

International Obligations Guideline

Purpose

This Guideline provides a summary of the government's international obligations relevant to covered government procurement by procuring entities¹.

This is a guiding document only. Procurement officers are responsible for ensuring they understand the applicable international obligations by reading each Agreement.

The South Australian Government ('government') is a signatory to, or has agreed to comply with, a range of bilateral and multilateral that are entered into to reduce or eliminate barrier to trade, to maximize and improve market access for Australian exporters and investors and which impose various obligations on governments when conducting procurements² including:

- Free Trade Agreements ('FTA') - international agreements that support free trade between the parties, including obligations for undertaking government procurement
- Government Procurement Agreements ('GPA') – international agreements relating specifically to government procurement, (together 'International Agreements').

The Chief Executive (or equivalent) of a public authority is responsible for their public authorities' compliance with the international obligations set out in these International Agreements. This guideline should also be read in conjunction with the policies provided under the *South Australian Government Procurement Framework*.

Most of these International Agreements include provisions dealing with supplier complaints about the conduct of procurements that are the subject of the International Agreements. Suppliers are required to attempt to resolve any complaints with the relevant procuring entity before the supplier is permitted to seek resolution of the dispute by an impartial administrative or judicial authority.

¹ Refer Schedule 3 of this Guideline: Principles for determining covered public authorities under the AUSFTA, ACIFTA, KAFTA, JAEPA, SAFTA, WTOGPA AND CPTPP

² A complete list of Australia's Free Trade Agreements in force can be found on the Department of Foreign Affairs and Trade (DFAT) website.

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Application of International Obligations to Procurement

The South Australian Government is bound by the following International Agreements:

- [Australia and New Zealand Government Procurement Agreement \(ANZGPA\)](#)

The South Australian Government has agreed to comply with the government procurement chapters ('GP Chapters') of the following International Agreements that the Australian Government has with foreign national governments:

- [Australia - United States FTA \(AUSFTA\)](#) - refer to Chapter 15
- [Australia - Chile FTA \(ACIFTA\)](#) - refer to Chapter 15
- [Korea - Australia FTA \(KAFTA\)](#) - refer to Chapter 12
- [Japan - Australia Economic Partnership Agreement \(JAPEA\)](#) - refer to Annex 3A
- [Singapore - Australia FTA \(SAFTA\)](#) - refer to Chapter 6
- [Comprehensive and Progressive Agreement for Trans-Pacific Partnership \(CPTPP\)](#) – refer to Chapter 15 and Chapter 28

The South Australian Government has agreed to comply with the following International Agreement that the Australian Government has with WTO signatories:

- [World Trade Organization Agreement on Government Procurement \(WTOGPA\)](#)
- refer to Article XVIII

Schedules 1 and 2 of this guideline outline the key principles and requirements for these International Agreements.

Schedule 3 of this guideline outlines the basis for resolving whether a public authority of the South Australian government is a "procuring entity" for the purposes of the 'GP Chapters' of these International Agreements, as well as the principles for determining "procuring entities" in the event of a government restructure.

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Schedule 1: ANZGPA Key Principles and Requirements

Objectives

The objective of the ANZGPA is to maximise opportunities for competitive Australian and New Zealand suppliers and reduce the costs of doing business for both government and industry.

Public authorities are responsible for achieving these objectives by:

- ensuring the opportunity exists for Australian and New Zealand suppliers to compete on an equal and transparent basis for government contracts
- ensuring inter-state and Trans-Tasman preference schemes and other forms of discrimination in government procurement based on place of origin are not applied
- providing a mechanism for co-operation in working towards consistency in contractual, technical and performance standards and specifications, and simplicity and consistency in the application of procurement policies, practices and procedures
- ensuring the application of electronic commerce methods to procurement is consistent with the ANZGPA.

Application

The ANZGPA applies to all government procurements of goods, services and construction (as defined by the ANZGPA), and is applicable to all government departments, statutory authorities and other bodies controlled by the South Australian Government.

Procurement Thresholds

There are no procurement thresholds for the ANZGPA.

Exceptions

The ANZGPA recognises that under certain circumstances there may be a need to exempt certain classes of procurement from some of the requirements of the ANZGPA. Annex 1 of the ANZGPA outlines the exempt classes of procurement.

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Schedule 2: Key Principles and Requirements of AUSFTA, ACIFTA, KAFTA, JAEPA, SAFTA and CPTPP ('FTAs') and WTOGPA

Objectives

The FTAs and WTOGPA are designed to maximise and improve market access, legal protections and business certainties that Australian exporters and investors require to compete in the United States, Chilean, Korean, Japanese, Singaporean, Trans-Pacific economies and WTO signatories.

The primary principle of the GP Chapters of the FTAs (although worded differently across chapters) and the WTOGPA is that each party will reduce and eliminate barriers to international trade and investment and treat any suppliers from other countries, that are a party to the FTA or the WTOGPA, no less favourably than its own domestic suppliers.

