should therefore prepare an evaluation report to document the evaluation process and the recommendation of a preferred *tenderer* (or shortlist of *tenderers*). The report can also assist in the future when providing feedback to *tenderers* through the debriefing process.

124. The evaluation report will normally contain:

- a summary of the evaluation process;
- a summary of the assessment of each *submission*;
- reasons for the exclusion of a *submission* from further consideration;
- recommendations concerning the preferred *tenderer*(s) based on value for money;[52] and

[49] See Defence Procurement Policy Directive D47.
[50] See Chapters 3 and 5 of the Guide.
[51] Paragraph 7.2 of the CPRs. This paragraph is subject to the JR Act, For further information regarding the JR Act, Defence officials should refer to Chapter 2 paragraphs 48 – 51 of the DPPM.
[52] For *procurements* to which the additional rules in Division 2 of the CPRs apply, Defence *officials* are required to award the *contract* to the *tenderer* that is assessed to provide the best value for money in accordance with the *request documentation*, including compliance with any *conditions for participation* and essential requirements. (See CPRs, paragraph 10.32 to 10.36).

- details of any issues which need resolution during subsequent *contract* negotiations.

125. The evaluation committee members will normally sign the report and submit this for endorsement by the relevant delegate.

126. The CPRs require Defence *officials* to notify affected *tenderers* promptly of the rejection of their *submission* or the award of a *contract*, and if requested, provide a debrief to the *tenderers* (both successful and unsuccessful *tenderers*).[53] A debrief (whether verbal or written) should include, as appropriate:

- an explanation of why the *submission* was unsuccessful (or successful);
- areas of weakness or non-compliance in the offer;
- suggestions as to how future *submissions* can be improved; and
- in the case of unsuccessful *tenderers*, if the *contract* has already been successfully negotiated, the name of the successful *supplier* and total *contract* price (noting that this needs to be reported on *AusTender* in any event, if valued at or above $10,000).

127. Defence *officials* should keep a written record of the debriefing.

128. The final stage in the *procurement* process itself relates to the negotiation and award of the *contract* with the preferred *tenderer*. During *contract* negotiations, Defence *officials* should seek to resolve any issues that were identified during the evaluation.

129. At any time during the *procurement* process, Defence can determine that awarding a *contract* is not in the public interest.[54] Public interest grounds generally arise in response to new information or unforeseen events which materially affect the objectives or reasons underlying the original *procurement* requirement as specified in the *request documentation*. Examples of situations in which it may not be in the public interest to award the *contract* could include:

- a Government decision to cancel or vary the program to which the *procurement* relates;
- unforeseen technological or environmental changes affecting the business case for the *procurement*;
- discovery of new information materially affecting the policy behind or operational effectiveness of the project or *procurement*.

130. However, termination of a *procurement* process is a serious step with potential legal and management risks that should be considered and addressed before any decision is made. At the least, it can harm Defence's credibility with *supplier*s that, in turn, may discourage *supplier*s' participation in future *procurements*. On the other hand, termination may be compelled in order to protect the integrity of the *procurement* process and avoid the awarding of a *contract* in a manner inconsistent with the stated evaluation process.

131. Defence *officials* cannot terminate a *procurement* process simply because they may be dissatisfied with the outcome of the evaluation conducted in accordance with the stated rules, conditions and criteria set out in the *request documentation* and evaluation plan.

132. If Defence cancels a *procurement* on the basis that it is not in the public interest to award a *contract*, it should normally provide *potential supplier*s with reasons. In any case, prior to cancelling a *procurement*, Defence *officials* should seek specialist legal or contracting advice.

133. Once Defence has entered into a *contract*, Defence *officials* need to ensure that they manage the *contract* effectively so that all parties to the *contract* (including Defence) fully meet their respective obligations as efficiently and effectively as possible, and to deliver the business and operation objectives required by the parties. Effective contract management is a key enabler to delivering value for money, as well as supporting proper governance and risk management across the life of the *contract*. Defence *officials* should refer to the Defence Contract Management Framework and the Defence Contract Management Handbook to support them achieving best practice contract management. The Framework brings together the underpinning principles, policies, tools, templates, guidance and competencies required to support more collaborative business relationships with

[53] CPRs, paragraph 7.17.
[54] For *procurements* to which the additional rules in Division 2 of the CPRs apply, this is the only ground on which a Defence *official* can decide not to award a *contract* in relation to the *procurement.* (See CPRs, paragraphs 10.35 and 10.36).

industry and deliver more effective *contract* outcomes. Defence *officials* should apply the Framework and use the Handbook when undertaking contract management.

The procurement life cycle – procurement complaints

134. *Procurement* complaints can be made at any stage of the *procurement* life cycle, and will be categorised as either a general *procurement* complaint or a JR Act complaint. In Defence, all *procurement* complaints must be managed under the DPCS. Compliance with the processes set out in the CPRs and the DPPM will minimise the risks associated with *procurement* complaints. See paragraphs 48 to 52 above for further information.

Appendix A to Chapter 2

CPR Paragraphs subject to the Government Procurement (Judicial Review) Act 2018

Section	CPRs Paragraphs
Division 1	
4. Value for money	
Third-party procurement	4.18
5. Encouraging competition	
Non-discrimination	5.4
7. Accountability and transparency in procurement	
Records	7.2
Notifications to the market	7.10, 7.13 – 7.15
Providing information	7.16 – 7.17
Reporting arrangements	7.18, 7.20
9. Procurement method	
Requirement to estimate value of procurement	9.3 – 9.6
Division 2	
10. Additional Rules	
Additional Rules	10.1 – 10.2
Conditions of limited tender	10.3 – 10.5
Request documentation	10.6 – 10.8
Specifications	10.9 – 10.13
Modification of evaluation criteria or specifications	10.14
Conditions for participation	10.15 – 10.19
Minimum time limits	10.20 – 10.27
Late submissions	10.28 – 10.31
Receipt and opening of submissions	10.32 – 10.34
Awarding contracts	10.35 – 10.36

Chapter 3

The procurement framework

2. Procurement framework

CPR 2.1 – 2.6

Procurement framework

2.1 The Commonwealth *Procurement* Rules (CPRs) are issued by the Minister for Finance (Finance Minister) under section 105B(1) of the *Public Governance, Performance and Accountability Act 2013* (PGPA Act).

2.2 Officials from *non-corporate Commonwealth entities* and prescribed *corporate Commonwealth entities* listed in section 30 of the Public Governance, Performance and Accountability Rule 2014 **must** comply with the CPRs when performing duties related to *procurement*. These entities will collectively be referred to as *relevant entities* throughout the CPRs.

2.3 Rules that **must** be complied with in undertaking *procurement* are denoted by the term '**must**'. *Non-corporate Commonwealth entities* **must** report non-compliance with the rules of the CPRs through the Commonwealth's compliance reporting process. The term 'should' indicates good practice.

2.4 The CPRs are the core of the *procurement* framework, which also includes:

a. web-based guidance, developed by the Department of Finance (Finance) to assist entities to implement the *procurement* framework;

b. Resource Management Guides, which advise of key changes and developments in the *procurement* framework; and

c. templates, such as the Commonwealth Contracting Suite, which simplify and streamline processes, creating uniformity across Commonwealth *contracts* to reduce the burden on businesses when contracting with the Commonwealth.

2.5 An *Accountable Authority* may use Accountable Authority Instructions to set out entity-specific operational rules to ensure compliance with the rules of the *procurement* framework.

Note: As the Defence *Accountable Authority*, the Secretary has issued Defence's AAIs. The AAIs set out specific operational rules dealing with *procurement*.

2.6 These CPRs do not apply to the extent that an *official* applies measures determined by their *Accountable Authority* to be necessary for the maintenance or restoration of international peace and security, to protect human health, for the protection of essential security interests, or to protect national treasures of artistic, historic or archaeological value.

Note: The CPRs state in a footnote to paragraph 2.6 that "Where such measures are applied, because Divisions 1 and 2 do not apply in full to the *procurement,* this has the effect that the *procurement* is not a 'covered procurement' under the *Government Procurement (Judicial Review) Act 2018*; see section 5".

Defence Procurement Policy Directives

D2. For paragraph 2.6 of the CPRs, the Secretary has determined that the *procurement* of the *goods* and services listed in Table 1 below are exempt from the operation of Division 2 of the CPRs.

D3. If a Defence *official* determines that an exemption given under paragraph 2.6 of the CPRs applies to a *procurement*, the *official* **must** ensure that the reasons supporting that determination are appropriately documented.

D4. If a Defence *official* seeks to exempt a particular *procurement* (not otherwise covered by an

existing exemption) from all or part of the CPRs, the *official* **must** seek the Secretary's written approval.

Table 1

Goods The *procurement* of *goods* that fall within the following US Federal Supply Codes (FSC):	- FSC 10 Weapons; - FSC 12 Fire Control Equipment; - FSC 13 Ammunition and Explosives; - FSC 14 Guided Missiles; - FSC 15 Aircraft and Airframe Structural Components; - FSC 16 Aircraft Components and Accessories; - FSC 17 Aircraft Launching, Landing, and Ground Handling Equipment; - FSC 18 Space Vehicles; - FSC 19 Ships, Small Craft, Pontoons and Floating Docks; - FSC 20 Ships and Marine Equipment; - FSC 23 Ground Effect Vehicles, Motor Vehicles, Trailers and Cycles; - FSC 28 Engines, Turbines, and Components; - FSC 29 Engine Accessories; - FSC 31 Bearings; - FSC 46 Water Purification and Sewage Treatment Equipment; - FSC 48 Valves; - FSC 49 Maintenance and Repair Shop Equipment; - FSC 54 Prefabricated Structures and Scaffolding; - FSC 58 Communication, Detection, and Coherent Radiation Equipment; - FSC 59 Electrical and Electronic Equipment Components; - FSC 60 Fibre Optics Materials, Components, Assemblies, and Accessories; - FSC 61 Electric Wire, and Power and Distribution Equipment; - FSC 63 Alarm, Signal and Security Detection Systems; - FSC 66 Instruments and Laboratory Equipment; and - No code - Specialty Metals.
Services The *procurement* of the following kinds of services:	- design, development, integration, test, evaluation, maintenance, repair, modification, rebuilding and installation of military systems and equipment; - operation of Government-owned facilities; - space services; and - services in support of military forces overseas.

Notes: Paragraph 2.6 of the CPRs allows the Secretary to determine that specific *procurements* should not be subject to all or part of the CPRs. Usually, a measure made under this paragraph will exempt a *procurement* from the rules in Division 2 of the CPRs (in particular, the obligation to undertake an *open tender* process). This exemption mechanism is provided for in the Australia-US Free Trade Agreement (AUSFTA), and is consistent with the market access arrangements agreed by Australia in its other FTAs.

In the case of Defence, the AUSFTA (Chapter 15, Annex A) specifically provides for various Defence *procurements* to be exempt from the operation of the *procurement* rules in Chapter 15 of the AUSFTA (which rules are now mainly in Division 2 of the CPRs, and which are consistent with the *procurement* rules agreed by Australia in its other FTAs). This exemption is permitted on the grounds of 'essential security' (Article 22.2 of the AUSFTA). To give effect to this exemption, the Secretary has made a measure under paragraph 2.6 of the CPRs to determine that the *procurement* of the various *goods* or services listed in Table 1 above are exempt from the operation of Division 2 of the CPRs. The list in Table 1 replicates the list in Chapter 15, Annex A of the AUSFTA. Further details of the FSC codes mentioned in Table 1 can be found in the Exemptions Fact Sheet on the Commercial Division intranet site.

Even if a *procurement* is exempt from Division 2 of the CPRs, Defence *officials* are still required to undertake their *procurements* in accordance with Division 1 of the CPRs. In addition, Defence *officials* are still required to comply with all applicable Defence Procurement Policy Directives contained in this manual (see Defence Procurement Policy Directive D43).

CPR 2.7 – 2.10

Procurement

2.7 *Procurement* is the process of acquiring *goods* and services. It begins when a need has been identified and a decision has been made on the *procurement* requirement. *Procurement* continues through the processes of risk assessment, seeking and evaluating alternative solutions, and the awarding and reporting of a *contract.*

2.8 In addition to the acquisition of *goods* and services by a *relevant entity* for its own use, *procurement* includes the acquisition of *goods* and services on behalf of another *relevant entity* or a third party.

