

2024

**THE LEGISLATIVE ASSEMBLY FOR THE
AUSTRALIAN CAPITAL TERRITORY**

GOVERNMENT PROCUREMENT AMENDMENT BILL 2023

REVISED EXPLANATORY STATEMENT

**Presented by
Chris Steel MLA
Special Minister of State
February 2024**

GOVERNMENT PROCUREMENT AMENDMENT BILL 2023

The Bill **is not** a Significant Bill. Significant Bills are bills that have been assessed as likely to have significant engagement of human rights and require more detailed reasoning in relation to compatibility with the *Human Rights Act 2004*.

INTRODUCTION

The explanatory statement relates to the Government Procurement Amendment Bill 2023 (the Bill) as presented to the Legislative Assembly. It has been prepared to assist the reader of the Bill and to help inform debate on it. It does not form part of the Bill and has not been endorsed by the Legislative Assembly. The statement is to be read in conjunction with the Bill, it is not, and is not meant to be, a comprehensive description of the Bill. What is said about a provision is not to be taken as an authoritative guide to the meaning of a provision, this being a task for the courts. This statement provides information about why a Bill is proposed together with an explanation about the proposed legislative amendments.

Each year, the ACT Government spends close to \$1.5 billion on procurements that support the delivery of quality public services, infrastructure, economic growth, and community wellbeing. This expenditure needs to be undertaken in alignment with community values; conducted with transparency, fairness and rigour; and achieve value for money.

Engaged in this process are procurement officers across the ACT Public Service, subject matter experts and advisors, financial delegates, Directors-General and Chief Executives of Territory entities, as well as the Government Procurement Board.

Each and every individual in this process is bound by a rigorously defined legal framework underpinned by the Financial Management Act, the Government Procurement Act, the Government Procurement Regulation and the Public Sector Management Act. The ACT Public Service and the Ministerial codes of conduct articulate the behaviours that support individual accountabilities.

Recognising procurement as a priority area for reform, the Procurement Reform Project was established in February 2022 to determine changes that needed to be made to the procurement framework to deliver efficient, effective, and accountable business outcomes, and to meet the policy objectives of Government, and otherwise strengthen procurement practices across the ACTPS.

The resulting Procurement Reform Program (the Program) which was agreed to by Government on 22 June 2022 identified three focus areas as key to achieving reform:

- Transparent, evidence-based procurement decisions which are conducted with probity and which can withstand scrutiny;

- Support for our workforce, local industries and businesses through clear roles and the delivery of consistent, accurate, timely, practical and customer-focused services through all phases of the procurement lifecycle; and
- Streamlining our legislative framework, policies, processes and templates to ensure that they are efficient and can facilitate timely procurement outcomes.

The Program improves government business, while helping our economy and our community. It provides more opportunities for industry and local businesses to work with the ACT Government. It supports the capability of our workforce through enhanced training and development programs to help staff make better procurement decisions.

The Program identified the need for legislative amendments to the ACT Government Procurement legislation. Whilst broadly fit for purpose, the *Government Procurement Act 2001* (Act) and *Government Procurement Regulation 2007* (Regulation) have not been reviewed or significantly updated since 2007. This has meant parts of the legislative framework governing procurement no longer supported contemporary procurement activities. Parts of the legislation were potentially inconsistent with procurement best practice and efficiencies in other Australian Jurisdictions, not reflective of accountability/decision making in procurement and may over time become misaligned with international trade obligations.

Through consultation under the Program a key area of feedback was that the current legislative framework could generally benefit from better clarification, enhanced definition and a strengthening of the prescribed role and functions of the Government Procurement Board.

The *Government Procurement Amendment Bill 2023* (Bill) aims to address inconsistency issues, to ensure the Act and Regulation are contemporary, and draw upon best practice and are fit for purpose. The Bill also makes changes which support the recommendations that require legislative change as a result of the Auditor-General's Performance Audit Report titled "Activities of the Government Procurement Board".

The amendments clarify the Board's roles, obligations, and composition in addition to the matters that need to be referred to the Board for consideration. In light of the Auditor-General's recommendations, matters referred to the Board will be threshold and risk based, in addition to these, procurements can also be referred to the Board during the planning and sourcing stage of the procurement lifecycle. The Bill further strengthens the Board's functions and governance with a suitable process of escalation when the Board considers that unmitigated risks are not being adequately addressed. The Bill establishes the requirement of the Board to annually report to the Minister on the performance of the Board during the year in improving the processes

and management of procurements and whether any conflicts of interest were identified within the Board.

The Board's role and obligations are proposed to be clarified in an enhanced Terms of Reference in subordinate legislation, and supported by forthcoming instruments which will set the Board's Strategic Directions, support the compliance of any Whole of Government procurement practices and provide the appropriate authorising environment for the Board in meeting its objectives.

