WHAT HAVE BEEN THE IMPLICATIONS FOR COMMONWEALTH GOVERNMENT PROCUREMENT OF CHAPTER 15 OF THE AUSTRALIA-UNITED STATES FREE TRADE AGREEMENT?

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ABSTRACT

This article reviews the impact on Commonwealth government procurement of Chapter 15 of the Australia-United States Free Trade Agreement. The article contends that there has been a significant tightening-up of procurement procedures at Commonwealth level in Australia (as reflected in the mandatory procurement procedures of the Commonwealth Procurement Guidelines) and an enhanced emphasis on openness and transparency of procurement information (although there remain areas where Commonwealth government departments and agencies have been derelict in their adherence to these requirements). The article contends that inhibiting the openness and transparency of Commonwealth government procurement processes adversely affects the efficacy of these processes and compromises the Commonwealth's ability to obtain best value for money. Chapter 15 of the Australia-United States Free Trade Agreement has brought about changes to legislative requirements regulating Commonwealth Government procurement activities and has largely eliminated preferential treatment programs for Australian and New Zealand suppliers. The article examines revised procurement practices brought into effect as a consequence of Chapter 15 and concludes by countenancing doubts expressed about the adequacy of existing tender challenge procedures.

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I INTRODUCTION

The *Australia-United States Free Trade Agreement* (the AUSFTA) is a bilateral treaty executed on 18 May 2004 that creates rights and obligations for each country under international law. The AUSFTA came into effect on 1 January 2005. Chapter 15 has been implemented at Commonwealth level through the *Commonwealth Procurement Guidelines* (the CPGs). The CPGs became law on 1 July 2009 following amendments to s 64 of the *Financial Management and Accountability Act 1997* (Cth) (the FMA Act) which state that guidelines issued under the *Financial Management and Accountability Regulations 1997* (the FMA Regulations) are now legislative instruments for the purpose of the *Legislative Instruments Act 2003* (Cth).[1]

Chapter 15 of the AUSFTA deals with government procurement. 'Government procurement' is defined in Article 1.2.13 of the AUSFTA to mean:

> The process by which a government obtains the use of or acquires goods or services, or any combination thereof, for governmental purposes and not with a view to commercial sale or resale or use in the production or supply of goods or services for commercial sale or resale.

Chapter 15 applies to all Federal Government departments and agencies covered by the FMA Act, listed entities under the *Commonwealth Authorities and Companies Act 1997* (Cth), State and Territory governments and statutory corporations. This article focuses on the implications of Chapter 15 at Commonwealth level in so far as Commonwealth procurement practices and procedures are concerned.

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[1] Specifically: *Financial Management and Accountability Act 1997* (Cth), s 64(3).

The government procurement chapter of the AUSFTA has been viewed as a move by Australia towards the government procurement requirements of the World Trade Organisation (WTO) Agreement on Government Procurement.[2] While Australia is not a party to the WTO Agreement, many of the terms of Chapter 15 are similar in nature to those set out in the WTO Agreement.

Chapter 15 of the AUSFTA requires that procuring entities of either party do not discriminate against suppliers of the other party in their procurement of goods and services above specified monetary thresholds. Under the AUSFTA, Australia is a 'designated country' under United States law. This means that Australian industry is not subject to the penalties that would otherwise apply to corporations of foreign countries under the *Buy American Act*. In return, most (but not all)[3] Australian requirements for industry development programs have been abolished.[4] Offsets for local content requirements are prohibited under Chapter 15. Other significant changes to Commonwealth procurement stemming from the AUSFTA relate to transparency of procurement processes, fairness and due procedure around solicitation activities. The requirements of the AUSFTA also have implications for government tender challenges.

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[2] Dr Nick Seddon, 'The AUSFTA and Government Procurement' (2006) 3(6) and 3(7) *Contract Management in Practice* 82.
[3] Exceptions apply for Defence and for small and medium enterprises. For a definition of what constitutes a small and medium enterprise, see below, note 12.
[4] For example, references to the *Australia New Zealand Closer Economic Relations Trade Agreement* and the *Australian and New Zealand Government Procurement Agreement* are no longer included in the *Commonwealth Procurement Guidelines*.

II CHANGES TO AUSTRALIAN INDUSTRY DEVELOPMENT REQUIREMENTS

One of the key principles underpinning Commonwealth government procurement for many years was the need for Commonwealth government agencies to take into account opportunities for the development of Australian and New Zealand industry when making procurement decisions.

The *Commonwealth Procurement Guidelines* in effect prior to the execution of the AUSFTA in May 2004[5] provided that:

> Buyers must ensure that Australian and New Zealand industry, particularly small and medium enterprises, have appropriate opportunity to compete for business. This includes being able to demonstrate, through accountability mechanisms, that buyers have:
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> - considered any commercial and practical benefits of doing business with competitive Australian and New Zealand industry when specifying requirements and evaluating Value for Money;
> - ensured procurement methods do not discriminate against Australian and New Zealand suppliers, particularly small and medium enterprises;
> - taken into account the capability and commitment to regional markets of small businesses in their local regions; and
> - considered any supplier-base and competitive benefits of ensuring access for new entrants to the market.[6]

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[5] This version of the *Commonwealth Procurement Guidelines & Best Practice Guidance* was in effect from February 2002 until May 2004. An interim version of the *Commonwealth Procurement Guidelines and Best Practice Guidance* was released in May 2004 but did not reflect changes associated with the AUSFTA. The *Commonwealth Procurement Guidelines* were revised in their entirety during the interim period and were reissued to incorporate changes associated with the AUSFTA in January 2005. The current *Commonwealth Procurement Guidelines* were issued in December 2008.

