



New South Wales

# **Public Sector Employment and Management Amendment (Procurement of Goods and Services) Act 2012 No 43**

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New South Wales

# **Public Sector Employment and Management Amendment (Procurement of Goods and Services) Act 2012 No 43**

Act No 43, 2012

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An Act to amend the *Public Sector Employment and Management Act 2002* with respect to the procurement of goods and services for the NSW Government; and for other purposes. [Assented to 22 June 2012]

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**The Legislature of New South Wales enacts:**

**1    Name of Act**

This Act is the *Public Sector Employment and Management Amendment (Procurement of Goods and Services) Act 2012*.

**2    Commencement**

This Act commences on a day or days to be appointed by proclamation.

## **Schedule 1      Amendment of Public Sector Employment and Management Act 2002 No 43**

**[1] Chapter 7, heading**

Omit the heading. Insert instead:

### **Chapter 7 Procurement of goods and services**

**[2] Parts 7.1–7.4**

Omit Parts 7.1 and 7.2. Insert instead:

#### **Part 7.1 Preliminary**

**135 Definitions**

In this Chapter:

**Board** means the New South Wales Procurement Board established under section 137.

**Board direction** means a direction issued by the Board under section 148.

**goods and services** means goods and services of any kind.

**government agency** means any of the following:

- (a) a public sector agency (within the meaning of this Act),
- (b) a NSW Government agency,
- (c) any other public authority that is constituted by or under an Act or that exercises public functions (other than a State owned corporation),
- (d) any State owned corporation prescribed by the regulations.

**government agency employee** means a person employed in or by a government agency.

**government agency head** means the person who is the chief executive officer, or who exercises the functions of chief executive officer, of a government agency.

**procurement** of goods and services means the process of acquiring goods and services by:

- (a) identifying the need to purchase goods and services, and
- (b) selecting suppliers for goods and services, and

- (c) contracting and placing orders for goods and services, and includes the disposal of goods that are unserviceable or no longer required.

**136 Application of Chapter**

- (1) This Chapter applies to the procurement of goods and services by or for a government agency, which includes:
  - (a) the procurement of goods and services required by a government agency to exercise its statutory functions, and
  - (b) the procurement of goods and services by a government agency pursuant to the agency's specific statutory powers of procurement.
- (2) This Chapter does not apply to the procurement of goods and services by or for:
  - (a) a local council or other local authority, or
  - (b) the Parliament of New South Wales.

**Part 7.2 NSW Procurement Board**

**137 Establishment of NSW Procurement Board**

- (1) There is established by this section the New South Wales Procurement Board.
- (2) The Board is a NSW Government agency.
- (3) The Board has the functions conferred or imposed on it by or under this or any other Act.

**138 Membership of Board**

- (1) The Board is to consist of the following members:
  - (a) the Director-General of the Department of Finance and Services,
  - (b) the Division Heads of at least 6 of the Divisions of the Government Service specified in Division 1 of Part 1 of Schedule 1, being the Divisions determined by the Minister from time to time.
- (2) The Director-General of the Department of Finance and Services is to be the Chairperson of the Board.
- (3) Schedule 2C contains ancillary provisions relating to the members and procedure of the Board.

**139 Ministerial control**

- (1) The Board is subject to the direction and control of the Minister in the exercise of its functions.
- (2) Without limiting subsection (1), the Minister may direct the Board to comply with a specified Government-wide procurement policy.
- (3) A copy of any direction given by the Minister to the Board under this section is to be included in its annual report for the year in which the direction was given.

**140 Subcommittees of Board**

- (1) The Board may establish subcommittees to assist the Board in connection with the exercise of any of its functions.
- (2) The subcommittees may have members who are not members of the Board.
- (3) The procedure for calling meetings of a subcommittee and for the conduct of those meetings is to be as determined by the Board or (subject to any determination of the Board) by the subcommittee.

**141 Advisory groups**

The Board may establish advisory groups (comprising members from the public and private sectors) to advise the Board on such matters relating to the procurement of goods and services as are referred by the Board to those advisory groups.

**142 Delegation of Board's functions**

- (1) The Board may delegate to an authorised person any of its functions, other than this power of delegation.
- (2) A delegate may subdelegate to an authorised person any function delegated by the Board if the delegate is authorised in writing to do so by the Board.
- (3) In this section, *authorised person* means any of the following:
  - (a) a member of the Board or a subcommittee of the Board,
  - (b) a member of staff of a Division of the Government Service,
  - (c) a statutory body,
  - (d) a statutory officer,
  - (e) any other person or body, or person or body of a class, prescribed by the regulations.

