



**Government
of South Australia**

State Procurement
Board

www.spb.sa.gov.au

International Obligations Policy

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Purpose

This policy sets out the requirements for public authorities to ensure appropriate compliance to a range of bilateral free trade agreements to which the South Australian Government is a party.

General Principles

The object of the *State Procurement Act 2004* (the Act) is to advance government priorities and objectives by a system of procurement for public authorities directed towards:

- a) obtaining value in the expenditure of public money
- b) providing for ethical and fair treatment of participants
- c) ensuring probity, accountability and transparency in procurement operations.

Complying with the requirements of any free trade agreements, to which the South Australian Government is a party, contributes to achieving the object of the Act.

All expressions defined in the Act and any relevant free trade agreements have the same meaning in this policy.

Policy Statement

The principal officer shall ensure that the requirements of any free trade agreements, to which the South Australian Government is a party, are complied with.

Where a public authority procurement is in breach of a free trade agreement, the public authority may be required to terminate or suspend the non-compliant procurement process.

Policy Scope

This policy applies to those public authorities, as defined in the Act, who are subject to the relevant free trade agreements. Lists of procuring entities are maintained and updated by the Department of State Development and are provided at Appendix 5.

Application

The South Australian Government is a party to the following agreements which have specific Government procurement commitments:

- *The Australian and New Zealand Government Procurement Agreement (ANZGPA)*
- *The Australia – United States Free Trade Agreement (AUSFTA)*
- *The Chile - Australia Free Trade Agreement (ACIFTA)*
- *The Korea – Australia Free Trade Agreement (KAFTA)*
- *The Japan – Australia Economic Partnership Agreement (JAEPA)*

Appendix 1 and 2 outlines the key principles and requirements for these agreements.



The information provided in this policy is not intended to replace the detailed requirements of the actual agreements. Procurement practitioners should read this policy in conjunction with the full free trade agreements which can be found at:

ANZGPA: [Australia New Zealand GPA](#)

AUSFTA: [Australia US FTA - refer to Chapter 15](#)

ACIFTA: [Australia Chile FTA - refer to Chapter 15](#)

KAFTA: [Australia Korea FTA - refer to Chapter 12](#)

JAPEA: [Japan Australia Economic Partnership Agreement - refer to Chapter 13](#)

Note that whilst the intent of each free trade agreement is the same, more recent agreements may have different wording to reflect the same requirements.

Appendix 4 outlines the principles for determining procuring entities in the event of a government restructure.

Exclusions

For exclusions relating to current free trade agreements, please refer to the specific agreement and Appendix 3.

Related Policy and Guidelines

SPB Acquisition Planning Policy
SPB Market Approaches and Contracts Guideline
SPB Panel Contracts Guideline

Responsibilities

Principal officers are responsible for ensuring this policy is implemented and monitored within their respective public authority.

The Board is responsible for ensuring this policy is promulgated, evaluated for its effectiveness across government and reviewed.

Review Date

This policy will be reviewed 24 months from the date of approval or on the ratification of a new, or changes to, an existing international free trade agreement.



APPENDIX 1

ANZGPA Key Principles and Requirements

The objective of the ANZGPA is to maximise opportunities for competitive Australian and New Zealand suppliers and reduce the costs of doing business for both government and industry.

The objectives will be achieved by:

- ensuring public authorities do not give preference to South Australian suppliers over those from another Australian jurisdiction or New Zealand;
- ensuring inter-state and trans-Tasman preference schemes and other forms of discrimination in government procurement based on place of origin are not applied;
- providing a mechanism for co-operation in working towards consistency in contractual, technical and performance standards and specifications, and simplicity and consistency in the application of procurement policies, practices and procedures; and
- ensuring the application of electronic commerce methods to procurement is consistent with the Agreement.

The ANZGPA applies to the procurement of goods, services and construction (as defined by the ANZGPA) by South Australian Government bodies, including public authorities, statutory authorities and other bodies controlled by the South Australian Government.

The Agreement recognises that under certain circumstances there may be a need for exemption from some of the requirements of the Agreement for certain classes of procurement. Annex 1 of the Agreement outlines the exempt classes of procurement.

APPENDIX 2

AUSFTA, ACIFTA, KAFTA and JAEPA Key Principles and Requirements

Objectives

The AUSFTA, ACIFTA, KAFTA and JAEPA are designed to maximise and improve market access, legal protections and business certainties that Australian exporters and investors require to compete in the United States, Chilean, Korean and Japan economies.