[6] *Commonwealth Procurement Guidelines & Best Practice Guidance*, 12 February 2002, paragraph 1.4.

The CPGs in effect prior to May 2004 further provided that:

> In major procurements of $5 million or more, agencies, and where appropriate outsourced service providers, must clearly identify in tender documentation:
>
> - any industry development criteria and associated evaluation methodology; and
> - where appropriate, opportunities for small and medium enterprise participation.[7]

In addition, when preparing tender documents, agencies were obliged to consult with the Ministers responsible for Finance and Industry to ensure that projects (of $5 million or more) realised their local industry development potential.[8]

The practical effect of these policies was that industry development criteria could be used as discriminators (in the form of evaluation criteria) in source selection decisions for government procurement requirements.[9]

Articles 15.2.1, 15.2.2 and 15.2.5 of the AUSFTA have brought about a cessation of overt preference for Australian and New Zealand industry suppliers. Article 15.2.1 provides that:

> Each Party and its procuring entities shall accord unconditionally to the goods and services of the other Party and to the suppliers of the other Party offering the goods or services of that Party, treatment no less favourable than the most favourable treatment the Party or the procuring entity accords to domestic goods, services and suppliers.

[7] Ibid, paragraph 1.4.3.
[8] Ibid.

Article 15.2.5 provides:

> A procuring entity may not seek, take account of, impose, or enforce offsets in the qualification and selection of suppliers, goods, or services, in the evaluation of tenders or in the award of contracts, before or in the course of a covered procurement (emphasis added).

'Offsets' is defined in Article 15.15.7 to mean any conditions or undertakings that require use of domestic content, domestic suppliers, the licensing of technology, technology transfer, investment, counter-trade, or similar actions to encourage local development or to improve a Party's balance-of-payments accounts.

A 'covered procurement' is defined in Appendix C of the current version of the CPGs[10] as a procurement, other than one that is specifically exempt, where the value of the property or services being procured exceeds specified procurement thresholds.[11]

Implementation of Article 15.2.5 at Commonwealth level in Australia has not been on a 'most favoured nation' basis in the sense that the CPGs have simply removed references to offsets programs and local industry development requirements as determinants of source selection decisions. This approach benefits the suppliers of all countries seeking to do business with the Commonwealth Government rather than affording special status to United States suppliers.

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[9] For an example of a major Commonwealth government procurement where industry development was a key criterion in a source selection decision, see: *Hughes Aircraft Systems International v Airservices Australia* (1997) 146 ALR 1.
[10] Effective from December 2008.
[11] $80,000 for FMA Act agencies, $400,000 for CAC Act bodies, $9 million for construction services.

Whilst industry development can no longer be used as a discriminator in government purchasing decisions, an imperative to support small and medium enterprises in government procurement has been maintained. The current CPGs state that the Federal Government is committed to FMA agencies sourcing at least 10 per cent of their purchases by value from small and medium enterprises.[12] This statement is unchanged from the 1992 version of the CPGs. This approach is consistent with the United States retaining a capacity to afford preferences to small and minority businesses, including the exclusive right to provide a good or service to government and price preferences.

III OPENNESS AND TRANSPARENCY OF PROCUREMENT INFORMATION

Articles 15.3, 15.4 and 15.6 of the AUSFTA provide for the publication of procurement information generally, notices of specific intended procurements and for the provision of comprehensive tender information to be provided to prospective suppliers, including the evaluation criteria to be applied in awarding a subsequent contract.

Article 15.3.1 provides that:

[12] Small and medium enterprises are defined in the *Commonwealth Procurement Guidelines* as an Australian or New Zealand firm with fewer than 200 full time equivalent employees (in the footnote to paragraph 5.3 and in Appendix C).

> Each Party shall promptly publish the following information relating to covered procurements, and any changes or additions to this information, in electronic or paper media that are widely disseminated and remain readily accessible to the public:
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> a) laws, regulations, procedures, and policy guidelines; and
>
> b) judicial decisions and administrative rulings of general application.

Article 15.3.1 appears to have influenced the behaviour of some Commonwealth government departments in so far as making their internal procurement policy documents available to prospective suppliers. Whilst the Department of Defence and the Defence Materiel Organisation (the largest procurement entities in the Commonwealth government)[13] have long made their standard form contracting documentation publicly available (the Australian Defence Contract suite of contracting templates, their predecessor documents and the Defence Procurement Policy Manual) the current Defence contracting website reveals that Defence (including the DMO) now also discloses its internal Defence Procurement Policy Instructions and the interpretive manuals that apply to each of its contracting templates.[14] Defence had previously declined to make the interpretive manuals available to external suppliers on the basis that they contained confidential information relating to how Defence interprets and applies its standard form contracting templates (including the extent to which it is prepared to depart from the standard form provisions).

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[13] *Statistics on Australian Government Procurement Contracts* (2008) Department of Finance and Deregulation <http://www.finance.gov.au/publications/statistics-on-commonwealth-purchasing-contracts/index.html> at 30 January 2011.
[14] *Procurement and Contracts*, Department of Defence <http://www.defence.gov.au/dmo/DMO/function.cfm?function_id=45> at 30 January 2011.

Article 15.6.1 of the AUSFTA provides that:

> A procuring entity shall promptly provide, on request, to any supplier participating in a covered procurement, tender documentation that includes all information necessary to permit suppliers to prepare and submit response tenders. Unless already provided in the notice of intended procurement, such documentation shall include a complete description of:
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> a) the procurement, including the nature, scope and, where known, the quantity of the goods or services to be procured and any requirements to be fulfilled, including any technical specifications, conformity certification, plans, drawings, or instructional materials;
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> b) any conditions for participation, including any financial guarantees, information, and documents that suppliers are required to submit;
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> c) all criteria to be considered in awarding of the contract;
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> d) where there will be a public opening of tenders, the date, time, and place for the opening of tenders; and
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> e) any other terms or conditions relevant to the evaluation of tenders (emphasis added).