**143 Annual report of Board**

- (1) The Board must, on or before 31 October in each year, prepare and present to the Minister a report of its work and activities for the year ending on the preceding 30 June.
- (2) The Minister must lay the report or cause it to be laid before both Houses of Parliament as soon as practicable after receiving the report.
- (3) The report may be included in any annual report of the Department for which the Minister is responsible.

**Part 7.3 Objectives and functions of Board**

**144 Objectives of Board**

The objectives of the Board are as follows:

- (a) to develop and implement a Government-wide strategic approach to procurement,
- (b) to ensure best value for money in the procurement of goods and services by and for government agencies,
- (c) to improve competition and facilitate access to Government procurement business by the private sector, especially by small and medium enterprises and regional enterprises,
- (d) to reduce administrative costs for government agencies associated with procurement,
- (e) to simplify procurement processes while ensuring probity and fairness.

**145 Functions of Board**

- (1) The Board has the following functions:
  - (a) to oversee the procurement of goods and services by and for government agencies,
  - (b) to develop and implement procurement policies,
  - (c) to issue directions to government agencies under section 148,
  - (d) to monitor compliance by government agencies with the requirements of this Chapter (including Board directions),
  - (e) to investigate and deal with complaints about the procurement activities of government agencies,

- (f) to develop appropriate procurement and business intelligence systems for use by government agencies,
  - (g) to collect, analyse and publish data and statistics in relation to the procurement of goods and services by and for government agencies,
  - (h) such other functions as are conferred or imposed on the Board by or under this or any other Act.
- (2) The Board has power to do all things necessary or convenient to be done for, or in connection with, the exercise of its functions.
  - (3) The Board is to exercise its functions in accordance with any applicable Government-wide procurement policies.

**146 Competitive neutrality in tendering**

- (1) The Board has the function of ensuring compliance by public authorities of the State with competitive neutrality principles referred to in the Competition Principles Agreement made on 11 April 1995 by the Commonwealth, the Territories and the States, as in force for the time being.
- (2) The regulations may make further provision for and with respect to the Board's function under this section.
- (3) A person who contravenes a provision of the regulations made under this section that is specified for the purposes of this section is guilty of an offence.

Maximum penalty: 100 penalty units or imprisonment for 6 months, or both.

## **Part 7.4 Procurement arrangements**

**147 Procurement of goods and services by government agencies**

- (1) The Board may establish a scheme under which a government agency accredited by the Board may procure goods and services for that agency or for other government agencies, subject to any terms and conditions of its accreditation.
- (2) The Board may also authorise a government agency to carry out specified procurement of goods and services without Board accreditation.

**148 Board may issue directions to government agencies**

- (1) The Board may issue directions to government agencies regarding the procurement of goods and services by and for government agencies.



- (2) A direction may be issued to government agencies generally or to a particular government agency.
- (3) Without limiting the generality of subsection (1), the Board may issue directions regarding:
  - (a) the methods to be used for procuring goods and services, and
  - (b) contracts for the procurement of specified goods and services, and
  - (c) the kinds of contracts for the procurement of goods and services for which tenders are required, and
  - (d) the limits on duration of contracts, and
  - (e) any matters relating to procurement procedures arising from a complaint about the procurement activities of a government agency.

**149 Obligations of government agencies**

- (1) A government agency is to exercise its functions in relation to the procurement of goods and services in accordance with:
  - (a) any policies and directions of the Board that apply to the agency, and
  - (b) the terms of its accreditation (if any) by the Board, and
  - (c) the principles of probity and fairness.
- (2) A government agency is also to ensure it obtains value for money in the exercise of its functions in relation to the procurement of goods and services.
- (3) A government agency is, at the request of the Board, to provide information to the Board about its activities in relation to the procurement of goods and services.

**150 Delegation of functions by government agencies**

A government agency or government agency head may delegate to a member of staff of the agency any function conferred or imposed on the agency or agency head pursuant to:

- (a) the terms and conditions of the agency's accreditation by the Board, or
- (b) any Board direction.

**151 Regulations**

- (1) The regulations may make provision for and with respect to the procurement of goods and services by and for government agencies, including but not limited to exemptions from any of the requirements of this Chapter.
- (2) The regulations may authorise the Board to enter into arrangements with public bodies other than government agencies in relation to the procurement of goods and services by and for those bodies.

