

2007

THE LEGISLATIVE ASSEMBLY
FOR THE AUSTRALIAN CAPITAL TERRITORY

(As presented)

(Treasurer)

Government Procurement Amendment Bill 2007

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FOR THE AUSTRALIAN CAPITAL TERRITORY

(As presented)

(Treasurer)

Government Procurement Amendment Bill 2007

A Bill for

An Act to amend the *Government Procurement Act 2001*, and for other purposes

The Legislative Assembly for the Australian Capital Territory enacts as follows:

J2006-383

Authorised by the ACT Parliamentary Counsel—also accessible at www.legislation.act.gov.au

1 **1 Name of Act**

2 This Act is the *Government Procurement Amendment Act 2007*.

3 **2 Commencement**

4 This Act commences on a day fixed by the Minister by written
5 notice.

6 *Note 1* The naming and commencement provisions automatically commence on
7 the notification day (see Legislation Act, s 75 (1)).

8 *Note 2* A single day or time may be fixed, or different days or times may be
9 fixed, for the commencement of different provisions (see Legislation
10 Act, s 77 (1)).

11 *Note 3* If a provision has not commenced within 6 months beginning on the
12 notification day, it automatically commences on the first day after that
13 period (see Legislation Act, s 79).

14 **3 Legislation amended**

15 This Act amends the *Government Procurement Act 2001*.

16 *Note* This Act also repeals other legislation (see s 44).

17 **4 Long title**

18 *substitute*

19 An Act about procurement by the Territory and territory entities,
20 and for other purposes

5 **New section 2A**

insert

2A **Meaning of *procurement***

In this Act:

procurement—

- (a) means the process of acquiring goods, services, works or property by purchase, lease, rental or exchange; and
- (b) includes the process of disposing of goods, works or property including by sale.

6 **Meaning of *territory entity***
Section 3 (2)

substitute

(2) However, *territory entity* does not include—

- (a) The University of Canberra; or
- (b) a Territory-owned corporation; or
- (c) another entity established under the Corporations Act; or
- (d) an entity declared under the regulations not to be a territory entity.

7 **New section 3A**

insert

3A **Application of Act**

This Act does not apply to the grant of a licence or lease of land, or the sale of a lease of land, under the *Land (Planning and Environment) Act 1991* or the *Planning and Land Act 2002*.

1 **8 New section 3B**

2 *insert*

3 **3B Responsible chief executive officer to ensure Act**
4 **complied with**

5 The responsible chief executive officer for a territory entity must
6 ensure that the entity complies with this Act.

7 **9 Section 6**

8 *substitute*

9 **6 Functions of board**

10 The functions of the board are—

- 11 (a) to review, and give advice to territory entities on, procurement
12 issues; and
- 13 (b) to review, and give advice on—
- 14 (i) procurement proposals and activities referred to the board
15 by a Minister or responsible chief executive officer; or
- 16 (ii) procurement proposals for procurement matters declared
17 by the Minister; and
- 18 (c) to review procurement proposals of territory entities in
19 accordance with the regulations; and
- 20 (d) to consider, advise on and, if appropriate, endorse procurement
21 practices and methods for use by territory entities; and
- 22 (e) to provide advice to the Minister on any issue relevant to the
23 procurement activities of territory entities or the operation of
24 this Act; and

- 1 (f) to exercise any other function given to the board under this Act
2 or any other Territory law.

3 *Note* A provision of a law that gives an entity (including a person) a function
4 also gives the entity powers necessary and convenient to exercise the
5 function (see Legislation Act, s 196 and dict, pt 1, def *entity*).

6 **10 Procurement guidelines**
7 **Section 7**

8 *omit*

9 **11 Section 11**

10 *substitute*

11 **11 Constitution of board**

12 The board consists of the following 7 part-time members:

- 13 (a) the chairperson;
14 (b) the deputy chairperson;
15 (c) 2 public employee members;
16 (d) 3 non-public employee members.

17 **12 Appointment of members**
18 **Section 12 (2)**

19 *substitute*

- 20 (2) A person appointed as chairperson, deputy chairperson, or as a
21 public employee member, must be a public employee.

22 *Note* **Public employee** is defined in the Legislation Act, dict, pt 1.