The requirements of Article 15.6.1 are mirrored in paragraph 8.4.2 of the CPGs with an additional statement that request documents must include a complete description of any minimum content and format requirements.

The existing procurement practices of Commonwealth government agencies give rise to questions about whether paragraph 8.4.2 (and therefore Article 15.6.1 of the AUSFTA) is being complied with.

Whilst agencies appear willing to make their standard form tendering and contracting templates available to external scrutiny, agencies have not been inclined to willingly

disclose their internal tender evaluation plans.[15] A review of advertised requirements on the AusTender website (the website used by Commonwealth government agencies to notify prospective suppliers of business opportunities) reveals that no Commonwealth government agencies voluntarily disclose tender evaluation plans to prospective suppliers.[16]

Tender evaluation plans form an essential component of the evaluation process. They set out the criteria that will be applied in evaluating submitted offers, the weightings to be afforded to each of the evaluation criteria (which may not be set out in the request for tender issued to prospective suppliers), the timeframes within which the evaluation is expected to be completed and the aspects of tender responses that will be subject to particular scrutiny. In the case of a complex procurement, each of the technical, financial, commercial and contractual aspects of tenders received may be subject to evaluation and ranking prior to any consolidated view of the respective merits of the tenders being formed.[17] It would clearly be in the interests of prospective respondents to know in advance which elements of their tender responses will be subject to individual evaluation and the degree of influence individual assessments in a particular category will have on the overall ranking of the tenders.

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[15] This approach has been endorsed by the courts. See, for example, the judgment of Adams J in: *Cubic Transportation Systems Inc v New South Wales* [2002] NSWSC 656, where the evaluation plans of a government agency were described as 'confidential internal documents' of the agency (at paragraph 46).

[16] *Current ATM List* (2011) AUSTender: The Australian Government Tender System <https://www.tenders.gov.au/?event=public.ATM.list> at 30 January 2011.

[17] Such an approach occurred in *Cubic Transportation Systems Inc v New South Wales* [2002] NSWSC 656, where the rankings of proponents in each evaluation subcategory were leaked prior to a consolidated view of proposals having been formed. Obtaining this information precipitated a course of action that ultimately led to a litigious challenge to the solicitation process in that case.

Regrettably, it is common for tender evaluation plans to be prepared after request for tender documents have been released. To the extent that the evaluation criteria are weighted in a particular order of importance and those weightings are not communicated to prospective respondents, the openness and transparency of the procurement process is compromised.

The provisions of the CPGs and the AUSFTA call for 'a complete description' of 'all criteria to be considered in awarding the contract'. It would seem that a description of the evaluation criteria is not complete unless the weightings attached to each criterion are communicated clearly to potential respondents.

Standard form Commonwealth government conditions of tender can further obscure relevant information by describing the evaluation criteria as not necessarily being 'in any order of importance'.[18]

The advantage to an agency of reserving a discretion of this nature to itself in the context of a tender process is that it may accord such weight as it sees fits to particular criteria when evaluating submitted responses. An alternative view is that an agency should be able to specify what it needs with some degree of precision before going to

[18] See, for example: Clause 6.1 of the conditions of tender of the standard form Australian Defence Contracts pertaining to Strategic Materiel, Complex Materiel and Support. While many categories of procurement to which these contracts apply are excluded from the scope of AUSFTA, Chapter 15 by virtue of Note 3 of the Schedule of Australia in Annex 15-A of the AUSFTA and Article 22.2 dealing with exemptions for 'Essential Security', it can be observed that the standard form conditions of tender for the Australian Defence Services Contract provides that not only are the evaluation criteria 'not in any order of importance' but they are 'not exhaustive'. These provisions are qualified in the current version of the Services template which states that such provisions should only be used 'when the procurement is a non-covered procurement and is therefore not subject to the Mandatory Procurement

market. If this is not possible, other processes (such as an expression of interest or request for proposals) should be adopted.

The disadvantage to prospective suppliers of an agency not revealing weightings applying to evaluation criteria is that it is not necessarily self-evident what the procuring agency will place emphasis on when making a source selection decision. This is particularly disadvantageous for new players in a procurement market unfamiliar with the established practices and procedures of a procuring agency.

Not providing prospective suppliers with the weightings attaching to evaluation criteria used in discriminating between competing bids is a clear breach of the CPGs. While clearly articulating the weightings of evaluation criteria in the conditions of tender would address this shortcoming, even more useful to prospective respondents would be for agencies to release the tender evaluation plan to be used in assessing submitted bids. This, of course, can only occur if the tender evaluation plan has been finalised at the time the other solicitation documents are released.

A Debriefing suppliers

A final point worth making on the subject of openness and transparency of procurement information relates to debriefing unsuccessful tenderers. Article 15.9.8 of the AUSFTA provides that:

Procedures in the CPGs': *Procurement and Contracts*, Department of Defence <http://www.defence.gov.au/dmo/DMO/function.cfm?function_id=45> at 30 January 2011.

> A procuring entity shall promptly inform suppliers that have submitted tenders of the contract award decision … a procuring entity shall, on request, provide an unsuccessful supplier with the reasons that the entity did not select its tender.

