

Government Procurement Rules 2024

Disallowable instrument DI2024-275

made under

the Government Procurement Act 2001, s42 (1) (Government procurement rules).

1 Name of instrument

This instrument is the *Government Procurement Rules 2024*.

2 Commencement

This instrument commences on the day after its notification day.

3 Application

This instrument applies to all ACT Government procurements.

4 Government Procurement Direction

I make the *Government Procurement Rules 2024* as attached in the Schedule.

Chris Steel
Special Minister of State
28 August 2024

Schedule



Government Procurement Rules 2024

Acknowledgement of Country



We pay our respects to the Traditional Custodians of the ACT, the Ngunnawal people, on whose land we live and work. We acknowledge that these lands are Aboriginal lands and pay our respect and celebrate their ongoing cultural traditions and contributions to the ACT and surrounding region. We also acknowledge the many other Aboriginal and Torres Strait Islander peoples from across Australia who have now made Canberra their home. We respect and celebrate their cultures, diversity, and contributions to the ACT and surrounding region.

The ACT Government and community partners are committed to self-determination as the guiding principle in the delivery of programs and services and are working in partnership with Aboriginal and Torres Strait Islander communities to address matters that are important to them.

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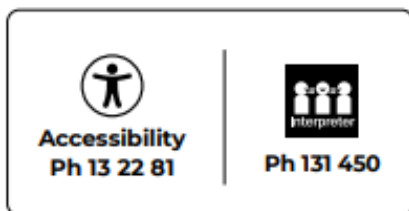


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Foreword

Under subsection 42(1) of the *Government Procurement Act 2001* (Act), the Minister responsible for procurement may “make rules in relation to procurements undertaken by Territory entities (the **government procurement rules**).”

The Government Procurement Rules 2024 (Rules) reflect the Territory’s expectations for procuring Territory entities and are an important part of the ACT Government’s procurement framework. The Rules demonstrate the ACT Government’s commitment to a rigorous, transparent, accountable procurement framework that upholds the highest standards of ethics, probity and integrity.

The Rules are an integral part of the ACT Government’s procurement framework.

Compliance with the Rules by procuring Territory entities ensures that procurement decisions are transparent, evidence based, conducted with probity, and can withstand scrutiny – meaning that the Canberra community can remain satisfied that the ACT Government maintains high standards in its procurement processes.

2. Overview

- 2.1 The ACT Government procurement framework comprises procurement related legislation, statutory instruments, policies, schemes, guidance documents, factsheets, tools, templates, and systems that support Territory entities to undertake procurement for the ACT Government.
- 2.2 The Government Procurement Rules 2024 (Rules) are issued to the relevant Territory entities by the Special Minister of State under Section 42(1) of the Government Procurement Act 2001 (Act).
- 2.3 Section 42(2) of the Act provides that a Territory entity **must** comply with the Rules when exercising a function in relation to procurement. Procurement is defined in Part 1A, Section 5 of the Act.
- 2.4 The Rules have been designed to allow Territory entities flexibility to develop and implement procurement processes that reflect their needs.
- 2.5 Rules that must be complied with when exercising a function in relation to procurement are denoted by the term '**must**'. The term '**should**' indicates better practice, to which Territory entities should aspire.
- 2.6 The Rules are read in conjunction with the Act and the Government Procurement Regulation 2007 (Regulation) and other policies and guides prescribed by legislation.
- 2.7 Territory entities may develop specific operational rules, tools, guidance, material, templates or requirements for training to give effect to the Rules. In the case of inconsistencies, the Rules supersede any operational rules, procurement tools, guidance material and/or templates.
- 2.8 Nothing in the Rules should be read to limit a Territory entity complying with other applicable laws.
- 2.9 Territory entities not covered by the Rules (refer subsection 42(4) of the Act), that is the Office of the Legislative Assembly, or an officer of the Assembly, are encouraged to consider the Rules in their procurement.
- 2.10 Unless otherwise defined in the Rules, capitalised terms in the Rules have the same meaning as that in the Act or Regulation.
- 2.11 For further information and guidance on applying the Rules contact Procurement ACT at ProcurementACT@act.gov.au or visit the Procurement ACT website at <https://www.procurement.act.gov.au/>

3. Governance

- 3.1 Legislative requirements pertaining to procurements by Territory entities are referred to throughout the Act and Regulation.
- 3.2 Procurement-connected policies are policies where procurement is identified as the means of delivery. Procurement ACT maintains a list of procurement-connected policies on the Procurement ACT website.
- 3.3 Except where required by law, it is the Government's policy position that ministers will not:
 - a. be involved in the conduct of procurement processes; or
 - b. direct officials in Territory entities about the conduct of procurement processes.
- 3.4 Where ministers are required to have a role in a procurement process, that role and any decisions arising from that role **should** be appropriately documented and these Rules **must** be applied.