The combination of updated legislation, legislative instruments and new terms of reference will ensure that the Board has appropriate power and authority and that Territory entities are clear on their accountabilities. Changes to the Government Procurement Board resulting from this Bill will ensure that the Board is operating with optimal efficiency and effectiveness and will reduce the duplication of work by focusing on fewer, higher-risk procurements.

The Bill proposes changes to the quotation and tender thresholds that determine the way in which the ACT Government approaches the market. Under the proposed amendments open market approaches will occur for goods and services procurements with a value of \$500,000 or more, or for the procurement of services related to construction with a value of \$1,000,000 or more.

These changes further support the ACT Government's compliance with the Government Procurement (Charter of Procurement Values) Direction 2020 by providing for a process of exemptions from the quotation and tender thresholds where Territory entities seek a quote directly from Certified Aboriginal and Torres Strait Islander enterprises. This updated process of exemptions from the tender and quotation thresholds will also be available where the Territory entity seeks two quotes with one quote from each of the following, a local business or a Small to Medium Enterprise.

Amending the quotation and tender thresholds aligns with the feedback the ACT Government heard from our suppliers during the development of the Reform Program. In addition, these changes bring the ACT in closer alignment with the thresholds of the NSW and Commonwealth Governments, further supporting our local suppliers through consistent approaches to market.

Value for money considerations have been expanded to ensure that the pursuit of value for money is not just to achieve the best available procurement outcome but is to seek the best available outcome for the procurement that maximises the overall benefit to the Territory. The Government Procurement Rules established under the Bill will be used to issue guidance in relation to maximising the overall benefit to the Territory. This value for money test in the procurement also supports the operation of

efficient and effective use of resources as requirement under the *Financial Management Act 1996*.

Concerns about probity in procurement undermine public trust and increase the risk of the Territory's exposure to reputational damage and/or financial loss. A new section in the Act has been included to ensure that all procurements are conducted in accordance with the ACT Government's Probity Principles.

The amendments made under this Bill strengthen the procurement decisions of the ACT Government and ensure that public funds are managed appropriately through robust and transparent procurement processes.

CONSULTATION ON THE PROPOSED APPROACH

Consultation on the changes in the Bill occurred through the broader Procurement Reform Program and associated executive forums. A significant number of amendments were also informed by the Auditor-General's Performance Audit Report titled "Activities of the Government Procurement Board".

The ACT Government accepted all recommendations arising from the Auditor General's Report and the proposed Bill gives effect to the areas relating to the Government Procurement Board that require legislative amendments. The contents of the Performance Audit Report were extensively socialised within Government and developed through consultation, analysis and research.

Consultation to inform the Bill included:

- A survey of all registered suppliers of Tenders ACT.
- Insights from the Procurement Workshop – Insights Report by the Better Regulation Taskforce.
- The establishment of a key internal stakeholder group which consisted of senior representatives from Directorates and agencies across the Territory, which undertake procurement activities both frequently and infrequently.
- A Procurement Review Advisory Group and feedback sought from the ACT Government Procurement Community of Practice.
- The ACT Government Solicitor.

In 2019, the Procurement Review Advisory Group collated a comprehensive list of changes and additions to the Act and the Regulation. This work continued through a working group under the auspices of the Procurement Community of Practice.

Stakeholders communicated that aspects of the Act are confusing or are inconsistently interpreted, present delays in application, and that there is an ongoing need for legal advice to interpret basic concepts such as the definition of procurement. The proposed

approach addresses these issues by clarifying concepts amongst a range of other improvements focused on transparency and consistency.

CONSISTENCY WITH HUMAN RIGHTS

The provisions within this Bill have a marginal potential impact on an individual's human rights.

Namely, this Bill has the potential to engage and promote an individual's right to privacy and reputation, as under section 12 of the *Human Rights Act 2004 (ACT)*, through changes to the confidential text provisions.

Rights engaged

The right to privacy and reputation is engaged and promoted by this Bill through automatically considering personal information as confidential text to ensure that individuals are not identifiable through their participation in ACT Government procurements.

Rights Promoted

Changes to the grounds for confidential text, to include that personal information is automatically considered confidential text, will promote the right to privacy and reputation for individuals and organisations engaging in public procurement with the ACT Government. These changes will ensure that no individuals will be identifiable due to information uploaded to the ACT Government Notifiable Contracts Register or Notifiable Invoice Register.

Rights Limited

No human rights will be limited by this Bill.

CLAUSE NOTES

Clause 1 Name of Act

This clause provides that the name of the Act is the *Government Procurement Amendment Act 2023*

Clause 2 Commencement

The clause provides that this Act commences on 1 July 2024.

Clause 3 Legislation amended

This Act amends the *Government Procurement Act 2001* and the Government Procurement Regulation 2007.

