



THE TRANS-PACIFIC PARTNERSHIP – IMPACT ON NSW GOVERNMENT PROCUREMENT

2018

1 WHAT IS THE TRANS-PACIFIC PARTNERSHIP (TPP)?

The Comprehensive and Progressive Agreement for Trans-Pacific Partnership (TPP-11) is a new free trade agreement (FTA) between Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, Peru, New Zealand, Singapore and Vietnam. However it applies in respect of NSW government only to Canada, Chile, Japan, Mexico and Peru. TPP-11 is a comprehensive agreement that covers both topics already covered by existing international and bilateral trade agreements, including government procurement, and also subjects not previously considered such as electronic commerce and cybersecurity.

TPP-11 is a separate treaty that incorporates, by reference, the provisions of the original Trans-Pacific Partnership (TPP) Agreement (signed but not yet in force), with the exception of a limited set of provisions to be suspended. The original TPP was revised following the withdrawal of the United States from that agreement.

TPP-11 was signed in Santiago, Chile on **8 March 2018**. It will become effective **60 days after the date on which at least six of the eleven members ratify the deal**. Australian Trade Minister Steven Ciobo said that member states will strive for TPP-11 to come into effect as soon as possible, and he is hopeful that this will occur before the end of 2018.

2 TPP-11 AND OTHER INTERNATIONAL AGREEMENTS

Chapter 15 (Government Procurement) of TPP-11 sets out requirements that government agencies of signatory countries must adhere to with respect to the procurement of certain goods and services. For the most part, Chapter 15 reflects obligations that Australia (including NSW) government entities are already bound by under existing international trade agreements. These include the existing bilateral free trade agreements between Australia and each of the US, Chile, Korea, Japan and Singapore and the Australia and New Zealand Government Procurement Agreement.

Looking forward, Australia has also applied to become part of the *World Trade Organisation Government Procurement Agreement* (WTO GPA). The WTO GPA is an agreement between 19 parties comprising of 47 World Trade Organisation members (counting the European Union and its 28 member states as one party). Australia first applied to become a party to the WTO GPA in September 2015, and submitted its final offer to the WTO Committee on Government Procurement on 7 March 2018. GPA members will have the opportunity to consider Australia's final offer again at the next GPA committee meeting scheduled for June 2018. If Australia is accepted to the WTO GPA, this will add further to the obligations that government agencies have in procuring goods and services.

3 WHICH PROCUREMENT PROCESSES ARE COVERED?

WHICH AGENCIES ARE COVERED?

The rules of Chapter 15 (Government Procurement) of TPP-11 apply to the NSW government agencies listed at the end of this bulletin, as outlined in Section B (Sub-Central Government Entities) of [Australia's Schedule](#) to Annex 15-A of the TPP-11.

Procurement for Transport for NSW's functions exercised through the Transport Construction Authority or Country Rail Infrastructure Authority and procurement related to the functions of the Privacy Commission are not covered by TPP-11.

WHAT TYPE OF PROCUREMENTS ARE COVERED?

In general, Chapter 15 applies to the government procurement of a good, service or any combination thereof as specified in each signatory's Schedule to Annex 15-A. This will cover the procurement of ICT goods and services, construction services, purchase, rental or lease agreements, build-operate-transfer agreements and public work concession contracts.

Grants, loans and government funding or subsidy arrangements are excluded from Chapter 15, as are research and development agreements, sponsorship arrangements and international aid (amongst other things). Some categories of procurement are exempt from TPP-11 for NSW government, most notably the procurement of health and welfare services, education services and motor vehicles.

WHAT VALUE OF PROCUREMENTS ARE COVERED?

Section B provides that the rules of Chapter 15 (Government Procurement) will only apply to NSW government agencies where the total value of the procurement is estimated to equal or exceed:

- a. for procurement of goods and services, 355,000 Special Drawing Rights (SDRs) (approx. A\$655,000); and
- b. for procurement of construction services, 5,000,000 SDR (approx. A\$9,200,000).

These values are to be adjusted every second year. Agencies are required to establish the value of each intended procurement over the life of the relevant agreement (including any option) in order to determine whether TPP-11 applies. If the value of the procurement cannot be determined, then the procurement is effectively deemed to be covered and the agency is required to comply with TPP-11.