4. Achieving value for money

- 4.1 Value for money is defined in Part 1A, Section 8 of the Act.
- 4.2 A thorough consideration of value for money begins by Territory entities clearly understanding and expressing the goals and purpose of the procurement.
- 4.3 When a business requirement arises to which the ACT Government procurement framework applies, Territory entities **should** consider the following matters to design a process that achieves the best value for money:
- a. stakeholder input;
 - b. the scale and scope of the business requirement;
 - c. the Territory entity's resourcing and budget;
 - d. obligations and opportunities under other existing arrangements;
 - e. relevant laws and policies; and
 - f. the market's capacity to competitively respond to a procurement.
- 4.4 Price is not the sole factor when assessing value for money. When conducting a procurement, a Territory entity **must** consider the relevant financial and non-financial costs and benefits of each submission including, but not limited to the:
- a. quality of the goods and services;
 - b. fitness for purpose of the proposal;
 - c. potential supplier's relevant experience and performance history;
 - d. flexibility of the proposal (including innovation and adaptability over the lifecycle of the procurement);
 - e. ability to achieve outcomes against the Procurement Values; and
 - f. whole-of-life costs, where whole of life costs could include:
 - i. maintenance and operating costs;
 - ii. transition out costs;
 - iii. licensing costs (when applicable);
 - iv. the cost of additional features procured after the initial procurement;
 - v. consumable costs; and
 - vi. decommissioning, remediation and disposal costs (including waste disposal).

5. Probity

- 5.1 The ACT Government promotes the ethical use and management of public resources, this includes acting consistently with the policies of the ACT Government, including the Information Privacy Act 2014, the Public Sector Management Act 1994 and the ACT Public Service (ACTPS) public sector values and ACT Public Sector Code of Conduct.

- 5.2 The Act requires Territory entities ensure that procurements are undertaken with probity. A procurement is undertaken with probity where¹:
- a. the Territory entity's behaviour is ethical and there is evidence of this behaviour; and
 - b. the procurement is undertaken with integrity, uprightness and honesty.
- 5.3 Procurement decisions **must** demonstrate probity in the pursuit of value for money. The ACT Government Probity in Procurement Guide (Guide) provides guidance for Territory Entities on applying probity in procurement. The guide applies to all Territory Entities as defined in the Act and covers all procurement as defined in the Act.
- 5.4 Territory Entities **must** identify probity risks and put in place adequate treatments, which may include engaging probity advisors and probity auditors. The appropriate probity risk allocation and risk treatment is a decision for the responsible Chief Executive Officer of the Territory Entity.
- 5.5 In addition to any training requirements set by a Territory entity, those undertaking or involved with a procurement **must**, within the preceding 12 months, have completed the ACT Government's Probity in Procurement eLearning Module.
- 5.6 Engaging a probity advisor or probity auditor does not diminish the accountability of the relevant Territory entity for ensuring probity in relation to the procurement or the necessity to implement sound probity practices.
- 5.7 All decision makers **must** obtain independent advice where they seek to depart from the recommendations of the evaluation team. This advice could include, but is not limited to, probity advice, legal advice, other technical advice or advice from the Government Procurement Board. The Territory entity **must** record, in writing, the Territory's response to, and any actions arising from, the advice. Where a probity advisor has not previously been engaged, probity advice **should** be sought through the Probity Advisory Services in Procurement ACT, in the first instance.
- 5.8 Territory entities **must** ensure that potential suppliers and tenderers are dealt with fairly and in a non-discriminatory manner. This includes avoiding a potential supplier, or group of potential suppliers, gaining an unfair advantage in a competitive procurement process.
- 5.9 Territory entities **must** promptly inform affected tenderers of procurement outcomes at an appropriate time. Debriefings **must** be made available, on request, to unsuccessful tenderers outlining the reasons the submission was unsuccessful. Debriefings should also be made available, on request, to the successful supplier(s).
- 5.10 Territory entities **should** make a written record of the key points communicated to a supplier in a debriefing, and provide the record, on request, to that supplier.