Clause 4 Legislation repealed

The Government Procurement (Relevant Standing Committee) Nomination 2012 (NI2012-602) is repealed.

Part 2 Government Procurement Act 2001

Clause 5 Long Title

This clause provides the long title of the Act is an Act about procurement by Territory entities for the Territory, and for other purposes.

Clause 6 Section 2, note 1

omit see section 3.

substitute see section 6.

This amends the definition of Territory entity by omitting the previous definition of Territory entity in section 3 of existing Act with a new definition. The new definition is set out in see Clause 9 (6), see below.

Clause 7 Sections 2A to 3B

Omit.

The following are omitted from the existing Act:

- Sect 2A: Meaning of procurement. A revised definition is provided, see Clause 9 (5) below.
- Clause 3 Meaning of Territory entity. A revised is provided, see Clause 9 (6) below.
- Sect 3A: Application of Act to land sales etc, see Clause 9 (5) below.

Clause 8 Sections 4 and 4A

Renumber as sections 3 and 4.

Clause 9 New Part 1A Important Concepts Meaning of procurement (5)

This clause provides that the meaning of procurement updated and clarified to mean: The process by which a Territory entity acquires goods or services by any contractual means, including purchase, lease or rent (with or without an option to buy), or exchange, including any legal or equitable estate or interest in land or deals in a right, power or privilege over, or in relation to, land as a sublease or licence over land, or part of land, in which the Territory or the Territory entity is the sublessee or licensee; and

includes the process by which a Territory entity disposes of goods by any contractual means, including sale. The definition also provides that procurement includes a procurement on behalf of a Territory entity acting solely on behalf of another entity or vice versa.

However, procurement does not include acquiring goods or services for resale or for use in the production of goods for resale and does not include an acquisition of goods or services by a Territory entity from another Territory entity or a dealing in any legal or equitable estate or interest in land or a dealing in a right, power or privilege over, or in relation to, land other than those established as a procurement.

Additionally, a Regulation may prescribe additional instances of what is or isn't procurement under the Act. The inclusion of the term 'contractual means' provides greater alignment with Free Trade Agreements.

Meaning of Territory entity (6)

This clause provides that the definition of a Territory entity as:

- (a) A directorate, or
- (b) The Office of the Legislative Assembly, or
- (c) An officer of the Legislative Assembly, or
- (d) A Territory authority or any other entity prescribed by Regulation

A list of all included Territory Authorities is provided at Part 1A (3B) (1) of the Regulation.

Probity (7)

This clause provides that in undertaking a procurement, a Territory entity must ensure that the procurement is undertaken with probity. Probity in procurement underpins public trust and decreases the Territory's exposure to reputational damage and/or financial loss. A procurement undertaken by a Territory entity is undertaken with probity if:

- (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

Value for money (8)

The Value for Money section establishes that the responsible chief executive for a Territory entity must ensure any decision, made in respect to procurement, achieves value for money. Value for money is defined as the best available outcome that maximises the overall benefit to the Territory.

This section establishes a clear link between the Act and the Financial management Act 1996.

Examples are provided of what activities are not allowed unless value for money has been adequately achieved. Value for money decisions must now be recorded in writing as soon as practicable after making the decision. Further provisions are included to ensure that probity principles are demonstrated in value for money decisions.

Meaning of procurement contract (9)

This part establishes that a procurement contract is a contract entered into by a Territory entity or an entity acting on behalf of the Territory entity and another entity for procurement under the Act and includes any document prescribed by regulation.

Form of procurement contracts and amendments (10)

Establishes that a procurement contract or any amendment must be in writing.

Clause 10 Part 2 and 2A

Substitute.

Part 2 Notifiable contracts and notifiable invoices

Application – pt 2 (11)

This establishes that the part applies to a procurement contract entered into by a Territory entity with an excluded body or an excluded body acting on behalf on a Territory entity.

For the purposes of Part 2 a procurement contract includes contracts between an excluded body acting on behalf of another excluded body.

Meaning of a notifiable contract (12)

This provides that the meaning of notifiable contracts is updated to state that notifiable contracts refer to procurement contracts with a total consideration of at least the prescribed amount.

This definition also includes standing-offer arrangements and contracts entered into

under a standing-offer arrangement but does not include a procurement contract of a kind prescribed by regulation. The thresholds for notifiable contracts are included at Part 3 (11) of the Regulation.

For a standing offer arrangement 'any amount' also captures where a standing offer has no dollar value assigned to the arrangement.

Meaning of a notifiable invoice (13)

This provides that the meaning of notifiable invoice which is an invoice for goods or services procured by or provided to the Territory entity under a procurement contract and includes invoices to the prescribed amount.