4 WHAT IS THE IMPACT ON THE PROCUREMENT PROCESS?

NATIONAL TREATMENT AND NON-DISCRIMINATION (ARTICLE 15.4)

The overarching principle of TPP-11 is that member states must treat vendors from each other's countries on equal footing with domestic suppliers in awarding government contracts.

Under TPP-11 government agencies are required to give the goods, services and suppliers from another signatory country treatment which is no less favourable than the treatment that the agency, gives to:

- i. domestic goods, services and suppliers; and
- ii. goods, services and suppliers of any other signatory country.

TPP-11 obliges countries to treat foreign suppliers fairly when they are competing for government contracts, irrespective of the type of tender process used. This means that governments cannot treat suppliers from other TPP-11 countries less favourably than their own domestic suppliers (known as the **national treatment obligation**) or discriminate against local suppliers just because they are partly foreign-owned or use foreign goods and/or services.

This also means that governments cannot create specifications or procedures that create obstacles for suppliers from TPP-11 countries to compete for the contract. The contract must be awarded to the supplier offering the best value for money solely on the basis of the stated evaluation criteria.

PROCUREMENT METHODS (ARTICLE 15.4)

A major feature of Chapter 15 (Government Procurement) is that governments must generally use an **open tendering procedure** for contracts above a certain threshold to ensure that government procurement is open to all suppliers. This is already standard practice in Australia (including NSW) but not necessarily in other TPP-11 countries.

This obligation does not mean that governments can only use open tendering. Governments may use pre-qualified tendering (where suppliers are pre-qualified for contracts on a registration system), multi-use lists or selective or limited tendering (where only a few suppliers are considered for contracts), but only in specific circumstances outlined in Chapter 15. In particular, where selective tendering is permitted by NSW procurement rules, the procuring entity is still required to publish a notice that invites suppliers to submit a request for participation in the procurement (see Article 15.9.3).

USE OF ELECTRONIC TENDERING (ARTICLE 15.4)

Chapter 15 also provides that procuring entities should seek to undertake relevant procurements through **use of electronic means**, including for the publication of procurement information, notices and tender documentation, and for the receipt of tenders. When conducting procurement by electronic means, a procuring entity should ensure that it uses systems and software which are generally available and should establish and maintain mechanisms that ensure the integrity of information provided by suppliers.



PUBLICATION OF PROCUREMENT AND NOTICES OF INTENDED PROCUREMENT (ARTICLES 15.6 AND 15.7)

For each relevant procurement, a procuring entity must publish information relating to the procurement and any change or addition to this information and publish a notice of intended procurement through the appropriate paper or electronic means. A notice of a procurement is required to include information specified in Article 15.7, most of which would typically be included in a government tender document in any event. However, there is an express requirement to include an indication that the procurement is covered by Chapter 15 unless that information has already been publicly notified.

If accessible by electronic means, notices must be provided free of charge and the notices must remain readily accessible to the public until at least the expiration of the time period for responding to the notice or the deadline for submission of the tender.

CONDITIONS FOR PARTICIPATION (ARTICLE 15.8)

A procuring entity must limit any conditions for participation in a procurement to those conditions that ensure that a supplier has the **legal and financial capacities** and the **commercial and technical abilities** to fulfil the requirements of that procurement. In evaluating financial capacity and commercial and technical abilities of a supplier, the procuring entity is required to take into account that supplier's business and activities both inside and outside the territory of the procuring entity.

Importantly, a procuring entity must not impose a condition that requires a supplier to have been previously awarded one or more contracts by a procuring entity or to have prior work experience in the territory of the procuring entity. However, a procuring entity may require relevant prior experience if essential to meet the requirements of the procurement.

NEGOTIATIONS (ARTICLE 15.11)

A procuring entity may only conduct negotiations in relation to a procurement where it has indicated its intention to do so in the notice of intended procurement or it appears from the evaluation that no tender is obviously the most advantageous in terms of the evaluation criteria. When conducting negotiations, suppliers must only be eliminated by applying the original evaluation criteria and when negotiations are concluded the procuring entity must provide a common deadline for the remaining suppliers to submit any new or revised tenders.

TECHNICAL SPECIFICATIONS (ARTICLE 15.12)

In describing the technical specifications for a good or service being procured, a procuring entity must set out the technical specifications in terms of performance and functional requirements, rather than design or descriptive characteristics. Procuring entities must base the technical specifications on international standards, if these exist, and otherwise on national technical regulations, recognised national standards or building codes.

