



New South Wales

Public Works and Procurement Regulation 2019

under the

Public Works and Procurement Act 1912

Her Excellency the Governor, with the advice of the Executive Council, has made the following Regulation under the *Public Works and Procurement Act 1912*.

DAMIEN TUDEHOPE, MLC
Minister for Finance and Small Business

Explanatory note

The object of this Regulation is to repeal and remake the provisions of the *Public Works and Procurement Regulation 2014*, which would otherwise be repealed on 1 September 2019 by section 10 (2) of the *Subordinate Legislation Act 1989*. This Regulation provides for the following matters:

- (a) the procurement of goods and services by and for government agencies, including procurement in emergencies, and the supply of goods and services by approved disability employment organisations,
- (b) agreements between the New South Wales Procurement Board (the **Board**) and public bodies that are not government agencies relating to procurement by or for those bodies,
- (c) the investigation by the Board of a complaint that a public trading agency has failed to comply with competitive neutrality principles in relation to tender bids made by the agency in response to an invitation for tenders,
- (d) the role of the Minister responsible for the public trading agency concerned in responding to a report of the Board with respect to the complaint,
- (e) savings and formal matters.

This Regulation is made under the *Public Works and Procurement Act 1912*, including sections 173 and 178 (the general regulation-making power).

This Regulation comprises or relates to matters set out in Schedule 3 to the *Subordinate Legislation Act 1989*, namely matters of a machinery nature and matters that are not likely to impose an appreciable burden, cost or disadvantage on any sector of the public.

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Public Works and Procurement Regulation 2019

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Part 1 Preliminary

1 Name of Regulation

This Regulation is the *Public Works and Procurement Regulation 2019*.

2 Commencement

This Regulation commences on the day on which it is published on the NSW legislation website.

Note. This Regulation repeals and replaces the *Public Works and Procurement Regulation 2014*, which would otherwise be repealed on 1 September 2019 by section 10 (2) of the *Subordinate Legislation Act 1989*.

3 Definitions

(1) In this Regulation:

Board means the New South Wales Procurement Board established under section 164 of the Act.

the Act means the *Public Works and Procurement Act 1912*.

Note. The Act and the *Interpretation Act 1987* contain definitions and other provisions that affect the interpretation and application of this Regulation.

(2) Notes included in this Regulation do not form part of this Regulation.

Part 2 Procurement arrangements

4 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 176 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.

5 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 176 of the Act does not apply in relation to the procurement of goods and services under this clause.
- (3) However, procurement under this clause is subject to any Board direction issued in relation to such procurement.
- (4) The Minister administering the *Disability Inclusion Act 2014* 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.
- (5) An approval may apply to a specified person or body or to all members of a specified class of persons or bodies.
- (6) An approval may apply to a branch or unit within a larger body.
- (7) For that purpose, a reference in this clause to a body includes a reference to a branch or unit within a larger body.
- (8) An approval may be limited to specified goods and services supplied by a person or body.
- (9) In that case, the person or body is approved as a disability employment organisation only in relation to those specified goods and services.
- (10) 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.
- (11) The register is to be kept and maintained by a person or body appointed for the time being by the Minister administering the *Disability Inclusion Act 2014*.
- (12) Information contained on the register is to be made available to the public in the manner that the Minister administering the *Disability Inclusion Act 2014* directs.
- (13) 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.

6 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 Secretary of the Treasury 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 or any 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).

Part 3 Competitive neutrality in tendering

Division 1 Preliminary

7 Purpose and application of Part

- (1) The purpose of this Part is to provide the Board with a role under the State's complaints mechanism, in connection with competitive neutrality principles, as contemplated by the *Competition Principles Agreement*, so far as they are applicable to public authorities.
- (2) Other bodies (including the Independent Pricing and Regulatory Tribunal and, in relation to local councils, the Department of Planning, Industry and Environment) may also have roles under the complaints mechanism.
- (3) This Part applies only to a complaint that a public authority has failed to comply with competitive neutrality principles in relation to a tender bid made by the authority in response to an invitation for tenders.
- (4) However, this Part does not apply to a complaint so far as it is the subject of a direction under section 24G (3) of the *Independent Pricing and Regulatory Tribunal Act 1992*.

8 Definitions

In this Part:

Chairperson means the Chairperson of the Board.

Competition Principles Agreement means the *Competition Principles Agreement* made on 11 April 1995 by the Commonwealth, the Territories and the States, as in force for the time being.

competitive neutrality principles means:

- (a) the competitive neutrality principles referred to in the *Competition Principles Agreement*, and
- (b) any policies adopted by the State for the purpose of complying with or giving effect to those principles.

complaint includes any part or aspect of a complaint.

portfolio Minister has the same meaning as in the *Independent Pricing and Regulatory Tribunal Act 1992*.

public authority means a public authority of the State.

public trading activities of a public authority means significant business activities relating to goods or services in which the authority is engaged.

public trading agency means a public authority that is engaged in public trading activities.

the State includes the Government or a Minister.