2.9 *Procurement* does not include:

a. grants (whether in the form of a *contract*, conditional gift or deed);

b. investments (or divestments);

c. sales by tender;

d. loans;

e. *procurement* of *goods* and services for resale or *procurement* of *goods* and services used in the production of *goods* for resale;

f. any property right not acquired through the expenditure of *relevant money* (for example, a right to pursue a legal claim for negligence);

g. statutory appointments;

h. appointments made by a Minister using the executive power (for example, the appointment of a person to an advisory board); or

i. the engagement of employees, such as under the *Public Service Act 1999*, the *Parliamentary Services Act 1999*, a *relevant entity*'s enabling legislation or the common law concept of employment.

2.10 Following the awarding of the *contract*, the delivery of and payment for the *goods* and services and, where relevant, the ongoing management of the *contract* and consideration of disposal of *goods*, are important elements in achieving the objectives of the *procurement*.

Notes: Paragraph 2.9a of the CPRs makes clear that grants are not *procurements*. Defence manages a number of grant programs and therefore these programs, and the individual grants made under them, are not *procurements* for the CPRs. For example, to give effect to the Australian Government's defence and industry policy, Defence undertakes various grants programs under which Defence companies and other entities receive payments. In undertaking these programs, Defence *officials* are required to comply with the Commonwealth Grant Rules and Guidelines, rather than the CPRs and the Defence Procurement Policy Directives in the DPPM. Defence grant programs also have their own rules that govern their operation.

For guidance on contracting processes for disposals, including sale by tender (see paragraph 2.9c of the CPRs) and gifting or transfer by deed, Defence *officials* should refer to the Materiel Logistics, Disposals and Sales Branch intranet page.

CPR 2.11 – 2.14

Resource management framework

2.11 *Relevant entities* and *officials* operate in an environment of legislation and Commonwealth policy. Within that broad context, the resource management framework consists of the legislation and policy governing the management of the Commonwealth's resources.

2.12 The *procurement* framework is a subset of the resource management framework related to the *procurement* of *goods* and services.

2.13 Section 16 of the PGPA Act outlines an *Accountable Authority's* duty to establish appropriate internal control systems for their *relevant entity*. The CPRs provide the necessary framework for Accountable Authorities when issuing Accountable Authority Instructions and operational requirements in relation to *procurement*. In the area of *procurement*, an *Accountable Authority* should provide a mechanism to:

a. apply the principles and requirements of the resource management and *procurement* frameworks, focusing on the *relevant entity*'s operations; and

b. provide primary operational instructions to *relevant entity officials* in carrying out their duties related to *procurement*, in a way that is tailored to a *relevant entity*'s particular circumstances and needs.

2.14 Non-compliance with the requirements of the resource management framework, including in relation to *procurement*, may attract a range of criminal, civil or administrative remedies including under the *Public Service Act 1999* and the *Crimes Act 1914*.

Defence Procurement Policy Directives

D5. When conducting a *procurement*, Defence *officials* **must** ensure that the following two delegations are exercised in the following order, unless the *procurement* does not involve the commitment of *relevant money* (for example, a 'nil-cost' contract change) in which case only the DFDs Schedule 4 – Enter into, Vary and Administer Arrangements delegation is required:

- DFDs Schedules 1, 2 or 3 as appropriate (Section 23(3) of the PGPA Act) – To Approve the Commitment of Relevant Money (Commitment Approval): a Defence *official* must exercise this delegation before the Commonwealth enters into the arrangement that commits *relevant money*; and
- DFDs Schedule 4 (Section 23(1) of the PGPA Act) – To Enter into, Vary or Administer and Arrangement: a Defence *official* **must not** exercise this delegation (Enter into an Arrangement) unless a Schedules 1, 2 or 3 delegation has been exercised for the *procurement* to which the arrangement relates.

D6. Prior to agreeing to a contingent liability in favour of a third party (for example, granting an indemnity, guarantee or warranty), Defence *officials* **must:**

- undertake a liability risk assessment in relation to the contingent liability, including considering the full potential cost of the liability to the Commonwealth; and
- ensure that the relevant delegate (Under DFDs Schedule 5) (or the Finance Minister, if necessary) authorises the contingent liability under section 60 of the PGPA Act.

Notes: Chapter 1 of the DPPM discusses the resource management framework in more detail.

If a *procurement* includes a contingent liability, the effect of Defence Procurement Policy Directive D6 is that the relevant delegate must authorise the granting of the contingent liability for the purposes of section 60 PGPA Act. In Defence, the Commitment Approval delegate may do this as part of exercising this delegation.

If a *procurement* is being undertaken through the Foreign Military Sales (FMS) system, the standard FMS conditions require the Commonwealth to grant an indemnity to the US Government. Accordingly, Defence Procurement Policy Directive D6 dealing with contingent liabilities applies to each FMS case. For guidance on conducting liability risk assessments for FMS cases see the Commercial Division Risk Assessments and Liabilities intranet page.

Agreeing to a contingent liability in favour of a third party is one kind of limitation of liability. The Commonwealth may also limit a third party's liability in other ways, for instance, by agreeing to one or more financial caps on different heads of loss or damage that a contractor may be exposed to under a *contract* (for example, for personal injury, property damage, delay or other contractual non-performance). Accordingly, in addition to the requirement under Defence Procurement Policy Directive D6 to undertake a liability risk assessment in relation to contingent liabilities, Defence Procurement Policy Directive D28 requires Defence *officials* to undertake a liability risk assessment prior to agreeing to any limitation on a third party's liability under a *contract*. Defence has developed guidance and tools to assist Defence *officials* with the conduct of liability risk assessments.

The Department of Finance's Resource Management Guide (RMG) No 414, together with Defence AAI 2 – Spending Defence Money – Procurement and the DFDs, set out Commonwealth and Defence policy in relation to indemnities, guarantees and warranties that give rise to 'contingent liabilities'. Consistently with RMG 414 and AAI 2, Defence has developed streamlined processes for undertaking liability risk assessments for certain kinds of contingent liabilities, namely indemnities contained in FMS cases and venue hire agreements. Defence *officials* should refer to the liability risk assessment guidance and tools for these streamlined processes.

CPR 2.15

International obligations

2.15 Australia is party to a range of free trade arrangements. These arrangements are implemented domestically by legislation and/or Commonwealth policy. Relevant international obligations have been incorporated in these CPRs. Therefore, an official undertaking a *procurement* is not required to refer directly to international agreements.

Note: Paragraph 2.15 of the CPRs means that Defence *officials* can refer to the CPRs as the single source of Australia's international commitments on government *procurement* and do not need to refer directly to the various treaties and other agreements. See also the Notes following paragraph 2.6 of the CPRs.

3. How to use the Commonwealth Procurement Rules

CPR 3.1 – 3.4

How to use the Commonwealth Procurement Rules

3.1 The CPRs set out the rules that *officials* **must** comply with when they procure *goods* and services. The CPRs also indicate good practice. The CPRs have been designed to provide *officials* with flexibility in developing and implementing *procurement* processes that reflect their *relevant entity*'s needs.

3.2 Achieving value for money is the core rule of the CPRs. This requires the consideration of the financial and non-financial costs and benefits associated with *procurement*.

3.3 Further information and guidance on applying the CPRs are available on Finance's *procurement* policy website at www.finance.gov.au/procurement.

3.4 *Relevant entities* may have additional rules, guidance, templates or tools that apply when conducting *procurements.*

Note: For paragraph 3.4 of the CPRs, the DPPM sets out 'additional rules' in relation to the conduct of Defence *procurement* that Defence *officials* **must** comply with when they procure *goods* and services for Defence. These additional rules are set out under the heading 'Defence Procurement Policy Directives' in the DPPM. The DPPM also refers to guidance, templates, tools and other resources to further assist Defence *officials* undertaking *procurement*. Defence *officials* should have regard to these resources when undertaking *procurement.*

CPR 3.5 – 3.8

Compliance with the two divisions of the CPRs

3.5 *Officials* of *non-corporate Commonwealth entities* **must** comply with the 'rules for all *procurements*' listed in Division 1, regardless of the *procurement* value. *Officials* **must** also comply with the 'additional rules' listed in Division 2 when the estimated value of the *procurement* is at or above the relevant *procurement threshold* and when an Appendix A exemption does not apply.

3.6 *Officials* of *corporate Commonwealth entities* prescribed in section 30 of the Public Governance, Performance and Accountability Rule 2014 (PGPA Rule) as having to comply with the CPRs **must** comply with the 'rules for all *procurements*' listed in Division 1 and the 'additional rules' listed in Division 2 when the expected value of the *procurement* is at or above the relevant *procurement threshold* and when an Appendix A exemption has not been utilised.

3.7 Despite being prescribed *corporate Commonwealth entities*, Australian Digital Health Agency, Australian Human Rights Commission, National Portrait Gallery of Australia, Old Parliament House and Regional Investment Corporation **must** apply a *procurement threshold* and *reporting threshold* of $80,000 for *procurements* other than the *procurement* of *construction services*. They may opt-in to coordinated *procurements* and must only comply with those policies of the Commonwealth that specify compliance by *corporate Commonwealth entities*.

3.8 Despite being a corporate *Commonwealth entity*, paragraph 3.7 also applies to the Commonwealth Superannuation Corporation in regards to its administrative functions only.

Note: The Department of Defence ('Defence') is a *non-corporate Commonwealth entity*. Hence, paragraph 3.5 of the CPRs applies to Defence *officials* (including a contractor who is prescribed as a Defence *official*). In addition to an Appendix A exemption referred to in paragraph 3.5 of the CPRs, a Defence specific exemption may also be utilised (See Defence Procurement Policy Directives D2 and D4).

CPR 3.9

Using an Appendix A exemption

3.9 When an Appendix A exemption applies, the additional rules of Division 2 for *procurements* at or above the relevant *procurement threshold* do not apply to the *procurement*, but the *relevant entity* **must** still comply with the rules for all *procurements* (Division 1), excluding paragraphs 4.7, 4.8 and 7.26. This does not prevent a *relevant entity* from voluntarily conducting the *procurement* for *goods* or services covered by an Appendix A exemption in accordance with some or all of the processes and principles of Division 2.

Defence Procurement Policy Directive

D7. If a Defence *official* determines that an exemption under Appendix A of the CPRs applies to a *procurement*, the *official* **must** ensure that the reasons supporting that determination are appropriately documented.

Notes: Items 15 and 16 of Appendix A permit Defence *officials* to procure directly from disability businesses and indigenous businesses, respectively. See further Chapter 2 of the DPPM, and Defence Procurement Policy Directive D14 (and the related Notes).

In addition to the exemptions provided for in Appendix A, various other kinds of Defence related *procurements* may be exempt from Division 2 of the CPRs. In particular, see Defence Procurement Policy Directives D2 and D4 (and the related Table 1 for a list of Defence *goods* and services that are exempt).

Chapter 4

Achieving value for money in procurement

Note: Chapter 4 of the DPPM incorporates all the rules from Division 1 of the CPRs.

4. Value for Money

CPR 4.1 – 4.3

Considering value for money

4.1 A thorough consideration of value for money begins by *officials* clearly understanding and expressing the goals and purpose of the *procurement*.

4.2 When a business requirement arises, *officials* should consider whether a *procurement* will deliver the best value for money. It is important to take into consideration:

a. stakeholder input;

b. the scale and scope of the business requirement;

c. the *relevant entity*'s resourcing and budget;

d. obligations and opportunities under other existing arrangements;

e. relevant Commonwealth policies; and

f. the market's capacity to competitively respond to a *procurement*.

Notes: Defence officials should refer to Chapter 2 of the DPPM, and the Complex Procurement Guide, for more guidance about value for money.

Defence *officials* should be aware that 'Commonwealth policies' (paragraph 4.2e.) may include Cabinet decisions and other formal directions issued by the Government (whether through the Minister for Defence or otherwise).

4.3 When a *relevant entity* determines that *procurement* represents the best value for money, these considerations will inform the development and implementation of the *procurement*.

Defence Procurement Policy Directives

D8. Defence *officials* undertaking *procurement* valued at or above $200,000 (including *GST*) **must** develop a written *procurement* plan for the *procurement* commensurate with its scale, scope and risk, and which takes account of the *procurement* life cycle, including cost of ownership and disposal considerations.

