



Commonwealth Procurement Rules: Construction Services Procurement Threshold

Introduction

This document provides guidance on the application of the procurement threshold for construction services within paragraph 9.7 of the Commonwealth Procurement Rules (CPRs) and is intended to be read in conjunction with the CPRs, the *Public Works Committee Act 1969*, Finance’s Procurement Policy Website ‘Buying for the Australian Government’ and any other procurement policies and guidance identified in the table below.

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| Commonwealth Procurement Rules | Paragraph 9.7c Appendix B: Definitions |
| Guidance | <i>RMG 423: Procurement Publishing and Reporting Obligations</i> for further information Buying for the Australian Government |
| Other relevant resources, systems or tools | <i>Public Works Committee Act 1969</i> <i>Public Works Committee Regulation 2016</i> |

Construction services procurement threshold

1. The CPRs set out the rules that are to be followed by officials when undertaking Commonwealth procurements. The rules that apply will depend on, among other things, whether the procurement meets or exceeds a relevant procurement threshold.
2. Under paragraph 9.7 of the CPRs, if the expected value (including GST) of the procurement is estimated to be at or above the relevant procurement threshold, and an exemption in Appendix A of the CPRs does not apply, then the rules in Division 2 of the CPRs **must** be followed. The procurement thresholds (including GST) are:
 - for non-corporate Commonwealth entities, other than for procurements of construction services, the procurement threshold is \$80,000;

- for prescribed corporate Commonwealth entities, other than for procurements of construction services, the procurement threshold is \$400,000¹; or
 - for procurements of construction services by relevant entities, the procurement threshold is \$7.5 million.
3. In order to determine the relevant procurement threshold, procuring officials need to determine whether the procurement is for the provision of construction services, and if so, apply the \$7.5 million procurement threshold.

What are “construction services”?

4. Construction services are defined in the CPRs as ‘procurements related to the construction of buildings and procurements of works as defined by the *Public Works Committee Act 1969*’ (PWC Act).
- a) In relation to ‘procurements related to the construction of buildings’, the term ‘buildings’ is used according to a normal dictionary definition, such as a ‘structure that has a roof and walls’.
 - b) In relation to ‘procurements of works as defined by the PWC Act’, an extract of the PWC Act definition of works is provided below. An example of a procurement activity that may not meet the definition of work as stated under the PWC Act would be the production of or anything done to movable property (such as repairs) that is not a fixture.
5. A procurement that satisfies either (a) or (b) above, or both, will be a procurement of construction services for the purposes of the CPRs.
6. Refurbishment and fitting out of existing buildings may be covered under either (a) or (b) of the definition.

¹ For entities mentioned in CPR paragraphs 3.7 and 3.8, the relevant thresholds set out in those paragraphs apply.

PWC Act and Regulation extracts

Public Works Committee Act 1969 (extract)

Section 5 – Interpretation

work means an architectural or engineering work, and includes:

- (a) the construction, alteration, repair, refurbishment or fitting out of buildings and other structures;
- (b) the installation, alteration or repair of plant and equipment designed to be used in, or in relation to, the provision of services for buildings and other structures;
- (c) the undertaking, construction, alteration or repair of landscaping and earthworks (whether or not in relation to buildings and other structures);
- (d) the demolition, destruction, dismantling or removal of:
 - (i) buildings and other structures;
 - (ii) plant and equipment falling within paragraph (b); and
 - (iii) earthworks;
- (e) the clearing of land and the development of land for use as urban land or otherwise; and
- (f) any other matter declared by the regulations to be a work;

but does not include:

- (g) the production of, or anything done in relation to, intangible things;
- (h) the production of, or anything done in relation to, movable property unless the work is, under the regulations, a movable work to which this Act applies;
- (j) the installation, alteration or repair of plant or equipment where the plant or equipment:
 - (i) is not designed to be used in, or in relation to, the provision of services for a building or other structure; and
 - (ii) is not necessary or desirable to make a building or structure a complete building or structure; and
- (k) any other matter declared by the regulations not to be a work.

Public Works Committee Regulation 2016 (extract)

Section 6 – Matters included in the definition of *work* in section 5 of the Act

For the purposes of paragraph (f) of the definition of **work** in section 5 of the Act, an activity that:

- (a) is described in paragraph (a), (b), (c) or (d) of that definition; and
- (b) relates to:

- i. a temporary building or structure; or
- ii. a demountable building or structure;

is declared to be a work.

Exclusions from 'construction services'

7. As stated in section 5 of the PWC Act (extract above), the meaning of 'work' excludes 'the production of, or anything done in relation to, intangible things'. The term intangible things is not defined in the PWC Act and as such, the ordinary dictionary meaning will apply and would cover non-physical goods and intellectual property that relate to certain services. However, noting intangible things may form a component of the 'work', if procured separately, the intangible things would not themselves meet the definition of 'works' for the purpose of section 5 of the PWC Act.

