Government procurement under International Agreements: Goods and services guide

## What are International Free Trade Agreements

Free Trade Agreements are treaties between two or more countries that benefit Australian importers, exporters and investors by reducing or eliminating certain barriers to international trade and investment.

## When International Free Trade Agreements apply

The requirements of International Agreements apply to all government departments, offices or bodies (organisations), excluding specific entities, bound by the Victorian Government Purchasing Board’s policies, if the organisation is procuring goods or services with an expected value (as at the date of issue of the invitation to supply), that exceeds:

* in the case of construction works - $AUD9,762,000 (inclusive of GST)
* in the case of goods or services - $AUD693,000 (inclusive of GST).

See the [list of organisations that must comply with International Agreements](https://www.buyingfor.vic.gov.au/covered-entities-international-agreements) (therefore subject to this guide).

For the purposes of this guide, to determine the 'expected value' of the goods or services, organisations must:

* consider the maximum value (inclusive of GST) of the proposed contract, including any options, extensions, renewals or other mechanisms that may be executed over the life of the contract;
* include the following amounts:
  + all forms of remuneration, including any premiums, fees, commission, interest, allowances and other revenue streams provided for in the proposed contract;
  + the value of the goods or services being procured, including the value of any options in the proposed contract to include additional goods or services or extend the term of the agreement; and
  + any taxes or charges;
* not divide the procurement of goods or services into separate parts solely for the purpose of avoiding the thresholds set out in this Instruction; and
* where it is not possible to determine the amounts payable over the entire duration of the proposed contract, treat the expected value as being above the relevant thresholds set out in this Instruction.

Note:For the purpose of this guide, International Agreement means any international agreement entered into by the State or the Commonwealth that applies to procurement undertaken by an organisation.

### **When International Agreements do not apply**

The requirements of International Agreements do not apply:

* if the organisation is acquiring or obtaining the goods or services:
  + on behalf of an organisation that is not subject to this guide, or any government entity of the Commonwealth or another state or territory of Australia that is not a 'covered entity' for the purposes of an applicable International Agreement, or of local government;
  + from another government entity, including another organisation, any government entity of the Commonwealth, another state or territory of Australia, or local government;
* with funds received from grants or sponsorship payments from a person other than an organisation subject to this guide, or any other person, including any government entity of the Commonwealth or another state or territory of Australia that is not a 'covered entity' for the purposes of an applicable International Agreement, or local government;
* with funds received from international grants, loans or other assistance, when the provision of such assistance is subject to conditions inconsistent with the requirements of this guide; and
* where the goods or services constitute research and development services, but not to the inputs to research and development undertaken by an organisation;
* to the extent reasonably necessary to:
  + protect public morals, order or safety;
  + protect human, animal or plant life or health (including by environmental measures); or
  + to protect intellectual property;
* to a reasonable extent relating to the goods or services of persons with disabilities, philanthropic or not-for-profit institutions, or of prison labour;
* to the extent that small and medium businesses are given preference;
* to the extent that action is taken to protect national treasures of artistic, historic or archaeological value;
* to the extent that action is taken for the health and welfare of indigenous people; or
* to the extent that action is taken for the economic and social advancement of indigenous people.

For the purposes of this guide, to determine whether a government entity of the Commonwealth or another state or territory is a 'covered entity', organisations will need to refer to the Schedules of relevant International Agreements.

## Australia New Zealand Government Procurement Agreement

Except where an exception applies, all organisations must apply the provisions of the Australia New Zealand Government Procurement Agreement.