The primary principle for each of the aforementioned FTAs is 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 treatment the Party or the procuring entity accords to domestic goods, services and suppliers.

In accordance with the FTAs, neither party may:

- a) treat a locally established supplier less favourably than another locally established supplier on the basis of degree of foreign affiliation or ownership; or
- b) discriminate against a locally established supplier on the basis that the goods or services offered by that supplier for a particular procurement are goods or services of the other party.

If it is determined that a procurement falls within the scope of the AUSFTA, ACIFTA, KAFTA or JAEPA, then the requirements of the Government Procurement chapters within those FTAs must be followed.

Application

The Government Procurement Chapters of the AUSFTA, ACIFTA, KAFTA and JAEPA apply to 'covered procurements', which is the government procurement of goods and/or services (including construction):

- by any contractual means, including purchase and rental or lease, with or without an option to buy, build-operate-transfer contracts and public works concessions contracts;
- for which the value equals or exceeds the relevant threshold;
- that are conducted by a procuring entity listed in Appendix 5 of this policy;
- that are not excluded from coverage by this Agreement as listed in Appendix 3; and
- that are subject to the conditions specified in the relevant Annexes to the Government Procurement chapters in the free trade agreements;

Thresholds

The Government Procurement chapter requirements apply to covered procurements where the value of the procurement (including GST) is estimated to equal or exceed the AUSFTA thresholds being:

- for procurement of goods and services: A\$614,000; and
- for procurement of construction services: A\$8,652,000.

The AUSFTA thresholds are marginally less than those for the other FTAs and therefore set the benchmark. The application of the above thresholds enables one set of thresholds consistently

across all FTAs. The current threshold values are as at 1 January 2016 and are adjusted in accordance with the requirements set out in the AUSFTA.

Exclusions

Most procurements carried out by procuring entities above the designated thresholds will be subject to the requirements of the Government Procurement chapters for the AUSFTA, ACIFTA, KAFTA and JAEPA. There are a limited number of exclusions or exemptions to the FTA requirements. *Appendix 3* provides a comprehensive list of the exemptions or exclusions.

Advertising Tender Documents

Prospective suppliers in the United States, Chile, Korea and Japan must be able to access tender advertisements and opportunities. The tender notices must be published in electronic or paper media that are widely disseminated and remain readily accessible to the public for the entire period established for tendering.

In order to meet this requirement, all procurement activities are to be advertised on the Tenders SA website www.tenders.sa.gov.au (at a minimum) to allow United States, Chilean, Korean and Japan suppliers access to tender opportunities.

Awarding of Contracts

Where a tender has been called, a contract must be awarded unless the procuring entity determines that it would not be in the public interest to do so.

Where a prospective supplier has applied to be considered for a covered procurement, the supplier is entitled to prompt notification of the procurement entity's decision regarding its eligibility to participate in the procurement process. If a prospective supplier is unsuccessful, they can request an explanation and the procuring entity must promptly provide a written explanation of the reasons for the decision.

Forward Procurement Plans

Procuring entities are encouraged to publish forward procurement plans. Where advanced notice of a procurement proposal is published in a forward procurement plan, some relaxation of the rules relating to tender call periods is permitted.

In order to meet this requirement all forward procurement plans are to be published on the Tenders SA website www.tenders.sa.gov.au.

Late Tenders

A procuring entity shall not penalise a supplier whose tender is received after the time specified for receiving tenders if the delay is due solely to mishandling on the part of the procuring entity.

Non-Discrimination

A response to a tender call, received from a United States, Chilean, Korean or Japanese supplier, must be treated no less favourably than a response from an Australian supplier.

Offsets

The imposition or enforcement of offsets (see definition in the agreements) is prohibited under the AUSFTA, ACIFTA, KAFTA and JAEPA.

Multi-Use Lists

The AUSFTA, ACIFTA, KAFTA and JAEPA allow the procuring entity to establish a multi-use list (also known as pre-qualified supplier lists) provided that it publishes, annually or continuously, a notice inviting interested suppliers to apply for inclusion on the list.

For the purposes of the aforementioned FTAs, a panel contract is considered to not come within the category of multi use lists. The *Panel Contracts Guideline* discusses the differences between a multi use list and a panel contract.

Procurement Methods

Procurement methods must be fair and transparent. Approved methods include:

- open tendering methods
- selective tendering methods where the procuring entity can ensure optimum effective competition by inviting tenders from the largest number of suppliers that is consistent with the efficient operation of the procurement system
- limited tendering methods as long as this method is not used to avoid competition and protect domestic suppliers or in a manner that discriminates against suppliers of the other parties.