1 **13 Section 12 (4)**

2 *substitute*

3 (4) The instrument appointing, or evidencing the appointment of, a
4 member must state whether the member is appointed as chairperson,
5 deputy chairperson, a public employee member or a non-public
6 employee member.

7 **14 Ending of appointment of members**
8 **Section 16 (1)**

9 *substitute*

10 (1) The Minister must end the appointment of the chairperson, deputy
11 chairperson, or a public employee member, if the person stops being
12 a public employee.

13 **15 Time and place of meetings**
14 **Section 18 (2)**

15 *omit*

16 **16 Procedure governing proceedings of board**
17 **Section 19 (2)**

18 *substitute*

19 (2) If the chairperson is absent, the deputy chairperson presides.

20 (2A) If the chairperson and deputy chairperson are absent, the member
21 chosen by the members present presides.

1 **17 Section 19A heading**

2 *substitute*

3 **19A Board quorum**

4 **18 Section 19A (2) to (4)**

5 *substitute*

6 (2) However, the review of a prescribed procurement matter may be
7 carried out at a meeting of the board consisting of—

8 (a) the chairperson, or the deputy chairperson, and 1 non-public
9 employee member; or

10 (b) 2 public employee members and 1 non-public employee
11 member.

12 *Note* The board's functions include reviewing procurement proposals and
13 activities referred to the board by a minister or responsible chief
14 executive officer, and procurement proposals of territory entities in
15 accordance with the regulations (see s 6 (b) and (c)).

16 (3) Subsection (2) does not apply to a prescribed procurement matter
17 if—

18 (a) the chairperson gives a direction that the subsection does not
19 apply to the matter; or

20 (b) a member tells the chairperson that the member objects to the
21 matter being reviewed by the board as constituted under the
22 subsection.

23 (4) In this section:

24 ***prescribed procurement matter*** means any of the following that is
25 approved, in writing, by the chairperson for subsection (2):

26 (a) a procurement proposal referred to the board by a Minister or
27 responsible chief executive officer;

- 1 (b) a procurement activity referred to the board by a Minister or
2 responsible chief executive officer;
- 3 (c) a procurement proposal referred to the board in accordance
4 with the regulations;
- 5 (d) a procurement proposal for a procurement matter stated in a
6 declaration under section 22B (Minister may declare
7 procurement matters to be reviewed).

8 *Note* Power to make a statutory instrument includes power to make
9 different provision for different classes (see Legislation Act,
10 s 48).

11 *procurement proposal* means a proposal by a territory entity for
12 procurement.

13 **19 New part 2A**

14 *insert*

15 **Part 2A Procurement activities**

16 **22A Procurement principle—value for money**

- 17 (1) A territory entity must pursue value for money in undertaking any
18 procurement activity.
- 19 (2) Value for money means the best available procurement outcome.
- 20 (3) In pursuing value for money, the entity must have regard to the
21 following:
- 22 (a) probity and ethical behaviour;
- 23 (b) management of risk;
- 24 (c) open and effective competition;
- 25 (d) optimising whole of life costs;
- 26 (e) anything else prescribed by regulation.

1 **22B Minister may declare procurement matters to be reviewed**

- 2 (1) The Minister may declare the procurement matters for which a
3 procurement proposal must be reviewed by the board.

4 **Examples of declarations**

- 5 1 procurement matters with the same risk profile
6 2 procurement matters above a stated value threshold

7 *Note 1* An example is part of the Act, is not exhaustive and may extend, but
8 does not limit, the meaning of the provision in which it appears (see
9 Legislation Act, s 126 and s 132).

10 *Note 2* Power to make a statutory instrument includes power to make different
11 provision for different classes (see Legislation Act, s 48).

- 12 (2) A declaration under subsection (1) is a disallowable instrument.

13 *Note* A disallowable instrument must be notified, and presented to the
14 Legislative Assembly, under the Legislation Act.

15 **22C Procurement proposal or activity may be referred to**
16 **board**

17 The responsible Minister or responsible chief executive officer may
18 refer a procurement proposal or activity to the board for review and
19 advice.

20 **20 Section 23**

21 *substitute*

22 **23 Application—pt 3**

- 23 (1) To remove any doubt, this part applies in relation to a contract
24 entered into by—

25 (a) a territory entity with an excluded body; or

1 (b) an excluded body as an agent of a territory entity.