D9. Defence *officials* **must** obtain an 'Endorsement to Proceed' prior to:

- approaching the market for *procurements* to establish a *standing offer* arrangement, and
- all other *procurements* that are valued at or above $200,000 (including *GST*)

D10. When undertaking a process to procure a Contractor, Consultant or Outsourced Service Provider, Defence officials **must**:

- obtain and document approval from a Defence official at the Senior Executive Service (SES) Band 1 / 1 Star level or above prior to or as part of the approval of the commitment of *relevant money* for the proposal; and
- advise the Secretary when the daily rate of the Contractor, Consultant or Outsourced Service Provider is at or above $4,500 (including *GST*).

D11. Prior to approaching the market to establish a strategic *standing offer* panel, Defence officials **must:**

- obtain written endorsement of the business need from First Assistant Secretary Procurement and Contracting; then
- obtain written approval to establish the strategic *standing offer* panel from the Enterprise

Business Committee.

Notes: See paragraphs 102 to 104 in Chapter 2 of the DPPM for guidance about *procurement* plans, including that the Endorsement to Proceed document may be sufficient to serve as the *procurement* plan for less complex *procurements*. More detailed guidance is set out in Chapter 2 of the Complex Procurement Guide.

Defence *officials* should refer to paragraphs 9.2 – 9.6 of the CPRs in relation to estimating the value of a *procurement*.

It is best practice to seek approval to undertake a process to procure a Contractor, Consultant, or Outsourced Service Provider prior to approaching the market. Should approval be sought as part of the commitment of *relevant money*, and the approval is not given, this may be a breach of CPR 10.35, which limits the ability of Defence *officials* to cancel a *procurement* once the process has been undertaken.

Defence *officials* should refer to the Glossary – Accountable Authority Instructions and Defence Financial Delegations glossary for the definition of Contractors, Consultants and Outsourced Service Providers. Defence *officials* should refer to the Engaging Contractors, Consultants and Outsourced Service Providers – Decision Making Governance Fact Sheet for further guidance on the evidence required to justify the *procurement* of Contractors, Consultants or Outsourced Service Providers.

An Endorsement to Proceed may also be required to place an order under a *standing offer*. Defence *officials* should refer to the Endorsement to Proceed Fact Sheet.

The Establishing and Using Standing Offers Fact Sheet contains further guidance on the establishment of strategic *standing offer* panels.

CPR 4.4 – 4.6

Achieving value for money

4.4 Achieving value for money is the core rule of the CPRs. *Officials* responsible for a *procurement* **must** be satisfied, after reasonable enquires, that the *procurement* achieves a value for money outcome. *Procurements* should:

a. encourage competition and be non-discriminatory;

b. use *public resources* in an efficient, effective, economical and ethical manner that is not inconsistent with the policies of the Commonwealth;

c. facilitate accountable and transparent decision making;

d. encourage appropriate engagement with risk; and

e. be commensurate with the scale and scope of the business requirement.

4.5 Price is not the sole factor when assessing value for money. When conducting a *procurement*, an *official* **must** consider the relevant financial and non-financial costs and benefits of each *submission* including, but not limited to:

a. the quality of the *goods* and services;

b. fitness for purpose of the proposal;

c. the *potential supplier*'s relevant experience and performance history;

d. flexibility of the proposal (including innovation and adaptability over the lifecycle of the *procurement*);

e. environmental sustainability of the proposed *goods* and services (such as energy efficiency, environmental impact and use of recycled products); and

f. whole-of-life costs.

4.6 Whole-of-life costs could include:

a. the initial purchase price of the *goods* and services;

b. maintenance and operating costs;

c. transition out costs;

d. licensing costs (when applicable);

e. the cost of additional features procured after the initial *procurement*;

f. consumable costs; and

g. disposal costs.

CPR 4.7 – 4.8

Broader benefits to the Australian economy

4.7 In addition to the value for money considerations at paragraphs 4.4 – 4.6, for *procurements* above $4 million (or $7.5 million for *construction services*) (except *procurements* covered by Appendix A and *procurements* from *standing offers*), *officials* are required to consider the economic benefit of the *procurement* to the Australian economy.

4.8 The policy operates within the context of relevant national and international agreements and *procurement* policies to which Australia is a signatory, including free trade agreements and the Australia and New Zealand Government Procurement Agreement.

Note: Defence *officials* should refer to paragraph 8 in Chapter 2 of the DPPM for guidance about the application of the 'economic benefit' requirement in relation to Defence *procurement*. The Department of Finance has also released guidance on the consideration of economic benefit on the Department of Finance webpage.

CPR 4.9 – 4.10

Procurement-connected policies

4.9 *Procurement*-connected policies are policies of the Commonwealth for which *procurement* has been identified as a means of delivery. To assist *relevant entities* in complying with policies of the Commonwealth, Finance maintains a list of procurement-connected policies, which can be found at www.finance.gov.au/procurement.

4.10 Generally, procurement-connected policies are the responsibility of entities other than Finance. The relevant policy-owning entity is responsible for administering, reviewing and providing information on the policy as required.

Notes: Defence contracting templates are drafted and regularly updated to give effect to applicable Commonwealth legislation and policy (including the CPRs), and applicable Defence policy. If using an endorsed Defence contracting template (for example, ASDEFCON, the Defence Facilities and Infrastructure Suite of Contracts or the Commonwealth Contracting Suite) for a *procurement* for which the template is intended, Defence *officials* may rely on the template as meeting applicable legislation and policy requirements. The endorsed Defence contracting templates may be found on the Commercial Division Tools and Templates intranet page.

Defence has numerous business policy owners that are responsible for ensuring Defence complies with applicable Commonwealth legislation and policy requirements, as well as with particular State and Territory legislation that may also apply to Defence activities. This legislation and policy often interacts with Defence *procurement* and in many cases is given effect to through *contract*s. There are many policy or support areas in Defence that that can assist in relation to this legislation and policy that intersects with *procurement* (eg contracting, legal, finance, environment, work health and safety, security, technical regulatory frameworks etc). These resources can be found on the *procurement* support areas link on the Commercial Division Help Desk Kiosk intranet page.

Defence Procurement Policy Directives

Black Economy

D12. Defence *officials* undertaking an *open tender procurement* which is subject to the CPRs and with an estimated value of over $4 million (including *GST*) **must** exclude, from consideration, *submissions* from *tenderers* that do not comply with the Black Economy Policy.

Note: Black Economy is a procurement connected policy.

The ASDEFCON contracting templates incorporate provisions that give effect to the Black Economy. Further information on the Black Economy Procurement Connected Policy can be found at the Department of Finance website.

Trade sanctions

D13. Defence *officials* undertaking a *procurement* **must** ensure that the *procurement* does not breach any current Australian Government trade sanctions.

Indigenous Procurement Policy

D14. Prior to approaching the market, Defence officials must determine whether the Indigenous Procurement Policy (IPP) applies to the *procurement* and if so comply with the IPP (see also Appendix A, item 16 of the CPRs).

Notes: The IPP is a procurement connected policy.

In addition, while not a Defence Procurement Policy Directive, Defence *officials* should also determine whether a disability business could deliver the required *goods* or services on a value for money basis before making any *approach to market*. If satisfied that value for money can be achieved, then the Defence *official* should procure the *goods* or services from the disability business (as permitted by Appendix A of the CPRs, item 15). If not, then the Defence *official* may procure through normal means. A list of Australian disability businesses can be found at the Australian Disability Enterprises website www.ade.org.au.

See Chapter 2 of the DPPM for more information about the IPP and the disability business exemption.

Workplace gender equality

D15. Defence *officials* undertaking a *procurement* at or above the relevant *procurement threshold* **must not** purchase *goods* or services from contractors that do not comply with the *Workplace Gender Equality Act 2012.*

Note: Workplace gender equality is a procurement connected policy.

Defence Policy for Industry Participation

D16. Defence *officials* **must** comply with the Defence Policy for Industry Participation 2019 for all *procurements* valued at or above $4 million (including *GST*) with the exception of the *procurement* of construction services to which it applies to *procurements* valued at or above $7.5 million (including GST). In particular Defence officials must ensure that the successful *supplier* in the *procurement* implements the appropriate Australian Industry Capability (AIC) Schedule, AIC Plan, or Local Industry Capability Plan.

Note: When considering the value of the procurement for the purposes of applying the Defence Policy for Industry Participation Defence *officials* are to exercise judgement in determining the threshold and requirements for either a schedule or plan

Currently, only the ASDEFCON or DEQMS contracting templates incorporate provisions that give effect to the Defence Policy for Industry Participation, including requiring *tenderers* to submit AIC Schedules, AIC Plans or Local Industry Capability Plans as part of the tender process. The particular type of industry schedule or plan required will depend on the type and value of the procurement being undertaken. The successful *tenderer* is required to give effect to the agreed schedule or plan under the *contract*. For further information about the Defence Policy for Industry Participation, Defence *officials* should refer to the Defence Industry Policy Division intranet page.

The Defence Policy for Industry Participation addresses the requirements of the Australian Industry

Participation Policy which is administered by the Department of Industry, Innovation and Science. Under the Australian Industry Participation Policy successful tenderers for certain non-materiel Commonwealth procurements valued as or above $20 million are required to prepare and implement an Australian Industry Participation Plan. Potential defence suppliers therefore do not need to prepare a separate Australian Industry Participation Plan.

For materiel procurements above $20 million also see Defence Industry Policy Statement 2016 and Defence Industrial Capability Plan 2018.

Code for the Tendering and Performance of Building Work 2016

D17. Defence *officials* **must** comply with the Code for the Tendering and Performance of Building Work 2016 (Building Work Code) when undertaking *procurements* for building work to which the Building Work Code applies.

Note: The Building Work Code is a procurement connected policy. In summary, the Building Work Code prevents Commonwealth agencies such as Defence from permitting companies to tender or enter into *contracts* for Commonwealth funded building work, unless the companies meet the requirements of the Building Work Code. In Defence, *procurements* for building work are normally managed by the Defence Estate and Infrastructure Group. The Defence Facilities and Infrastructure Suite of Contracts include provisions to ensure that Defence complies with the Building Work Code.

Public-private partnerships (PPP) policy

D18. Defence *officials* **must:**

- consider using a public-private partnership (PPP) for all project proposals having an estimated capital cost over $50 million where there is an opportunity to enter into a long term *contract* (for example, 15-30 years) with a focus on the delivery of services to government (for example, making materiel or facilities available for use by Defence); and
- comply with the National PPP Policy and Guidelines (December 2008), and complete a PPP Suitability Checklist.

Note: More guidance on PPPs is set out in the Procurement Delivery Models Better Practice Guide. PPPs (or Private Finance Initiatives or 'PFIs') involve the creation of an asset through financing and ownership control by a private party and private sector delivery of related services that may normally have been provided by the Commonwealth. The Commonwealth may contribute to establishing the infrastructure, for example through land, capital works or risk sharing. The service delivered may be paid for by the Commonwealth or directly by the end user. Defence *officials* should consult with the Public Private Partnership Centre of Expertise, and engage the Resource Assurance and Analysis Branch, in Chief Finance Officer Group (CFOG) for an independent review of financial and budgetary impact. Building work that involves a PPP or PFI for the delivery of functions or services of the Commonwealth is also subject to the Building Work Code (see Defence Procurement Policy Directive D17).

CPR 4.11 – 4.12

Coordinated procurement

4.11 Coordinated *procurement* refers to whole-of-government arrangements for procuring *goods* and services. A list of coordinated *procurements* can be found at www.finance.gov.au/procurement.

4.12 *Non-corporate Commonwealth entities* **must** use coordinated *procurements*. Exemptions from coordinated *procurements* can only be granted jointly by the requesting *non-corporate Commonwealth entity's* Portfolio Minister and the Finance Minister when a *non-corporate Commonwealth entity* can demonstrate a special need for an alternative arrangement. Prescribed *Corporate Commonwealth entities* may opt-in to coordinated *procurements*.

Defence Procurement Policy Directives

D19. Prior to selecting a *procurement* method, Defence *officials* **must** determine whether a coordinated *procurement* arrangement has been established for the *goods* or services to be procured.

D20. If a coordinated *procurement* arrangement has been established for *goods* or services, Defence *officials* **must** use the arrangement when procuring relevant *goods* or services unless an exemption is in place.