**[3] Part 7.3 Competitive neutrality in tendering**

Omit the Part.

Transfer the Part to the *Public Sector Employment and Management Regulation 2009* as Schedule 1 to that Regulation, renumber sections 144–157 as clauses 1–14 and Divisions 1–3 as Parts 1–3, respectively, and amend any cross-references and references to Parts, Divisions, sections and subsections accordingly.

**[4] Schedule 2C**

Insert after Schedule 2B:

**Schedule 2C Members and procedure of NSW Procurement Board**

(Section 138)

**1 Deputy Chairperson**

- (1) The Minister may appoint a member of the Board to act as Deputy Chairperson during the illness or absence of the Chairperson, and may revoke any such appointment.
- (2) In the absence of the Chairperson, the Deputy Chairperson may, if available, act in the place of the Chairperson.
- (3) While acting in the place of the Chairperson, the Deputy Chairperson has all the functions of the Chairperson.

**2 Deputies of members**

- (1) The Minister may, from time to time, appoint a person, or the holder of a specified office, to be the deputy of a member of the Board, and may revoke any such appointment.
- (2) In the absence of a member, the member's deputy may, if available, act in the place of the member.

- (3) While acting in the place of a member, a person has all the functions of the member and is taken to be a member.

**3 Disclosure of pecuniary interests**

- (1) If:
- (a) a member has a direct or indirect pecuniary interest in a matter being considered or about to be considered at a meeting of the Board, and
  - (b) the interest appears to raise a conflict with the proper performance of the member's duties in relation to the consideration of the matter,
- the member must, as soon as possible after the relevant facts have come to the member's knowledge, disclose the nature of the interest at a meeting of the Board.
- (2) A disclosure by a member at a meeting of the Board that the member:
- (a) is a member, or is in the employment, of a specified company or other body, or
  - (b) is a partner, or is in the employment, of a specified person, or
  - (c) has some other specified interest relating to a specified company or other body or to a specified person,
- is a sufficient disclosure of the nature of the interest in any matter relating to that company or other body or to that person which may arise after the date of the disclosure and which is required to be disclosed under subclause (1).
- (3) Particulars of any disclosure made under this clause must be recorded by the Board and the records must be available at all reasonable hours for inspection by any person on payment of the fee determined by the Board.
- (4) After a member has disclosed the nature of an interest in any matter, the member must not, unless the Minister or the Board otherwise determines:
- (a) be present during any deliberation of the Board with respect to the matter, or
  - (b) take part in any decision of the Board with respect to the matter.

- (5) For the purposes of the making of a determination by the Board under subclause (4), a member who has a direct or indirect pecuniary interest in a matter to which the disclosure relates must not:
  - (a) be present during any deliberation of the Board for the purpose of making the determination, or
  - (b) take part in the making by the Board of the determination.
- (6) A contravention of this clause does not invalidate any decision of the Board.
- (7) For the purposes of this clause, a member is taken to have a pecuniary interest in a matter if the government agency to which the member belongs has such an interest.
- (8) This clause applies to a member of a subcommittee of the Board and the subcommittee in the same way as it applies to a member of the Board and the Board.

#### **4 Personal liability**

A matter or thing done or omitted to be done by the Board, a member of the Board, or a person acting under the direction of the Board does not, if the matter or thing was done or omitted to be done in good faith for the purpose of executing this or any other Act, subject a member or a person so acting personally to any action, liability, claim or demand.

#### **5 General procedure**

The procedure for the calling of meetings of the Board and for the conduct of business at those meetings is, subject to this Schedule, as determined by the Board.

#### **6 Quorum**

The quorum for a meeting of the Board is a majority of its members for the time being.

#### **7 Presiding member**

- (1) The Chairperson (or, in the absence of the Chairperson, the Deputy Chairperson, or in the absence of both the Chairperson and the Deputy Chairperson, a person elected by the members of the Board who are present at a meeting of the Board) is to preside at a meeting of the Board.
- (2) The presiding member has a deliberative vote and, in the event of an equality of votes, has a second or casting vote.

**8 Voting**

A decision supported by a majority of the votes cast at a meeting of the Board at which a quorum is present is the decision of the Board.