The CPGs reflect the foregoing sentiments in the following terms:

> Where a potential supplier makes a submission in response to an approach to the market, the agency must promptly advise the potential supplier of its final decision regarding the submission.
>
> On request, an agency must provide an unsuccessful potential supplier with the reasons that its submission was not successful.
>
> Where an agency rejects an expression of interest or an application for inclusion on a multi-use list, or ceases to recognise a potential supplier as having satisfied the conditions for participation in either, the agency must promptly inform the potential supplier and, on request, promptly provide the potential supplier with a written explanation of the reasons for its decision.[19]

Whilst the guidance in the CPGs is not particularly effusive in terms of what information can be provided to an unsuccessful bidder, previously there was no compulsion on government agencies to debrief unsuccessful suppliers at all.[20]

The adequacy of debriefing unsuccessful bidders for government procurement requirements should be a key element of the implementation of the AUSFTA as these processes are critical to enabling suppliers to gain an understanding of how the procurement practices of the other party work. Initial failure to win contracts could be

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[19] *Commonwealth Procurement Guidelines*, December 2008, paragraphs 8.72 – 8.74.
[20] The CPGs in effect prior to execution of the AUSFTA in May 2004 make no mention of the need to notify unsuccessful tenderers of the outcome of a procurement process.

expected when seeking to supply to a government agency of the other party without previous experience of having done so. Whether suppliers are subsequently able to improve their competitiveness in the bidding process on the next occasion they participate will depend largely on information gleaned from previous attempts. Inadequacy of feedback to unsuccessful tenderers acts as an impediment to suppliers gaining access to government procurement opportunities in the future.

Another (perhaps cynical) benefit of debriefing (from an agency's perspective) is that it can be used to protect the government from possible challenges. If it is made clear in the debriefing that the unsuccessful bidder was assessed as not competitive on certain criteria, it would be very difficult to mount a challenge because, even if the challenger can show that the assessment was flawed in a particular respect, the government can say 'maybe, but it made no difference'.[21]

IV REVISED PROCUREMENT PRACTICES AND PROCEDURES

A key feature of the CPGs, brought into operation as a consequence of the AUSFTA, is the imposition of 'mandatory procurement procedures' which apply when agencies undertake a covered procurement activity (defined above). The default position under the mandatory procurement procedures is that open tender procurement processes are to be applied. An 'open tender' procurement process is one where a request for tender is published inviting all suppliers that satisfy the conditions for participation to submit

[21] This point made by Dr Seddon in providing feedback on an initial version of this paper.

tenders.[22] Select tendering (where prospective suppliers are shortlisted from a multi-use list or an expression of interest process and invited to submit tenders)[23] and direct sourcing (where an agency invites a potential supplier of its choice to make a submission)[24] are permitted in certain limited circumstances.

In all tender processes, a procuring entity is required to limit participation eligibility to those factors that ensure a supplier has the legal, commercial, technical and financial abilities to fulfil the advertised requirements.[25] The evaluation of a supplier's conformity with these requirements cannot be based on whether the supplier has past experience in Australia.[26] Minimum standards and times for public notices of procurement requirements apply.[27]

The mandatory procurement procedures place an additional level of rigour around the tender process with a consequence that government agencies have less flexibility in relation to the procurement methods they adopt. The abolition of direct (or sole) sourcing as a principal means of satisfying government procurement requirements (except in limited circumstances) is significant in that prior to the adoption of the AUSFTA requirements, a large proportion of government work was sourced through

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[22] Defined in: AUSFTA, Article 15.15.8; *Commonwealth Procurement Guidelines* Appendix C.
[23] Defined in: AUSFTA, Article 15.15.11; *Commonwealth Procurement Guidelines*, Appendix C. Process described in: AUSFTA, Article 15.7.7; *Commonwealth Procurement Guidelines*, paragraphs 8.20-8.29.
[24] Referred to as 'limited tendering' in: AUSFTA, Article 15.8. Defined in: *Commonwealth Procurement Guidelines*, Appendix C. The process itself is described in paragraphs 8.30 – 8.34 of the CPGs.
[25] AUSFTA, Article 15.7.1; *Commonwealth Procurement Guidelines*, paragraphs 8.52 – 8.55.
[26] AUSFTA, Article 15.7.2(b); *Commonwealth Procurement Guidelines* paragraph 8.53.
[27] AUSFTA, Article 15.5; *Commonwealth Procurement Guidelines*, paragraphs 8.58 – 8.59.

this method.[28] The advantage of direct-sourcing to agencies was that the procurement process could be expedited (less tenders to evaluate), less resources were required to oversee the process and non-preferred suppliers were not put to the trouble of preparing tenders that would ultimately be declined. The earlier procedures did not require tenders at all. It was assumed, but not mandated.[29]

A Tender closing times

A further illustration of the reduced flexibility afforded to government tender processes is the inability of agencies to accept tenders after the nominated tender closing time (unless the agency itself is responsible for the delay in submission).[30] Whilst this approach reduces the potential for the integrity of the tender process to be compromised by untoward behaviour (such as disclosing the pricing details of a tender submitted on time) it also deprives suppliers of the opportunity to have their tenders considered in circumstances where a failure to lodge on time is not attributable to any fault of their own. In circumstances where a tender may have taken many weeks (or months) to prepare, declining to evaluate it because it was submitted a minute late (and through no fault of the submitting party) seems grossly unfair. It may also deprive the government of a promising supplier.

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[28] Sole sourcing should now only occur in respect of covered procurements subject to the mandatory procurement procedures in the limited circumstances set out in: *Commonwealth Procurement Guidelines* , paragraph 8.33. As to whether this requirement is being met, see: 'Tender Tie-ups Costing 'billions' Govt Departments Ignoring Contract Savings Guidelines', *The Sunday Canberra Times*, 30 January 2011, 1, 4.

[29] In Australia, it has long been recognised that there has not been a specialised system regulating government contracts as there has been in the United States and the European community. See: further, Nicholas Seddon, *Government Contracts: Federal, State and Local* (The Federation Press, 1995) 199-200.