Notes: The Department of Finance has established several whole of government coordinated *procurement* arrangements for various *goods* and services, for example, ICT, telecommunications, stationery and office supplies, and airline travel. Defence *officials* can find more details at www.finance.gov.au/procurement.

Specialised military and classified telecommunications products and services (for military or intelligence agencies) fall outside the operation of the telecommunications coordinated *procurement* arrangements. For information about these exemptions Defence *officials* should refer to Non Materiel Procurement - ICT.

CPR 4.13 – 4.15

Cooperative procurement

4.13 Cooperative *procurements* involve more than one *relevant entity* as the buyer. *Relevant entities* can procure cooperatively by approaching the market together or by joining an existing *contract* of another *relevant entity*.

4.14 If a *relevant entity* intends to join an existing *contract* of another *relevant entity*, the initial *request documentation* and the *contract* **must** have already specified potential use by other *relevant entities*.

4.15 *Relevant entities* joining an existing *contract* **must** ensure that:

a. value for money is achieved;

b. the *goods* and services being procured are the same as provided for within the *contract*; and

c. the terms and conditions of the *contract* are not being materially altered.

Notes: The Defence Support Services panel (DSS Panel) is an example of a cooperative *procurement*. The panel was established so as to be able to be accessed by other Commonwealth agencies, and as a result many agencies have used and continue to use this panel for a range of support services.

Defence *officials* who are planning to establish a new *standing offer* arrangement with multiple *suppliers* should consider whether it would be appropriate for other Commonwealth agencies to be able to use the proposed panel for their needs. If so, the *approach to market* for the panel (and the panel deed) will need to expressly advise the *potential suppliers* that the panel may be used not only by Defence, but also by other agencies. However, in such circumstances, Defence *officials* will also need to consider the administrative arrangements for how the panel may be used, the extent to which this will impose an additional resource burden on Defence, and whether there will be any administrative fee charged to other agencies to cover Defence's costs of managing the panel.

CPR 4.16 – 4.18

Contract end dates

4.16 When a *contract* does not specify an *End date* it **must** allow for periodic review and subsequent termination of the *contract* by the *relevant entity*, if the *relevant entity* determines that it does not continue to represent value for money.

Third-party procurement

4.17 *Procurement* by third parties on behalf of a *relevant entity* can be a valid way to procure *goods* and services, provided it achieves value for money.

4.18 *Relevant entities* **must** not use third-party arrangements to avoid the rules in the CPRs when procuring *goods* and services.

Note: Under Defence *contract*s, it is not unusual for contractors to be required to undertake *procurements* on behalf of Defence. In many cases, this is simply part of the contractor's overall contracted responsibility to deliver a particular capability or outcome to Defence. In these cases, Defence does not usually intervene to specify that the contractors comply with CPR requirements, although Defence may wish to approve or specify under the *contract* the key subcontractors that the contractor will use, and further impose obligations on the contractor to ensure value for money is obtained, for example, by requiring the contractor to undertake competitive *procurements*. In other cases, the Commonwealth may task a contractor to undertake *procurement* activity that Defence *officials* might normally undertake themselves; that is, Defence is outsourcing the *procurement* function itself. In these cases, it may be appropriate to require the contractor to comply with the CPRs as if they were bound by them. If not, it could be argued that Defence was outsourcing the *procurement* function simply to avoid the operation of the CPRs. Defence is always under an obligation to ensure that its *procurement* activities (whether outsourced or not) deliver value for money to the Commonwealth.

5. Encouraging Competition

CPR 5.1 – 5.2

Encouraging competition

5.1 Competition is a key element of the Australian Government's *procurement* framework. Effective competition requires non-discrimination and the use of competitive *procurement* processes.

5.2 Participation in *procurement* imposes costs on *relevant entities* and *potential suppliers*. Those costs should be considered when designing a process that is commensurate with the scale, scope and risk of the proposed *procurement*.

Note: Chapter 2 of the DPPM discusses the importance of competition and selecting an appropriate *procurement* process to achieve value for money outcomes.

CPR 5.3 – 5.4

Non-discrimination

5.3 The Australian Government's *procurement* framework is non-discriminatory.

5.4 All *potential suppliers* to government **must**, subject to these CPRs, be treated equitably based on their commercial, legal, technical and financial abilities and not be discriminated against due to their size, degree of foreign affiliation or ownership, location, or the origin of their *goods* and services.

Note: See Chapter 2 of the DPPM for more information about the non-discrimination principle.

CPR 5.5 – 5.7

Small and Medium Enterprises

5.5 To ensure that *Small and Medium Enterprises* (SMEs) can engage in fair competition for Australian Government business, *officials* should apply *procurement* practices that do not unfairly discriminate against SMEs and provide appropriate opportunities for SMEs to compete. *Officials* should consider, in the context of value for money:

a. the benefits of doing business with competitive SMEs when specifying requirements and evaluating value for money;

b. barriers to entry, such as costly preparation of *submissions*, that may prevent SMEs from competing;

c. SMEs' capabilities and their commitment to local or regional markets; and

d. the potential benefits of having a larger, more competitive *supplier* base.

5.6 The Australian Government is committed to *non-corporate Commonwealth entities* sourcing at least 10 per cent of *procurement* by value from SMEs.

5.7 In addition, the Government has a target of *non-corporate Commonwealth* entities procuring 35 per cent of *contract*s by volume, with a value of up to $20 million, from *SMEs*.

Notes: In the Defence context, the Australian Government's policy relating to *small to medium enterprises* (SMEs) is given effect to through the Defence Industry Policy 2016, and in particular, the Defence Policy for Industry Participation 2019 which includes the Australian Industry Capability (AIC) program. As noted in Chapter 2 of the DPPM, the AIC program is identified as a specific exemption from the 'non-discrimination' principle (reflected in paragraph 5.3 of the CPRs) in the Australia-US Free Trade Agreement (AUSFTA), and other FTAs to which Australia is a party. The AUSFTA (Chapter 15, Annex A) provides that 'the Australian Government reserves the right to maintain the Australian Industry Involvement program and its successor programs and policies.' The AIC program is a successor to the previous Australian Industry Involvement (AII) program.

The ASDEFCON templates incorporate provisions that give effect to the AIC program, including requiring *tenderers* to submit AIC Schedule or Plans as part of the tender process. The successful *tenderer* is required to give effect to the agreed AIC Schedule or Plan under the *contract*. See also Defence Procurement Policy Directive D16 and the related note following.

6. Efficient, effective, economical and ethical procurement

CPR 6.1 – 6.9

Efficient, effective, economical and ethical procurement

6.1 The Australian Government promotes the proper use and management of *public resources*. Proper means efficient, effective, economical and ethical. For *non-corporate Commonwealth entities*, this would also include being not inconsistent with the policies of the Commonwealth.

6.2 Efficient relates to the achievement of the maximum value for the resources used. In *procurement*, it includes the selection of a *procurement* method that is the most appropriate for the *procurement* activity, given the scale, scope and risk of the *procurement*.

6.3 Effective relates to the extent to which intended outcomes or results are achieved. It concerns the immediate characteristics, especially price, quality and quantity, and the degree to which these contribute to specified outcomes.

6.4 Economical relates to minimising cost. It emphasises the requirement to avoid waste and sharpens the focus on the level of resources that the Commonwealth applies to achieve outcomes.

6.5 Ethical relates to honesty, integrity, probity, diligence, fairness and consistency. Ethical behaviour identifies and manages conflicts of interests, and does not make improper use of an individual's position.

Note: Chapter 2 of the DPPM, the Complex Procurement Guide, and the Early Industry Engagement Better Practice Guide provide more guidance about probity and effective industry engagement.

Ethical behaviour

6.6 In particular, *officials* undertaking *procurement* **must** act ethically throughout the *procurement*. Ethical behaviour includes:

a. recognising and dealing with actual, potential and perceived conflicts of interest;

b. dealing with *potential supplier*s, *tenderers* and *supplier*s equitably, including by:

i. seeking appropriate internal or external advice when probity issues arise, and

ii. not accepting inappropriate gifts or hospitality;

c. carefully considering the use of *public resources*; and

d. complying with all directions, including *relevant entity* requirements, in relation to gifts or hospitality, the Australian Privacy Principles of the *Privacy Act 1988* and the security provisions of the *Crimes Act 1914*.

6.7 *Relevant entities* **must** not seek to benefit from *supplier* practices that may be dishonest, unethical or unsafe. This includes not entering into *contract*s with *tenderers* who have had a judicial decision against them (not including decisions under appeal) relating to employee entitlements and who have not satisfied any resulting order. *Officials* should seek declarations from all *tenderers* confirming that they have no such unsettled orders against them.

Note: The endorsed Defence contracting templates contain the necessary provisions and form of statutory declaration to give effect to paragraph 6.7 of the CPRs.

6.8 If a complaint about *procurement* is received, *relevant entities* **must** apply timely, equitable and non-discriminatory complaint-handling procedures, including providing acknowledgment soon after the complaint has been received. *Relevant entities* should aim to manage the complaint process internally, when possible, through communication and conciliation.

Judicial Review

6.9 For the purposes of paragraph (a) of the definition of relevant Commonwealth Procurement Rules in section 4 of the *Government Procurement (Judicial Review) Act 2018*, the following paragraphs of Division 1 of these CPRs are declared to be relevant provisions: paragraphs 4.18, 5.4, 7.2, 7.10, 7.13 – 7.18, 7.20, and 9.3 – 9.6.

Defence Procurement Policy Directive

D21. If a Defence *official* receives a *procurement* complaint from a *supplier* in relation to a Defence *procurement*, the *official* **must** direct the complaint to the procurement complaints mailbox (procurement.complaints@defence.gov.au).

D22. Defence *officials* must comply with a notice from a *Government Procurement (Judicial Review) Act 2018* Section 19 Delegate to investigate a *procurement* complaint, and prepare a report on the investigation.

D23. Defence *officials* must comply with a notice to suspend a relevant *procurement* from a *Government Procurement (Judicial Review) Act 2018* Section 20 Delegate.

D24. PIC delegates must obtain legal advice from Defence Legal and commercial advice from the Commercial Division within CASG prior to issuing a Public Interest Certificate (PIC) under Section 22 of the *Government Procurement (Judicial Review) Act 2018*.[55] PIC delegates must ensure that the PIC and the supporting *submission* are registered on the PIC Register.

Note: In Defence all *procurement* complaints including those made under the *Government Procurement (Judicial Review) Act 2018* (JR Act) are managed through the Defence Procurement Complaints Scheme. JR Act delegations have been issued by the Secretary to certain Defence officials to receive and investigate complaints, suspend *procurements* and issue Public Interest Certificates (PICs). The JR Act delegations can be found on the Commercial Division Defence Procurement Complaints Scheme intranet page.

The procurement complaints mailbox (procurement.complaints@defence.gov.au) is managed by the Central Procurement Complaints Function which is part of the Defence Procurement Complaints Scheme.

A PIC is a document issued by a PIC delegate that states that it is not in the public interest for a 'covered procurement' process to be suspended while complaints made under the JR Act are investigated or applications for injunctions are being considered. The PIC Register and a template *submission* for a PIC (including the applicable considerations) can be found on the Commercial Function Defence Procurement Complaints Scheme intranet page.

A 'covered procurement' under the JR Act is a *procurement* to which the rules in Divisions 1 and 2 of the CPRs apply, and which is not included in a class of *procurements* specified by the Minister for Finance in a determination under section 5(2) of the JR Act. As at the date of this version of the DPPM, the Minister for Finance has not issued any determinations under section 5(2) of the JR Act.

Information regarding the Defence Procurement Complaints Scheme can be found on the Commercial Function Defence Procurement Complaints Scheme intranet page.

7. Accountability and transparency

CPR 7.1 – 7.5

Accountability and transparency

7.1 The Australian Government is committed to ensuring accountability and transparency in its *procurement* activities. Accountability means that *officials* are responsible for the actions and decisions that they take in relation to *procurement* and for the resulting outcomes. Transparency involves *relevant entities* taking steps to enable appropriate

[55] This is set out in the Instrument of Delegation as a mandatory precondition to exercising the delegation in respect of section 22 of the JR Act

scrutiny of their *procurement* activity. The fundamental elements of accountability and transparency in *procurement* are outlined in this section.

Records

7.2 *Officials* **must** maintain a level of documentation commensurate with the scope, scale and risk for each *procurement*.