**9 Transaction of business outside meetings or by telephone**

- (1) The Board may, if it thinks fit, transact any of its business by the circulation of papers among all the members of the Board for the time being, and a resolution in writing approved in writing by a majority of those members is taken to be a decision of the Board.
- (2) The Board may, if it thinks fit, transact any of its business at a meeting at which members (or some members) participate by telephone, closed-circuit television or other means, but only if any member who speaks on a matter before the meeting can be heard by the other members.
- (3) For the purposes of:
  - (a) the approval of a resolution under subclause (1), or
  - (b) a meeting held in accordance with subclause (2),the Chairperson and each member have the same voting rights as they have at an ordinary meeting of the Board.
- (4) A resolution approved under subclause (1) is, subject to the regulations, to be recorded in the minutes of the meetings of the Board.
- (5) Papers may be circulated among the members for the purposes of subclause (1) by facsimile or other transmission of the information in the papers concerned.

**10 First meeting**

The Minister may call the first meeting of the Board in such manner as the Minister thinks fit.

**11 Authentication of documents**

Any document requiring authentication by the Board may be sufficiently authenticated if it is signed by the Chairperson or by any government agency employee authorised to do so by the Chairperson.

**[5] Schedule 4 Savings, transitional and other provisions**

Insert at the end of clause 1 (1):

*Public Sector Employment and Management Amendment  
(Procurement of Goods and Services) Act 2012*

**[6] Schedule 4**

Insert at the end of the Schedule with appropriate Part and clause numbering:

**Part Provisions consequent on enactment of  
Public Sector Employment and  
Management Amendment (Procurement of  
Goods and Services) Act 2012**

**Abolition of State Contracts Control Board**

- (1) The State Contracts Control Board is abolished.
- (2) Each person holding office as a member of the State Contracts Control Board immediately before the commencement of this clause:
  - (a) ceases to hold office as such a member, and
  - (b) is not entitled to any remuneration or compensation because of the loss of that office.
- (3) The assets, rights and liabilities of the State Contracts Control Board are the assets, rights and liabilities of the Crown.
- (4) The Director-General of the Department of Finance and Services may act for the Crown in connection with any contract or agreement entered into by the State Contracts Control Board and in force immediately before the commencement of this clause.
- (5) A reference in any document to the State Contracts Control Board is to be read as a reference to the NSW Procurement Board, except as provided by subclause (6).
- (6) A reference in or in relation to a contract or agreement entered into by the State Contracts Control Board is to be read as a reference to the Director-General of the Department of Finance and Services, subject to the regulations.
- (7) In this clause, *document* means an Act (other than this Act) or statutory instrument, or any other instrument, or any contract or agreement.

## **Schedule 2 Amendment of Public Sector Employment and Management Regulation 2009**

### **[1] Part 4A**

Insert after Part 4:

### **Part 4A Procurement of goods and services**

#### **21A Procurement for emergencies**

- (1) A government agency head or a government agency employee nominated for the purposes of this clause by the agency head may, in any case of emergency, authorise the procurement of goods and services to a value sufficient to meet that particular emergency.
- (2) Every authorisation under this clause must be reported to the Board as soon as possible.
- (3) Section 149 of the Act does not apply in relation to the procurement of goods and services under this clause.
- (4) This clause does not authorise the procurement of goods and services in excess of those necessary to meet the immediate needs of any emergency.

#### **21B Supply of goods and services by approved disability employment organisations**

- (1) A government agency may procure goods and services that are supplied by a person or body approved as a disability employment organisation under this clause.
- (2) Section 149 of the Act does not apply in relation to the procurement of goods and services under this clause. However, procurement under this clause is subject to any Board direction issued in relation to such procurement.
- (3) The Minister for Disability Services may, by order, approve a person or body as a disability employment organisation if satisfied that the person or body conducts a business a principal purpose of which is to provide employment to persons with a disability.
- (4) An approval may apply to a specified person or body or to all members of a specified class of persons or bodies.

- (5) An approval may apply to a branch or unit within a larger body. For that purpose, a reference in this clause to a body includes a reference to a branch or unit within a larger body.
- (6) An approval may be limited to specified goods and services supplied by a person or body. In that case, the person or body is approved as a disability employment organisation only in relation to those specified goods and services.
- (7) A register of disability employment organisations is to be kept for the purposes of this clause and is to include particulars of approvals given under this clause.
- (8) The register is to be kept by a person or body appointed for the time being by the Minister for Disability Services to maintain the register.
- (9) Information contained on the register is to be made available to the public in such manner as the Minister for Disability Services directs.
- (10) In this clause, *disability*, in relation to a person, has the same meaning as it has in the *Disability Discrimination Act 1992* of the Commonwealth.