2 **Example**

3 A government department (representing the Territory) enters into a notifiable
4 contract with a Territory owned corporation. The government department, but not
5 the Territory owned corporation, is required to notify the contract under pt 3
6 (Notifiable contracts).

7 *Note* An example is part of the Act, is not exhaustive and may extend, but
8 does not limit, the meaning of the provision in which it appears (see
9 Legislation Act, s 126 and s 132).

10 (2) In this section:

11 *excluded body* means a body that is not included as a territory entity
12 under section 3 (2) (Meaning of *territory entity*).

13 **21 What is a notifiable contract**
14 **Section 25 (1)**

15 *substitute*

16 (1) For this part, a *notifiable contract* is a written contract for
17 procurement entered into by the Territory or a territory entity.

18 **22 Section 25 (2) (a)**

19 *omit*

20 \$50 000

21 *substitute*

22 \$20 000

23 Section 25 (2), example

substitute

Example—par (a)

The consideration for a contract for the purchase of swings by the Territory is \$18 500. The contract is later amended to increase the total consideration to \$25 500. The contract, as amended, is a notifiable contract.

Note An example is part of the Act, is not exhaustive and may extend, but does not limit, the meaning of the provision in which it appears (see Legislation Act, s 126 and s 132).

24 Section 26

substitute

26 Meaning of *notifiable amendment*

For this part, a *notifiable amendment* of a notifiable contract is any amendment that, either alone or counted with another amendment or other amendments that have not been notified in the notifiable contracts register—

- (a) increases the total consideration for the contract by at least the greater of—
 - (i) 10% (or, if another percentage is prescribed under the regulations, the other percentage) of the total consideration for the contract as already notified in the notifiable contracts register; and
 - (ii) \$20 000 (or, if another amount is prescribed under the regulations, the other amount); or
- (b) substantially changes the scope or nature of the goods, services, works or property to be procured under the contract.

Example

The consideration for a contract between the Territory and Acme Pty Ltd for the supply of road runner retention devices is \$190 000.

1 The minimum value for notification of an amendment, or a series of amendments,
2 of the contract is \$20 000 (ie the greater of \$20 000 or 10% of the value of the
3 contract which is \$19 000). The contract is amended on 3 occasions.
4 The 1st and 2nd amendments are for \$15 000 each. While neither of the
5 amendments is separately notifiable, the total of the 2 amendments is \$30 000 and
6 each of them is therefore a notifiable amendment. When the 2 amendments are
7 notified on the register, the 2 amendments cannot be counted towards any other
8 notifiable amendment. They increase the total consideration for the contract to
9 \$220 000.
10 The 3rd amendment is for \$21 000. It is not a notifiable amendment because,
11 even though it is more than \$20 000, it is less than 10% of the total consideration
12 for the contract as amended by all previous notifiable amendments, ie \$22 000.
13 *Note* An example is part of the Act, is not exhaustive and may extend, but
14 does not limit, the meaning of the provision in which it appears (see
15 Legislation Act, s 126 and s 132).

16 **25 Contents of register**
17 **Section 28 (1) (g)**

18 *substitute*

- 19 (g) if a notifiable amendment of the contract is made—
- 20 (i) the change in—
- 21 (A) the value of the consideration to which the
22 amendment relates; or
- 23 (B) the scope or nature of the goods, services, works or
24 property to which the amendment relates; and
- 25 (ii) the value of the total consideration, or estimated total
26 consideration, for the contract because of the amendment;
27 and
- 28 (iii) the date the amendment was made;

1 **26 Public access to material on register**
2 **Section 29 (1)**

3 *substitute*

- 4 (1) The chief executive must ensure, as far as practicable, that a copy of
5 the material mentioned in section 28 (1) for a notifiable contract is
6 accessible on a web site approved by the chief executive—
7 (a) at all times; and
8 (b) for at least 2 years after the day the notifiable contract expires.

9 **27 Grounds for confidentiality of information**
10 **Section 35 (3)**

11 *substitute*

- 12 (3) The responsible territory entity for the contract may delegate the
13 entity's functions under this section to a public employee.
14 (4) In this section:
15 *personal information*—see the *Privacy Act 1988* (Cwlth), section 6.
16 *public employee*—see the *Legislation Act*, dict, pt 1.