Division 2.2 Register

Keeping of a register (14)

This provides that the Director-General must keep a register of notifiable contracts and invoices and that the registers must be kept electronically.

Contents of register (15)

This provides that the regulation may prescribe the information included in the register for each notifiable contract and notifiable invoice. Further the provisions ensure that any confidential text in the procurement contract or invoice must not be disclosed on the register.

Division 2.3 Confidential text in notifiable contracts

Meaning of confidential text (16)

Establishes the meaning of confidential text in a notifiable procurement contract. This includes the new requirement that provides that personal information for the purposes of the *Information Privacy Act 2014* is confidential text.

Omit

- b) a notifiable contract for the employment of an individual.

This is amended to remove reference that a notifiable contract, for the employment of an individual, is confidential. Contracts for employment are not subject to the Act.

Notice of effect of div 2.3 to contracting parties (17)

This gives effect to the parties of a contract proposing parts of the contract be confidential text in relation to a notifiable procurement contract.

Grounds for confidential text (18)

This provides that the grounds for confidential text will be clarified to include any

information that would cause unreasonable detriment to the Territory or another party to the contract or would reasonably have a significant adverse effect on the financial, legal or property interests of the Territory or a Territory entity. This clarifies the Territory entity's obligations in regard to confidentiality, to ensure that contracts are managed in accordance with confidentiality provisions. This provides that a text of a contract is confidential where:

- (a) law requires (for example the Information Privacy Act 2014)
- (b) disclose of the text would cause unreasonable detriments to the Territory or another party to the contract
- (c) disclosure would risk personal or public safety
- (d) reasonably have significant adverse effects on financial, legal or property interests of the Territory or Territory entity
- (e) unreasonable constrain policy
- (f) disclose information prescribed by regulation

This Clause protects the Territory and contracted parties from disclosing information with commercial value which may adversely affect market competition through disclosure of commercially sensitive information.

Model confidentiality clause required for confidential text (19)

This provides that the text of a notifiable contract must not be confidential unless a confidentiality clause is included, and it does not limit the disclosure of information.

Invalidity of non-complying confidentiality clauses (20)

This provides that the confidentiality clause in relation to a notifiable contract is void if the clause in the contract contravened section 18 (grounds for confidentiality of information) or does not comply with section 19 (Model confidentiality clause required for confidential text).

Auditor general's requests for contracts and information, reporting obligations (21)

This provides that the auditor general can request a copy of the notifiable contract and any other contract or other contract information requested.

Division 2.4 Other matters

Effect of disclosure of confidential text (22)

This provides that if confidential text or information about confidential text is disclosed under this part, the disclosure does not affect the continuing force of the obligation of confidence.

Effect of other disclosure laws (22)

This part does not affect any other law applying in the ACT about the disclosure of documents or information.

Notice of effect of pt 2 to parties issuing invoices (22A)

This removes reference to the term 'works.'. Definition of works is currently incorporated in the definition of Services. The term 'works' has been removed to simplify the definition.

Effect of other disclosure laws etc (22B)

This provides that the part does not affect any other law in the ACT about the disclosure of documents or prevent responsible Territory entities from making available information otherwise than as required by this part. This creates additional obligations and does not contravene other bills.

No liability for complying with pt 2 (22C)

This provides that the Territory or Territory entity is not civilly liable to an entity that is a party to a notifiable contract, an entity issuing a notifiable invoice, or to anyone else, for anything done honestly under this part.

Clause 11 Section 22D

Substitute

Application – pt 2B (22D) This applies to a procurement by a Territory entity where a quote is received from the parties identified in the Act and establishes the parts that do not apply

Clause 12 Definitions—pt 2B Section 22E, definition of tenderer

Omit.

This definition has been included in the Dictionary (see Clause 73).

Clause 13 Meaning of territory-funded work—pt 2B Section 22F (1), definition of territory-funded work

Amended to omit. "services or works that are for a territory entity" and substitute

“services that are for a Territory entity.”

This removes reference to the term ‘works.’. Definition of works is currently incorporated in the definition of Services. The term ‘works’ has been removed to simplify the definition.

Clause 14 Section 22F (1), definition of territory-funded work, paragraph (a)

Amended to Omit “services or works” and substitute “services.”

This removes reference to the term ‘works.’. Definition of works is currently incorporated in the definition of Services. The term ‘works’ has been removed to simplify the definition.

Clause 15 Section 22F (1), definition of territory-funded work, paragraph (b)

Substitute(b) services that are primarily for construction work (other than excluded services).

This removes reference to the Work Health and Safety Regulation 2011.as ‘construction work’ is defined in the Dictionary (56) to align with the Work Health and Safety Regulation 2011 definition.

Clause 16 Section 22F (1), definition of territory-funded work, paragraph (c)

Amended to Omit “services or works” and substitute “services.”

