

## Procurement or Grant Guideline

### Purpose

The purpose of the guideline is to:

- promote a consistent approach by public authorities when distinguishing between a procurement (as defined in [Treasurer's Instructions 18 Procurement](#)) and a grant (as defined in [Treasurer's Instructions 15 Grant Funding](#))
- provide guidance to public authorities to help determine whether an engagement with a non-SA Government party is a procurement or a grant, or something other than a procurement or a grant
- ensure that public authorities operate in accordance with [Premier and Cabinet Circular \(PC044\) South Australian Funding Policy](#), which is read in conjunction with other relevant Treasurer's Instructions, Procurement Services SA (PSSA) policies and guidelines and related legislation.

Public authorities will often make these determinations based on their judgement and detailed knowledge of the specific funding and contracting arrangements and the business context in which the proposed arrangements sit. In unusual or complex cases, specific policy guidance may be sought from PSSA and/or legal advice may be required.

### Key Takeaways

1. Because the expenditure of public money is involved, Treasurer's Instructions impose process and approval obligations on SA Government agencies in relation to both procurements and grants. Treasurer's Instructions 18 Procurement (TI 18) governs procurements, and Treasurer's Instructions 15 Grant Funding (TI 15) deals with grants.
2. When determining whether funding is a procurement or grant, it is necessary to carefully consider the nature and circumstances of the funding with regard to the definitions of "procurement" (as set out in TI 18) and "grant" (as set out in TI 15). The distinction is important, because very different process and approval rules applies to each category of spend, reflecting the different public policy context underpinning the planning and implementation of grant programs compared to that underpinning expenditure on goods and services for business needs.
3. The [key indicators](#) and examples set out on pages 4 and 5 of this Guideline are provided to assist agencies to make this determination.
4. Some types of Government expenditure are neither a procurement nor a grant; examples of these are set out on page 7 of this Guideline.

### Policy Framework

When determining your funding arrangements, it is important to have a sound understanding of the Policy framework that governs procurements and grants in SA Government.

Both procurements and grants in SA Government are governed by Treasurer's Instructions. Treasurer's Instructions are legislative instruments issued under the *Public Finance and Audit Act 1987* (SA) and are directed at imposing rules around the receipt, expenditure or investment of public money, the acquisition or disposal of property, or the incurring of liabilities, by the Treasurer and public authorities. Treasurer's Instructions are legally binding, and a breach can amount to an offence.

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### TI 18 - Procurement

The objectives of this Instruction are to:

- promote good governance, contract management, transparency and record keeping by public authorities in the course of planning and undertaking procurements which create liabilities or potential liabilities for expenditure by public authorities; and
- promote compliance with whole-of-government procurement policies; and
- provide for reporting to the Department of Treasury and Finance about procurements by public authorities; and
- make Chief Executives of public authorities responsible for procurements by the public authority and for determining agency-specific procurement arrangements.

TI 18 requires that certain processes be followed in the planning, undertaking and reporting on procurements (as defined in the Treasurer's Instruction).

### TI 15 - Grant Funding

The objective of Treasurer's Instruction 15 Grant Funding is to establish appropriate accountability on the part of non-SA Government entities that receive a **grant(s)** from an administrative unit(s). It requires that a written agreement be entered into when a grant is provided to a recipient, and that in some circumstances the agreement contain certain minimum provisions, such as reporting requirements and the ability for the Government party to recover unexpended funds.

### Premier and Cabinet Circular 044 South Australian Funding Policy for the Not-for Profit Sector

Premier and Cabinet Circulars are whole-of-Government policies issued by Cabinet. While circulars do not have legal effect, there is a clear administrative expectation that SA Government parties will comply with their terms.

Where funding is provided to a Not for Profit (NFP) entity, PC044 is relevant regardless of whether the funding is classified as a procurement or a grant.