6. Competition

- 6.1 An appropriately competitive process helps to demonstrate efficient and effective use of public resources.
- 6.2 Participation in procurement imposes costs on Territory entities and potential suppliers. Those costs and the quotation and tender thresholds in Part 2 of the Regulation **should** be considered when designing a process that is commensurate with the scale, scope and risk of the proposed procurement.

¹ Section 7 of the Act

7. Risk management

- 7.1 Risk is defined as the effect of uncertainty on objectives². Risk management is the combination of culture, systems and processes undertaken by an entity in the identification and management of risk.
- 7.2 As a general principle, risks **should** be allocated to the party best suited to manage them. Territory entities **should** not accept risks which another party is better placed to manage. Similarly, when a Territory entity is best placed to manage a particular risk, it **should** not seek to inappropriately transfer that risk to the supplier.
- 7.3 Territory entities **must** have a process to identify, analyse, allocate and treat risk when conducting a procurement. Risk is a relevant consideration in value for money.
- 7.4 The effort directed to risk assessment and management **should** be commensurate with the scale, scope and risk of the procurement. Risk **should** be considered at the earliest stages of the procurement planning and be continuously reviewed and updated throughout the procurement lifecycle.
- 7.5 Territory entities **should** consult the tools, guidance and resources provided by the ACT Insurance Authority (ACTIA) (including any procurement specific tools, guidance and resources) to better manage risk. It is expected that Territory entities utilise the ACTIA Risk Assessment Matrix in procurement risk management plans and use it to identify, measure and manage risks.
- 7.6 Procurement contracts may contain clauses that determine how risk is allocated and managed between the Territory and a supplier. Below are common examples of provisions that address risk.

Insurance

- 7.7 Contractual insurance requirements **should** align with the risk profile of the procurement. Territory entities **should** limit insurance requirements in contracts by reflecting the actual risk borne by suppliers. Insurance requirements in a procurement **should** be underpinned by a robust risk assessment of the procurement activity.
- 7.8 Territory entities **should** limit insurance requirements in contracts by reflecting the actual risk borne by suppliers. Risk management through insurance is appropriate in the following circumstances:
- a. Compliance with the law: Territory entities **must** ensure that a supplier maintains specific insurance coverage required by law, such as workers compensation.
 - b. Risk mitigation and financial protection: In some circumstances, the market may present certain delivery risks (including residual risks), that cannot be managed through the selection of a specific supplier, for example, accidents, delays, or defects. Appropriate insurance coverage may be used to instil confidence in a supplier's ability to fulfill contractual obligations.
- 7.9 To help manage insurance costs for suppliers, suppliers **should** not be directed to take out insurance until identified as a preferred respondent.
- 7.10 At the time a contract is awarded, the Territory entity **should** require that the supplier provide the Territory entity with a valid certificate of currency for each type of insurance required under the contract.

² AS ISO 31000:2018 Risk Management Guidelines

Contingent liabilities and indemnities

- 7.11 A contingent liability is defined as “a possible obligation that arises from past events whose existence will be confirmed only by the occurrence or non-occurrence of one or more uncertain future events not wholly within the control of the entity”. A contingent liability may occur in the future depending on the outcome of an uncertain future event.
- 7.12 Where a contingent liability exists, it may be necessary for a Territory entity to disclose relevant information in its financial statements. This is relevant where the Territory has agreed to indemnify a supplier for a particular loss, and that loss has arisen, or a claim has been made in relation to that loss.
- 7.13 Under the *Insurance Authority Act 2005*, ACTIA may give an indemnity to a third party for a territory risk arising under a contract to which the Territory or a territory entity is a party only if the relevant Minister has certified that the giving of the indemnity by the authority is in the Territory’s interest. Where a supplier requires an indemnity from the Territory, the Territory entity **must** consult with ACTIA, to ensure compliance with the *Insurance Authority Act 2005*.
- 7.14 The Territory has standard indemnity clauses in its template contracts. Where a supplier requests an amendment to the standard indemnity clause, or where a supplier seeks to use its own terms and conditions, the Territory entity **should**:
- ensure that the Territory is the party best positioned to manage the risk arising from the indemnity;
 - consult with ACTIA to determine whether the Territory’s insurance cover the amended indemnity;
 - consult with the ACT Government Solicitor on any legal risk matters;
 - determine whether the amendment appropriately manages the risk for the Territory; and
 - determine whether the proposed amendment could potentially limit the scope of the standard indemnity clause beyond what is reasonable.