7.3 Documentation should provide accurate and concise information on:

a. the requirement for the *procurement*;

b. the process that was followed;

c. how value for money was considered and achieved;

d. relevant approvals; and

e. relevant decisions and the basis of those decisions.

7.4 *Relevant entities* **must** have access to evidence of agreements with *suppliers*, in the form of one or a combination of the following documents: a written *contract*, a purchase order, an invoice or a receipt.

7.5 Documentation **must** be retained in accordance with the *Archives Act 1983*.

Note: For Defence policy in relation to record keeping, Defence *officials* should refer to the Defence Records Management Manual (RECMAN). RECMAN takes a principles based approach to records management and does not include information about practices and procedures – which are proposed to be set out in a Records Management Operations Guide (under development). For further information, Defence *officials* should contact Directorate of Records Management Policy at DRMP.Policy@defence.gov.au.

CPR 7.6 – 7.9

AusTender

7.6 *AusTender*, the Australian Government's *procurement* information system, is a centralised web-based facility that publishes a range of information, including *relevant entities*' planned *procurements*, *open tenders* and *contracts* awarded. It also supports secure electronic tendering to deliver integrity and efficiency for *relevant entities* and *potential suppliers*.

7.7 *AusTender* is the system used to enable *relevant entities* to meet their publishing obligations under the CPRs. It also enables *relevant entities* to monitor and review their *AusTender*-based *procurements*, including *approaches to market*, publication of *contracts*, and amendments to *contracts*.

Annual procurement plans

7.8 In order to draw the market's early attention to potential *procurement* opportunities, each *relevant entity* **must** maintain on *AusTender* a current *procurement* plan containing a short strategic *procurement* outlook.

7.9 The *annual procurement plan* should include the subject matter of any significant planned *procurement* and the estimated publication date of the *approach to market*. *Relevant entities* should update their plans regularly throughout the year.

Notes: The *Annual Procurement Plan* (APP) is a tool that facilitates early *procurement* planning and notifies *potential suppliers* to the planned Defence *procurements*. The APP includes a short strategic *procurement* outlook for Defence supported by details of any planned *procurements*. The APP includes only those opportunities that are planned as *open tender* as there are linkages between the APP and subsequent *approaches to market*.

For practical reasons (given the volume of Defence *procurement),* Defence includes in its APP only those *procurements* valued at or above $1,000,000 (*GST* inclusive). *Procurements* of a lesser value can be included if advance notice to industry is desired, but this is not mandatory.

Details regarding the coordination and publication of Defence's APP can be found on the AusTender Publishing intranet page. Defence *officials* should refer to the intranet page for more information about the APP process.

CPR 7.10 – 7.15

Notifications to the market

7.10 *Relevant entities* **must** use *AusTender* to publish *open tenders* and, to the extent practicable, to make relevant *request documentation* available.

7.11 *Relevant entities* may use AusTender to publish *limited tender approaches to market* and make relevant *request documentation* available.

Note: All *open approaches to market* (*open tenders*) from Capability Acquisition and Sustainment Group (CASG) to be published on *AusTender* are managed centrally through the CASG e-tendering service. Defence *officials* from other Groups and Services can submit requests for *AusTender* publication for *open approaches to market* to defence.procurement@defence.gov.au. For further information about *AusTender* publication, Defence *officials* should refer to the Commercial Division AusTender intranet page.

7.12 *Relevant entities* should include relevant *evaluation criteria* in *request documentation* to enable the proper identification, assessment and comparison of *submissions* on a fair, common and appropriately transparent basis.

Defence Procurement Policy Directive

D25. Defence *officials* undertaking a *procurement* **must** ensure that the *evaluation criteria* advertised in the *request documentation* are the criteria used for the evaluation of *submissions*.

7.13 In any additional notification through other avenues, such as printed media, the details selected for inclusion in the notification **must** be the same as those published on *AusTender*.

Note: The Department of Finance's Resource Management Guide No 407 sets out Commonwealth policy in relation to advertising *open approaches to market* in the media. As a general rule, such advertising is not permitted, although exemptions from the policy may be granted on a case by case basis.

7.14 When a *relevant entity* provides *request documentation* or any other document, already published on *AusTender* in any other form (for example, a printed version) that documentation **must** be the same as that published on *AusTender*.

7.15 The initial *approach to market* for a *multi-stage procurement* must include, for every stage, the criteria that will be used to select *potential suppliers*, and if applicable, any limitation on the number of *potential suppliers* that will be invited to make *submissions*.

CPR 7.16 – 7.17

Providing information

7.16 *Officials* **must**, on request, promptly provide, to eligible *potential suppliers*, *request documentation* that includes all information necessary to permit the *potential supplier* to prepare and lodge *submissions*.

7.17 Following the rejection of a *submission* or the award of a *contract*, *officials* **must** promptly inform affected *tenderers* of the decision. Debriefings **must** be made available, on request, to unsuccessful *tenderers* outlining the reasons the *submission* was unsuccessful. Debriefings **must** also be made available, on request, to the successful *supplier*(s).

Note: Defence *officials* should refer to Chapter 5 of the Complex Procurement Guide for guidance about when to inform an affected *tenderer* of a decision in relation to a *procurement* process.

CPR 7.18 – 7.20

Reporting arrangements

7.18 *Relevant entities* **must** report *contract*s and amendments on *AusTender* within 42 *days* of entering into (or amending) a *contract* if they are valued at or above the *reporting threshold.*

7.19 The *reporting thresholds* (including *GST*) are:

a. $10,000 for *non-corporate Commonwealth entities*; and

b. for prescribed *corporate Commonwealth entities* ,

i. $400,000 for *procurements* other than *procurement* of construction services, or

ii. $7.5 million for *procurement* of construction services.

7.20 Regardless of value, *standing offers* must be reported on *AusTender* within 42 *days* of the *relevant entity* entering into or amending such arrangements. Relevant details in the *standing offer* notice, such as *supplier* details and the names of other *relevant entities* participating in the arrangement, must be reported and kept current.

Defence Procurement Policy Directive

D26. To enable Defence to meet its accountability and transparency requirements (including *AusTender* reporting), for all new *contract*s and *contract* amendments that meet the *AusTender reporting thresholds*, Defence *officials* **must** complete the AE643 Defence Purchasing form.

Notes: The *reporting threshold* in paragraph 7.19a of the CPRs applies to the Department of Defence as a *non-corporate Commonwealth entity*.

The CPR reporting requirements apply equally to *contract* changes (whether called a *contract* change, amendment or variation or some other terminology) that are valued at or above the relevant *reporting threshold* as they do to the original *contract*s. However, the reporting requirements do not apply to *contract*s or *contract* changes for *goods* or services procured outside Australia to be used completely outside of Australia.

To assist Defence to meet its *AusTender* reporting requirements, Defence has developed the AE643 form and related *AusTender* reporting procedure. The form and procedure covers the proper recording of *contract*s and amendments that may be undertaken or processed through ROMAN, MILIS and the CMS financial management system. Defence *officials* should refer to the Commercial Division AusTender intranet page for more information about *AusTender* reporting requirements, including in relation to *standing offer* notices.

For *procurement* of Contractors, Consultants or Outsourced Service Providers, the AE643 records that a Senior Executive Service (SES) Band 1 or a 1 Star Officer or above has endorsed the requirement in accordance with Defence Procurement Policy Directive D10.

CPR 7.21

Subcontractors

7.21 *Relevant entities* **must** make available on request, the names of any subcontractor(s) engaged by a contractor in respect of a *contract*.

a. *Relevant entities* **must** require contractors to agree to the public disclosure of the names of any subcontractors engaged to perform services in relation to a *contract*.

b. Contractors **must** be required to inform relevant subcontractors that the subcontractor's participation in fulfilling a *contract* may be publicly disclosed.

Note: The endorsed Defence contracting templates contain the necessary provisions to give effect to paragraph 7.21 of the CPRs.

CPR 7.22 – 7.25

Treatment of confidential information

7.22 When conducting a *procurement* and awarding a *contract*, *relevant entities* should take appropriate steps to protect the Commonwealth's confidential information. This includes

observing legal obligations, such as those under the *Privacy Act 1988*, and statutory secrecy provisions.

7.23 *Submissions* **must** be treated as confidential before and after the award of a *contract*. Once a *contract* has been awarded the terms of the *contract*, including parts of the *contract* drawn from the *supplier's submission*, are not confidential unless the *relevant entity* has determined and identified in the *contract* that specific information is to be kept confidential in accordance with the 'confidentiality test' set out in the guidance on *Confidentiality Throughout the Procurement Cycle* at www.finance.gov.au/procurement.

7.24 The need to maintain the confidentiality of information should always be balanced against the public accountability and transparency requirements of the Australian Government. It is therefore important for *officials* to plan for, and facilitate, appropriate disclosure of *procurement* information. In particular, *officials* should:

a. include provisions in *request documentation* and *contracts* that alert *potential suppliers* to the public accountability requirements of the Australian Government, including disclosure to the Parliament and its committees;

b. when relevant, include a provision in *contracts* to enable the Australian National Audit Office to access contractors' records and premises to carry out appropriate audits; and

c. consider, on a case-by-case basis, any request by a *supplier* for material to be treated confidentially after the award of a *contract*, and enter into commitments to maintain confidentiality only when such commitments are appropriate.

7.25 When confidential information is required to be disclosed, for example following a request from a parliamentary committee, reasonable notice in writing **must** be given to the party from whom the information originated.

Note: The endorsed Defence contracting templates contain the necessary provisions to give effect to the CPR requirements on treatment of confidential information. Defence *officials* should refer to the Commercial Division Fact Sheets and Guidance intranet page for more guidance on how to determine what information is actually 'confidential' and the use of confidentiality provisions in Defence *contracts*.

CPR 7.26

Contract management/Standard verification

7.26 For *procurements* valued at or above the relevant *procurement threshold*, where applying a *standard* for *goods* or services, *relevant entities* **must** make reasonable enquiries to determine compliance with that *standard*:

a. this includes gathering evidence of relevant certifications; and

b. periodic auditing of compliance by an independent assessor.

CPR 7.27

Other obligations

7.27 Other reporting and disclosure obligations apply to *officials* undertaking *procurement*, including:

a. disclosure of *procurement* information for *relevant entity* annual reporting purposes;

b. disclosure of non-compliance with the CPRs through the Commonwealth's compliance reporting process;

c. disclosure to the Parliament and its committees, as appropriate, in line with the Government Guidelines for *Officials Witnesses before Parliamentary Committees and Related Matters*;

d. disclosure of information consistent with the *Freedom of Information Act 1982*; and

e. disclosure of discoverable information that is relevant to a case before a court.

8. Procurement risk

CPR 8.1 – 8.4

Procurement risk

8.1 Risk management comprises the activities and actions taken by a *relevant entity* to ensure that it is mindful of the risks it faces, that it makes informed decisions in managing these risks, and identifies and harnesses potential opportunities.

8.2 *Relevant entities* **must** establish processes for the identification, analysis, allocation and treatment of risk when conducting a *procurement*. The effort directed to risk assessment and management should be commensurate with the scale, scope and risk of the *procurement*. *Relevant entities* should consider risks and their potential impact when making decisions relating to value for money assessments, approvals of proposals to spend *relevant money* and the terms of the *contract*.

8.3 *Relevant entities* should consider and manage their *procurement* security risk in accordance with the *Australian Government's Protective Security Policy Framework*.

8.4 As a general principle, risks should be borne by the party best placed to manage them; that is, *relevant entities* should generally not accept risk which another party is better placed to manage. Similarly, when a *relevant entity* is best placed to manage a particular risk, it should not seek to inappropriately transfer that risk to the *supplier*.

Defence Procurement Policy Directives

D27. For all *procurements* at or above the relevant *procurement threshold*, Defence *officials* **must**:

- undertake a risk assessment so that they are properly informed about the risks associated with the *procurement*; and
- subject to the risk assessment, develop and implement a risk management plan to manage the risks.

D28. Defence *officials* **must** undertake a liability risk assessment prior to agreeing to limit a third party's liability under a *contract*.

Notes: Chapter 2 of the DPPM provides guidance on risk management. The endorsed Defence contracting templates enable Defence *officials* to allocate risks to the parties best placed to manage them.