This removes reference to the term ‘works’. Definition of works is currently incorporated in the definition of Services. The term ‘works’ has been removed to simplify the definition.

Clause 17 Section 22F (3), definition of excluded services or works

Substitute excluded services means services prescribed by regulation.

This removes reference to the term ‘works’. Definition of works is currently incorporated in the definition of Services. The term ‘works’ has been removed to simplify the definition.

Clause 18 Division 2B.2 heading.

Substitute to Division 2B.2 requirements for procurement by Territory entities.

Clause 19 Requirements for procurement-secure local jobs code certificates etc Section 22G (1) and (3)

Amended to omit “territory entity” and substitute with “Territory entity”.

Clause 20 Section 22G (4)

Amended to omit “A territory entity must not enter into a contract for procurement” and substitute with “A Territory entity must not enter into a procurement contract”.

Clause 21 Section 22G (5)

Amended to omit “contracts” and substitute with “procurement contracts”.

Clause 22 Exemption from requirements—secure local jobs code certificates etc Section 22H (1) and (3)

Amended to omit “territory entity” and substitute with “Territory entity.”

Clause 23 Surrender of secure local jobs code certificates etc Section 22L (2)

Amended to omit “territory entity” and substitute with “Territory entity.”

Clause 24 Section 22L (3)

Substitute

Amended to replace the term ‘contract’ with ‘procurement contract’ and “territory entity” with “Territory entity”.

Clause 25 22L (4)

Amended to omit “territory entity” and substitute with “Territory entity.”

Clause 26 Secure local jobs code Section 22M (2) (a)

Amended to omit “territory entity” and substitute with “Territory entity.”

Clause 27 Functions of council Section 22ZA (a) (ii)

Amended to omit “territory entity” and substitute with “Territory entity.”

Clause 28 Part 3 and 3A

omit

The Part 3 of the existing Act dealing with notifiable contracts is omitted and replaced with new provisions (see Clause 10 Part 2 and 2A) that deal with notifiable contracts and notifiable invoices.

Clause 29 Part 4

This is renumbered as Part 3, noting that Parts 3 and 3A are omitted

Clause 30 Section 43 heading

Substitute Application-pt 3

Clause 31 Section 43

Amended to omit “contract entered into by the Territory or a territory entity for procurement” substitute with “procurement contract.”

Clause 32 Section 43

Renumber as section 23

Clause 33 Section 44 heading

Substitute 44 Definitions—pt 3

Clause 34 Section 44 definition of commercial account, except example

substitute “commercial account means an account given to a Territory entity for the payment of money under a procurement contract”.

Clause 35 Section 44 definition of payment date, paragraph (b)

Amended to omit ‘the Territory or’ Clause 36 Section 44

Renumber as section 24.

Clause 37 Interest on unpaid accounts Section 45 (1) and (2)

Substitute.

Amended to omit “Territory or” and replaced “territory entity” with “Territory entity.”

Clause 38 Section 45

Renumber as section 25.

Clause 39 Exclusion of inconsistent contractual terms Section 46

Amended to omit “in a contract” substitute with “in a procurement contract.”

Clause 40 Section 46 (a)

Amended to omit section 43 and substitute with section 23.

Clause 41 Section 46

Renumber as section 26.

Clause 42 Section 47

Renumber as section 27.

Clause 43 New Part 4

Part 4 Government Procurement Board (28)

This establishes the Government Procurement Board.

Purpose and functions of the Government Procurement Board (29)

The Board will:

review and make recommendations in relation to procurement as prescribed under

the Regulation.

- review and endorse whole of government procurement practices.
- recommend the Minister make a direction under the regulation about whole of government procurement practices.
- provide advice to the Minister on any issue relevant to procurement by Territory entities.
- review and, if appropriate, endorse practices to be used by Territory entities for managing procurements (endorsed procurement practices).
- to recommend that the Minister give a direction about an endorsed procurement practice to Territory entities under section 51B (Procurements practices, policies and procedures).
- to provide advice to the Minister on any issue relevant to procurements by Territory entities or the operation of this Act; and
- to exercise any other function given to the board under this Act or any other territory law.

Recommendations of the board (30)

This provides that a new section will be created regarding the recommendations of the Board. This section states that a responsible chief executive for a Territory entity must ensure that the entity, as far as practicable, complies with the recommendations of the Board.

If the recommendations of the Board are not complied with, the Board may require the procurement to come back to the Board and the Board may make further recommendations on this matter to the CEO or governing board.

If the procurement is in the planning period and the Board considers that its further recommendations have not been addressed, or not been adequately addressed, the Board must refer the matter to the responsible Minister for the Territory entity.

This escalation process post-Board consideration will action Recommendation 10 and 15 of the Auditor-General's Performance Audit Report on the Activities of the Government Procurement Board.

