

2007

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

GOVERNMENT PROCUREMENT AMENDMENT BILL 2007

EXPLANATORY STATEMENT

**Presented by
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Treasurer**

EXPLANATORY STATEMENT

This explanatory statement relates to the *Government Procurement Amendment Bill 2007* (the Bill) as introduced to the ACT Legislative Assembly.

Overview

The purpose of the Bill is to amend the *Government Procurement Act 2001* (the Act) to provide clearer and more effective arrangements for the operation of the Government Procurement Board and the procurement activities of Territory entities, including incorporating into the Act key elements from the *Government Procurement (Principles) Guideline 2002*.

The new legislative framework will streamline the operations of the Act and the Board and define such terms as ‘procurement’, update Procurement Principles with which entities must comply, and lower the threshold for reporting contracts from \$50,000 to \$20,000.

NOTES ON CLAUSES

PART 1 - PRELIMINARY

Clauses 1 ‘Name of Act’ and 2 ‘Commencement’ are formal requirements. They deal with the short title of the Bill, and the commencement provisions.

Clause 3 ‘Legislation amended’ - amends the *Government Procurement Act 2001*.

Clause 4 ‘Long title’ - amends the long title to read: ‘An Act about procurement by the Territory and territory entities, and for other purposes’.

Clause 5 ‘New section 2A’ - inserts new section 2A ‘Meaning of Procurement’, including definition of ‘procurement’ to mean the process of acquiring goods, services, works or property by purchase, lease, rental or exchange; and including the process of disposing of goods, works or property including by sale.

Clause 6 ‘Meaning of territory entity Section 3(2)’ - provides that references to ‘territory entity’ in the Act do not include the University of Canberra; a Territory owned corporation; or another entity established under the Corporations Act; or an entity declared under the regulations not to be a territory entity.

Clause 7 ‘New Section 3A’ - inserts new section 3A ‘Application of Act’ to clarify that the 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*.

Clause 8 ‘New Section 3B’ - inserts new Section 3B ‘Responsible chief executive officer to ensure Act complied with’, which transfers an equivalent former provision to Part 1 of the Act. The clause provides that the responsible chief executive officer for a territory entity must ensure that the entity complies with the Act.

PART 2 – GOVERNMENT PROCUREMENT BOARD

Clause 9 ‘Section 6’ - substitutes new Section 6 ‘Functions of board’ to update the board’s original functions. The new functions strengthen the board’s strategic advisory role in relation to reviewing and giving advice on procurement issues, in addition to reviewing and advising on procurement proposals referred to the board by a Minister or responsible Chief Executive.

Clause 10 ‘Procurement guidelines Section 7’ - removes the power of the board to make procurement guidelines as disallowable instruments.

Clause 11 ‘Section 11’ - This section reconstitutes the board through replacement of one public employee member with a position of deputy chairperson (total membership remains at 7), to improve the efficiency of board operations.

Clause 12 ‘Appointment of members Section 12(C)’ - provides that a person appointed as the chairperson, deputy chairperson or as a public employee member must be a public employee (consequential amendment arising from Clause 11 change).

Clause 13 ‘Section 12(4)’ - provides that the instrument appointing must state whether the members is appointed as chairperson, deputy chairperson, etc (consequential amendment arising from Clause 11 change).

Clause 14 ‘Ending of appointment of members Section 16(1)’ - provides that the Minister must end the appointment of the deputy chairperson if the person stops being a public employee (consequential amendment arising from Clause 11 change).

Clause 15 ‘Time and place of meetings Section 18 (2)’ - removes a former provision, which required the board to meet at least once per month, to improve efficiency of board operations.

Clause 16 ‘Procedure governing proceedings of board Section 19 (2)’ - amends existing subsection 19(2) of the Act to enable the deputy chairperson to preside in the absence of the chairperson or, in the absence of both the chairperson and deputy chairperson, the members chosen by the members (consequential amendment arising from Clause 11 change).

Clause 17 ‘Section 19A heading’ - substitutes ‘Board quorum’ to replace the former section heading ‘Constitution of board’ to more accurately reflect content of clause.