The Commonwealth may limit a third party's (including a contractor's) liability in various ways, for instance, by agreeing to one or more financial caps on different heads of loss or damage that a contractor may be exposed to under a *contract* (for example, for personal injury, property damage, delay or other contractual non-performance). Defence has developed tools and guidance to assist Defence *officials* with undertaking liability risk assessments. See also Defence Procurement Policy Directive D6 which requires Defence *officials* to undertake a liability risk assessment in relation to contingent liabilities.

9. Procurement method

CPR 9.1

Procurement method

9.1 Australian Government *procurement* is conducted by *open tender* or *limited tender*. These methods are detailed in this section.

Defence Procurement Policy Directives

D29. In deciding on the *procurement* method for a *procurement*, Defence *officials* **must** ensure that the method is commensurate with the scope, scale, and risk of the *procurement* and is consistent with value for money.

D30. Defence *officials* **must** ensure that all *procurement* method decisions are appropriately documented.

Note: For *procurements* valued at or above $200,000 (*GST* inclusive), the Endorsement to Proceed template is normally the mechanism by which *procurement* method decisions are documented. The Commitment Approval delegate (see section 23(3) of the PGPA Act) would also confirm the *procurement* method decision as part of the exercise of their delegation.

CPR 9.2 – 9.7

Requirement to estimate value of procurement

9.2 The expected value of a *procurement* **must** be estimated before a decision on the *procurement* method is made. The expected value is the maximum value (including *GST*) of the proposed *contract*, including options, extensions, renewals or other mechanisms that may be executed over the life of the *contract*.

9.3 The maximum value of the *goods* and services being procured **must** include:

a. all forms of remuneration, including any premiums, fees, commissions, interest, allowances and other revenue streams that may be provided for in the proposed *contract*;

b. the value of the *goods* and services being procured, including the value of any options in the proposed *contract*; and

c. any taxes or charges.

9.4 When a *procurement* is to be conducted in multiple parts with *contract*s awarded either at the same time or over a period of time, with one or more *supplier*s, the expected value of the *goods* and services being procured **must** include the maximum value of all of the *contract*s.

9.5 A *procurement* **must** not be divided into separate parts solely for the purpose of avoiding a relevant *procurement threshold*.

9.6 When the maximum value of a *procurement* over its entire duration cannot be estimated the *procurement* **must** be treated as being valued above the relevant *procurement threshold*.

Procurement thresholds

9.7 When the expected value of a *procurement* is at or above the relevant *procurement threshold* and an exemption in Appendix A is not utilised, the rules in Division 2 **must** also be followed. The *procurement thresholds* (including *GST*) are:

a. for *non-corporate Commonwealth entities*, other than for *procurements* of *construction services*, the *procurement threshold* is $80,000;

b. for prescribed *corporate Commonwealth entities*, other than for *procurements* of *construction services*, the *procurement threshold* is $400,000; or

c. for *procurements* of *construction services* by *relevant entities*, the *procurement threshold* is $7.5 million.

Defence Procurement Policy Directives

Procurements under $10,000 (GST inclusive) - Defence Purchasing Card

D31. For *procurements* valued under $10,000 (*GST* inclusive), Defence *officials* **must** use the Defence Purchasing Card (DPC), unless there are valid reasons for not doing so.

D32. Defence *officials* **must** not use the DPC for *procurements* made through MILIS (the core logistics management system in Defence).

Procurements under $200,000 (GST inclusive) - Commonwealth Contracting Suite

D33. For *procurements* valued under $200,000 (*GST* inclusive), Defence *officials* **must** use the Department of Finance's Commonwealth Contracting Suite (CCS), unless the *procurement* has been assessed as exempt from this requirement by applying the Defence specific CCS Decision Tree.

D34. If the *procurement* is exempt from using the CCS, the *official* **must** use an endorsed Defence contracting template.

Procurements valued at or above $200,000 (GST inclusive)

D35. For *procurements* valued between $200,000 and $1 million (*GST* inclusive), officials must consider using the CCS as the basis for the *procurement*. If the CCS is unsuitable or the *procurement* is valued at or above $1 million (*GST* inclusive), if an endorsed Defence contracting template exists for the type of *procurement* being undertaken, Defence *officials* **must** use that template as the basis for the *procurement*.

D36. If a Defence *official* intends to use a form of *contract* other than an endorsed Defence contracting template, the *official* **must** ensure the *contract* is appropriate for the requirement, and capable of achieving an appropriate risk allocation consistent with the Commonwealth resource management framework.

Procurements through the US Foreign Military Sales (FMS) system

D37. If a Defence *official* is undertaking a *procurement* through the FMS system, the *official* **must** consult with the Office of the Counsellor Defence Materiel (Washington) (DEFMAT (W)) prior to establishing or amending the FMS case.

Notes: Defence *officials* should follow the Simple Procurement Process Tool when undertaking low risk, low value (or 'simple') *procurements*.

For Defence Procurement Policy Directive D35, the Department of Finance's Commonwealth Contracting Suite (CCS) and the Defence specific CCS Decision Tree can be found at the Department of Finance's Commonwealth Contracting Suite webpage.

The endorsed Defence contracting templates and guidance on appropriate template selection can be found on the Commercial Policy Tools and Templates intranet page

The US Foreign Military Sales (FMS) program is a form of security assistance authorised by the US Arms Export Control Act (AECA) and is part of US foreign policy. Under Section 3, of the AECA, the US may sell defence articles and services to foreign countries like Australia when to do so will strengthen the security of the US and promote world peace. For more information about the FMS system see the Support Office Foreign Military Sales intranet page.

The Capability Acquisition and Sustainment Group has a Washington office (CASG-W) which is the focal point for Defence materiel related activity in North America, providing acquisition and sustainment support to Defence and other Australian government agencies. DEFMAT (W) provides acquisition advice to the Head of Australian Defence Staff (Washington) (HADS(W)) and is the representative of Deputy Secretary CASG in North America. The office supports a range of activities, including FMS and direct commercial *procurements*. For more information and contact details see the Support Office Foreign Military Sales intranet page.

CPR 9.8

Procurement methods

Method 1 – Open tender

9.8 *Open tender* involves publishing an *open approach to market* and inviting *submissions*. This includes *multi-stage procurements*, provided that the first stage is an *open approach to market.*

Defence Procurement Policy Directive

D38. Defence *officials* **must** use an *open tender* process for all *procurements* at or above the relevant *procurement threshold*, unless the conditions for a *limited tender* can be satisfied, or the *procurement* is otherwise exempt from this requirement.

Note: See Defence Procurement Policy Directive D2 (and the related Table 1) for Defence *procurements* that are exempt from the *open tender* requirement. Appendix A of the CPRs also sets out various kinds of *procurements* that do not require *open tender* processes.

See paragraphs 30 to 36 in Chapter 2 of the DPPM for guidance about *procurement* methods.

CPR 9.9 – 9.11

Method 2 – Limited tender

9.9 *Limited tender* involves a *relevant entity* approaching one or more *potential suppliers* to make *submissions*, when the process does not meet the rules for *open tender*.

9.10 For *procurements* at or above the relevant *procurement threshold*, *limited tender* can only be conducted in accordance with paragraph 10.3, or when a *procurement* is exempt as detailed in Appendix A.

9.11 When conducting a *limited tender* in accordance with paragraph 9.10, the relevant exemption or *limited tender* condition **must** be reported on *AusTender*.

Defence Procurement Policy Directive

D39. For *procurements* at or above the relevant *procurement threshold*, a Defence *official* **must not** use a *limited tender* process unless a circumstance in paragraph 10.3 of the CPRs applies, or the *procurement* is otherwise exempt from this requirement.

D40. In undertaking a *limited tender*, Defence *officials* **must** ensure that, where practicable, the number of *potential suppliers* invited to participate in the process is sufficient to ensure a value for money outcome.

Notes: Many *procurements* related to the acquisition or sustainment of Defence major capital equipment are undertaken through *limited tender* processes, despite not meeting the requirements of paragraph 10.3 of the CPRs. Usually, this is because they are exempt *procurements* of *goods* or services (see Defence Procurement Policy Directives D2-D4).

A particular *procurement* may be categorised as a *limited tender*, irrespective whether or not a request for tender or similar *request documentation* is used to undertake the *procurement*. Further, a 'sole source' arrangement with a contractor constitutes a *limited tender* for the purposes of the CPRs. Similarly, each FMS case with the US Government constitutes a *limited tender*.

See paragraphs 37 to 47 in Chapter 2 of the DPPM for guidance about how the circumstances set out in paragraph 10.3 of the CPRs may apply so as to justify using a *limited tender* process.

Where a *limited tender procurement* method has been utilised for a *procurement* valued at or above the relevant *procurement threshold*, the Contract Notice published on *AusTender* will include either:

- the exemption from Division 2 of the CPRs; or
- the condition from paragraph 10.3 of the CPRs.

CPR 9.12 – 9.13

Procurement from existing arrangements

Procurements from standing offers

9.12 *Procurements* from an existing *standing offer* are not subject to the rules in Division 2 of these CPRs. However, these *procurements* **must** comply with the rules in Division 1.

9.13 *Officials* should report the original *procurement* method used to establish the *standing offer* when they report *procurements* from *standing offer*s.

Defence Procurement Policy Directive

D41. If a *standing offer* panel is established in Defence for *goods* or services, Defence *officials* **must** use the *standing offer* when procuring relevant *goods* or services, unless a Group Head has approved not doing so.

D42. Defence *officials* **must not** use a *standing offer* panel to order *goods* or services that were not specified in the *request documentation* used to establish the arrangement, even if the relevant *supplier* may be able to provide the *goods* or services.

Notes: *Standing offer* panels provide an efficient and effective mechanism to enable Defence *officials* to procure relevant *goods* and services from industry. The benefit of these arrangements is eroded if *officials* seek to procure outside the panel, noting that panel members also have the reasonable expectation that Defence will use the panel rather than procure outside it. Nevertheless, there may be occasions when Defence *officials* may need to procure *goods* or services outside the panel, for example, where particular knowledge or expertise is required that is only available outside the panel. A valid reason could also include where a *standing offer* panel arrangement has been established by another Commonwealth agency which is able to be used by Defence and which offers better value for money than the corresponding Defence panel. For further information on *standing offers* and current Defence *standing offer* panel arrangements, Defence *officials* should refer to the factsheet on the Commercial Division Fact Sheets and Guidance intranet page and the Commercial Division Defence Goods and Services Procurement Directory intranet page.

The Department of Finance has established several whole of government coordinated *procurement* arrangements for various *goods* and services, for example, ICT, telecommunications, stationery and office supplies, and airline travel. Defence *officials* are required to use these arrangements unless specific exemptions apply (see paragraphs 4.9 and 4.10 of the CPRs and Defence Procurement Policy Directives D19 and D20 and related Notes). Defence *officials* can find more details at www.finance.gov.au/procurement

Chapter 5

Procurements valued at or above the procurement thresholds

Note: Chapter 5 of the DPPM incorporates all the rules from Division 2 of the CPRs.

Defence Procurement Policy Directive

D43. Defence *officials* **must** comply with the Defence Procurement Policy Directives in Chapter 5 of the DPPM (in addition to those in Chapters 1, 3 and 4) when undertaking *procurements* in Defence, if the *procurement* is valued at or above the relevant *procurement threshold* (unless otherwise specified in the relevant Defence Procurement Policy Directive).

Note: Defence Procurement Policy Directive D43 means that, even though Defence *officials* may be exempt from having to comply with the additional rules in Division 2 of the CPRs in relation to their *procurement*, Defence *officials* are still required to comply with the Defence Procurement Policy Directives that are set out in Chapter 5 of the DPPM, unless stated otherwise. This is because these Defence Procurement Policy Directives are of general application and compliance with them will help to ensure that Defence undertakes its *procurements* in an efficient, effective, economical and ethical manner as required by the PGPA Act.

10. Additional rules

CPR 10.1 – 10.8

Additional rules

10.1 The rules set out in Division 2 are additional to those in Division 1 and **must** not be interpreted or applied in a manner that diminishes or negates Division 1.

10.2 A *procurement*, except a *procurement* that is specifically exempt in accordance with Appendix A, is subject to the rules contained in Division 2 if the expected value of the *procurement* is at, or above, the relevant *procurement threshold*.