[30] AUSFTA, Article 15.9.3; *Commonwealth Procurement Guidelines*, paragraphs 8.63-8.66.

B Award of contracts

The AUSFTA and the CPGs expressly contemplate that once a tender process has commenced, a contract will subsequently be awarded.[31] These sentiments may be contrasted with standard form conditions of tender used by Commonwealth government agencies that expressly state that the agency is under no obligation to proceed to contract in respect of an advertised requirement. The conditions of tender in the Australian Defence Contract suite of contracting templates state that 'the Commonwealth may, at its discretion, suspend, defer, terminate or abandon this request for tender process at any time prior to the execution of a formal written contract'.[32]

While there will be circumstances where it is not possible to proceed to contract on the basis of bids received (such as when there are none received that meet essential evaluation criteria) the standard form words set out in the preceding paragraph effectively allows procurement processes to be terminated on a whim rather than as a consequence of substantive justification.

[31] AUSFTA, Article 15.8.7; *Commonwealth Procurement Guidelines* paragraphs 8.70-8.71.
[32] Clause 1.5 of the Conditions of Tender in the Australian Defence Contract suite of contracting templates for Strategic Materiel, Complex Materiel and Support.

C Multi-use lists

A change to government procurement methods that offers scope for increased flexibility and accessibility to government supply chains is the advent of multi-use lists. A 'multi-use list' is defined in the CPGs as a list, intended for use in more than one procurement, of pre-qualified potential suppliers that have satisfied the conditions for participation for inclusion on the list.[33] Multi-use lists have been described as similar in nature to 'common-use' or 'endorsed supplier' arrangements.[34] While the operation of a multi-use list is similar to its predecessor arrangements, multi-use lists introduced as a consequence of the AUSFTA appear to be easier to access. All that is required in order to be included on a multi-use list is to satisfy nominated 'conditions for participation'. Suppliers that satisfactorily meet these conditions must be included on the list.[35] Inclusion as a preferred supplier on a common-use or endorsed supplier arrangement would usually only occur after completion of a more comprehensive evaluation process. Being included on a multi-use list is potentially a low-cost means for new suppliers to gain access to work in new markets. Once included on a multi-use list, government agencies will likely be more comfortable contracting with that supplier on the basis that they have been assessed (at least in a preliminary sense) as being competent to supply a particular good or service to government. Requests for applications for inclusion on multi-use lists must be published continuously or republished annually on AusTender.[36] Inclusion on a multi-use list will also pre-

[33] *Commonwealth Procurement Guidelines*, paragraph 8.15, Appendix C.
[34] Prevalent when Commonwealth government procurement was overseen by the former Department of Administrative Services.
[35] *Commonwealth Procurement Guidelines*, paragraph 8.19.
[36] Ibid, paragraph 8.18.

qualify suppliers for select tender processes.[37] Multi-use lists can be contrasted with standing offer arrangements. These are popular now because, once the panel is established, an agency can 'direct source' from the panel.

V TENDER CHALLENGES

United States corporations that wish to challenge a tender evaluation process and subsequent contract award have no entitlement to invoke the dispute resolution provisions contained in Chapter 21 of the AUSFTA.[38] Invoking these provisions remains the sole purview of the parties to the AUSFTA, they being the Australian and United States governments. The terms of the AUSFTA do however provide for domestic review of supplier challenges to the tender process. These provisions, and the extent to which Australia is complying with them, give rise to several contentious issues.

A Internal review

Article 15.11.1 of the AUSFTA provides for an internal review process to be put in place within procuring agencies to deal with complaints from suppliers who have an interest in a covered procurement process. This requirement is addressed in paragraph 7.34 of the CPGs. Larger Commonwealth government agencies have put in place

[37] Ibid, paragraphs 8.23-8.24.
[38] AUSFTA, Article 21.15.

arrangements to reflect these requirements.[39] Previously, there has been no obligation on Commonwealth government agencies to provide an internal review process to unsuccessful prospective suppliers.

B Independent external review

Article 15.11.2 places an onus on the parties to the AUSFTA to have a mechanism in place to provide for independent review of procurement decisions:

> Each party shall maintain at least one impartial administrative or judicial authority that is independent of its procuring entities to receive and review challenges that suppliers submit, in accordance with the Party's law, relating to a covered procurement. Each Party shall ensure that any such challenge not prejudice the supplier's participation in ongoing or future procurement activities.

The Australian judicial system appears fully compliant with this provision. The Courts are independent of the executive arm of government and are able to deal with challenges to government procurement decisions.

C Prompt interim relief measures

Article 15.11.4 of the AUSFTA goes on to provide that the authorities referred to in subparagraph 2 (above) shall have the power to take 'prompt interim measures' pending resolution of a challenge to preserve the supplier's opportunity to participate

[39] See, for example: the internal Department of Defence procurement complaints handling process set out in Chapter 5.7B of the Defence Procurement Policy Manual (1 December 2010 edition);

in the procurement. Such interim measures 'may include, where appropriate, suspending the contract award or the performance of a contract that has already been awarded' (emphasis added). For these purposes, 'measures' extend to any law, regulation, procedure, requirement, practice or guideline.[40]

There is limited scope for Australian judicial and administrative bodies to give effect to such measures, other than in the form of an interlocutory injunction prior to contract award.[41] Administrative law remedies are able to set aside a contract already awarded but the application of these remedies in decided cases has been limited. In *MBA Land Holdings Pty Ltd v Gungahlin Development Authority*,[42] a decision to grant a lease following a tender process was set aside on the basis of a finding that procedural fairness had not been afforded to all of the tenderers. The winner of the tender process had been allowed to revise its tendered price after tenders had been submitted. Whilst the contract award decision was held not be have been made under an enactment (which would have provided a statutory basis for judicial review of the decision), it was deemed to nevertheless be reviewable on the grounds of common law judicial review.[43] Similarly, in *Hunter Brothers v Brisbane City Council*,[44] a contract awarded following a defective tender process was held to be void on the basis that the Council accepted a tender that had not been lodged by the tender closing time in accordance with the requirements of ordinances that expressly precluded the

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Procurement and Contracts, Department of Defence <http://www.defence.gov.au/dmo/DMO/function.cfm?function_id=45> at 30 January 2011.