Application

The GP Chapters of the FTAs and the WTOGPA apply to 'covered procurements', which means government procurement of goods, services or construction:

- by any contractual means, including purchase, rental or lease, with or without an option to buy; build-operate-transfer contracts and public works concessions contracts
- for which the value equals or exceeds the relevant threshold specified in the GP Chapter
- that are not excluded from coverage (refer to Schedule 3 of this guideline for guidance).

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Procurement Thresholds

The government procurement requirements of the FTAs and the WTOGPA apply to covered procurements where the value of the procurement (including GST) exceeds a monetary threshold.

FTA or GPA	Goods and Services	Construction Services
AUSFTA (Chapter 15)	AUD680,000	AUD9,395,000
ACIFTA	AUD679,000	AUD9,570,000
KAFTA	KRW310,000,000	KRW25,500,000,000
JAEPA	SDR355,000	SDR355,000
SAFTA	SDR355,000	SDR5,000,000
CPTPP	AUD685,000	AUD9,641,000
WTOGPA	SDR355,000	SDR5,000,000

*The current threshold values apply as at 1 January 2020 and are adjusted in accordance with the requirements set out in each FTA and the WTOGPA.

** 1 KRW equals approximately 0.12AUD

** 1 SDR equals approximately 1.95AUD

The AUSFTA threshold is marginally less than those for the other FTAs and the WTOGPA and therefore, when applied, ensure compliance across all FTAs and the WTOGPA. The current threshold values apply as at 1 January 2020 and are adjusted in accordance with the requirements set out in the AUSFTA.

- For procurement of Goods and Services AUD680,000; and
- For procurement of Construction Services AUD9,584,000.

Valuing a Procurement

The estimated value of a procurement, to determine if it is a covered procurement under the FTAs and WTOGPA, will include the total value of any extension and other options.

Procurements cannot be divided into separate procurements for the purpose of avoiding the application of the FTAs and the WTOGPA.

Exceptions

Most procurements that are valued above the set thresholds (identified above) will be 'covered procurement' and therefore subject to the requirements of the GP Chapters of the FTAs and the WTOGPA. However, for each FTA and the WTOGPA there are a range of exceptions that apply.

Public authorities covered by FTAs and the WTOGPA must refer to the specific Agreements to obtain details of exceptions. Public authorities may need to seek legal advice as to whether any exception applies to the proposed procurement.

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Advertising Tender Documents

In accordance with the GP Chapters of the FTAs and the WTOGPA, prospective suppliers in the United States, Chile, Korea, Japan, Singapore and signatories to the CPTPP and WTOGPA must be able to access tender advertisements and opportunities. Further, the tender notices must be published in electronic, or paper media that are widely disseminated, and remain readily accessible to the public for the entire period for responding to the tender.

In order to meet this requirement, the *Sourcing Policy* requires all open market approaches valued above \$550,000 to be advertised on the [SA Tenders and Contracts website](#) (at a minimum).

Awarding of Contracts

Unless it is not in the public interest to do so, where a tender has been called a contract should be awarded to the supplier that submits the best value for money³ offer, based on the evaluation methodology specified.

Each public authority is required to advise all suppliers that submitted an offer for a covered procurement, in writing, the outcome of the supplier's offer and provide an opportunity for the supplier to receive feedback on their offer. The public authority will prepare and conduct a formal tender debrief as requested. Tender debriefs should provide constructive feedback to suppliers.

Late Tenders

A public authority should not penalise a supplier whose tender is received after the specified closing date and time if the public authority has determined that the delay in lodgement was due to a failure on the part of the public authority. Refer to the *Sourcing Policy* for details on how to handle late tenders.

Non-Discrimination

An offer to a tender call, received from a United States, Chilean, Korean, Japanese, Singaporean or participating TPP or WTOGPA signatory supplier, must not be treated less favourably than an offer from an Australian supplier.

Offsets

The imposition or enforcement of offsets (see definition in the Agreements) is prohibited under the FTAs and the WTOGPA.

Multi-Use Lists

The FTAs and WTOGPA allow public authorities to establish multi-use lists (also

³ For the purposes of the SAFTA, WTOGPA and the CPTPP 'best value for money' is the same as 'most economically advantageous tender'. See Schedule 1 of the *Procurement Governance Policy* to see what the government considers to be value for money.

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known as pre-qualified supplier lists) provided they publish, annually or continuously by electronic means, a notice inviting interested suppliers to apply for inclusion on the list.

For the purposes of the FTAs and WTOGPA listed in this Schedule, a panel contract is not considered a multi-use list. The *Across-Government, Multi-Agency and Panel Contracts Guideline* discusses the differences between a multi-use list and a panel contract.

Market Approach (Sourcing)

The selected market approach for a 'covered procurement' should be fair and transparent and adhere to the requirements detailed in the *Procurement Planning Policy*.