17 **28 Section 38**

18 *substitute*

19 **38 Contracts and information to be given to auditor-general**

20 The responsible territory entity for a reportable contract must, if
21 requested by the auditor-general, give the auditor-general the
22 contracts and information the auditor-general requests.

1 **29 Section 39**

2 *substitute*

3 **39 Responsible territory entity's reporting obligations for**
4 **contracts etc**

5 (1) The responsible territory entity for a reportable contract must, for
6 each relevant reporting period, give the appropriate Legislative
7 Assembly committee either—

8 (a) a list of the following:

9 (i) the reportable contracts that became notifiable contracts
10 during the relevant period;

11 (ii) the reportable contracts that had confidential text changed
12 during the relevant period; or

13 (b) a statement that no reportable contracts became notifiable or
14 changed during the relevant period.

15 (2) The list must contain—

16 (a) the following information for each reportable contract
17 mentioned in subsection (1) (a) (i):

18 (i) the parties to the contract;

19 (ii) a brief description of what the contract is for;

20 (iii) the date the contract was made;

21 (iv) the date the contract ends;

22 (v) the value of the total consideration, or estimated total
23 consideration, for the contract; and

24 (b) for each reportable contract mentioned in
25 subsection (1) (a) (ii)—the thing that the change relates to; and

26 (c) any other information prescribed by regulation.

- 1 (3) The entity may also give the committee any other information the
2 entity considers appropriate.
- 3 (4) The entity must give the list or statement to the committee within
4 21 days after the day each relevant reporting period ends.
- 5 (5) The entity must, if asked by the committee, give the committee the
6 information the committee requires about the decision to agree to
7 the inclusion of confidential text in the contract.
- 8 (6) In this section:
- 9 *appropriate Legislative Assembly committee* means a standing
10 committee of the Legislative Assembly nominated, in writing, by
11 the Speaker.
- 12 *confidential text* includes text that purports to be confidential text.
- 13 *reportable contract* means a notifiable contract that contains
14 confidential text.
- 15 *reporting period* means a 6-month period ending on 31 March or
16 30 September.
- 17 (7) A nomination under subsection (6) is a notifiable instrument.
- 18 *Note* A notifiable instrument must be notified under the Legislation Act.

19 **39A Auditor-general's reporting obligations for contracts etc**

- 20 (1) This section applies if the auditor-general requests a copy of a
21 reportable contract under section 38.
- 22 (2) The auditor-general must report to the appropriate Legislative
23 Assembly committee on whether the auditor-general is satisfied that
24 confidential text in the contract complies with section 35 (1) (a)
25 or (b) (Grounds for confidentiality of information).
- 26 (3) In this section:
- 27 *appropriate Legislative Assembly committee*—see section 39 (6).

1 *confidential text* includes text that purports to be confidential text.

2 **30 No liability for complying with pt 3**
3 **Section 42 (2), definition of *reportable contract***

4 *omit*

5 section 38 (1)

6 *substitute*

7 section 39 (6)

8 **31 Section 43**

9 *substitute*

10 **43 Application—pt 4**

11 This part applies to a contract entered into by the Territory or a
12 territory entity for procurement, other than a contract—

13 (a) with a consideration of at least \$10 000 (or, if another amount
14 is prescribed by regulation, the other amount); and

15 (b) that states that this part does not apply to it.

16 **32 Interest on unpaid accounts**
17 **Section 45 (1)**

18 *substitute*

19 (1) This section applies if—

20 (a) the Territory or a territory entity does not pay a commercial
21 account in full by the relevant date for the account; and

22 (b) the person to whom the account is payable requests, in writing,
23 that the Territory, or the territory entity, pay interest on the
24 amount of the account that remains unpaid from time to time
25 after the payment date.

- 1 **33 Reporting of excluded contracts**
2 **Section 48 (2), definition of *responsible chief executive***
3 *omit*
- 4 **34 Discounts for prompt payments**
5 **Section 49**
6 *omit*
- 7 **35 Responsible chief executive to ensure Act complied with**
8 **Section 50**
9 *omit*
- 10 **36 Regulation-making power**
11 **Section 52 (2)**
12 *substitute*
- 13 (2) The regulations may—
14 (a) make provision in relation to procurement by territory entities;
15 and
16 (b) provide that prescribed things are, or are not, goods, services,
17 works or property for this Act; and
18 (c) provide that prescribed activities are, or are not, for this Act—
19 (i) procurement; or
20 (ii) procurement activities.