Clause 18 ‘Section 19A (2) to (4)’ - substitutes new arrangements in relation to a *prescribed procurement matter* which enable the chairperson to effectively and efficiently manage the workflow of the board by defining *prescribed procurement matters* so that proposals or activities according with the definition are not required to be submitted to a meeting of the full board unless the chairperson so decides or a member tells the chairperson that the member objects to consideration of the particular matter by less than the full board.

Clause 19 ‘New part 2A’ - inserts new Part 2A ‘Procurement activities.

- **New subsection 22A ‘Procurement principle—value for money’** - provides that in undertaking procurement activities, the primary obligation of territory entities is to pursue value for money outcomes, with value for money being defined as the best available procurement outcome. The section also provides that in pursuing value for money, entities must have regard to:
 - (a) probity and ethical behaviour;
 - (b) management of risk;
 - (c) open and effective competition;
 - (d) optimising whole of life costs; and
 - (e) anything else prescribed by regulation.
- **New subsection 22B ‘Minister may declare procurement matters to be reviewed’** – provides that the Minister may declare the procurement matters for which a procurement proposal must be reviewed by the board. Examples included in the clause relate to procurement matters with the ‘same risk profile’, which could include proposals rated as being of significant risk to the Territory, measured in accordance with Australian/New Zealand Standard AS/NZS4360:2004 - ‘Risk Management’; or procurement matters above a stated value threshold. A declaration under this subsection is a disallowable instrument.
- **New subsection 22C ‘Procurement proposal or activity may be referred to board’** - enables a Minister or responsible chief executive officer to refer a procurement proposal or activity to the board for review and advice.

PART 3 – NOTIFIABLE CONTRACTS

Clause 20 ‘Section 23’ - substitutes new section 23 ‘Application—pt 3’ - clarifies that Part 3 Notifiable Contracts applies in relation to a contract entered into by a Territory entity with an excluded body; or an excluded body as an agent of a Territory entity. The purpose of the Clause is to clarify that a contract entered into by a Territory entity with an excluded body (ie a Territory owned corporation as an example) is required to be notified by the Territory entity.

Clause 21 ‘What is a *notifiable contract* Section 25 (1)’ - provides that for this part (Part 3), a *notifiable contract* is a written contract for procurement entered into by the Territory or a territory entity.

Clause 22 ‘Section 25 (2) (a)’ - reduces the threshold at which contracts must be notified from \$50,000 to \$20,000 to enhance public accountability and transparency, and provide more timely information to the ACT and wider community.

Clause 23 ‘Section 25 (2), example’ - clarifies that a contract with a consideration below the \$20,000 threshold which is later amended to increase the total cumulative contract consideration to in excess of the \$20,000 threshold is, as amended, a notifiable contract (consequential amendment arising from Clause 22 change).

Clause 24 ‘Section 26’ - substitutes amended clause 26 ‘Meaning of *notifiable amendment*’ to include new subsection 26 (b) which specifies that any amendment to a notifiable contract that substantially changes the scope or nature of the goods, services, works or property to be procured under the contract, is a notifiable amendment.

Clause 25 ‘Contents of register Section 28 (1) (g)’ - substitutes amended subsection (g) to require that additional information relating to the scope or nature of the goods, services, works or property to which a contract amendment relates, and the value of the total consideration, or estimated total consideration, for the contract because of the amendment, be notifiable on the register.

Clause 26 ‘Public access to material on register Section 29 (1)’ - defines that the time frame during which, as far as practicable, a copy of the material mentioned in section 28 (1) for a notifiable contract is accessible on a web site approved by the chief executive, be for at least 2 years after the day the notifiable contract expires.

Clause 27 ‘Grounds for confidentiality of information Section 35 (3)’ - substitutes amended subsection (3) to enable the responsible territory entity for the contract to delegate the entity’s functions under this section to a public employee, as defined under the Legislation Act, dict, pt 1.

Clause 28 ‘Section 38’ - substitutes new clause requiring that a responsible territory entity for a reportable contract must, if requested by the auditor-general, give the auditor-general the contracts and information the auditor-general requests.