Examples of intangible things may include, but are not limited to:

- a) intellectual property rights for engineering and architectural drawings and designs,
 - b) easement interests (the right of use granted to real property),
 - c) licenses or other land access arrangements,
 - d) copyrights,
 - e) patents,
 - f) trademarks,
 - g) trade secrets,
 - h) digital goods, and
 - i) services for non-physical goods.
8. As stated in section 5 of the PWC Act (extract above), the meaning of 'work' excludes 'the production of, or anything done in relation to, movable property unless the work is, under the regulations, a movable work to which this Act applies'. While the PWC Act defines the term 'movable property', subsection (h) should not to be used to exclude items which would otherwise be captured by the definition of 'work' under the PWC Act, that is, subsections (a)-(f). For example, office furniture provided as part of a procurement for office fit-out services would fall under 'fitting out' under subsection (a) of that definition and so would not be considered to be 'movable property'. For clarification, office furniture that is not a fixture, when procured separately, would not be considered as meeting the definition of 'construction services'.

Guidance for officials designing a procurement

9. When designing a procurement, officials should consider the scope of the requirement, including the components of the goods and services sought through the procurement.
10. If the requirement includes more than one component, officials should identify whether the nature of goods or services being procured are suitable to be delivered as a 'bundled' procurement or as separate procurements to achieve a value for money outcome. Relevant factors may include:
 - Timing of the procurement/s – are all requirements to be undertaken within a short period of time, or spread out over a number of years?

- Nature of the goods and services – is one set of requirements dependent on, or closely connected to another set of requirements?
- Parties to be involved in delivering the goods and services – following market research, is it possible that all the requirements may be delivered under one contract or are there activities that may require specific professions and qualifications (for example, licences to work on heritage listed sites?).

Guidance for officials determining the procurement threshold

11. When determining whether a procurement meets the definition of 'construction services' for the purposes of the CPRs, officials should consider the procurement's scope, including the components of the goods and services sought through the procurement.
12. When a procurement is to be conducted in multiple parts with contracts awarded either at the same time or over a period of time, with one or more suppliers, the expected value of the goods and services being procured must include the maximum value of all of the contracts. For procurements that involve construction and non-construction components, the relevant threshold for the majority of the components would apply.
13. A construction project that features numerous components that are different in nature may not be suitable to be bundled as a single procurement, including through multiple parts as outlined above (paragraph 12 refers). If this is the case, it would be reasonable for procuring officials to consider each of the different elements or stages to be treated as separate procurements, with the value of each package used to determine the appropriate procurement method for that package.
14. When estimating the value of a procurement, the procurement must not be divided into separate parts for the sole purpose of avoiding a relevant procurement threshold.
 - Procurement officials should be aware that, similar to the division of procurements, when considering the bundling of elements related to construction projects, doing so with the intent to avoid applying the lower relevant procurement threshold for procurements other than construction services may not be in keeping with the intent of the CPRs.
15. A procurement for construction services may include some components that meet the definition of construction services (such as fit-out services) and other related components (such as design or construction related project management services) that, if considered in isolation, would be considered as other types of goods and services.
16. A procurement would not meet the definition of construction services where the majority of components of the procurement, including the corresponding value of the components, do not relate to the construction of buildings or the procurement of works as defined by the PWC Act.

17. Procurement officials should note that, while certain related procurements are not defined as ‘construction services’ and therefore not relevant to the application of the Construction Services Procurement threshold within the CPRs, these related procurements may still be required to be included in the work project ‘cost estimate’ if the relevant entity is required to make a submission to the Public Works Committee (PWC)².
18. Officials should carefully consider the nature of the goods and services required, and clearly document what is being procured, whether the procurement is for construction services and whether the procurement should be bundled or separated. Where required, officials should consider whether to seek legal advice that may assist in determining whether the proposed procurement meets the definition of construction services.
19. Where a procurement meets the definition of construction services and the estimated value is below the relevant procurement threshold of \$7.5 million (including GST), then Division 2 of the CPRs will not apply. The procurement will still need to comply with Division 1 of the CPRs. Consistent with Section 5 of the CPRs, the procurement process should be commensurate with the scale, scope and risk of the proposed procurement and take into account market conditions to encourage competition and ensure the relevant entity is achieving value for money.