PC044 aims to support and strengthen the collaborative partnerships between government and the NFP sector by setting out clear requirements and providing a consistent approach for all aspects of funding while reducing the administrative burden on NFPs. It does so by specifying key principles that Government party should adhere to when providing funding to a NFP. PC044 applies to:

- all public authorities
- all funding arrangements (procurement and grants), regardless of dollar value.
- all NFPs excluding schools, universities, and churches.

### Definitions relevant to this Guideline

This Guideline uses terms which are defined in the above instructions and policies.

#### Not for Profit (defined in PC044)

A NFP is an organisation that does not operate for the profit, personal gain, or other benefit of particular people. NFP organisations consist of two broad categories:

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- charities<sup>1</sup>, which will usually be registered with the Australian Charities and Not-for-profits Commission
- other types of NFP organisations such as community service organisations, professional and business associations, sporting and recreational clubs and cultural and social societies.

### Funding (defined in PC044)

Funding is very broadly defined in PC044 and captures any payments made by the government to an NFP organisation in relation to funding of that NFP organisation.

In this Guideline more broadly, “funding” is a convenient term used to describe the full spectrum of payments made to non-SA Government entities, including both procurements and grants.

### Procurement (defined in TI 18)

Procurement means:

- the process undertaken by a public authority for:
  - acquiring goods or services for the public authority, including the acquisition of goods or services on behalf of another public authority or third party (including members of the public); or
  - engaging in a construction project<sup>2</sup>; or
  - disposing of or distributing an asset of the public authority,
- which involves expenditure by a public authority, and does not include:
  - the provision of funding to a third party by a public authority that is a grant under Treasurer’s Instructions 15 Grant Funding; or
  - the engagement of a legal practitioner to provide legal services; or
  - purchase or lease of real property; or
  - a sponsorship arrangement; or
  - any activity or class of activities determined by the Treasurer to not be a procurement for the purposes of Treasurer’s Instructions 18.

### Grant (defined in TI 15)

The provision of funding to a third party is classified as a grant if:

- it constitutes expenditure by a public authority to assist or support a third party in the conduct of its undertaking, and
- the benefits on account of that expenditure do not flow, or do not predominantly flow, to the public authority.

A non-recourse grant means:

- a grant for a specified purpose, and with specified objectives that may or may not have a

<sup>1</sup> For further information see: [Getting started | Australian Taxation Office \(ato.gov.au\)](#).

<sup>2</sup> Defined in TI 18, but does not include construction projects with a value above \$165,000 – which are currently exempted from the operation of TI 18

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series of conditions attached. Failure to meet any or all the conditions does not entitle the Government to recover the grant.

### How to determine if your funding is a Procurement or Grant

When determining if the funding is a procurement or grant, it is necessary to carefully consider the nature and circumstances of the funding with regard to the definitions of “procurement” (TI 18) and “grant” (TI 15) described above. The distinction is important as there are fundamentally different requirements in TI 18 and TI 15 which reflect the distinct policy objectives underpinning Government’s role as a purchaser of goods and services as compared to a grant funder. There are also different internal agency requirements for procurements and grants, such as distinct budget allocations.

Consideration should be given to the [key indicators of a procurement](#) and [key indicators of a grant](#) set out below. Please note that these are indicators only; no single indicator is necessarily determinative that the funding is either a procurement or a grant.

In some instances, it may be straightforward to determine whether funding is a procurement or a grant, for example:

- an agency purchasing stationery falls clearly within the scope of a procurement;
- an agency providing funding to a NFP organisation for its everyday, operational expenses (only) is clearly a grant.

In other instances this may not be straightforward to determine; it is possible that the funding may have indicators of both a procurement and a grant. In this instance, the public authority will need to determine whether the funding more closely aligns with a procurement or a grant. In more complex cases, specific policy guidance may be sought from PSSA.

This complexity is most likely to arise in a goods and services context, specifically where the funding arrangement involves either:

- the non-Government party providing goods and/or services to the State or a third party; or
- the non-Government party acquiring goods and/or services for its own consumption.