Limitation of liability

- 7.15 A limitation of liability clause or ‘Liability Cap’ limits the amount and types of losses one party can recover from the other party. Suppliers may request limit to their liability. Any decision to accept a cap on liability **must** only be done following consultation with ACTIA.
- 7.16 Any amendments to the indemnity clauses in the contract, **must** not allow for the supplier to contract out its WHS obligations and responsibilities.
- 7.17 If a Territory entity accepts or limits liability so that the Territory entity takes on liability which the supplier is best placed to manage, there may be a financial impact to the Territory entity.

Guarantees and warranties

- 7.18 Guarantees are a legally binding promise, where the supplier is liable to meet a debt or performance obligation for another party should that party default on its obligations in some way and is most appropriate where:
- a third party’s financial viability or capacity to deliver is uncertain; or
 - additional financial incentives are desirable to ensure the supplier satisfies the contractual requirements.

- 7.19 Warranties are voluntary promises which provide a level of insurance in the quality of the goods or services being procured. Warranty clauses are additional to the basic consumer rights and are typically valid for a specified warranty period.
- 7.20 Territory entities **should** consider the use of guarantees and warranties consistent with paragraph 7.2 of the Rules.

8. Appropriate disclosure of procurement information

- 8.1 The need to maintain the confidentiality of information **should** always be balanced against the public accountability and transparency requirements of the ACT Government. It is therefore important for Territory entities to plan for, and facilitate, appropriate disclosure of procurement information. In particular, Territory entities **should**:
- a. include provisions in request documentation and contracts that alert potential suppliers to the public accountability requirements of the ACT Government, including disclosure to the Assembly; and
 - b. consider, on a case-by-case basis, any request by a supplier for material to be treated as confidential text under a notifiable contract or otherwise, and enter into commitments to maintain confidentiality only when such commitments are appropriate.
- 8.2 When confidential information is required to be disclosed, reasonable notice in writing **must** be given to the party from whom the information originated.

9. Estimating the total consideration of a procurement

- 9.1 The total consideration of a procurement **must** be estimated before a decision on the procurement method is made. The total consideration 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.
- 9.2 The total consideration 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 total consideration of the goods and services being procured, including the total consideration of any options in the proposed contract; and
 - c. any taxes or charges.
- 9.3 A procurement **must** not be divided into separate parts solely for the purpose of avoiding a quotation or tender threshold in the Regulation.
- 9.4 When the total consideration of a procurement cannot be estimated, the procurement **must** be treated as being subject to the Open Tender threshold in Section 8 of the Regulation.

10. Procurement from existing arrangements

- 10.1 An arrangement includes a contract, agreement, deed, standing offer, understanding, list or any other instrument that creates rights and obligations.
- 10.2 A standing offer, or other standing arrangement established by a Territory entity, the Australian Government, or another State or Territory (another government entity) may permit access to a Territory entity.

- 10.3 Where a Territory entity intends to join an existing standing offer, or other standing arrangement, whether established by the Territory or by another government entity, the initial request documentation and the contract **must** have specified potential use by a government entity, such as the Territory.
- 10.4 Where a Territory entity intends to join an existing standing offer, or other standing arrangement of another government entity, the Territory entity **must** first confirm that the arrangement achieves value for money, that the goods and services intended to be procured are within the scope of the arrangement, and that the terms and conditions of the arrangement are not being materially altered.
- 10.5 Where feasible, all new and refreshed existing standing offer, or other standing arrangements established by the Territory **must**:
- a. allow access to all Territory entities; and
 - b. be designed to minimise the administrative burden for potential suppliers to apply and if successful, respond to purchase orders under the arrangement terms and conditions.
- 10.6 Territory entities **should** consider supplier diversity when procuring under an existing standing offer, or other standing arrangement, for example, by approaching:
- a. a Small or Medium Enterprise (as defined by the Australian Bureau of Statistics);
 - b. a Canberra Region Enterprise (a Canberra Region Enterprise is defined in the Regulation);
 - c. an Aboriginal or Torres Strait Islander Enterprise (Certified by a body as identified under the Aboriginal and Torres Strait Islander Procurement Policy or any other certifying body identified by the ACT Government); or
 - d. a Social Enterprise (an enterprise that has a defined primary social, cultural or environmental purpose. Certified by Social Traders or any other certifying body as identified by the ACT Government).