Constitution of the board (32)

This provides for the constitution of the members of the Board. This provides for members to be appointed by the Minister and provides that the Chairperson position of the Board be held by a non-public employee. The position of deputy chairperson must be held by a public employee.

The appointment of these members must be ended if the Chairperson becomes a public employee, or the deputy chairperson is no longer a public employee.

This measure responds to Recommendation 11 of the Auditor-General's Performance Audit Report on the Activities of the Government Procurement Board which focuses on enhancing Board independence through requiring that the position of Board Chairperson be held by a non-public employee.

Board members – appointment (33)

This provides the process for the appointment of Board members.

Board members – conditions of appointment (34)

This provides that the regulation may prescribe the term of appointment and any conditions.

Board members – abuse of position (35)

This provides the circumstances and penalties for a Board member who commits an offence.

Board members – ending appointment (36)

This provides the circumstances where an appointment can be ended.

Clause 44 Part 4A

Renumbered as part 5.

Clause 45 Section 48 heading

Substitute 48 Meaning of reviewable decision—pt 5.

Clause 46 Sections 48, 49, 50 and 50A

Renumber as sections 37, 38, 39 and 40.

Clause 47 Part 5

Renumber as part 6.

Clause 48 Section 51 and 52 substitute.

Amounts inclusive of GST (41)

This clarifies that any dollar amount mentioned in this Act is inclusive of any GST payable in relation to the amount.

Government procurement rules (42)

This provides that the Minister may make rules in relation to procurements undertaken by Territory entities. Government procurement rules are a disallowable instrument that will include guidance in relation to value for money.

Government procurement practices (43)

This provides that the Minister may give directions about government procurement practices, policies or procedures.

Compliance with the Act (44)

This provides that if a Territory entity is required to prepare an annual report under the *Annual Reports (Government Agencies) Act 2004*, this report must include whether the entity has been compliant with the Act, and if not compliant, must detail why the entity has not complied.

Regulation-making power (45)

This provides for who can make a regulation under the Act and what a regulation can prescribe.

Clause 49 New part 12

Part 12 Transitional Government Procurement Amendment Act 2023

Instruments under pre-amendment Act and regulation (105)

This provides for transitional arrangements from the current Act, and this is particularly relevant for appointments of the Government Procurement Board.

Part 12 Transitional regulations (106)

This provides that a regulation may prescribe transitional matters in the enactment of the Act.

Part 12 Expiry-pt 12 (107)

This provides that the transitional arrangement expires 2 years after the day it commences.

Clause 50 Confidentiality obligations of Territory Schedule 1 reference

omit “(see s 36)” substitute “see s 19”.

Clause 51 Schedule 1, section M (4)

Amended to omit part 3 (Notifiable contracts) and substitute with part 2 (Notifiable contracts and notifiable invoices)).

Clause 52 Schedule 1, section M (5)

Amended to omit section 35 (1) and substitute with section 18 (1) and (2).

Clause 53 Dictionary, note 2

Insert 'GST' and 'territory instrumentally'.

Clause 54 Dictionary, definition of board

Amended to omit section 5 and substitute with section 28.

Clause 55 Dictionary, definitions of commercial account, confidential text and contract

Substitute commercial account, for part 3 (Interest on commercial accounts)— see section 24. confidential text, of a notifiable contract.

Clause 56 Dictionary, new definition of construction work

Notes the definition of construction work is referenced under the *Work Health and Safety Regulation 2001*, section 289.

Clause 57 Dictionary definition of a contract

Substitute contract include a contract as amended.

Clause 58 Dictionary, new definitions

Insert goods include intellectual property

and

goods or services includes goods or services related to construction work.

Clause 59 Dictionary, definition of notifiable amendment

Omit.

Clause 60 Dictionary, definition of notifiable contract

Substitute notifiable contract, for part 2 (Notifiable contracts and notifiable invoices)— see section 12.

Clause 61 Dictionary, definition of notifiable contracts register

Omit.

Clause 62 Dictionary, definition of notifiable invoice

Substitute notifiable invoice, for part 2 (Notifiable contracts and notifiable invoices)—see section 13.

Clause 63 Dictionary, definition of notifiable invoice register

Omit

Clause 64 Dictionary, definition of payment date

Substitute payment date, for a commercial account, for part 3 (Interest on commercial accounts)—see section 24.

Clause 65 Dictionary, new definition of probity

Insert probity -see section 7.

Clause 66 Dictionary, definition of procurement

Substitute procurement—see section 5.

Clause 67 Dictionary, new definition of procurement contract

Insert procurement contract—see section 9.

Clause 68 Dictionary, definition of public text

Omit.

Clause 69 Dictionary, new definition of register

Insert register—see section 14(1).