It is common for SA Government agencies when providing grant funding to impose conditions that are directed at achieving agreed objectives, and for those objectives to align with the priorities and mandate of the agency. These arrangements are properly characterised as grants, because the benefit that flows to the SA Government agency is merely indirect (e.g., achievement of a broader policy or economic objective consistent with the mandate of the agency). However, in some cases, there will be a point at which the benefit flowing to the Government party is sufficiently direct, such that the funding should be considered a procurement.

Finally, there are some types of Government expenditure that cannot be classified as a procurement nor as a grant. These are discussed further on page 7.

### Key indicators that an activity is more likely to be a procurement

Public authorities can use the list of indicators below to help assess whether their activity is likely to be a **procurement**:

- the goods or services are being acquired by the public authority for its own use, consumption, or benefit

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- the goods or services are being acquired by the public authority for a third party's use, consumption, or benefit (i.e., the public authority has a statutory, policy or contractual responsibility to provide goods or services to the public and is contracting or outsourcing delivery)
- the public authority specifies the nature of the goods or services and controls the scope, time or place of acquisition or disposal
- the public authority own, control, or has some form of licence or title to the equipment, property, infrastructure, or other asset provided by the supplier
- the amount paid by the public authority is likely to include a profit margin for the recipient
- the public authority is disposing of its goods or assets including by sale.

### Key indicators that an activity is more likely to be a grant.

Public authorities can use the list of indicators below to assess whether their activity is likely to be a **grant**:

- the public authority is providing funds to a recipient to enable the recipient to achieve its own goals and objectives that are consistent with public authority policy
- the public authority does not receive a direct benefit even though an indirect benefit may be obtained by the public authority through aligned objectives
- the direct beneficiary of the goods or services from the arrangement are the recipient or a broader group (e.g., an identified segment of the community)
- the public authority does not receive anything in return from the supplier such as ownership, control, licence or title, but may attach terms and conditions on expenditure
- the recipient has a level of discretion in how they use the funding
- the recipient may have more than one source of funding to deliver the goods or services (e.g., from other public authorities or the Commonwealth, benefactors etc.) or contribute other volunteer or in-kind efforts to augment the funds received from the public authority
- the amount paid by the public authority does not include a profit margin for the recipient
- the funds are provided by the public authority to provide assistance to the community following a disaster, crisis, or other significant event
- there is a requirement for the recipient to acquit the funds and/or to return unspent funds at the end of the arrangement<sup>3 4</sup>
- funding is directed to the achievement of an outcome and there is less focus in the terms and conditions on how that outcome is achieved.

The following examples are provided to further assist you with your determinations

<sup>3</sup> Some exceptions may apply to non-recourse grants.

<sup>4</sup> However, please note that the Not-for-Profit Funded Services Agreement (used for certain procurements) includes provisions for the acquittal of expended funds and the repayment of unexpended funds, due to the unique payment structure used in this standard agreement.

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### Funding of Aged Care Home Nursing Services

- One of the functions of the public authority is to provide aged-care home nursing services to the South Australian community.
- The public authority engages a NFP sector organisation to provide nursing services to the community and provides funding to a third party to undertake these services to the community.
- The public authority specifies the services and will determine who is eligible to receive those services.
- The process for engaging the NFP sector organisation to provide the services is a process (procurement) undertaken by the public authority.
- The community and the third-party benefit from these services but the public authority receives the predominate benefit as it would otherwise have had to provide the services itself. On one view, this is effectively the appointment of an outsourced service provider.

This funding is a **procurement**.

### Funding to a Sporting Club to purchase equipment

- One of the functions of the public authority is to promote sport for children.
- The public authority provides money to a football club for the purchase of 100 new footballs for its junior program (third parties undertaking).
- The community and the third party are the predominant beneficiaries of this funding.
- The process to procure the footballs is a process (procurement) undertaken by the football club in its own right, and not by or on behalf of the public authority.

This funding is a **grant**.

### Funding to a Peak Body to undertake advocacy

- A public authority provides funding to a Peak Body to undertake advocacy in South Australia.
- The public authority has provided this funding to the Peak Body to support the body's policy objectives.
- There is minimal specification of the services to be provided by the Peak Body.
- The Peak Body is the primary beneficiary as the funding they receive enables them to provide advocacy for their members and participate and contribute to policy debate.
- The public authority does not receive any direct benefit.