**21C Procurement arrangements for other public bodies**

- (1) The Board may enter into agreements with public bodies that are not government agencies relating to the procurement of goods and services by and for those bodies.
- (2) The Board may do so by allowing those bodies to have access to the procurement arrangements for government agencies or by making separate arrangements.
- (3) The Board may establish criteria for the exercise of the Board's functions under this clause, including but not limited to the circumstances in which, and the public bodies to which, access to the arrangements for government agencies will not be given.
- (4) The Director-General of the Department of Finance and Services may charge a fee in connection with any agreement entered into between a public body and the Board under this clause.
- (5) In this clause:  
*community non-profit organisation* does not include an industry association or similar body the activities of which are intended to promote the interests of a particular industry or sector of an industry.



**public body** includes the following:

- (a) a private hospital,
- (b) a local council or other local authority,
- (c) a charity or other community non-profit organisation,
- (d) a private school or college,
- (e) a university,
- (f) a public authority of the Commonwealth, any other State or Territory,
- (g) a public authority of any other jurisdiction (but only if it carries on activities in this State),
- (h) a contractor to a public authority (but only in respect of things done as such a contractor).

**21D Savings**

- (1) Any act, matter or thing that, immediately before the repeal of the *Public Sector Employment and Management (Goods and Services) Regulation 2010* (the **repealed Regulation**) by the *Public Sector Employment and Management Amendment (Procurement of Goods and Services) Act 2012*, had effect under the repealed Regulation continues to have effect under this Part.
- (2) Any policies and procedures determined under clause 6 of the repealed Regulation continue to apply, despite the repeal of that clause, to infrastructure projects to which the *Nation Building and Jobs Plan (State Infrastructure Delivery) Act 2009* applies.

**[2] Schedule 1, clause 2 (as transferred and renumbered by Schedule 1 [3])**

Omit the definition of **Board**.

**[3] Schedule 1, clause 11 (as transferred and renumbered by Schedule 1 [3])**

Omit the penalty to clause 11 (5).

**[4] Schedule 1, clause 11 (as transferred and renumbered by Schedule 1 [3])**

Insert after clause 11 (5):

- (5A) Subclause (4) is specified for the purposes of section 146 (3) of the Act (which makes a contravention of subclause (4) an offence).

**[5] Schedule 1, clause 12 (as transferred and renumbered by Schedule 1 [3])**

Insert after clause 12 (5):

- (5A) Subclauses (1), (3), (4) and (5) are specified for the purposes of section 146 (3) of the Act (which makes a contravention of any of those subclauses an offence).

**[6] Schedule 1, clause 12 (as transferred and renumbered by Schedule 1 [3])**

Omit the penalty to the clause.

## **Schedule 3 Consequential amendments to other legislation**

### **3.1 Government Information (Public Access) Act 2009 No 52**

#### **Section 36 Disputes**

Omit section 36 (1). Insert instead:

- (1) If a person other than an officer of the agency (including, for example, a party to a government contract) disagrees with the way in which an agency has interpreted its obligations under this Division, the agency is to obtain:
  - (a) the opinion of the Chairperson of the NSW Procurement Board in relation to the matter, or
  - (b) if the principal officer of the agency is the Chairperson of the Board—the opinion of the Minister in relation to the matter.

### **3.2 Government Information (Public Access) Regulation 2009**

#### **Schedule 3 Agencies declared to be part of other agencies**

Omit “State Contracts Control Board”.

Insert instead “NSW Procurement Board”.

### **3.3 Independent Pricing and Regulatory Tribunal Act 1992 No 39**

#### **Section 24G Purpose and application of Part**

Omit “State Contracts Control Board” from section 24G (1).

Insert instead “NSW Procurement Board”.

### **3.4 Local Government Act 1993 No 30**

#### **Section 55 What are the requirements for tendering?**

Omit “State Contracts Control Board” from section 55 (3) (g).

Insert instead “NSW Procurement Board”.

Public Sector Employment and Management Amendment (Procurement of Goods and Services) Act 2012 No 43

Consequential amendments to other legislation

Schedule 3

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### **3.5 Public Sector Employment and Management (Goods and Services) Regulation 2010**

The *Public Sector Employment and Management (Goods and Services) Regulation 2010* is repealed.

[Second reading speech made in—

Legislative Council on 23 May 2012

Legislative Assembly on 20 June 2012]