### **When the Australia New Zealand Government Procurement Agreement does not apply**

The following classes of procurement are exempt from the Australia New Zealand Government Procurement Agreement:

* procurement conducted by Government bodies that trade in substantial competition with the private sector and would be placed at a significant commercial disadvantage if they were required to fully comply with all provisions of the Agreement;
* joint ventures with the private sector;
* internal procurement of goods and services by a government from its own Departments or public bodies is exempt from all provisions of the Australia New Zealand Government Procurement Agreement where no other supplier has been asked to tender. If, however, public tenders are called for goods or services the provisions of the Australia New Zealand Government Procurement Agreement apply irrespective of whether a government body submits a tender;
* where procurement specifications include proprietary items to ensure machinery or equipment integrity, the procurement specification is exempt from the obligation not to discriminate based on the origin of goods and services within that market. Where such items are available from a number of sources or public tenders are called, all aspects of the procurement, other than the specification, are subject to the provisions of the Australia New Zealand Government Procurement Agreement;
* the urgent procurement of goods and services in the event of emergencies, such as natural disasters, periods of national security or United Nations peacekeeping operations;
* procurement of proprietary equipment of a work, health or safety nature specified in industrial agreements is exempt from the obligation not to discriminate based on the origin of goods and services within that market, only as they may relate to biased specifications;
* procurement supporting measures necessary to protect human, animal or plant life or health, including the protection of indigenous or endangered animal or plant life. Each country may impose quarantine requirements on imports, but such requirements must not be used as a means of arbitrary or unjustified discrimination, or a disguised restriction on trade; and
* procurement supporting measures in relation to the goods or services of persons with a disability, or of philanthropic or not-for-profit institutions.

### **Requirements of the Australia New Zealand Government Procurement Agreement**

Except where an exception applies, the Australia New Zealand Government Procurement Agreement requires the following principles to be applied:

* purchasing bodies must treat all of Australia and New Zealand as a single market;
* no discrimination based on the origin of goods and services within that market;
* Australia and New Zealand tender participants must be able to compete on an ‘equal and transparent basis’;
* unsuccessful Australia and New Zealand tender participants are entitled to a debrief upon request; and
* value for money based on a whole of life costing must be the fundamental determinant of tender outcomes.

## General requirements of International Agreements

### **Non-discrimination and equal treatment**

Tender participants from other countries must be given the same opportunity to compete for government business as local tender participants.

Local tender participants must not be discriminated against on the basis that they have foreign shareholders or that they supply products originating in other countries.

Technical specifications and evaluation criteria should not be worded to exclude international tender participants.

Tender participants must not be required to provide offsets – which includes requirements for local content, use of domestic suppliers, licensing of technology, counter-trade or actions – to encourage local development, other than where required by Victorian laws (such as those relating to trade qualifications) or policies (such as the [Local Jobs First](https://localjobsfirst.vic.gov.au/)).

### **Conditions of participation**

Conditions of participation that inappropriately discriminate against international tender participants are not permitted.

Most common conditions for participating in a tender are acceptable under International Agreements. Examples of permitted conditions of participation include:

* legal capacity to enter a binding agreement;
* financial capacity appropriate for the scale and type of the project;

commitment to the Victorian [Supplier Code of Conduct](https://www.buyingfor.vic.gov.au/supplier-code-conduct); or

* appropriate licences or professional qualifications.

A condition requiring prior work experience in Victoria would discriminate against potential international tender participants and would not be acceptable.

## Forms of tender

### **Open tenders**

An open tender is the preferred approach to market under International Agreements.

### **Selective Tenders**

Registers used to select participants for Selective Tenders must be continuously open to new applicants for registration.

Note: For the purpose of this guide, Selective Tenders means a competitive tender open only to suppliers on a register of pre-qualified suppliers.

### **Limited Tenders**

Limited Tenders are allowed under any of the Special Circumstances detailed in this guide.

When a Limited Tender is used a written a report must be created recording what was procured, the circumstances that justified the Limited Tender and to demonstrate how value for money was obtained.

Note: For the purpose of this guide, ‘Limited Tenders’ means the engagement of a supplier conducted:

* without competition – that is by inviting a single tender participant (whether or not from a register of pre-qualified suppliers); or
* with limited competition – that is by inviting two or more tender participants (whether or not from a register of pre-qualified suppliers).