Clause 29 ‘Section 39’ - substitutes new subsections:

- **New subsection 39 ‘Responsible territory entity’s reporting obligations for contracts etc’** - requires that territory entities must provide specific information to a specified appropriate Legislative Assembly committee within a specific timeframe for a reportable contract for each relevant reporting period. This provision replaces a pre-existing requirement that such reports be provided to the auditor-general, which in turn was required to provide the reports to a specified Legislative Assembly committee.
- **39A ‘Auditor-general’s reporting obligations for contracts etc’** - requires that if the auditor-general requests a copy of a reportable contract under section 38, the auditor-general must report to the appropriate Legislative Assembly committee on whether the auditor-general is satisfied that confidential text in the contract complies with section 35 (1) (a) or (b) (Grounds for confidentiality of information).

Clause 30 ‘No liability for complying with pt 3 Section 42 (2), definition of *reportable contract*’ - omits reference to ‘section 38 (1)’ and substitutes ‘section 39 (6)’ (consequential amendment arising from Clause 29 change).

PART 4 – INTEREST ON COMMERCIAL ACCOUNTS

Clause 31 ‘Section 43’ - clarifies the application of the existing Act, but excludes reference to Territory owned corporations, etc (consequential amendment arising from the exclusion of Territory owned corporations under the provisions of Clause 6 ‘Meaning of territory entity Section 3(2)').

Clause 32 ‘Interest on unpaid accounts Section 45 (1)’ - substitutes revised arrangements for the payment of interest on unpaid accounts to clarify that interest is payable only where the creditor requests payment of the interest after a properly rendered invoice has not been paid in the relevant timeframe.

Clause 33 ‘Reporting of excluded contracts Section 48 (2), definition of *responsible chief executive*’ - omitted as definition now included through the provisions of Clause 3B ‘Responsible chief executive officer to ensure Act complied with’.

PART 5 - MISCELLANEOUS

Clause 34 ‘Discounts for prompt payments Section 49’ - deletes a pre-existing requirement, as the proposed new Part 2A ‘Procurement activities’ requirement to pursue value for money outcomes supersedes the requirements of the former provision.

Clause 35 ‘Responsible chief executive to ensure Act complied with Section 50’ - section deleted as the relevant definition has been transferred to Clause 3B ‘Responsible chief executive officer to ensure Act complied with’.

Clause 36 ‘Regulation-making power Section 52 (2)’ - clause amended to reflect the definition of ‘procurement’, as defined in Section 2A, ‘Meaning of procurement’.

Clause 37 ‘New part 10’ - inserts Transitional provisions:

- **‘200 Procurement guidelines’** - provides for the *Government Procurement (Quotation and Tender Thresholds) Guideline 2003 (No 1)*:
 - remains in force as a regulation under this Act; and
 - may be amended or repealed as if it had been made as a regulation by the Executive under this Act; and
 - is taken to have been notified under the Legislation Act on the day the *Government Procurement Amendment Act 2007* is notified; and
 - commences on commencement day, ie. the day the *Government Procurement Amendment Act 2007* commences.
- **‘201 Notifiable contracts’** - provides for a contract made before the commencement of this section:
 - Part 3 ‘Notifiable contracts’ does not apply to the contract unless—
 - (a) the contract was a notifiable contract when the contract was made, or became a notifiable contract before the commencement of this section; or
 - (b) an amendment to the contract made after the commencement of this section increases the total consideration for the contract by at least \$20,000.

Clause 38 ‘Dictionary, definitions of *board* and *chairperson*’ - substitutes definitions for ‘board’ and ‘chairperson’.

Clause 39 ‘Dictionary, new definitions of *department* and *deputy chairperson*’ - inserts definitions for ‘*department*’ and ‘*deputy chairperson*’.

Clause 40 ‘Dictionary, definition of *member*’ - substitutes definition for ‘*member*’.

Clause 41 ‘Dictionary, new definition of *procurement*’ - inserts definition of ‘*procurement*’.

Clause 42 ‘Dictionary, definition of *procurement guidelines*’ – omitted as the power of the Government Procurement Board to issue procurement guidelines is removed by the provisions of this Bill.

Clause 43 ‘Dictionary, new definition of *responsible chief executive officer*’ - inserts definition for *responsible chief executive officer*’.

Clause 44 ‘Instruments repealed’ - The *Government Procurement (Approved Procurement Units) Guideline 2002 (No 1)* and the *Government Procurement (Principles) Guideline 2002* are repealed.