This funding is a **grant**.

## Additional information

### Standard Funding Agreements for Not-for-Profit sector

Since 1 January 2019, when providing funding to NFP entities, public authorities are required to use [standard funding agreements](#) that have been specifically developed with the NFP sector.

The terms and conditions in these agreements have been negotiated with the NFP sector and

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represent a simplified, fair, and consistent approach to funding the NFP sector in accordance with PC044. The standard agreements are:

- [Standard Not-for-Profit Grant Agreement](#) - a standardised grant agreement for all low to medium risk grants to NFP entities valued at greater than \$10,000 (GST exclusive);
- [Standard Not-for-Profit Low Value Grant Agreement](#) - a simple letter agreement for low value grants to NFP entities of up to \$10,000 (GST exclusive); and
- [Standard Not-for-Profit Funded Services Agreement](#) - for public authorities that are procuring services from a NFP entity that requires some amount of up-front payment. *Note: Pursuant to Treasurer's Instructions 11, no more than 25% of an annual payment may be made up-front in this instance.*

The Funded Services Agreement and Grant Agreements consist of standard terms and conditions relevant to the funding type, with an attachment of details specific to the contract, and a clause bank of special conditions.

The PSSA [Guideline for the use of Standard Government Contracts](#) provides advice for public authority contract managers and administrators about how to use the NFP standard contracts.

### Arrangements that are neither a procurement nor a grant

There are some types of Government expenditure that cannot be classified as a procurement nor as a grant. Examples of these are set out below.

- **Ex gratia payments** – a type of expenditure where Government has no legal obligation to make the payment and does not receive any reciprocal obligation from the payee in return.
- **Outgoing Sponsorships** – an arrangement under which a public authority pays money to a non-government party for an event, project or program in exchange for some negotiated benefit in the nature of co-branding or promotion.
- **Certain Collaborative arrangements** – for example, a joint research project where the Government party is a co-participant or partner in an endeavour of common purpose and benefit. Often in these arrangements, the cost of participation is to provide cash or in-kind contribution towards the endeavour. In some cases, the Government party may receive some return such as intellectual property rights. Care needs to be taken in the characterisation of these arrangements, and policy and/or legal advice may need to be sought to ensure compliance with Treasurer's Instructions.
- **Investment** – for example, social impact investments (e.g. whereby Government invests in a social impact scheme designed to reduce future Government costs through improved social outcomes) or traditional financial investments as part of the discharge of a statutory function to invest monies.

The above types of expenditure should be documented in legally binding agreements when they involve non-SA Government parties. Agencies are encouraged to seek their own advice (including policy and legal) through their usual channels for doing so, to confirm:

- whether the expenditure falls into any of the above categories, and
- the appropriate form of legally binding agreement.