Division 2 Complaints

9 Complaints about competitive neutrality

- (1) The Minister may refer to the Board, for investigation and report, a complaint about a public trading agency with respect to either or both of the following (so far as the complaint relates to a tender bid made by the agency in response to an invitation for tenders):
 - (a) a failure of the agency to comply with competitive neutrality principles in relation to any or all of its public trading activities,

- (b) the inappropriate manner in which competitive neutrality principles are applied by or to the agency in relation to any or all of its public trading activities.
- (2) The Minister is not to refer a complaint to the Board unless satisfied:
 - (a) that the complaint relates to any or all of the public trading activities of the agency, and
 - (b) that the complainant is able to demonstrate that a person (the *competitor*) competes, or seeks to compete, in a particular market with the agency and is hindered or is likely to be hindered from or in doing so by the matters complained of, and
 - (c) that the competitor is materially affected by the matters complained of or is likely to be so affected, and
 - (d) that the complaint has been made by the competitor or by a person or body authorised by the competitor to make the complaint on behalf of the competitor, and
 - (e) that the subject-matter of the complaint has been raised with the agency and the complainant has reasonable grounds for not being satisfied with the response to the complaint.
- (3) The Board is required to notify the complainant, the agency, the agency's portfolio Minister and the Treasurer of the reference and that an investigation into the complaint will be conducted.
- (4) If the Minister has referred a complaint to the Board for investigation and report, the Minister may withdraw or amend the reference at any time before the Minister has received the report from the Board.

10 Investigation and report

- (1) The Board is to conduct an investigation into and make a report on any complaint referred to it and not withdrawn by the Minister.
- (2) The Board is, as far as possible, to use its best endeavours to complete the investigation and report within 10 weeks after receiving the complaint or such other period as the Minister may approve from time to time.

11 Reports

- (1) The report of the Board with respect to a complaint is to contain a statement of its findings and recommendations about the complaint.
- (2) If the Board finds that the complaint has been wholly or partly substantiated, the report is to contain a statement about:
 - (a) any need for changes to the conduct of the public trading agency to ensure future compliance with competitive neutrality principles with regard to tendering bids made by it in response to invitations for tenders, and
 - (b) any policy changes that should be considered by the State.
- (3) Copies of the report are to be furnished to the complainant, the agency, the agency's portfolio Minister, the Treasurer and the Minister.
- (4) The Board is to arrange for the report to be publicly available.

12 Portfolio Minister's response to report

- (1) Within 8 weeks after a report about a public trading agency has been furnished to the agency's portfolio Minister, the portfolio Minister is to prepare a written response to the report.

- (2) That requirement does not apply where the report states that the investigation concerned was terminated because the complainant did not comply or did not fully comply with a request under clause 16.
- (3) The response must include a statement as to whether or not the recommendations have been adopted or are proposed to be adopted and must include a statement of the reasons why any recommendation will not be adopted (whether wholly or partly).
- (4) Copies of the response are to be furnished to the complainant, the agency, the Treasurer, the Minister and the Board.
- (5) The Board is to arrange for the response to be publicly available.

Division 3 Investigations

13 Definition

In this Division:

investigation means an investigation by the Board for the purposes of this Part.

14 Conduct of investigations

- (1) Subject to this Part, in an investigation, the Board:
 - (a) is to act with as little formality as possible, and
 - (b) may inform itself on any matter in any way it thinks fit and is not bound by the rules of evidence, and
 - (c) may receive information or submissions in the form of oral or written statements, and
 - (d) may consult with such persons as it thinks fit.
- (2) The investigation is to be conducted in private, as far as possible, and accordingly the Board is not to conduct public hearings, public seminars and public workshops except with the approval of the Minister.
- (3) Nothing in this clause prevents the Board from holding one or more meetings for the purposes of the investigation, but all such meetings are to be held privately.
- (4) The Board is required to seek and consider submissions from the public trading agency that is the subject of the complaint to which the investigation relates and the Treasurer, but is not required to seek or consider submissions from any other person.

15 Public trading agency to provide information, documents and evidence

- (1) For the purposes of an investigation, the Chairperson may, by notice in writing served on an officer of the public trading agency that is the subject of the complaint to which the investigation relates, require the officer to do any one or more of the following:
 - (a) to send to the Board, on or before a day specified in the notice, a statement setting out such information as is so specified,
 - (b) to send to the Board, on or before a day specified in the notice, such documents as are so specified,
 - (c) to attend a meeting of the Board to give evidence.
- (2) If documents are given to the Board under this clause, the Board:
 - (a) may take possession of, and make copies of or take extracts from, the documents, and
 - (b) may keep possession of the documents for such period as is necessary for the purposes of the investigation to which they relate, and

- (c) during that period must permit them to be inspected at all reasonable times by persons who would be entitled to inspect them if they were not in the possession of the Board.