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| CPR Paragraph 5.1 | Competition is a key element of the Australian Government’s procurement framework. Effective competition requires non-discrimination and the use of competitive procurement processes. |
| CPR Paragraph 5.2 | Participation in procurement imposes costs on relevant entities and potential suppliers. Those costs should be considered when designing a process that is commensurate with the scale, scope and risk of the proposed procurement. |

Practical Examples

20. The following examples are provided to assist officials when considering whether a procurement meets the CPR definition of ‘construction services’ and are not intended to prescribe circumstances when a procurement is or is not construction services. Examples are broken into:
- a) Examples of procurements defined as construction services
 - b) Examples of procurements not defined as construction services, and
 - c) Examples of procurements relating to leases (office accommodation).
21. Procuring officials should consider the individual circumstances and context for their proposed procurement. In cases where a relevant entity has questions in relation to

² Relevant entities should refer to the PWC Manual for further guidance on this matter at www.finance.gov.au/government/property-and-construction/public-works-committee.

the application of the CPR definition and threshold, they may need to seek legal advice to determine whether the procurement meets the definition of construction services.

Procurement defined as construction services

Example 1: Managing contractor services and a design and build contract

A relevant Commonwealth entity has a requirement for the design and construction of a multi-purpose accommodation facility to be built on Commonwealth owned land. The relevant entity decides to use modular construction and will engage a contractor to deliver the specific requirements of the project. The work requires land development, remediation works, earthworks, construction of permanent facilities, purchase and installation of plant and equipment, use of temporary accommodation and landscaping. The relevant entity has assessed their requirements against the definition of 'construction services' and determines that the procurement meets the definition. The estimated value of the procurement is above the construction services procurement threshold of \$7.5 million (including GST).

Division 2 of the CPRs will apply and, consistent with the CPRs, an open approach to market is required (unless a relevant limited tender condition or exemption applies). The relevant entity decides to conduct an open tender.

Example 2: Building fit-out and renovations

A relevant Commonwealth entity is undertaking renovations of a kitchen and general office accommodation within the building in which they reside. The relevant entity requires the kitchen to be remodelled, which is expected to include the demolition of existing walls and structures, the removal and installation of equipment, features and surfaces, and the installation of new flooring and painting of walls throughout the leased premises. The work includes locating a leak and associated remediation. Included in the requirement is installation of new workstations, stationery storage cupboards and supply of non-fixed office furniture. As most of the components of the requirement will involve the repair, refurbishment and fitting out of the existing building, the relevant entity has assessed their requirements against the definition of 'construction services' and determines that the procurement meets the definition. The estimated value of the procurement is \$900,000 (including GST) and so is below the construction services procurement threshold of \$7.5 million (including GST).

Division 2 of the CPRs will not apply. The relevant entity decides to conduct a limited tender.

Example 3: Repairs to existing plant and equipment

A relevant Commonwealth entity requires repairs to existing air-conditioning plant and equipment attached to a large Commonwealth owned building. These requirements are used in relation to the provision of services for this building. The relevant entity has assessed their requirements against the definition of 'construction services' and determines the procurement meets the definition. The estimated value of the procurement is \$5.5 million (including GST), and so is below the construction services procurement threshold of \$7.5 million (including GST).

Division 2 of the CPRs will not apply. However, noting the value of the procurement, the complexity of the work and the risks, the relevant entity decides to conduct an open tender.

Procurements not defined as construction services

Example 4: Specialist equipment with construction services

A relevant Commonwealth entity has a requirement for ICT network equipment and cabling to be installed in a Commonwealth owned building. The estimated value of the procurement is \$6 million, comprising of \$4.75 million in equipment, cabling and installation; \$1 million of construction services for building modifications and associated installation; and \$250,000 for the design of the upgrade. As the majority of components are not identified as construction services, the relevant entity has assessed their requirements against the definition of 'construction services' and determined that the procurement does not meet the definition. The estimated value of the procurement is above the relevant procurement threshold for procurements other than construction services.

Division 2 of the CPRs will apply and, consistent with the CPRs, an open approach to market is required (unless a relevant limited tender condition or exemption applies). In this case, the relevant entity has identified that the services are available under a relevant panel arrangement and decides to issue a request for quotation to multiple suppliers under the panel. As the procurement is from an existing panel, Division 2 of the CPRs will not apply.

Example 5: Manufactured material procured separately to construction services

A relevant Commonwealth entity is refurbishing and extending a Commonwealth owned building and the architectural plans require the manufacture and supply of specialised structural steel for use in construction of the building addition. These specialised materials are considered 'goods' as the relevant entity will include the installation of the steel as part of the construction procurement. The relevant entity has assessed their requirements against the definition of 'construction services' and determined that the procurement does not meet the definition. The estimated value of the procurement is above the relevant procurement threshold for procurements other than construction services.

Division 2 of the CPRs will apply and, consistent with the CPRs, an open approach to market is required (unless a relevant limited tender condition or exemption applies). The relevant entity decides to conduct an open tender.