Conditions for limited tender

10.3 A *relevant entity* **must** only conduct a *procurement* at or above the relevant *procurement threshold* through *limited tender* in the following circumstances:

a. when, in response to an *open approach to market*:

i. no *submissions*, or no *submissions* that represented value for money, were received,

ii. no *submissions* that met the *minimum content and format requirements* for *submission* as stated in the *request documentation* were received, or

iii. no *tenderers* satisfied the conditions for participation,

and the *relevant entity* does not substantially modify the essential requirements of the *procurement*; or

b. when, for reasons of extreme urgency brought about by events unforeseen by the *relevant entity*, the *goods* and services could not be obtained in time under *open tender*; or

c. for *procurements* made under exceptionally advantageous conditions that arise only in the very short term, such as from unusual disposals, unsolicited innovative proposals, liquidation, bankruptcy, or receivership, and which are not routine *procurement* from regular *supplier*s; or

d. when the *goods* and services can be supplied only by a particular business and there is no reasonable alternative or substitute for one of the following reasons

i. the requirement is for works of art,

ii. to protect patents, copyrights, or other exclusive rights, or proprietary information, or

iii. due to an absence of competition for technical reasons; or

e. for additional deliveries of *goods* and services by the original *supplier* or authorised representative that are intended either as replacement parts, extensions, or continuing services for existing equipment, software, services, or installations, when a change of *supplier* would compel the *relevant entity* to procure *goods* and services that do not meet requirements for compatibility with existing equipment or services; or

f. for *procurements* in a *commodity market*; or

g. when a *relevant entity* procures a prototype or a first *good* or service that is intended for limited trial or that is developed at the *relevant entity*'s request in the course of, and for, a particular *contract* for research, experiment, study, or original development; or

h. in the case of a *contract* awarded to the winner of a design contest, provided that

i. the contest has been organised in a manner that is consistent with these CPRs, and

ii. the contest is judged by an independent jury with a view to a design *contract* being awarded to the winner.

Note: See paragraphs 37 to 45 in Chapter 2 of the DPPM for guidance about how the circumstances set out in paragraph 10.3 of the CPRs may apply so as to justify using a *limited tender* process.

10.4 A *procurement* at or above the relevant *procurement threshold* conducted by *limited tender* is not required to meet the rules in paragraphs 10.6 -10.8 (*Request documentation*), 10.20-10.31 (Minimum time limits), or 10.35 (Awarding *contracts*).

10.5 In accordance with the general rules for accountability set out in these CPRs, for each *contract* awarded through *limited tender*, an *official* **must** prepare and appropriately file within the *relevant entity*'s records management system a written report that includes:

a. the value and type of *goods* and services procured;

b. a statement indicating the circumstances and conditions that justified the use of *limited tender*; and

c. a record demonstrating how the *procurement* represented value for money in the circumstances.

Request documentation

10.6 *Request documentation* **must** include a complete description of:

a. the *procurement*, including the nature, scope and the quantity of the *goods* and services to be procured or, where the quantity is not known, the estimated quantity, and any requirements to be fulfilled, including any technical *specifications*, conformity certification, plans, drawings, or instructional materials;

b. any *conditions for participation*, including any financial guarantees, information and documents that *potential supplier*s are required to submit;

c. any *minimum content and format requirements*;

d. *evaluation criteria* to be considered in assessing *submissions* and, if applicable to the evaluation, the relative importance of those criteria;

e. any dates for the delivery of *goods* or supply of services, taking into account the complexity of the *procurement*; and

f. any other terms or conditions relevant to the evaluation of *submissions*.

10.7 However, *relevant entities* are not obligated to release confidential information, information sensitive to essential security or information that may impede competition.

10.8 *Relevant entities* **must** ensure that *potential suppliers* and *tenderers* are dealt with fairly and in a non-discriminatory manner when providing information leading to, or following,

an *approach to market*. *Relevant entities* **must** promptly reply to any reasonable request from a *potential supplier* for relevant information about a *procurement*, and when responding to such enquiries **must** avoid a *potential supplier*, or group of *potential suppliers*, gaining an unfair advantage in a competitive *procurement* process.

Defence Procurement Policy Directives

D44. Defence *officials* **must** ensure that the *request documentation* for a *procurement* is consistent with the approved *procurement* plan and includes all of the information necessary to enable *potential suppliers* to properly prepare and lodge *submissions*.

D45. Defence *officials* **must** ensure that all *potential suppliers* are provided with the same information in the *request documentation*, including any amendments to the *request documentation*.

D46. For all competitive *procurement* processes, Defence *officials* **must** prepare a tender evaluation plan that is commensurate with the scale, scope and risk of the *procurement*.

D47. Defence *officials* **must** ensure that the tender evaluation plan for a *procurement* is approved by the relevant *official* no later than the opening of *submissions*.

Note: Defence officials should refer to Chapter 5 of the Complex Procurement Guide for more information about how to undertake a tender evaluation for a complex *procurement*.

CPR 10.9 – 10.13

Specifications

10.9 A *relevant entity* **must** not use *specifications* or prescribe any conformity assessment procedure in order to create an unnecessary obstacle to trade.

10.10 In prescribing *specifications* for *goods* and services, a *relevant entity* **must**, where appropriate:

a. set out the *specifications* in terms of performance and functional requirements; and

b. base technical *specifications* on international *standards*, when they exist and apply to the relevant *procurement*, except when the use of international standards would fail to meet the *relevant entity*'s requirements.

10.11 Where an Australian *standard* is applicable for *goods* or services being procured, tender responses **must** demonstrate the capability to meet the Australian *standard*, and *contracts* **must** contain evidence of the applicable standards (see paragraph 7.26).

10.12 A *specification* **must** not require or refer to a particular trademark or trade name, patent, copyright, design or type, specific origin, producer, or *supplier*, unless there is no other sufficiently precise or intelligible way of describing the requirement. In an exceptional circumstance when this type of *specification* is used, words such as 'or equivalent' **must** be included in the *specification*.

10.13 A *relevant entity* may conduct market research and other activities in developing *specifications* for a particular *procurement* and allow a *supplier* that has been engaged to provide those services to participate in *procurements* related to those services. *Relevant entities* **must** ensure that such a *supplier* will not have an unfair advantage over other *potential suppliers*.

Defence Procurement Policy Directive

D48. If essential requirements are specified in *request documentation*, Defence *officials* **must** exclude a *tenderer* from further consideration in the *procurement* process, if the *official* considers that the *tenderer* has not met those requirements (unless the *procurement* is exempt from Division 2 of the CPRs).

Notes: Defence *officials* should refer to Chapter 3 of the Complex Procurement Guide for more information about the use of standards, *specifications* and essential requirements in *request documentation*. For *procurements* that are exempt from Division 2 of the CPRs, Defence Procurement Policy Directive D48 should be followed as good practice.

CPR 10.14 – 10.19

Modification of evaluation criteria or specifications

10.14 When, during the course of a *procurement*, a *relevant entity* modifies the *evaluation criteria* or *specifications* set out in an *approach to market* or in *request documentation*, or amends or reissues an *approach to market* or *request documentation*, it **must** transmit all modifications or amended or reissued documents:

a. to all the *potential supplier*s that are participating at the time the information is amended, if known, and, in all other cases, in the same manner as the original information; and

b. in adequate time to allow *potential supplier*s to modify and re-lodge their *submissions*, if required.

Conditions for participation

10.15 *Relevant entities* may specify *conditions for participation* that *potential suppliers* **must** be able to demonstrate compliance with in order to participate in a *procurement* or, if applicable, class of *procurement*. *Conditions for participation* **must** be limited to those that will ensure that a *potential supplier* has the legal, commercial, technical and financial abilities to fulfil the requirements of the *procurement*.

10.16 *Conditions for participation* may require relevant prior experience when that experience is essential to meet the requirements of the *procurement* but **must** not specify, as a requirement, that *potential suppliers* have previous experience with the *relevant entity* or with the Australian Government or in a particular location.

10.17 In assessing whether a *tenderer* satisfies the *conditions for participation*, a *relevant entity* **must**:

a. evaluate financial, commercial, and technical abilities on the basis of the *tenderer*'s business activities, wherever they have occurred; and

b. base its determination solely on the *conditions for participation* that the *relevant entity* has specified in either the *approach to market* or the *request documentation*.

10.18 A *relevant entity* may exclude a *tenderer* on grounds such as bankruptcy, insolvency, false declarations, or significant deficiencies in performance of any substantive requirement or obligation under a prior *contract*.

10.19 *Officials* **must** make reasonable enquiries that the *procurement* is carried out considering relevant regulations and/or regulatory frameworks, including but not limited to *tenderers'* practices regarding:

a. labour regulations, including ethical employment practices;

b. workplace health and safety; and

c. environmental impacts.

Note: See the Notes following paragraph 4.10 of the CPRs as extracted in Chapter 4 of the DPPM.

Defence Procurement Policy Directive

D49. If *conditions for participation* are specified in *request documentation*, Defence *officials* **must** exclude a *tenderer* from further consideration in the *procurement* process, if the *official* considers that the *tenderer* has not met those conditions (unless the *procurement* is exempt from Division 2 of the CPRs).

Note: Defence *officials* should refer to Chapters 3 and 5 of the Complex Procurement Guide for more information about *conditions for participation*.

CPR 10.20 – 10.27

Minimum time limits

10.20 *Potential suppliers* **must** be required to lodge *submissions* in accordance with a common deadline.

10.21 *Relevant entities* **must** provide sufficient time for *potential suppliers* to prepare and lodge *submissions* in response to an *approach to market*. Time limits discussed in this section represent minimum time limits to lodge *submissions* and should not be treated as default time limits.

10.22 The time limit for *potential suppliers* to lodge a *submission* **must** be at least 25 *days* from the date and time that a *relevant entity* publishes an *approach to market* for an *open tender*.

10.23 The 25 *day* period referred to in paragraph 10.22 **must** be extended by five *days* for each of the following circumstances:

a. when a *relevant entity* does not make *request documentation* available electronically from the date that a *relevant entity* published an *approach to market*; and/or

b. when a *relevant entity* does not accept *submissions* electronically.

10.24 A *relevant entity* may establish a time limit that is less than 25 *days* but no less than 10 *days* under the following circumstances"

a. when the *relevant entity* has published details of the *procurement* in an *annual procurement plan* on *AusTender*, at least 40 *days* and not more than 12 months in advance, and those details include a description of the *procurement*, the timing of the *approach to market* and the procedure to obtain *request documentation*;

b. when the *relevant entity* procures *commercial goods and services* (unless the *relevant entity* does not accept the *submissions* electronically, in which case the minimum time limit **must** be no less than 13 *days*); or

c. when a genuine state of urgency renders the normal time limit impracticable.

10.25 In the case of *a multi-stage procurement* each *approach to market* **must** comply with the time limits stated in paragraph 10.22 – 10.24.

10.26 When a *relevant entity* intends to specify *conditions for participation* that require *potential suppliers* to undertake a separate registration procedure, the *relevant entity* **must** state the time limit for responding to the registration in the *approach to market*. Any such *conditions for participation* **must** be published in sufficient time to enable all *potential suppliers* to complete the registration procedures within the time limit for the *procurement*.

10.27 When a *relevant entity* extends the time limit for registration or *submission*, or when negotiations are terminated and *potential suppliers* are permitted to lodge new *submissions*, the new time limit **must** apply equitably.

Defence Procurement Policy Directive

D50. Defence *officials* **must** not grant an extension to a deadline for registration or lodgement of *submissions* once the closing date for registration or *submissions* has passed.

CPR 10.28 – 10.31

Late submissions

10.28 Late *submissions* **must** not be accepted unless the *submission* is late as a consequence of mishandling by the *relevant entity*. A *relevant entity* **must** not penalise any *potential supplier* whose *submission* is received after the specified deadline if the delay is due solely to mishandling by the *relevant entity*.

10.29 *Relevant entity* mishandling does not include mishandling by a courier or mail service provider engaged by a *potential supplier* to deliver a *submission*. It is the responsibility of the *potential supplier* to ensure that the *submission* is dispatched in sufficient time for it to be received by the *relevant entity* by the deadline.

10.30 Late *submissions* should be returned unopened to the *potential supplier* who submitted them, to:

a. ensure that they are not evaluated or compared with *submissions* which were submitted by the due time and date;

b. demonstrate to other *tenderers* that the process for receiving *submissions* is fair and impartial; and

c. eliminate scope for any suggestion that the *submission* was rejected for any reason other than because it was late.