11. ICT and Cyber Security

- 11.1 The ACT Protective Framework (ACT PSF) applies to a procurement.
- 11.2 A Territory entity is accountable for security risks arising from procuring goods and services.
- 11.3 Consistent with the ACT PSF, Territory entities **must**:
- a. ensure contracted providers comply with relevant ACT PSF requirements³; and
 - b. adhere to any additional provisions concerning the security of people, information and assets contained in agreements and arrangements to which the Territory is a party⁴.
- 11.4 Territory entities **should**:
- a. ensure the security considerations in procurement processes are proportionate and align with the various stages of the procurement lifecycle;
 - b. consider conducting a supply chain risk assessment for suppliers of Applications, Information Technology Equipment, Operational Technology Equipment and Services in order to assess the impact to a system's security risk profile;

³ GOCSEC 6 - Security governance for contracted goods and service providers in the ACT Protective Security Framework

⁴ GOCSEC 7 - Security governance with partners in the ACT Protective Security Framework

- c. assess suppliers on their commitment to the security of their products and services;
- d. clearly set out requirements for managing and reporting security incidents in their procurement contract, outlining supplier's responsibilities for advising of issues such as incidents and reporting timeframes; and
- e. assess as part of acceptance of products and services, the integrity and the authenticity of Applications, Information Technology Equipment, Operational Technology Equipment.

12. Awarding contracts

- 12.1 Where the Open Tender threshold in Section 8 of the Regulation applies, unless a Chief Executive Officer determines that it is not in the public interest⁵ to award a contract, the Chief Executive Officer **must** award a contract to the supplier that the Territory entity has determined achieves value for money under Part 1A of the Act.

13. Procurement contract management

- 13.1 Territory entities are responsible for the management of their contracts and ensuring value for money is achieved through the delivery of the contract.
- 13.2 In managing their procurement contracts, ACTPS employees **must** act ethically and with integrity in accordance with the *Public Sector Management Act 1994* and ACTPS Code of Conduct, including by considering, disclosing and managing any conflicts of interest in accordance with any Guide in place from time to time.

14. Records

- 14.1 Territory entities **must** maintain appropriate records commensurate with the scale, scope and risk of the procurement in accordance with the *Territory Records Act 2002* and associated policies.
- 14.2 Records **must** document 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.
- 14.3 Territory entities **must** have access to evidence of agreements with suppliers and variations to those agreements, in the form of one or a combination of the following documents: a written contract, a purchase order, an invoice or a receipt.

15. Anticipated Procurement Activity (APA) report

- 15.1 An APA report provides overview of what the Territory entity anticipates procuring in the next 12 months. The APA **should** cover procurement with a total estimated consideration of \$25 000 or more.

⁵ 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.

15.2 Territory entities **must**:

- a. complete an APA report each financial year and submit this in July to Procurement ACT; and
- b. where appropriate, publish an advance notice of the procurement electronically.

15.3 The APA is provided to the Government Procurement Board. The Board has the opportunity to select and review procurements from a Territory entity's APA report that would not otherwise be presented to the Board.

15.4 The APA may be updated at any time. The Territory entity **must** advise Procurement ACT of any updates to the APA.

16. Work Health and Safety (WHS)

16.1 The *Work Health and Safety Act 2011* (WHS Act) gives effect to the Territory's commitment under the Inter-Governmental Agreement for Regulatory and Operational Reform in OHS to implement the model work health and safety laws in the ACT⁶.

16.2 Where appropriate, having regard to the WHS Act, and commensurate with the scale, scope and risk of a procurement, Territory entities **must**:

- a. consult, cooperate, and coordinate with suppliers about WHS duties and obligations to determine how shared responsibilities will be managed throughout the contract period; and
- b. assess the WHS performance and capabilities of a supplier during the procurement. This includes reviewing the supplier's WHS policies, procedures, and past performance.

16.3 If a supplier needs to work at a Territory controlled site, the Territory entity **must** provide WHS induction training (including where applicable, workplace walkthrough) before the supplier commences work.

16.4 Any amendments to the indemnity clauses in the contract, **must** not allow for the supplier to contract out their WHS obligations and responsibilities.

16.5 Territory entities **should** comply with the *ACTPS Managing WHS Obligations with Contractors Policy* and the WHS Act and corresponding regulation.

⁶ WorkSafe ACT