1 **37 New part 10**

2 *insert*

3 **Part 10 Transitional provisions**

4 **100 Procurement guideline**

- 5 (1) *The Government Procurement (Quotation and Tender Thresholds)*
6 *Guideline 2003 (No 1)* in force under this Act, section 7
7 immediately before commencement day is taken to be a regulation
8 made under this Act, section 52 (Regulation-making power) and
9 applies, with any necessary changes, for the purposes of this Act.
- 10 (2) To remove any doubt and without limiting subsection (1), the
11 guideline mentioned in subsection (1) may be amended or repealed
12 as if it had been made as a regulation by the Executive under this
13 Act, section 52.
- 14 (3) To remove any doubt, the guideline mentioned in subsection (1) is
15 taken—
- 16 (a) to have been notified under the Legislation Act on the day the
17 *Government Procurement Amendment Act 2007* is notified;
18 and
- 19 (b) to have commenced on commencement day; and
- 20 (c) not to be required to be presented to the Legislative Assembly
21 under the Legislation Act, section 64 (1).
- 22 (4) Subsections (1), (2) and (3) are laws to which the Legislation Act,
23 section 88 (Repeal does not end effect of transitional laws etc)
24 applies.
- 25 (5) This section expires on commencement day.

- 1 (6) In this section:
2 *commencement day* means the day the *Government Procurement*
3 *Amendment Act 2007* commences.

4 **101 Notifiable contracts**

- 5 (1) This section applies to a contract made by the Territory or a territory
6 entity before the commencement of this section.
- 7 (2) Part 3 (Notifiable contracts) does not apply to the contract unless—
8 (a) the contract was a notifiable contract when the contract was
9 made, or became a notifiable contract before the
10 commencement of this section; or
11 (b) an amendment to the contract made after the commencement
12 of this section increases the total consideration for the contract
13 by at least \$20 000.
- 14 (3) Subsections (1) and (2) are laws to which the Legislation Act,
15 section 88 (Repeal does not end effect of transitional laws etc)
16 applies.
- 17 (4) This section expires 1 year after the day it commences.

18 **38 Dictionary, definitions of *board* and *chairperson***

19 *substitute*

20 *board* means the Australian Capital Territory Government
21 Procurement Board established under section 5.

22 *chairperson* means the chairperson of the board.

23 **39 Dictionary, new definitions of *department* and *deputy***
24 ***chairperson***

25 *insert*

26 *department*—see the *Financial Management Act 1996*, dictionary.

1 *deputy chairperson* means the deputy chairperson of the board.

2 **40 Dictionary, definition of *member***

3 *substitute*

4 *member* means—

- 5 (a) the chairperson; or
6 (b) the deputy chairperson; or
7 (c) a public employee member; or
8 (d) a non-public employee member.

9 **41 Dictionary, new definition of *procurement***

10 *insert*

11 *procurement*—see section 2A.

12 **42 Dictionary, definition of *procurement guidelines***

13 *omit*

14 **43 Dictionary, new definition of *responsible chief executive officer***

15 *insert*

16 *responsible chief executive officer* means—

- 17 (a) for a department—the responsible chief executive of the
18 department under the *Financial Management Act 1996*; or
19 (b) for a territory authority—the chief executive officer of the
20 authority under the *Financial Management Act 1996*; or
21 (c) for a joint venture or trust in which the Territory or a territory
22 entity has a controlling interest—the responsible chief
23 executive of the department or territory entity that is
24 responsible for matters most closely related to that interest.
25

1 **44 Instruments repealed**

2 The following instruments are repealed:

- 3 • *Government Procurement (Approved Procurement Units)*
4 *Guideline 2002 (No 1)* DI2002-57
5 • *Government Procurement (Principles) Guideline 2002*
6 *DI2002-58.*

Endnotes

1 Presentation speech

Presentation speech made in the Legislative Assembly on 2007.

2 Notification

Notified under the Legislation Act on 2007.

3 Republications of amended laws

For the latest republication of amended laws, see www.legislation.act.gov.au.