10.31 It may be necessary to open a late *submission* if there is no return address or any indication of which *approach to market* the *submission* relates. When a *submission* has been opened under such circumstances the *potential supplier* should be advised that the *submission* was rejected due to lateness and advised of the reason it was opened.

Defence Procurement Policy Directives

D51. Defence *officials* **must** decide whether to accept a late *submission* before the relevant *submission* is opened.

D52. For *procurements* not covered by Division 2 of the CPRs, Defence *officials* may accept a late *submission* if this is consistent with probity in the circumstances of the case.

Notes: Before accepting a late *submission*, Defence *officials* should seek specialist contracting or legal advice. Defence *officials* should refer to Chapters 4 and 5 of the Complex Procurement Guide for more information about the probity risks relating to the acceptance of late tenders.

There are three ways through which Division 2 of the CPRs will not apply to a *procurement*: First, the *procurement* is below the relevant *procurement threshold* (see paragraph 9.7 of the CPRs); second, the *procurement* is exempt through the application of the general exemptions listed in Appendix A to the CPRs (see Appendix A to the DPPM); and third, the *procurement* is exempt through the application of a Defence specific exemption as a result of a measure made by the Secretary under paragraph 2.6 of the CPRs (see Defence Procurement Policy Directives D2 - D4).

CPR 10.32 – 10.34

Receipt and opening of submissions

10.32 Procedures to receive and open *submissions* **must** guarantee fairness and impartiality and **must** ensure that *submissions* are treated in confidence.

10.33 When a *relevant entity* provides *tenderers* with opportunities to correct unintentional errors of form between the opening of *submissions* and any decision, the *relevant entity* **must** provide the opportunity equitably to all *tenderers*.

10.34 Further consideration **must** be given only to *submissions* that meet *minimum content and format requirements*.

Defence Procurement Policy Directive

D53. If *minimum content and format requirements* are specified in *request documentation*, Defence *officials* **must** exclude a *tenderer* from further consideration in the *procurement* process, if the *official* considers that the *tenderer* has not met those requirements, unless the *official* considers that there has been an unintentional error of form (or unless the *procurement* is exempt from Division 2 of the CPRs).

Note: Defence *officials* should refer to Chapters 3 and 5 of the Complex Procurement Guide for more information about *minimum content and format requirements* and unintentional errors of form.

CPR 10.35 – 10.36

Awarding contracts

10.35 Unless a *relevant entity* determines that it is not in the public interest to award a *contract*, it **must** award a *contract* to the *tenderer* that the *relevant entity* has determined:

a. satisfies the *conditions for participation*;

b. is fully capable of undertaking the *contract*; and

c. will provide the best value for money, in accordance with the essential requirements and *evaluation criteria* specified in the *approach to market* and *request documentation*.

10.36 A *relevant entity* **must** not use options, cancel a *procurement*, or terminate or modify an awarded *contract*, so as to avoid the rules of Division 2 of these CPRs.

Notes: The CPRs state that public interest grounds generally arise in response to unforeseen events or new information that materially affects the objectives or reasons underlying the original *procurement* requirement as specified in the request document.

Defence *officials* should typically not make any public announcement regarding the selection of a preferred *tenderer* or *tenderers* until *contract* negotiations are completed, all necessary approvals have been obtained, the *contract* signed and unsuccessful *tenderers* have been notified. Defence's experience is that public announcements of preferred *tenderers* can significantly lengthen the time needed to finalise the negotiation of the *contract*.

Defence Procurement Policy Directives

Contract negotiations and management

D54. Prior to entering into *contract* negotiations, Defence *officials* **must** document their negotiation strategy commensurately with the scale, scope and risk of the *procurement* to which the *contract* relates.

D55. If *contract* negotiations result in a significant change to a *tenderer's* offer (including its technical solution, pricing, or commercial terms), Defence *officials* **must** consider whether the amended offer continues to represent best value for money.

D56. Defence *officials* **must** not change the scope of a *contract* to obtain additional or different *goods* or services that fall outside the terms of the original *contract* approval, unless that change is approved by the relevant delegate as a *limited tender* and is otherwise consistent with the CPRs and the Defence Procurement Policy Directives in the DPPM.

Notes: For more complex *procurements*, the negotiation strategy will typically be documented in a *contract* negotiation directive that is endorsed by the relevant delegate for the *procurement.*

To exercise an option in an existing *contract* to procure additional quantities of *goods*, services or optional extras, Defence *officials* should follow the mechanism set out in the relevant *contract*.

Defence *officials* should refer to Chapters 6 of the Complex Procurement Guide for more information about how to undertake *contract* negotiations.

Defence *officials* should refer to the Defence Contract Management Framework to support them achieving best practice contract management. The Framework brings together the underpinning principles, polices, tools, templates, guidance and competencies required to support more collaborative business relationships with industry and deliver more effective contract outcomes. Defence *officials* should refer to Chapter 7 of the Complex Procurement Guide and the Defence Contract Management Handbook for guidance about how to undertake *contract* management.

Appendices

CPR Appendix A – Appendix B

Appendix A: Exemptions from Division 2 of the CPRs

Procurements of the following kinds of *goods* and services are exempt from the rules of Division 2 of the CPRs, and from paragraphs 4.7, 4.8 and 7.26 of Division 1:

1. *procurement* (including leasing) of land, existing buildings or other immovable property or any associated rights (note: the *procurement* of *construction services* is not exempt);
2. *procurement* of *goods* and services from another *Commonwealth entity,* or a state, territory or local government entity;
3. *procurements* funded by international grants, loans or other assistance, when the provision of such assistance is subject to conditions inconsistent with this document;
4. *procurements* funded by grants and sponsorship payments from non-Commonwealth entities;
5. *procurement* for the direct purpose of providing foreign assistance;
6. *procurement* of *research and development* services, but not the *procurement* of inputs to *research and development*;
7. the engagement of an expert or neutral person, including engaging counsel or barristers, for any current or anticipated litigation or dispute;
8. *procurement* of *goods* and services (including construction) outside Australian territory, for consumption outside Australian territory;
9. acquisition of fiscal agency or depository services, liquidation and management services for regulated financial institutions, and sale and distribution services for government debt;
10. *procurement* by the Future Fund Management Agency of investment management, investment advisory, or master custody and safekeeping services for the purposes of managing and investing the assets of the Future Fund;
11. *procurement* of blood plasma products or plasma fractionation services;
12. *procurement* of government advertising services;
13. *procurement* of *goods* and services by, or on behalf of, the Defence Intelligence Organisation, the Australian Signals Directorate, or the Australian Geospatial Intelligence Organisation;
14. *contracts for labour hire*;
15. *procurement* of *goods* and services from a business that primarily exists to provide the services of persons with a disability; and
16. *procurement* of *goods* and services from an SME with at least 50 per cent Indigenous ownership.

Appendix B: Definitions

The following definitions apply for the purposes of the CPRs:

Accountable Authority – as defined in section 8 of the PGPA Act.

Annual procurement plan – a document published on *AusTender* through which *relevant entities* provide a short summary of their strategic *procurement* outlook for the coming year and information on significant *procurements* they plan to undertake.

Approach to market – any notice inviting *potential supplier*s to participate in a *procurement* which may include a request for tender, request for quote, request for expression of interest, request for information or request for proposal.

Note: the acronym 'ATM' is used on *AusTender* and other *procurement* documents to reference an *approach to market*.

AusTender – the central web-based facility for the publication of Australian Government *procurement* information, including business opportunities, *annual procurement plans* and *contracts* awarded.

Commercial goods and services – commercial *goods* and services are of a type that are offered for sale to, and routinely purchased by, non-government buyers for non-government purposes, including any modifications common in the commercial marketplace and any minor modifications not common in the commercial marketplace.

Commodity market – a recognised exchange dealing in generic, largely unprocessed, *goods* that can be processed and resold.

Commonwealth entity – as defined in section 8 of the PGPA Act.

Conditions for participation – minimum conditions that *potential supplier*s must demonstrate compliance with, in order to participate in a *procurement* process or for *submissions* to be considered. This may include a requirement to undertake an accreditation or validation procedure.

Construction services – *procurements* related to the construction of buildings and *procurements* of works as defined by the *Public Works Committee Act 1969*.

Contract – an arrangement, as defined by s23(2) of the PGPA Act, for the *procurement* of *goods* and/or services under which *relevant money* is payable or may become payable. Note: this includes *standing offers* and panels.

Contracts for labour hire – a *contract* under which a *relevant entity* engages an individual to provide labour, when the individual is engaged either directly or through a firm which primarily exists to provide the services of only that individual. This includes the appointment of an eminent individual to a special role by an *Accountable Authority*, or the appointment of a person or persons by an *Accountable Authority* to a governance committee (for example, an audit committee, ethics committee or steering committee), but does not include the engagement of consultants.

Corporate Commonwealth entities – as defined in section 8 of the PGPA Act.

Days – means calendar *days*.

End date (in a contract) – can be defined by reference to a specific date or by reference to a specific event.

Evaluation criteria – the criteria that are used to evaluate the compliance and/or relative ranking of *submissions*. *Evaluation criteria* must be clearly stated in the *request documentation*.

Goods – every type of right, interest or thing which is legally capable of being owned. This includes, but is not restricted to, physical *goods* and real property as well as intangibles such as intellectual property, *contract* options and goodwill.

GST – The *Goods* and Services Tax, as defined by the A New Tax Systems (*Goods* and Services Tax) Act 1999.

Limited tender – involves a *relevant entity* approaching one or more *potential supplier*s to make *submissions*, when the process does not meet the rules for *open tender*.

Minimum content and format requirements – criteria that a *tenderer*'s *submission* is required to meet, when responding to an *approach to market*, to be eligible for further consideration in a *procurement* process.

Multi-stage procurement – involves an initial *approach to market* followed by one or more subsequent *approaches to market* (for example, inviting expressions of interest followed by a request for tender).

Non-corporate Commonwealth entities – as defined in section 8 of PGPA Act.

Officials – as defined in section 8 of the PGPA Act.

Open approach to market – any notice inviting all *potential supplier*s to participate in a *procurement* which may include a request for tender, request for quote, request for expression of interest, request for information and request for proposal.

Open tender – involves publishing an *open approach to market* and inviting *submissions*. This includes *multi-stage procurements*, provided the first stage is an *open approach to market*.

Potential supplier – an entity or person who may respond to an *approach to market*.

Procurement – refer to paragraphs 2.7 to 2.9 of the CPRs

Procurement thresholds – refer to paragraph 9.7 of the CPRs

Public resources – as defined in section 8 of the PGPA Act.

Relevant money – as defined in section 8 of the PGPA Act.

Relevant entity – *non-corporate Commonwealth entities* and prescribed *corporate Commonwealth entities* (listed at Appendix B) that must comply with the CPRs when performing duties related to *procurement*.

Reporting thresholds – refer to paragraph 7.19 of the CPRs.

Request documentation – documentation provided to *potential supplier*s to enable them to understand and assess the requirements of the procuring *relevant entity* and to prepare appropriate and responsive *submissions*. This general term includes documentation for expressions of interest, *open tender* and *limited tender*.

Research and development – research is described as systematic enquiry or investigation into a subject in order to discover facts or principles. Research includes surveys, market research, scientific research and educational research. Development applies to the function of creating/producing new and improved products, devices, processes or services. Development also extends to design, proof of concept and the production of prototypes.

Small and Medium Enterprises (SMEs) – an Australian or New Zealand firm with fewer than 200 full-time equivalent employees.

Specification – a description of the features of the *goods* and services to be procured.

Standing offer – an arrangement setting out the terms and conditions, including a basis for pricing, under which a *supplier* agrees to supply specified *goods* and services to a *relevant entity* for a specified period.

Submission – any formally submitted response from a *potential supplier* to an *approach to market*. *Submissions* may include tenders, responses to expressions of interest or responses to request for quote.

Supplier – an entity or person who has entered into a *contract* with the Commonwealth.

Tenderer – an entity or person who has responded with a *submission* to an *approach to market*.

Defence Procurement Policy Directive

D57. Terms that are defined in Appendix B of the CPRs and which are used in the DPPM, have the same meaning in the DPPM as they do in the CPRs, unless the contrary intention appears.

Note: Terms that are defined in Appendix B and which are used in the DPPM are generally identified through the use of italics text.