Example 6: Procuring architectural design services separately to construction services

A relevant Commonwealth entity is undertaking a project to construct a new building with an estimated cost of \$18 million. The relevant entity develops a project plan for the proposed construction of the building, which will be conducted in phases, and requires architectural services to design the building prior to commencing the construction services. After consideration, the relevant entity decides to conduct a separate procurement for the architectural design services. The relevant entity has assessed their requirements against the definition of 'construction services' and determined that the procurement does not meet the definition. The estimated value of the procurement for the architectural design services is \$480,000 and is above the relevant procurement threshold for procurements other than construction services.

Division 2 of the CPRs will apply and, consistent with the CPRs, an open approach to market is required (unless a relevant limited tender condition or exemption applies). In this

case, the relevant entity conducted market research and identified that while there is a relevant panel arrangement, the suppliers on the panel did not offer services to match the specific scope of this procurement. Division 2 of the CPRs will apply. The relevant entity decides to conduct an open tender.

Example 7: Project management services for build fit-out and renovations

Project management services are required to oversee the fit-out of office accommodation for a relevant Commonwealth entity. The relevant entity is anticipating that the project manager will oversee the construction, however the service provider will not be performing any of the construction services. The relevant entity has assessed their requirements against the definition of 'construction services' and determines the procurement does not meet the definition. The estimated value of the procurement is above the relevant procurement threshold for procurements other than construction services.

Division 2 of the CPRs will apply and, consistent with the CPRs, an open approach to market is required (unless a relevant limited tender condition or exemption applies). In this case, the relevant entity has identified that the services are available under a relevant panel arrangement and decides to issue a request for quotation to multiple suppliers under the panel. As the procurement is from an existing panel, Division 2 of the CPRs will not apply.

Procurements for lease (office accommodation)

Example 8: Lease for office accommodation with landlord to provide fit-out works

A relevant Commonwealth entity has a requirement for leased office accommodation. Following an assessment of lease options from the approach to market, the preferred option will require some construction (fit-out services) as part of the tenancy to bring the office accommodation up to a standard to meet the Commonwealth's requirements, carried out and paid for by the potential landlord.

Lease for office accommodation

The relevant entity has assessed their requirements against the definition of 'construction services' and determines the procurement does not meet the definition. The estimated value of the procurement is above the relevant procurement threshold for procurements other than construction services.

Leases for office accommodation fall under Appendix A Exemption 1 of the CPRs, therefore Division 2 of the CPRs will not apply to the procurement.

The relevant entity decides to conduct a limited tender for the lease for office accommodation.

Example 9: Lease for office accommodation with entity to provide fit-out works

A relevant Commonwealth entity has a requirement for leased office accommodation. After considering value for money, including whole-of-life costs, the preferred option of office accommodation will require some construction (fit-out services) as part of the tenancy to bring the office accommodation up to a standard to meet the Commonwealth's requirements. In this instance, the requirement includes an option for either the potential landlord or the Commonwealth to carry out the fit-out services. A respondent has offered a rent incentive as part of the lease agreement for the Commonwealth to procure and carry

out the fit-out services which will be subsequently reimbursed by the potential landlord via a reduction in rent for a set amount. The relevant entity decides that the rent incentive option is preferred.

As a result, the relevant entity will undertake two separate procurements:

1. Lease for office accommodation
2. Fit-out for office accommodation

Lease for office accommodation

The relevant entity has assessed their requirements against the definition of 'construction services' and determines the procurement does not meet the definition. The estimated value of the procurement is above the relevant procurement threshold for procurements other than construction services. Leases for office accommodation fall under Appendix A Exemption 1 of the CPRs and therefore Division 2 of the CPRs will not apply to the procurement. The relevant entity decides to conduct a limited tender for the lease for office accommodation.

Fit-out of office accommodation

The preferred option for the leased accommodation (from the first procurement activity) means the relevant entity has a separate requirement for a procurement for the office fit-out services which will include a construction component. The relevant entity assesses their requirement against the definition of 'construction services' and determines the procurement for fit-out services meets the definition. The estimated value of the procurement is \$8.2 million (including GST), which is above the construction services procurement threshold of \$7.5 million (including GST).

Division 2 of the CPRs will apply and, consistent with the CPRs, an open approach to market is required (unless a relevant limited tender condition or exemption applies). The relevant entity decides to conduct an open tender for the fit-out services.

Advice

Procuring officials seeking advice in relation to the application of the CPR definition and procurement threshold should contact their entity's central procurement team in the first instance for guidance to determine if their procurement meets the CPR definition of 'construction services'.

Feedback

We welcome feedback from stakeholders to ensure this guidance meets your needs. Comments and feedback should be sent via email to procurementagencyadvice@finance.gov.au.