A procuring entity must not seek or accept, in a manner that would have the effect of precluding competition, advice that may be used in the preparation or adoption of any technical specification for a procurement from a person that may have a commercial interest in the procurement.

TIME PERIODS (ARTICLE 15.14)

A procuring entity must provide sufficient time for a supplier to obtain the tender documentation and to prepare and submit a request for participation and a responsive tender, taking into account factors such as:

- iii. the nature and complexity of the procurement; and
- iv. the time necessary for transmitting tenders by non-electronic means from foreign as well as domestic points if electronic means are not used.

A procuring entity must establish that the final date for submission of tenders shall not be less than **40 days**, though this can be reduced to **25 days** if the tender is a selective tender. The timeframes may be further reduced if specified criteria (including the use of electronic tendering) are met.

TREATMENT OF TENDERS (ARTICLE 15.15)

If a procuring entity provides a supplier with an opportunity to correct unintentional errors of form between the opening of tenders and the awarding of a contract, then the procuring entity must provide the same opportunity to all participating suppliers.

DISCLOSURE OF INFORMATION (ARTICLE 15.17)

On request of any signatory to TPP-11, a signatory must provide promptly information sufficient to demonstrate whether a procurement was conducted fairly, impartially and in accordance with Chapter 15, including information on the characteristics and relative advantages of the successful tender. However, signatories are not required to disclose confidential information.

ENSURING INTEGRITY IN PROCUREMENT PRACTICES (ARTICLE 15.18)

Each signatory to TPP-11 is required to ensure that criminal or administrative measures exist to address corruption in its government procurement. These may include procedures to render ineligible for participation in procurements suppliers that have been determined to have engaged in fraudulent or other illegal actions in relation to government procurement in the signatory's territory. Each signatory is also required to have in place policies and procedures to eliminate or manage conflicts of interest.

DOMESTIC REVIEW (ARTICLE 15.19)

Each TPP-11 signatory is required to maintain, establish or designate at least one impartial administrative or judicial review authority to review in a non-discriminatory, timely, transparent and effective manner a challenge or complaint by a supplier in relation to a procurement. The Commonwealth Government's *Government Procurement (Judicial Review) Bill 2017* is seen as an endeavour to implement this at a federal level.

NSW GOVERNMENT AGENCIES

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| 1. Advocate for Children and Young People | 21. New South Wales Electoral Commission |
| 2. Board of Studies, Teaching and Education Standards | 22. NSW Food Authority |
| 3. Crown Solicitor's Office | 23. New South Wales Ombudsman |
| 4. Department of Education | 24. NSW Rural Assistance Authority |
| 5. Department of Family and Community Services | 25. New South Wales Rural Fire Service |
| 6. Department of Finance, Services and Innovation | 26. Office of the Director of Public Prosecutions NSW |
| 7. Department of Industry, Skills and Regional Development | 27. Office of Environment and Heritage |
| 8. Department of Justice | 28. Office of the Local Government |
| 9. Department of Planning and Environment | 29. Parliamentary Counsel's Office |
| 10. Department of Premier and Cabinet | 30. Police Integrity Commission |
| 11. Environment Protection Authority | 31. Public Service Commission |
| 12. Fire and Rescue NSW | 32. State Emergency Service |
| 13. Health Care Complaints Commission | 33. Sydney Harbour Foreshore Authority |
| 14. Information and Privacy Commission (Note 3) | 34. Sydney Olympic Park Authority |
| 15. Legal Aid NSW | 35. The Audit Office of New South Wales |
| 16. Ministry of Health | 36. The Treasury |
| 17. Ministry for Police and Emergency Services | 37. Transport for NSW (Note 4) |
| 18. Motor Accidents Authority of NSW | 38. WorkCover NSW |
| 19. Multicultural NSW | |
| 20. New South Wales Crime Commission | |

NOTES

- For the entities listed for New South Wales, Chapter 15 (Government Procurement) shall not cover the procurement of health and welfare services, education services or motor vehicles.
- For the entities listed for New South Wales, Chapter 15 (Government Procurement) shall not apply to procurements undertaken by a covered entity on behalf of a non-covered entity.
- Chapter 15 (Government Procurement) shall not cover procurement related to the functions of the Privacy Commission by the Information and Privacy Commission.
- Chapter 15 (Government Procurement) shall not cover procurement by Transport for NSW, related to the functions of the Transport Construction Authority, and the Country Rail Infrastructure Authority or its successor agencies.



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