Tender Call Periods

Under the AUSFTA, ACIFTA, KAFTA, JAEPA the default minimum period between the advertising of a tender and the closing date is 30 calendar days.

Under the SAFTA, WTOGPA and CPTPP 40 days is allowed for open tendering from the date of publication of the notice of intended procurement. 25 days is provided for selective tendering.

For all FTAs, this period can be reduced to 25 days, where:

- the tender is advertised on SA Tenders and Contracts;
- the tender documentation is made available electronically from the date of advertisement of the tender; and
- tender responses can be submitted electronically.

Breaches of Free Trade Agreements

Each GP Chapter of the FTAs and the WTOGPA includes domestic review procedures relating to breaches of the respective International Agreements.

In the event that a complaint is made against a public authority, the public authority should consider that complaint in a timely and impartial manner. In accordance with the *South Australian Government Procurement Framework*, suppliers must be allowed a minimum of 14 calendar days to submit a complaint in writing (from the time when the complaint becomes known or should have been known to the supplier).

Public authorities should manage complaints in line with their Complaints Management Framework⁴ and in conjunction with the *Supplier Complaints Guideline*. Legal advice should be sought if required.

⁴ Refer to the *Procurement Governance Policy* for further details on how to handle complaints.

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Schedule 3: Principles for determining covered public authorities under the AUSFTA, ACIFTA, KAFTA, JAEPA, SAFTA AND CPTPP ('FTAs') AND WTOGPA

Purpose

These principles have been prepared by the Crown Solicitor's Office in consultation with the Department of Treasury and Finance (DTF).

The purpose is to set out the basis for resolving whether a public authority of the South Australian government is a "procuring entity" under the GP Chapters of the AUSFTA, ACIFTA, KAFTA JAEPA, SAFTA and CPTPP and the WTOGPA.

If a public authority is a "procuring entity", a procurement conducted by the public authority is a "covered procurement" (assuming that other criteria for a covered procurement such as value are met, and that it is not subject to an exemption).

Definitions

public authority means-

- (a) a government department;
- (b) a Minister;
- (c) a statutory authority-
 - (i) that is an instrumentality of the Crown; or
 - (ii) the accounts of which the Auditor-General is required by law to audit;
- (d) such other body or person as is prescribed,

but subject to any other provision of the *Public Audit and Finance Act 1987* (the Act), does not include a statutory authority if the Act by or under which the authority is appointed or established provides for the auditing of the accounts of the authority by a person other than the Auditor-General.⁵

department means an administrative unit created under the *Administrative Arrangements Act 1994* (SA). Departments are not legal entities but are identifiable as organisations with a distinct legal structure, in which persons are employed.

business unit means a unit within a department. It is a part or division of the overarching government department.

statutory authority means a body corporate established under legislation specific to the agency, for example the South Australian Metropolitan Fire Service is a statutory authority established pursuant to the *Fire and Emergency Services Act 2005*.

⁵ Part 1, Section 4, *Public Finance and Audit Act 1987*.

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Principles

1. If a department is named in the GP Chapter of an FTA or in the WTOGPA, it is covered and all business units that are part of the department are covered.

For example, the Department of Treasury and Finance (DTF) is named. Procurement Services SA and Revenue SA are covered because they are business units of DTF; they do not have to be separately identified.

2. If a department is named in the GP Chapter of an FTA or in the WTOGPA, and one or more but not all of the business units in the department are named, the whole department and all its business units are nevertheless covered.

For example, the Department of the Premier and Cabinet (DPC) is named, and Aboriginal Affairs and Reconciliation Division (AARD), which is but a part of DPC, but no other part of DPC is named. The whole of DPC is included as a procuring entity. The separate naming of AARD is of no consequence. There is no implication that it is the only part of DPC covered by the GP Chapter or the WTOGPA.

3. If a named statutory authority has been continued under another name, then it continues to be a covered entity notwithstanding the new name.
4. If a new department or statutory authority is created, it is not a procuring entity, unless it is created to take over all or some of the functions of a named entity (as set out in the following principles). Procurement Services SA should be consulted to determine whether the new entity should be treated as a procuring entity, having regard to its functions.
5. If functions of a named department (or statutory authority) are transferred to a newly created department or statutory authority, or to an existing department or statutory authority that is not named in the GP Chapter or WTOGPA, then the newly created department or statutory authority will be treated as a procuring entity.

For instance, the Department of State Development no longer exists, and its functions have been transferred to the newly created Department for Energy and Mining and the Department for Industry and Skills. These are treated as procuring entities.

6. If an entity that is not named undertakes its own procurement, although other procurements may be undertaken for its benefit by a procuring entity, the procurement is not a covered procurement.

For example, a hospital may purchase goods and services for itself. That is not a covered procurement as the hospital is not a procuring entity. The Department of Health and Wellbeing conducts some covered procurement for use in hospitals from time to time, which are considered covered procurements as the Department of Health and Wellbeing is a procuring entity.