[40] AUSFTA, Articles 1.2.15, Article 15.15.5.

[41] See: *Patrick Stevedores Operation No 2 Pty Ltd v Maritime Union of Australia (No 3)* (1998) 195 CLR 1.

[42] *MBA Land Holdings Pty Ltd v Gungahlin Development Authority* [2000] ACTSC 89.

[43] See further: Nicholas Seddon, *Government Contracts: Federal, State and Local* (The Federation Press, 4th ed, 2009) 420, 428.

making of a contract that did not comply with established tender procedures set out in the ordinances.[45]

It is not possible under private law to have a contract set aside except in circumstances where rescission is considered an appropriate remedy.[46] This can only be pursued by a party in a contractual relationship and would therefore not be of any practical benefit to a party who has missed out on being awarded a contract.[47] Rescission, as a remedy, would be irrelevant in the context of a pre-award tender process contract.

At face value, it would seem that the language used in Article 15.11.4 (set out above) does not impose a compulsion on either party to make provision for the suggested interim relief measures to be provided in domestic law. In this respect, use of the word 'may' in the last sentence of the Article can be contrasted with use of the word 'shall' earlier in the Article (emphasised above). On a literal interpretation of the wording, the specific acts of suspending an award of contract or its performance post-award are merely suggestions as to what may constitute appropriate interim relief measures in the circumstances. Cassimatis has argued that such an interpretation appears inconsistent with the general context of Article 15.11.4 and Chapter 15 as a whole and would therefore render the words 'where appropriate' (emphasised above) otiose.[48] Certainly there are many examples where apparently obligatory or discretionary

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[44] *Hunter Brothers v Brisbane City Council* [1984] 1 Qd R 328.
[45] Ibid, 439-441.
[46] Ibid 53.
[47] See further: above n 43, 420, 428.
[48] Anthony E Cassimatis, 'Government Procurement Following the Australia US Free Trade Agreement – Is Australia Complying with its Obligations to Provide Remedies to Unsuccessful Tenderers?' (2008) 30 *Sydney Law Review* 412, 422.

words in domestic legislation have been interpreted contrary to their ordinary meanings.[49]

The question arises that if suspending an award of contract or its performance post-award are not to be construed as mandatory requirements under Article 15.11.4, what alternative remedies (in the form of interim relief measures) are available to meet the broader obligation (itself described in the language of a mandatory requirement) that unsuccessful prospective suppliers should be able to take prompt interim measures 'to preserve the supplier's opportunity to participate in the procurement'? The answer to that question appears to be that, other than suspending the solicitation process or revoking an awarded contract, there are none.

Cassimatis contends that the obligation to suspend an award or performance of contracts in appropriate circumstances extends beyond providing interim relief measures.[50] He states that there would be no purpose in requiring contracts to be suspended by way of interim proceedings if this could not be followed by a final order terminating the agreement.[51]

In the United States at Federal level, there are specialist adjudicative bodies that deal with challenges to procurement decisions.[52] These bodies focus exclusively on resolving tender challenge disputes, have considerable experience in dealing with

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[49] See, for example: DC Pearce & RS Geddes, *Statutory Interpretation in Australia*, (Butterworths, 4th ed, 1996) 272-274.
[50] Cassimatis, above n 48, 422.
[51] See further: Nicholas Seddon, *Government Contracts: Federal, State and Local*, 4th edition, The Federation Press, Sydney, 2009, 420, 423.

Federal government procurement matters and are able to make adjudicative decisions in a timely manner.[53]

Article 15.11.5(d) of the AUSFTA states that 'the review authority shall provide its decision on a supplier's challenge in a timely fashion, in writing, with an explanation of the basis for the decision'. Cleary Australian courts are not equipped to provide expeditious determinations in respect of tender challenge proceedings initiated by aggrieved suppliers (see, for example, *Cubic Transportation Systems Inc v New South Wales*[54]). Presumably this recognition is what precipitated an exchange of side letters between the parties to the AUSFTA that effectively recasts the nature and scope of the 'supplier challenge' provisions.

The side letter to Chapter 15 (one of many that seek to elucidate the terms of various chapters of the AUSFTA) from the Australian government to the United States government states in respect of Article 15.11 that in the case of Australia:

> the Federal Court of Australia and the Supreme Courts of the States and Territories are impartial authorities for the purposes of Article 15.11; and the remedies available in, and the procedures applicable to, such courts, satisfy the requirements of that Article.[55]

The Unites States' letter of response affirms this understanding and goes on to state that the side letters 'constitute an integral part of the Agreement'.[56]

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[52] Seddon, above n 2, 84.
[53] Ibid.
[54] *Cubic Transportation Systems Inc v New South Wales* [2002] NSWSC 656.
[55] Letter to the Honourable Robert B. Zoellick, (30 January 2011), http://www.dfat.gov.au/trade/negotiations/us_fta/final-text/letters/15_procuremen_revt.pdf.
[56] Above n 55.

