

Capital Works Management Framework

Australia-United States Free Trade Agreement and Queensland Government Building Projects

Queensland Government building capital works procurement is subject to the provisions of the *Australia-United States 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-United States Free Trade Agreement* (AUSFTA) entered into force on 1 January 2005. AUSFTA 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 AUSFTA, which largely addresses the administrative processes for conducting procurement. Chapter 15 does not affect the portfolios of Health or Education, Training and the Arts. The chapter does not provide any additional legal remedies beyond those that currently exist within Australia's legal framework.

Application of the AUSFTA to government building projects

With respect to Queensland Government building projects, Chapter 15 of the AUSFTA 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 AUSFTA 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 AUSFTA (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 15.1.6).

The procurement of a single project cannot be divided into smaller projects to avoid the relevant threshold. 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 AUSFTA 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 AUSFTA.

Conducting a 'covered procurement'

Once a building project has been identified as meeting/exceeding the relevant AUSFTA threshold, tenders for that project must be evaluated without discrimination against United States contractors/suppliers. That is, contractors/suppliers from the United States must be treated no less favourably than their domestic counterparts. In this regard, Article 15.2.5 of the AUSFTA specifically bans the use of 'offsets', which are broadly defined as any condition built into the procurement that requires the use of domestic content or suppliers².

¹ Different thresholds apply to the Commonwealth Government.

² The Queensland Government's *Local Industry Policy* (LIP) does not contradict the AUSFTA 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 15.2.3 of the AUSFTA permits the use of three procurement methods: open tendering; select tendering (referred to as ‘multi-use lists’); and limited tendering. 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 PQC System

Under Article 15.7, any conditions for participation in a covered procurement must be limited to those that ensure that a contractor/supplier has the legal, commercial, technical and financial abilities to fulfil the requirements of the procurement.

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 (QBSA) at the time of tender. As such, this system of prequalification of building industry consultants/contractors complies with the provisions of the AUSFTA.

Provisions addressing treatment of procurement information

The AUSFTA 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 15.3.1, 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 15.4 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 AUSFTA and publication of procurement information (see 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 AUSFTA 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 15.5 for further detail).

Tender documentation and specifications

Article 15.6 of the AUSFTA sets down 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 15.9.9); this provision is reflected in section 4.2 of the CWMF policy document. In Queensland's case, the officially designated publication is the Queensland Government Chief Procurement Office website (www.qgcpcpo.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 AUSFTA. As such, by following the requirements of the CWMF and the *State Procurement Policy* departments are meeting their obligations under the AUSFTA. 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 AUSFTA and Australia's other trade agreements.

References

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

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

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

For further information

Building Policy Unit

Building Industry and Services
Building Services and Works
Department of Housing and Public Works
GPO Box 2457
Brisbane QLD 4001

Telephone: 07 3224 5482
Fax: 07 3224 5498
Email: bpu@publicworks.qld.gov.au
Web: www.hpw.qld.gov.au

January 2010
(First published February 2009)

© The State of Queensland
(Department of Housing and Public Works)