### **Special Circumstances**

The Special Circumstances when organisations may conduct a Limited Tender are:

* due to reasons of extreme urgency brought about by events unforeseeable by the organisation, or because the goods or services could not be obtained in time by means of an open tender or Selective Tender. Such reasons may include:
  + life threatening situations;
  + occupational health and safety;
  + security;
  + loss of essential services;
  + avoiding significant loss or damage to assets, or significant service delivery disruption;
  + weather protection; or
  + any comparable events beyond the control of the organisation.
* to protect essential security interests;
* where, in response to an open tender or Selective Tender:
  + no tenders were submitted;
  + no tender that represented a value-for-money outcome was received;
  + no tenders were submitted that conform to the essential requirements in the tender documentation; or
  + no tender participants satisfied the conditions for participation;

provided that, in the tender documentation for the Limited Tender, the organisation does not substantially modify the essential requirements set out in the original tender documentation;

* only single or a limited number of potential tender participants could supply the goods or services for any of the following reasons:
  + the requirement is for a work of art;
  + to protect patents, copyrights or other exclusive rights or proprietary information; or
  + due to an absence of competition for technical reasons;
* the supplier of the goods or services is selected as a result of a design competition; or
* where the procurement arises from unsolicited innovative proposals (Market-led proposal).

### **Market-led proposals**

Market-led proposals (also called unsolicited proposals) are permitted when conducted in accordance with the Victorian Government Purchasing Board’s procurement framework.

## Notice requirements

### **Procurement activity plan**

Organisations must publish a procurement activity plan in accordance with the [Developing a procurement activity plan – Goods and services procurement guide](https://www.buyingfor.vic.gov.au/developing-procurement-activity-plan-goods-and-services-procurement-guide) to promote competition and allow potential tender participants to plan for and allocate resources to participating in tender processes. Where applicable, the procurement activity plan must identify that the procurement is covered by International Agreements.

### **Tender Notice**

Organisations must publish a Tender Notice in accordance with the [Market approach – Goods and services procurement guide](https://www.buyingfor.vic.gov.au/market-approach-goods-and-services-procurement-guide), including all details listed under the heading ‘Invitation to supply information’.

At the same time that an organisation publishes an Invitation to Supply, the organisation must also publish a summary notice containing the following information:

* the subject matter of the procurement;
* the final date for the submission of the procurement activity; and
* the address (electronic or other) from which documents relating to the procurement may be requested.

Note: For the purpose of this guide, Tender Notice the notice announcing the beginning of a formal tender process, which occurs:

* in a single stage tender process: a request for proposal, request for tender, notice of invitation to supply, or notice of approach to market; or
* in a two-stage tender process: the request for information or request for expression of interest.

### **Tender open period**

Tenders must be open for at least 40 calendar days. This period can be reduced to 25 calendar days if all the following three requirements are satisfied:

* the Tender Notice is published electronically;
* the tender documentation is available electronically; and
* responses can be submitted by electronic means.

A tender open period may be reduced to 10 calendar days if:

* there is a substantiated state of urgency; or
* a procurement activity plan was published at least 40 calendar days – but no longer than one year – before the Tender Notice and if the procurement activity plan contained the information set out in the [Developing a procurement activity plan –Goods and services procurement guide](https://www.buyingfor.vic.gov.au/developing-procurement-activity-plan-goods-and-services-procurement-guide).

These requirements apply to open tenders and Selective Tenders. These requirements may apply to, but are not mandatory for, Limited Tenders.

### **Tender close**

A response must not be excluded from consideration if it was submitted late because of some fault on the part of the organisation.

### **Evaluation criteria**

Evaluation criteria must not discriminate between local tender participants and those from other countries.

The tender documentation must disclose the relative importance of the evaluation criteria. This requirement may be met by either:

* describing the weightings applied to each evaluation criterion; or
* by listing the evaluation criteria in order of importance.

Where not all evaluation criteria are weighted, the tender documentation should explain how certain criteria will be assessed using weightings or the order of importance, with other matters then considered in making the final value for money determination.

### **Post tender negotiations**

Post tender negotiations are only permitted if:

* the Tender Notice advised that post tender negotiations either would or may be conducted; or
* following the evaluation, no response is obviously the most advantageous in terms of the evaluation criteria.

