

Capital Works Management Framework

Australia-Chile Free Trade Agreement and Queensland Government Building Projects

Queensland Government building capital works procurement is subject to the provisions of the *Australia-Chile Free Trade Agreement*. This policy advice note outlines those aspects of the procurement of government buildings (where such procurement exceeds the relevant thresholds) that are affected by this agreement.

Background

The *Australia-Chile Free Trade Agreement* (ACFTA) entered into force on 6 March 2009. ACFTA is a comprehensive agreement that covers goods, services, investment, standards and technical regulations, telecommunications, competition-related matters, electronic commerce, intellectual property rights, labour and the environment.

Government procurement is covered by Chapter 15 of the ACFTA, which largely addresses the administrative processes for conducting procurement. Chapter 15 does not affect the portfolios that provide health and welfare services, education services, government advertising and motor vehicles. The chapter does not provide any additional legal remedies beyond those that currently exist within Australia's legal framework.

Application of the ACFTA to government building projects

With respect to Queensland Government building projects, Chapter 15 of the ACFTA applies to any project (with the exception of those procured by Queensland Health or the Department



of Education and Training) for which the estimated value equals or exceeds the thresholds specified in Annex 15-A. A project that equals/exceeds the relevant threshold is referred to as a 'covered procurement'.

The thresholds for application of the ACFTA are adjusted at intervals of two years, in accordance with Section 8 of Annex 15-A. The current thresholds for Australian states and territories¹ are as follows:

- AUD \$675,000 for the procurement of goods and services
- AUD \$9,514,000 for the procurement of construction services.

Estimating the value of a government building project

When estimating the value of a building project to ascertain whether it is covered by the ACFTA (i.e. whether it is a 'covered procurement'), departments must take into account 'all forms of remuneration, including any premiums, fees, commissions, interest, other revenue streams that may be provided for under the contract and, where the procurement provides for the possibility of option clauses, the total maximum value of the procurement, inclusive of optional purchases' (see Article 15.5.1).

The procurement of a single project cannot be divided into smaller projects to avoid the relevant threshold (see Article 15.3.2). Where the procurement of a building project is to be conducted in multiple parts (i.e. with contracts to be awarded at the same time, or over a given period, to one or more suppliers), the 'estimated project value' for purposes of the ACFTA is the total maximum value of the procurement over its entire duration. Where the total maximum value of a project over its entire duration is not known, the project should be considered a 'covered procurement', unless otherwise excluded under the ACFTA (see Article 15.5.1b).

Conducting a 'covered procurement'

Procuring entities must identify 'covered procurements': that is, any procurements made by contractual means where the individual procurement equals or exceeds specified thresholds, and no exceptions, exemptions or exclusions apply.

Once a building project has been identified as meeting/exceeding the relevant ACFTA threshold, tenders for that project must be evaluated without discrimination against Chile contractors/suppliers. That is, contractors/suppliers from Chile must be treated no less favourably than their domestic counterparts. In this regard, Article 15.6 of the ACFTA specifically bans the use of 'offsets', which are broadly defined as any condition built into the procurement that requires the use of domestic content and/or suppliers².

¹ Different thresholds apply to the Commonwealth Government.

² The Queensland Government's *Local Industry Policy* (LIP) does not contradict the ACFTA as it does not require the use of local content. Rather, the LIP seeks to ensure that Queensland and Australian suppliers, contractors and manufacturers are given full, fair and reasonable opportunity to tender for projects.



Permitted procurement models: Open, select and limited tendering

Article 15.14 of the ACFTA permits the use of three procurement methods: open tendering; select tendering (referred to as ‘multi-use lists’); and limited tendering (refer to Article 15.15).

1. A procuring entity shall only use open or selective tendering procedures consistent with the provisions of Chapter 15 of the ACFTA, except as provided for in Article 15.15.
2. A procuring entity may use selective tendering procedures in accordance with Article 15.4 and the procurement laws, regulations, procedures and policies of its Party.
3. To ensure effective competition under selective tendering procedures, a procuring entity shall invite tenders from the largest number of domestic suppliers and suppliers of the other Party that is consistent with the efficient operation of the procurement system. It shall select the suppliers to participate in the procedure in a fair and non-discriminatory manner.

These methods are already in use for capital works procurement in Queensland under the *Capital Works Management Framework* (CWMF). Detailed information on these models as they pertain to the selection of building industry contractors and consultants can be found in the CWMF guidelines, *Contractor PQC Tendering and Selection Process* and *Consultant PQC Invitation and Selection Process*.

Conditions for participation in a covered procurement: The Prequalification System

Under Article 15.13 a Party shall limit any conditions for participation in a covered procurement to those that ensure the supplier’s capability to fulfil the requirements of the procurement. For example, a Party may not impose the condition that, in order for a supplier to participate in a procurement, the supplier must have prior experience to working in Australia, but may impose the requirement of previous relevant experience.