Seddon has speculated[57] that a possible explanation for the willingness of the United States government to accede to this arrangement can be found in the outcome of the Hughes tender challenge case[58] in which Hughes Aircraft Systems International (a Unites States corporation) successfully sued an Australian government agency (Airservices Australia) for deficient tender practices. The outcome of this case may have given the United States government a level of assurance that United States corporations bidding for work in Australia would have adequate means of redress through the Australian court system in the event of being unfairly treated in a government tender process. The irony of this proposition is that the two avenues in which Hughes successfully challenged the tender process in that case are no longer able to be pursued under Australian domestic law (at least in a practical sense).

Hughes was successful in its tender challenge based on establishing a preliminary process contract that governed the solicitation process and in establishing misleading or deceptive conduct contrary to s 52 of the *Trade Practices Act 1974* (Cth) on the part of Airservices Australia in the way in which that agency conducted the tender process.

A 'tender process contract' in this respect is distinct from a procurement contract subsequently awarded following a tender process. Standard form conditions of tender used by Commonwealth government agencies expressly seek to exclude the

[57] Dr Nick Seddon, Government Contracts seminar, Australian National University, 23 May 2010.
[58] *Hughes Aircraft Systems International v Airservices Australia* (1997) 146 ALR 1.

possibility of a tender process contract arising. The standard form conditions of tender in the Australian Defence Contract suite of contracting templates state that:

> This request for tender is an invitation to treat and must not be construed, interpreted, or relied upon, whether expressly or impliedly, as an offer capable of acceptance by any person, or as creating any form of contractual, quasi-contractual, restitutionary or promissory estoppel rights, or rights based upon similar legal or equitable grounds.
>
> No binding contract (including a process contract) or other understanding (including, without limitation, any form of contractual, quasi-contractual, restitutionary or promissory estoppel rights, or rights based upon similar legal or equitable grounds) will exist between the Commonwealth and a tenderer unless and until a contract is signed by the Commonwealth and the successful tenderer.[59]

There is nothing in the AUSFTA or the CPGs that precludes the exclusion of tender process contracts in this manner notwithstanding the fact that the AUSFTA mandates that a tender challenge procedure must be available. In any event, a tender process contract would not necessarily provide a basis for an unsuccessful tenderer to suspend an already awarded procurement contract or to be considered for a new contract in place of the suspended contract.[60]

With regard to the second tenet under which Hughes was successful, case law subsequently decided has held that the *Trade Practices Act 1974* (Cth) does not bind the Commonwealth government in its procurement activities.[61] In *JS McMillan Pty*

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[59] Clause 1.2, Conditions of Tender, Australian Defence Contract for Strategic Materiel, Complex Materiel and Support; *Procurement and Contracts*, Department of Defence <http://www.defence.gov.au/dmo/DMO/function.cfm?function_id=45> at 30 January 2011.
[60] Cassimatis, above n 48, 426.
[61] Sedden, above n 43, 53.

Ltd v Commonwealth,[62] a distinction was drawn because of the interpretation of s 2A of the Act between activities that entailed 'carrying on a business' and those which were deemed 'purely governmental or regulatory' in nature. The proposition was there advanced that an agency as a user of services for ordinary governmental purposes is not carrying on a business with the result being that government procurement activities are generally excluded from the purview of the Trade Practices legislation.[63] *McMillan* has been followed in subsequent cases resulting in most forms of government procurement activity being considered outside the scope of the *Trade Practices Act 1974* (Cth) generally, and s 52 (dealing with the misleading and deceptive conduct) in particular.[64] Remedies under the *Trade Practices Act* (were it to apply) can include suspension and setting aside of contracts in appropriate circumstances.[65]

D Non-compliance with regulations

The Federal Court has held that legislation regulating Commonwealth procurement does not create duties enforceable by a party other than the government: *Dardek v Minister for Regional Services, Territories and Local Government*.[66] The approach is the same as that adopted by the High Court when interpreting a provision that requires a statutory authority to obtain its Minister's consent to enter into a contract above a specified monetary threshold: *Australian Broadcasting Corporation v Redmore Pty*

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[62] *JS McMillan Pty Ltd v Commonwealth* (1997) 147 ALR 419.
[63] Ibid, 437.
[64] Seddon, above n 43, 296.
[65] See, for example: *Trade Practices Act 1974* (Cth), s 80.
[66] *Dardek v Minister for Regional Services, Territories and Local Government* (2002) 65 ALD 451.

Ltd.[67] Statutory provisions pertaining to procurement deal with 'the exercise … rather than the existence of the power'.[68] It follows that without further changes to the role of procurement regulation (be it through the FMA Regulations or the CPGs), Australian courts have limited capacity to deal with complaints that a procurement process has been conducted other than in conformance with the legislative framework.

E Changes to procurement legislation

As to legislative changes that have already been brought about as a consequence of the AUSFTA, the inclusion of subs 64(3) in the FMA Act has made the CPGs a statutory instrument within the meaning of the *Legislative Instruments Act 2003* (Cth). This means that the CPGs must now:

- be published on the Federal Register for Legislative Instruments (Comlaw);
- be subject to higher drafting standards, consultation and parliamentary scrutiny (as of May 2011, this had yet to occur);
- be interpreted having regard to the *Acts Interpretation Act 1901* (Cth);
- be subject to the scope of enabling legislation (the FMA Act and FMA Regulations) meaning that expressions used in that legislation will have the same meaning as in the CPGs.

The CPGs are not subject to disallowance or the sunsetting rules under the *Legislative Instruments Act 2003* (Cth).

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[67] *Australian Broadcasting Corporation v Redmore Pty Ltd* (1989) 166 CLR 454.
[68] Ibid, 457.

A further step towards enhancing the robustness of the CPGs is the repeal of FMA Regulation 8 that provided (in part) that an official performing duties in relation to the procurement of property or services must 'have regard' to the CPGs. New FMA Regulation 7(4) provides that an official 'must act in accordance with' the CPGs.