The restriction on post tender negotiations does not inhibit the right to meet with tender participants to clarify their responses.

Post tender negotiations must apply the evaluation criteria listed in the tender documentation. If, following any post tender negotiations, tender participants are requested to submit revised responses, the same opportunity within the same time period must be provided to all tender participants under consideration.

### **Publication of award**

International Agreements contain disclosure obligations that apply in addition to those specified in the [Contract management and contract disclosure policy](https://www.buyingfor.vic.gov.au/contract-management-and-contract-disclosure-goods-and-services-policy). Importantly, these obligations may apply to require disclosure in relation to all contracts awarded for covered procurements, including contracts under head agreements.

Following the award of a contract, the procuring organisation is required to promptly publish the following details regarding the procurement:

* a description of the goods or services;
* the name and address of the procuring entity;
* the name and address of the successful tenderer;
* the value of the contract award;
* the date of the award and contract date;
* the procurement method used; and
* if a limited tender was conducted, the circumstances justifying such approach.

## Dispute resolution

### **Dispute resolution clause**

The organisation must include in the invitation to supply a legally binding dispute resolution clause. This clause must provide for the resolution of complaints or challenges by a supplier of non-compliance with measures to implement the procurement requirements of International Agreements. The dispute resolution clause is to provide for such complaints to be resolved by a process of:

* negotiation and then mediation between the supplier and the organisation; and
* if this is not successful, determination by an independent arbitral tribunal with the power to make an award of compensation or award corrective action.

An organisation may, at its election, limit the compensation which may be awarded to the supplier to one of the following:

* costs reasonably incurred by the supplier in the preparation of the tender;
* costs reasonably incurred by the supplier in bringing the complaint;

The Victorian Government Purchasing Board [template Invitation to Supply](https://www.buyingfor.vic.gov.au/goods-and-services-invitation-supply-templates) includes a model dispute resolution clause which complies with the requirements of International Agreements.

In circumstances where a supplier has a complaint within the scope of the dispute resolution clause but is not bound by the terms of the Invitation to Supply (for example, because it has not submitted a valid response) the organisation should invite the supplier to arbitration on terms consistent with the dispute resolution clause contained in the provision in the Victorian Government Purchasing Board template Invitation to Supply.

### **Public interest certificate**

At any stage during a procurement process, the accountable officer of an organisation may issue a written certificate (public interest certificate) stating that it is not in the public interest for a procurement by the organisation to be suspended while a complaint by a supplier is being managed in accordance with the dispute resolution clause.

### **Interim measures**

The accountable officer for an organisation must suspend a procurement if:

* a supplier makes a complaint to the organisation under the dispute resolution clause; and
* there is no public interest certificate issued in respect of the procurement.

Such suspension is to continue until the first to occur of:

* the supplier informing the accountable officer that the supplier considers the complaint to be resolved;
* the supplier withdrawing the complaint;
* the accountable officer issuing a public interest certificate in relation to the procurement; and
* the complaint is resolved or concludes under the dispute resolution clause.

## Using this guide

This guide accompanies the [goods and services supply policies](https://buyingfor.vic.gov.au/goods-services-supply-policies). There are 5 policies:

* Governance policy
* Complexity and capability policy
* Market analysis and review policy
* Market approach policy
* Contract management and disclosure policy

Please refer to [Covered entities – international agreements](https://buyingfor.vic.gov.au/covered-entities-international-agreements) for a list of organisations that must comply with International Agreements

For further information and the text of International Agreements, visit the [Department of Foreign Affairs and Trade](http://dfat.gov.au/trade/agreements/Pages/trade-agreements.aspx).

## Tools and support

Access a document version of this guide in the [[Toolkit and library](https://www.buyingfor.vic.gov.au/government-procurement-under-international-agreements-goods-and-services-guide-0).](https://www.buyingfor.vic.gov.au/create-procurement-business-case-goods-and-services-guide-0)

For more information on aggregating demand, please contact the [[goods and services policy team](https://www.buyingfor.vic.gov.au/contact)](https://www.buyingfor.vic.gov.au/contact).

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