16 Complainant may be requested to provide information, documents and evidence

- (1) For the purposes of an investigation, the Chairperson may, by notice in writing served on the complainant, request the complainant to do any one or more of the following:
 - (a) to send to the Board, on or before a day specified in the notice, a statement setting out such information as is so specified,
 - (b) to send to the Board, on or before a day specified in the notice, such documents as are so specified,
 - (c) to attend a meeting of the Board to give evidence.
- (2) If documents are given to the Board under this clause, the Board:
 - (a) may take possession of, and make copies of or take extracts from, the documents, and
 - (b) may keep possession of the documents for such period as is necessary for the purposes of the investigation to which they relate, and
 - (c) during that period must permit them to be inspected at all reasonable times by persons who would be entitled to inspect them if they were not in the possession of the Board.
- (3) If the complainant does not comply or fully comply with a request under this clause, the Board may terminate the investigation and the Board's report may be limited to a statement that the investigation was terminated for that reason.

17 Confidential information

- (1) If a person provides information (*protected information*) to the Board on the understanding that the information is confidential and will not be divulged, the Board is required to ensure that the information is not divulged by it to any person, except:
 - (a) with the consent of the person who provided the information, or
 - (b) to the extent that the Board is satisfied that the information is not confidential in nature, or
 - (c) to a member of the Board or an officer working for the Board.
- (2) The Board may notify a complainant that the Board proposes to divulge the information to a specified person, or in its report, after a specified period if:
 - (a) the Board is satisfied that protected information provided to the Board by the complainant needs to be divulged so that the complaint can be properly dealt with, and
 - (b) the exceptions in subclause (1) (a)–(c) are not applicable.
- (3) After the specified period, and despite subclause (1), the Board may divulge the information to the specified person or in its report, unless the complainant withdraws the complaint.
- (4) If the Board is satisfied that it is desirable to do so because of the confidential nature of any information provided to the Board for the purposes of an investigation, it may give directions prohibiting or restricting the divulging of the information.
- (5) A person must not contravene a direction given under subclause (4).
- (6) Subclause (4) is specified for the purposes of section 173 (3) of the Act (which makes a contravention of subclause (4) an offence).

- (7) A reference in this clause to information includes information contained in any evidence given at a meeting of or hearing before the Board and information contained in any documents given to the Board.

18 Offences

- (1) A person must not, without reasonable excuse:
- (a) refuse or fail to comply with a notice served under this Division, or
 - (b) refuse or fail to answer a question that the person is required to answer by the Chairperson at any meeting of or hearing before the Board under this Division.
- (2) It is a reasonable excuse for the purposes of subclause (1) that to comply with the notice or to answer the question might tend to incriminate the person or make the person liable to any forfeiture or penalty.
- (3) A person must not:
- (a) give to the Board, whether orally or in writing, information that the person knows to be false or misleading in a material particular (unless the person informs the Board of that fact), or
 - (b) at a meeting of or hearing before the Board, give evidence that the person knows to be false or misleading in a material particular.
- (4) A person must not hinder, obstruct or interfere with the Chairperson or any other member of the Board in the exercise of functions for the purposes of this Division as Chairperson or other member.
- (5) A person must not take any action that detrimentally affects the employment of another person, or threaten to do so, because that other person has assisted the Board in any investigation.
- (6) Subclauses (1), (3), (4) and (5) are specified for the purposes of section 173 (3) of the Act (which makes a contravention of any of those subclauses an offence).
- (7) Subclause (1) does not apply to a complainant in relation to a notice served on the complainant under clause 16.

19 Cabinet information and proceedings

- (1) This Part does not enable the Board:
- (a) to require any person to give any statement of information or answer any question that relates to confidential proceedings of Cabinet, or
 - (b) to require any person to disclose Cabinet information, or
 - (c) to inspect Cabinet information.
- (2) For the purposes of this clause, a certificate of the General Counsel of the Department of Premier and Cabinet that any information or question relates to confidential proceedings of Cabinet, or that information is Cabinet information, is conclusive of that fact.
- (3) In this clause:
Cabinet includes a committee of Cabinet or a subcommittee of such a committee.
Cabinet information means information that is Cabinet information under the *Government Information (Public Access) Act 2009*.

20 Report of complaints

The Board, or the Public Service agency whose annual report covers the Board, is required to include in its annual report a statistical summary of complaints received

by the Board, investigations conducted by the Board and complaints disposed of by the Board during the period covered by the annual report.

Part 4 Miscellaneous

21 Repeal

The *Public Works and Procurement Regulation 2014* is repealed.

22 Savings

Any act, matter or thing that, immediately before the repeal of the *Public Works and Procurement Regulation 2014*, had effect under that Regulation continues to have effect under this Regulation.