F Administrative law review

Judicial review allows for review of a decision regarding the legality, but not the merits, of government action. Judicial review under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (the ADJR Act) has not been available in respect of procurement decisions on the basis that a decision to contract is said to derive its force and effect from the common law of contract rather than from any statutory provisions (subordinate or otherwise) that need to be fulfilled in order for the government agency to enter into contractual relations. In *General Newspapers Pty Ltd v Telstra Corp*,[69] the Full Federal Court held that a decision to contract, made under a statutory power to contract, was not a decision made under an enactment. It was held that the ADJR Act provides for review of decisions that affect legal rights or obligations and not decisions or acts taken under the common law. Whilst subject to criticism,[70] the High Court endorsed the reasoning in *General Newspapers* in *Griffith University v Tang*.[71]

[69] *General Newspapers Pty Ltd v Telstra Corp* (1993) 117 ALR 629.
[70] See Seddon, above n 43, 408.
[71] *General Newspapers* in *Griffith University v Tang* (2005) 221 CLR 99.

Commonwealth government departments and agencies make decisions to enter into contractual relations under the executive power in s 61 of the Constitution. The Constitution is not regarded as an enactment for ADJR purposes.[72]

Commonwealth government procurement decisions that cannot be reviewed under the ADJR Act may be reviewed under s 39B of the *Judiciary Act 1903* (Cth) or ss 75(iii) and 75(v) of the Constitution which confer jurisdiction on the Federal Court and High Court respectively to review Commonwealth government executive action. A challenge to a decision to award a contract must be brought against an 'officer of the Commonwealth'.[73]

It has been observed that the ability to challenge government contracting decisions through judicial review is an expanding field of administrative law.[74] In *Victoria v Master Builders' Association of Victoria*,[75] the Full Court of the Victorian Supreme Court held that there is a prospect of judicial review where a failure to observe procedural fairness or accord natural justice has occurred. Similarly, in *MBA Land Holdings Pty Ltd v Gungahlin Development Authority*,[76] a decision to grant a lease following a tender process was set aside when it was found that procedural fairness had not been accorded to all tenderers. Common law judicial review was applied to set aside the decision.

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[72] *Dixon v Attorney-General* (1987) 75 ALR 300, 306.
[73] A statutory corporation or a Commonwealth controlled company would not fulfil this requirement. See: Seddon, above n 43, 414.
[74] Ibid, 415.
[75] *Victoria v Master Builders' Association of Victoria* (1994) 7 VAR 278.

It has also been contended that where government tendering policies and tender documents include representations regarding the tender process to be followed, then a legitimate expectation may arise that compels the government agency to adhere to advertised procedures for the tender process.[77] The expectation created is not that a contract will be awarded to a particular party, but rather that tenderers have a legitimate expectation that the government will not depart from the advertised procedures without first giving suppliers who lodged bids in accordance with the specified tender process an opportunity to be heard.[78] In *Century Metals and Mining NL v Yeomans*,[79] the Full Federal Court held that a legitimate expectation had been created by undertakings given by the Commonwealth as to the way in which a tender evaluation process would be conducted. It was held that the party appointed to evaluate tenders was not an independent third party and did not conduct the evaluation in an impartial and thorough manner. The Court concluded that procedural fairness had not been observed and that the tender award decision should be set aside.

VI CONCLUSION

The implications of the AUSFTA for government procurement at Commonwealth level in Australia have been a tightening-up of procurement procedures (as reflected in the mandatory procurement procedures of the CPGs), an enhanced emphasis on openness and transparency of procurement information, changes to legislative

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[76] *MBA Land Holdings Pty Ltd v Gungahlin Development Authority* [2000] ACTSC 89.
[77] Seddon above n 43, 426; Cassimatis, above n 48, 433.
[78] Seddon above n 43, 426; Cassimatis, above n 48, 433.

requirements regulating procurement activities (amendment of s 64 of the FMA Act and repeal of FMA Regulation 8(2)) and the elimination of preferential treatment for Australian and New Zealand suppliers.

In the areas of openness and transparency of procurement information, clearly the AUSFTA has had a beneficial effect which complements more recent government initiatives relating to enhanced access to government information.[80] Government agencies can further promote openness and transparency of procurement information by ensuring that the weightings associated with evaluation criteria used in assessing responses to procurement requirements are clearly communicated to prospective suppliers. An effective means of achieving this (beyond stating the weightings in the conditions of tender) would be for agencies to release their tender evaluation plans at the same time as other procurement documents are released. Releasing tender evaluation plans would alert prospective suppliers to those elements of their submissions that will be subject to individual assessment. This information could assist prospective suppliers in ascertaining which elements of their submissions are likely to receive the most scrutiny. They would therefore be better placed to make informed decisions as how their resources should be applied in preparing a bid. In instances where evaluation criteria are released but the weightings attaching to those criteria are not, the efficacy of the procurement process (not to mention its lawfulness) is significantly undermined.

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[79] *Century Metals and Mining NL v Yeomans* (1989) 100 ALR 383.
[80] See, for example: the *Freedom of Information Amendment (Reform) Act 2010* (Cth).

In terms of future directions for Commonwealth procurement, the next iteration of the CPGs will likely be prepared with significant input from the Office of Parliamentary Counsel. This will be the first time this has occurred. It will be interesting to observe any changes in drafting approach (perhaps less policy oriented and more prescriptive in terms of requirements agencies are expected to comply with). More significant changes will be required to provide avenues of redress for aggrieved United States suppliers seeking to suspend a contract award, or the performance of a contract that has already been awarded, in circumstances where the contracting agency has conducted the procurement process otherwise than in accordance with the requirements of the CPGs.