Refer to the SPB Market Approach and Contract Documents Guideline regarding the allowable conditions or circumstances to conduct selective or limited tendering.

Tender Call Periods

The AUSFTA, ACIFTA, KAFTA and JAEPA require that a minimum period of 30 (calendar) days is to elapse between the advertising of a tender and the closing date. This period may be reduced where specific limited conditions exist – refer to the Government Procurement chapter for each trade agreement.

Tender Documentation

Documentation must include all information necessary to permit potential suppliers to prepare and lodge a tender. This obligation does not apply to release of confidential information or information that may impede competition.

Valuing a Procurement

When estimating the value of a procurement, to determine if it is a covered procurement under the AUSFTA, ACIFTA, KAFTA and JAEPA, the total value of any extension and other options must also be included.

Procurements cannot be divided into separate procurements for the purpose of avoiding the application of the FTAs.



Breaches of Trade Agreements

Each Government Procurement chapter of the AUSFTA, ACIFTA, KAFTA and JAEPA includes domestic review procedures relating to breaches of the chapter.

In the event of a complaint by a US, Chilean, Korean or Japanese supplier that a procuring entity has breached the requirements of a covered procurement in which the supplier has, or had, an interest, the procuring entity must accord timely and impartial consideration to that complaint.

Each Party may take prompt interim measures, pending the resolution of a challenge which may include suspending the contract award or the performance of a contract that has already been awarded.

It is recommended that, if and when appropriate, legal advice is sought.

APPENDIX 3

Exemptions / Exclusions from AUSFTA, ACIFTA, KAFTA and JAEPA

The list is subject to change, public authorities must refer to specific trade agreements to obtain details, and legal advice may be required for complex matters.

The Government Procurement chapters of the AUSFTA, ACIFTA, KAFTA and JAEPA do not apply to:

- Procurement of goods and services by a procuring entity from another entity of the same Party, or between a procuring entity of a Party and a regional or local government of that Party
- Non-contractual agreements or any form of assistance that a Party provides, including grants, loans, equity infusions, fiscal incentives, subsidies, guarantees, cooperative agreements, and sponsorship arrangements
- Procurement for the direct purpose of providing international assistance
- Procurement of research and development services
- Procurement funded by international grants, loans, or other assistance where the applicable procedure or condition would be inconsistent with the Government Procurement chapter
- Procurement funded by grants and sponsorship payments received from a person other than a procuring entity of a Party
- Procurement or acquisition of fiscal agency or depository services, liquidation and management services for regulated financial institutions, and sale and distribution services for government debt
- Procurement of goods and services outside the territory of the procuring Party, for consumption outside the territory of the procuring Party
- Procurement of plasma fractionation services
- Public employment contracts (exclusion does not apply to the AUSFTA)
- The acquisition or rental of land, existing buildings, or other immovable property or rights thereof (exclusion does not apply to the AUSFTA)
- Procurement of financial services including insurance and insurance-related services and all banking and other financial services (exclusion does not apply to the AUSFTA)
- Procurement conducted under the particular procedure or condition of an international agreement relating to the stationing of troops or relating to the joint implementation by the signatory countries of a project (exclusion does not apply to the AUSFTA nor the ACIFTA)
- Procurement of financial advisory and asset management services pertaining to reserves held by each Party, including for the purposes of funding retirement benefits (exclusion does not apply to AUSFTA or the ACIFTA)
- Procurement of legal services (exclusion does not apply to the AUSFTA or the ACIFTA)
- Procurement of telecommunication services (exclusion does not apply to the AUSFTA or the ACIFTA)
- Procurement of transport services (exclusion does not apply to the AUSFTA or the ACIFTA)
- Any form of preference to benefit small to medium enterprises



- Measures to protect national treasures of artistic, historic, or archaeological value
- Measures for the health and welfare of indigenous people
- Measures for the economic and social advancement of indigenous people
- Measures necessary to protect public morals, order or safety
- Measures necessary to protect human, animal, or plant life or health (including environmental measures)
- Measures necessary to protect intellectual property
- Measures relating to goods or services of handicapped persons, or philanthropic or not for profit institutions, or of prison labour
- Measures necessary to protect essential security interests
- For the entities listed for South Australia, the Government Procurement chapters do not cover the procurement of:
 - health and welfare services
 - education services
 - advertising services or
 - motor vehicles.

APPENDIX 4

Principles for Determining Covered Public Authorities under the AUSFTA, ACIFTA, KAFTA and JAEPAPurpose

These principles have been prepared by the Crown Solicitor's Office in consultation with the Department for Treasury and Finance and the Department of State Development.