To be eligible to tender for a Queensland Government building project, consultants/contractors are required to:

- be appropriately registered on the whole-of-Government Prequalification (PQC) System
- have a PQC level that matches or exceeds the service risk rating associated with the project
- satisfy financial requirements
- meet project-specific criteria.

The PQC System identifies (through self-assessment against prescribed criteria) applicants’ compliance with contractual and legislative requirements, their capabilities, commitment to continuous improvement, and experience. Successful applicants for prequalification are assigned one of four PQC levels, from effective work practices (PQC level 1) to leading edge practice in a multi-sectoral global context (PQC level 4). A formal financial capacity assessment of the preferred tenderer is undertaken by the Queensland Building Services Authority (BSA) at the time of tender. As such, this system of prequalification of building industry consultants/contractors complies with the provisions of the ACFTA.



Provisions addressing treatment of procurement information

The ACFTA sets out minimum standards for the publication of information regarding procurement activities and for the administration of procurement more generally. This section highlights specific provisions of the agreement as they relate to government building projects in Queensland.

Publication of procurement information

In accordance with Article 15.7 the laws, regulations, procedures and policy guidelines regarding Queensland Government capital works procurement are available to the public in hard copy and electronic formats (see the [references](#) section of this document for some of the main policy guidance and procedures).

Article 15.9 requires the publication of a 'notice of intended procurement' for each covered procurement and, at the earliest opportunity in each fiscal year, an annual forward procurement schedule. This requirement is reflected in the *State Procurement Policy*, whereby departments are required to publish all open tender opportunities and annual procurement schedules on the Queensland Government Chief Procurement Office website (www.qgcpcpo.qld.gov.au).

The CWMF also reinforces departments' obligations with respect to the ACFTA and publication of procurement information (see CWMF section 4.2 of the policy document). Each year, the Department of Housing and Public Works gathers and disseminates information on the Government's annual building program in the form of the *Queensland Government Building Projects Industry Guide*.

Tender duration/notices

Time limits for the tender process are to reflect the nature and complexity of the covered procurement. The ACFTA sets a minimum tender duration of 30 days for tender notices published in a hard copy medium and 25 days for notices published in an electronic medium, although shorter time periods to a minimum of 10 days may apply in certain cases (see Article 15.10 for further detail).

Tender documentation and specifications

Articles 15.11 and 15.12 of the ACFTA sets down the requirements for tender documentation and technical specifications for government procurement. Tender documents must contain all of the typical information currently included in tenders under the CWMF, namely:

- the nature and scope of the work, including technical specifications, conformity certification, plans and drawings
- all evaluation criteria for the tender
- for open tenders, the date, time and place for the opening of tenders.

The procuring entity must implement and manage a system to deal with reasonable requests for information regarding the tender process.



Technical specifications must not include any unnecessary obstacle to trading. As far as possible, technical specifications must be:

- drafted in terms of performance/functional requirements (rather than design/descriptive characteristics)
- based on international standards (where these exist), except where to do so would impose a greater burden than the application of a recognised national standard or where the international standard fails to comply with the procurer's program requirements.

Technical specifications may not refer to a particular trademark or trade name, specific origin, producer or supplier unless there is no other sufficiently precise means of communicating the procurer's requirements and words such as 'or equivalent' are included in the tender documentation.

Notification of the award of contracts

The results of a tender process for a covered procurement must be published, in an officially designated (hard copy or electronic) publication, no later than 60 days after the award of the tender (see Article 15.16); this provision is reflected in section 4.2 of the CWMF policy document. In Queensland's case, the officially designated publication of tender awards is the Queensland Government Chief Procurement Office website (www.qgcpo.qld.gov.au).

Conclusion

The policies and procedures that govern building capital works procurement in Queensland, (including probity and transparency requirements) meet the standards set out in the ACFTA. As such, by following the requirements of the CWMF and the *State Procurement Policy* departments are meeting their obligations under the ACFTA. The Queensland Government Chief Procurement Office has released the better purchasing guide, *International Trade Obligations and Government Procurement*, to assist departments in ensuring they meet their obligations under the ACFTA and Australia's other trade agreements.

References

Australia-Chile Free Trade Agreement (Department of Foreign Affairs and Trade) www.dfat.gov.au/trade/ftas.html

International Trade Obligations and Government Procurement (Better Purchasing Guide, Department of Housing and Public Works) www.qgcpo.qld.gov.au

Capital Works Management Framework: Policy for Managing Risks in the Planning and Delivery of Queensland Government Building Projects (Department of Housing and Public Works) www.hpw.qld.gov.au

Consultant PQC Invitation and Selection Process (CWMF guideline, Department of Housing and Public Works) www.hpw.qld.gov.au

Contractor PQC Tendering and Selection Process (CWMF guideline, Department of Housing and Public Works) www.hpw.qld.gov.au



Local Industry Policy (Department of Employment, Economic Development and Innovation)
www.industry.qld.gov.au

Queensland Government Building Projects: Industry Guide (Department of Housing and Public Works) www.hpw.qld.gov.au

State Procurement Policy (Department of Housing and Public Works) www.qgcpo.qld.gov.au

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