Clause 70 Dictionary, definition of relevant date

Substitute relevant date, for the payment of a commercial account, for part 3 (Interest on commercial accounts)—see section 24.

Clause 71 Dictionary, definitions of responsible chief executive officer, responsible Territory entity and reviewable decision

Substitute responsible chief executive officer, for a Territory entity, means—

- (a) if the entity is a directorate—the responsible director-general of the directorate under the Financial Management Act 1996; or
- (b) if the entity is the Office of the Legislative Assembly—the clerk of the Legislative Assembly; or
- (c) if the entity is an officer of the Assembly—the officer; or

(d) if the entity is a territory authority—the chief executive officer of the authority under the Financial Management Act 1996; or

(e) if the entity is prescribed by regulation—the person prescribed by regulation.

responsible Territory entity, for a procurement contract, means—

(a) the Territory entity that is, or will be, responsible for the administration of the contract; or

(b) if a Territory entity administers, or will administer, the contract for another Territory entity—the other Territory entity.

reviewable decision, for part 5 (Notification and review of decisions)—see section 37.

Insert "if the contract is entered into by another entity acting on behalf of a Territory entity—the Territory entity".

Clause 72 Dictionary, new definition of standing offer arrangement

Insert standing-offer arrangement means an arrangement or agreement to supply stated goods or services on agreed terms, including pricing, that may be procured from time to time during a period stated in the arrangement or agreement. Examples could include a common use arrangement, a deed of standing offer, and head agreement for instance.

Clause 73 Dictionary, definitions of tenderer and Territory entity

substitute tenderer, in relation to a procurement, means an entity that submits a quote, tender or other response in relation to the procurement. Territory entity—see section 6.

Clause 74 Dictionary, new definition of value for money

Insert value for money—see section 8 (1).

Amendments to the Government Procurement Regulation 2007

Clause 75 New Section 2

Insert

Dictionary

The dictionary at the end of this regulation is part of this regulation.

Note 1 The dictionary at the end of this regulation defines certain terms used in this regulation and includes references (signpost definitions) to other terms defined elsewhere. For example, the signpost definition 'supplier—see section 6 (2)' means that the term 'supplier' is defined in that section.

Note 2 A definition in the dictionary (including a signpost definition) applies to the entire regulation unless the definition, or another provision of the regulation, provides

otherwise or the contrary intention otherwise appears (see Legislation Act, s 155 and s 156 (1)).

Clause 76 New part 1A

Insert

Part 1A Important concepts

Meaning of procurement- Act, s 5 (4) (3A)

This establishes what is not a procurement.

Prescribed Territory authorities (3B)

This provides a list of prescribed Territory Authorities subject to the Act and Regulation.

Meaning of a procurement contract (3C)

This establishes that the Labour Relations, Training and Workplace Equity Plans and a plan made in relation to the Local Industry Participation Plan are prescribed documents under the procurement contract.

Clause 77 Parts 2 and 3

Substitute.

Part 2 Quotations and tender thresholds and exemptions

Division 2.1 Preliminary

Application – pt 2 (4)

This outlines procurement outlines what types of procurements are exempt from tender and quotation thresholds. **Delegation by responsible chief executive officer (5)**

This provides that the responsible chief executive officer for a Territory entity may delegate the officer's functions under this part to a public employee.

Division 2.2 Quotation and tender thresholds (6) (7) and (8)

This clause provides that the quotation and tender thresholds will be amended as following:

- low-value procurements under \$25,000, will require a single quote that must be recorded in writing.
- Limited Tender processes will require that at least three written quotes be sought for procurements between \$25,000 and \$500,000 for goods and services and between \$25,000 and \$1,000,000 for construction procurements.
- Any procurements above these thresholds must use a public tender.

The open tenders must be invited electronically for at least 25 days or 10 days where the Territory entity has published a notice electronically for at least 40 days (but not more than 12 months) before the first day the invitation is advertised.

Division 2.3 Exemptions

Exemption reasons—limited and open tender procurement (9)

This section establishes the other grounds for exemptions that a responsible chief executive for a Territory entity can apply under section 9 or section 1.

For the purposes of 9 (h) the reference to an independent judge means a judge who is impartial and is not directly involved with the design contest.

Exemptions – limited tender procurement (10)

This provides the circumstances that a chief executive officer of a Territory entity can, in writing, exempt the Territory entity from a limited tender procurement, and provides that specific exemptions from the tender and quotation thresholds will be available where:

- the Territory entity seeks at least one written quotation from a Certified Aboriginal and Torres Strait Islander Enterprise.
- the Territory entity seeks two quotations, one from a local business and one from a Small to Medium Enterprise.

Exemptions – open tender procurement (10A)

This provides the circumstances that a chief executive officer of a Territory entity can in writing exempt the Territory entity from an open tender procurement.