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### Policy considerations

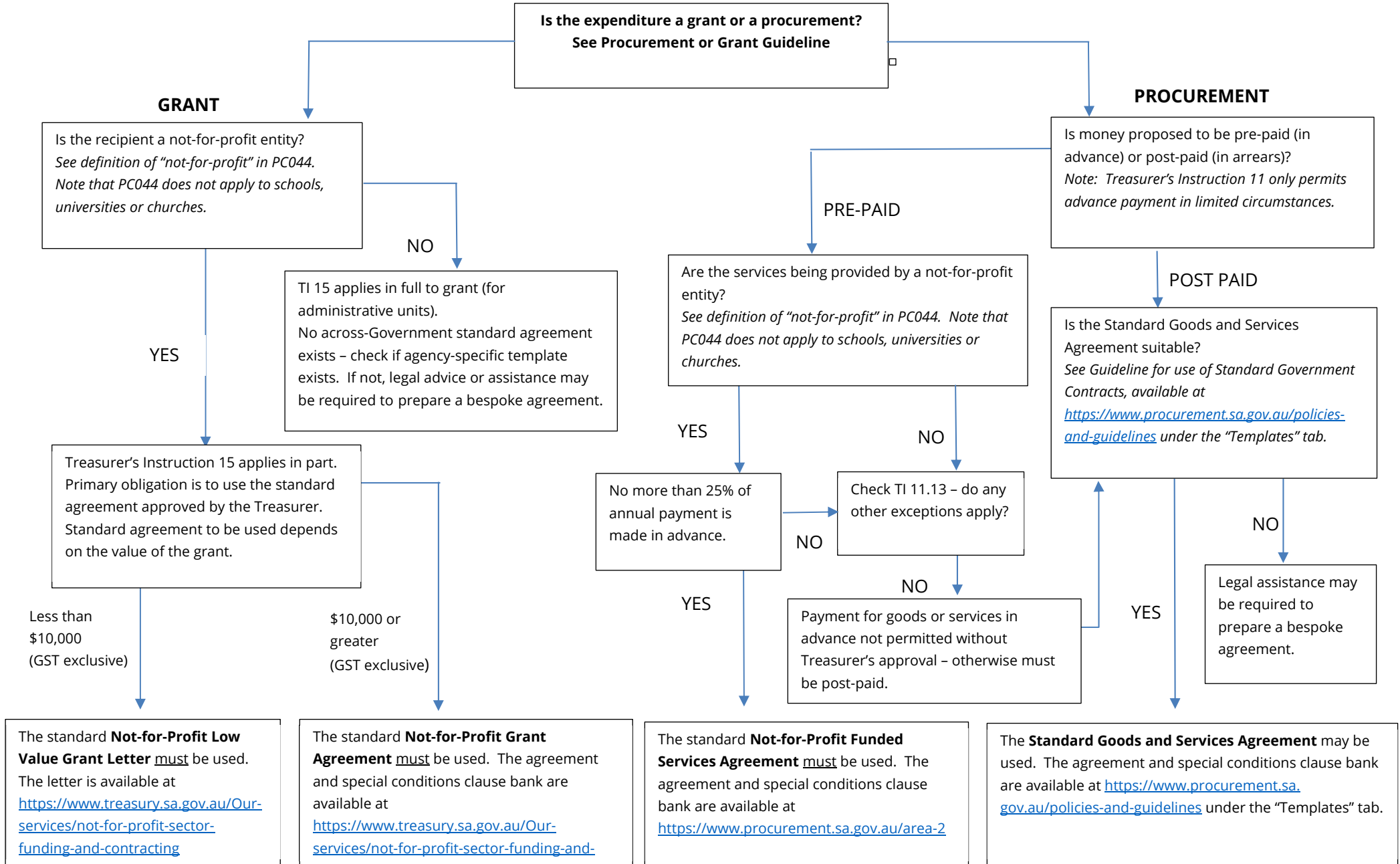
It is important to note that just because expenditure may not be governed by TI 18 (for procurements) or TI 15 (for grants), this does not mean that the expenditure is unregulated in a policy sense. There are still likely to be Treasurer's Instructions that apply, such as:

- [Treasurer's Instructions 8](#) (Financial Authorisations), which requires public authorities to ensure that all expenditure is properly authorised;
- [Treasurer's Instructions 14](#) (Ex Gratia Payments), which regulates ex gratia payments;
- [Treasurer's Instructions 17](#) (Public Sector Initiatives), which applies to expenditure in connection with a public sector initiatives.

As the aim of PC044 is to support and strengthen the collaborative partnerships between government and the NFP sector, public authorities are also encouraged to apply the same principles to NFP sponsorships as they would to procurements with NFPs and grants provided to NFPs.



Which SA Government Standard Template (if any) should be used?\*



\*Please Note: The purpose of this flowchart is to address the most commonly used SA Government templates, and the most common circumstances for their use. It is not intended to cover all templates, or all arrangements with non-SA-Government parties. There will be arrangements where the none of the above template are appropriate, including where the arrangement is neither a grant nor a procurement.