The purpose is to set out the basis for resolving whether an agency of the South Australian public sector is a "procuring entity" under the procurement chapters of the AUSFTA, ACIFTA, KAFTA and JAEPA.

It is anticipated that the Department of State Development will use this document following government departmental restructures to ascertain which entities are "procuring entities".

If an agency is a "procuring entity", a procurement conducted by the entity is a "covered procurement" (assuming that other criteria for a covered procurement such as value are met, and that it is not subject to an exception).

Definitions

Portfolio Department means a department that represents a major government portfolio. It provides an overarching framework for departments, statutory authorities and business units, which come within the portfolio. The portfolio department operates as a network, coordinating and linking the agencies it represents.

Department means an administrative unit created under the *Administrative Arrangements Act 1994* (SA). Departments are not legal entities, but are identifiable as organisations with a distinct legal structure, in which persons are employed.

Statutory Authority means a body corporate established under legislation specific to the agency, for example the SA Metropolitan Fire Service is a Statutory Authority established pursuant to the *Fire and Emergency Services Act 2005*.

Business Unit means a unit within a department. It is a part or division of the overarching government department.

Principles

1. If a department is named in the list, it is covered and all business units that are part of the department are covered.

For example, the Department of Treasury and Finance is named. Government Accounting, Reporting and Procurement, and Revenue SA are covered because they are business units of DTF; they do not have to be separately identified.

2. If a department is named on the list, and one or more but not all of the business units in the department are named, the whole department and all its business units are nevertheless covered.

For example, Department of the Premier and Cabinet (DPC) is named, and Arts SA, which is but a part of DPC, but no other part of DPC is named. The whole of DPC is included as a procuring entity. The separate naming of Arts SA is of no consequence. There is no implication that it is the only part of DPC covered by Chapter 15.

3. If a Portfolio Department is named on the list, that does not mean that unnamed departments nor statutory authorities included (or were formerly included) in the portfolio are to be treated as procuring entities.
4. It follows from principle 3 that if a Statutory Authority is on the list, it is a procuring entity for that reason (not for the reason that its Portfolio Department is named).
5. It also follows from principle 3 that if a Statutory Authority is not on the list, it is not a procuring entity, regardless of whether its Portfolio Department is named or not.
6. If a named Statutory Authority has been continued under another name, then it continues to be a covered entity notwithstanding the new name.
7. If a new Department or Statutory Authority is created, it is not a procuring entity, unless it is created to take over all or some of the functions of a named entity (as set out in the following principles). The State Procurement Board should be consulted to determine whether or not the new organisation should be treated as a procuring entity, having regard to its functions.
8. If functions of a named Department (or Statutory Authority) are transferred to a newly created Department or Statutory Authority, or to an existing department or authority that is not named in the list, then the newly created department or authority will be treated as a procuring entity.

For instance, the Department for Manufacturing, Innovation, Trade, Resources and Energy no longer exists and its functions have been transferred to Department of State Development, the Department of the Premier and Cabinet, and the Department of Primary Industries and Regions. These are treated as procuring entities.

9. If an entity that is not named undertakes its own procurement, regardless of the fact that other procurements may be undertaken for its benefit by a procuring entity, the procurement is not a covered procurement.

For example, a hospital may purchase goods and services for itself. That is not a covered procurement as the hospital is not a procuring entity. The fact that the Department of Health and Ageing conducts some covered procurement for the benefit of the hospital has no bearing on this matter.



APPENDIX 5

Public Authorities nominated to participate in the AUSFTA, ACIFTA, KAFTA and JAEPA Government Procurement chapters*.

The principles for determining who is a procuring entity can be found in Appendix 4.

Auditor-General's Department
Department of the Premier and Cabinet
Department of Treasury and Finance
Independent Gambling Authority
Department of State Development
Department of Primary Industries and Regions
Department of Planning, Transport and Infrastructure
Attorney-General's Department
Legal Services Commission
Department for Correctional Services
Country Fire Services
State Emergency Services
Courts Administration Authority
South Australian Fire and Emergency Services Commission
South Australian Metropolitan Fire Services
South Australia Police
Electoral Commission SA
Department for Communities and Social Inclusion
Department of Health and Ageing
Department of Education and Child Development
South Australian Tourism Commission
Department of Environment, Water and Natural Resources
Environment Protection Authority
State Procurement Board
Defence SA
Parliament of South Australia
TAFE SA

*The list of nominated public authorities is maintained and updated by the Department of State Development.