Exemptions – directions (10B)

This provides that the responsible chief executive officer for a Territory entity exempts the Territory entity under section 9 or section 10 for a procurement, the officer may, in writing, direct the Territory entity to do 1 or more of the following:

- (a) seek a stated kind or number of written quotations for the procurement;
- (b) seek a written quotation or invite a tender from a stated supplier for the procurement.

Division 2.4 Open tender procurement

Notice of procurements for open tender procurements (10C)

This provides the requirement to publish a notice of a procurement electronically, at the earliest possible date.

Late tenders (10D)

This provides that a Territory entity must not accept a late tenders, for an open tender procurement, unless the tender was late due to an act of omission by the Territory entity.

Part 3 Notifiable contracts and notifiable invoices

Notifiable contract threshold – Act s 20 (2) (b) (11)

The prescribed amount is \$25,000.

Notifiable invoice threshold – Act s 21 (a) (ii) (12)

The prescribed amount is \$25,000.

Contents of register – Act s15 (1) (12A)

This provides that the register for notifiable contracts will include additional fields such as the Procurement Unique Identifier, the contract number, confidential text, application of the Secure Local Jobs Code and any other information under a direction.

Public access to information on register (12B)

This provides that the director-general must ensure that the prescribed information is available on a website approved by the director-general at all times.

Territory entities to enter information in the register (12C)

This provides that the responsible officer for a notifiable contract and notifiable invoices must, within 21 days after the day the contract is made, enter any information into the Register.

Clause 78 Sections 12AA and 12AB headings

Substitute.12AA Prescribed value of services—Act, s 22F (1) (a) (ii)

12AB Excluded services—Act, s 22F (3).

Clause 79 Labour relations, training and workplace equity plan – Act, s 22G (6) (b) Section 12AC (1) (g)

This omits “or works.”

This removes the term ‘works.’ Definition of works is currently incorporated in the definition of Services.

Clause 80 Section 12AC (1) (i)

This omits “territory entity” and substitutes with “Territory entity.”

Clause 81 Parts 5 and 6 substitute

Part 5 Procurement Board

Division 5.1 Application – div 5.1 (13)

This provides that procurements which establish a new standing-offer arrangement must be reviewed by the Government Procurement Board. The use of an established and current standing offer arrangement does not require Government Procurement Board consideration unless the value is higher than the prescribed consideration amount.

Procurements to be reviewed by the Board (14)

This provides that the Government Procurement Board must review procurements, including acquisitions and disposals, with an estimated total consideration of \$7 million or more.

The Board must also review a procurement that, irrespective of its total estimated value, is in the plan phase (before an approach to market), and meets at least one of the following thresholds:

- a) the procurement has been assessed by the procuring Territory entity as having a high or extreme risk rating;
- b) the proposed procurement relates to information and communications technology that includes an element of system development or redesign;
- c) the proposed procurement is for a cooperative or collaborative arrangement;
- d) the procurement proposes to substantially change the scope or nature of an existing procurement contract;

This also provides that procurements can also be referred from any of the following: the Minister, the responsible chief executive officer for a Territory entity, the administrative unit responsible for administering the Act, Major Projects Canberra or a person that has been engaged to investigate the probity of the procurement or proposal.

The changes to the referral thresholds for Board consideration responds to Recommendation 1 of the Auditor-General's Performance Audit Report on the Activities of the Government Procurement Board. As stated in the Audit Report, the dollar value-based thresholds have not been revised since 2007 and due to the passage of time and the changing nature of Government procurements and the marketplace, including the increasing use of whole of Government standing arrangements and panels, these thresholds may no longer be appropriate.

Board members – term of appointment – Act, s 34 (a) (15)

This provides the term of appointments. This provides that the information on the term of appointment of Board members will be moved from the Act to the Regulation.

Board members – honesty, care and diligence – Act s 34 (b) (16)

This provides that members will exercise a degree of honesty, care and diligence in exercising their functions as a Board member.

Board members – disclosure of interests – Act, s 34 (b) (17)

This provides the process where a Board member who has a direct or indirect interest, financial or otherwise, or an interest that could conflict with their proper exercise of their function as a Board member.

Board members – ending appointment – Act s 36 (3) (c) (18)

Contravening either section 16 or section 17 without reasonable excuse is prescribed.

Division 5.3 Board proceedings and reporting Annual Board meeting (19)

This provides the Board must meet at least once each financial year to discuss how the Board proposes to improve the processes and management of procurements undertaken by Territory entities under the Act.

Board annual report (20)

Provides for the Board to annually report to the Minister on the performance of the Board, management of procurements and whether any conflicts of interest were identified within the Board.

Clause 82 New Dictionary

This provides that a dictionary of terms used in the Regulation will be established at the end of the Regulation. This dictionary also includes references (signpost definitions) to other terms described elsewhere.