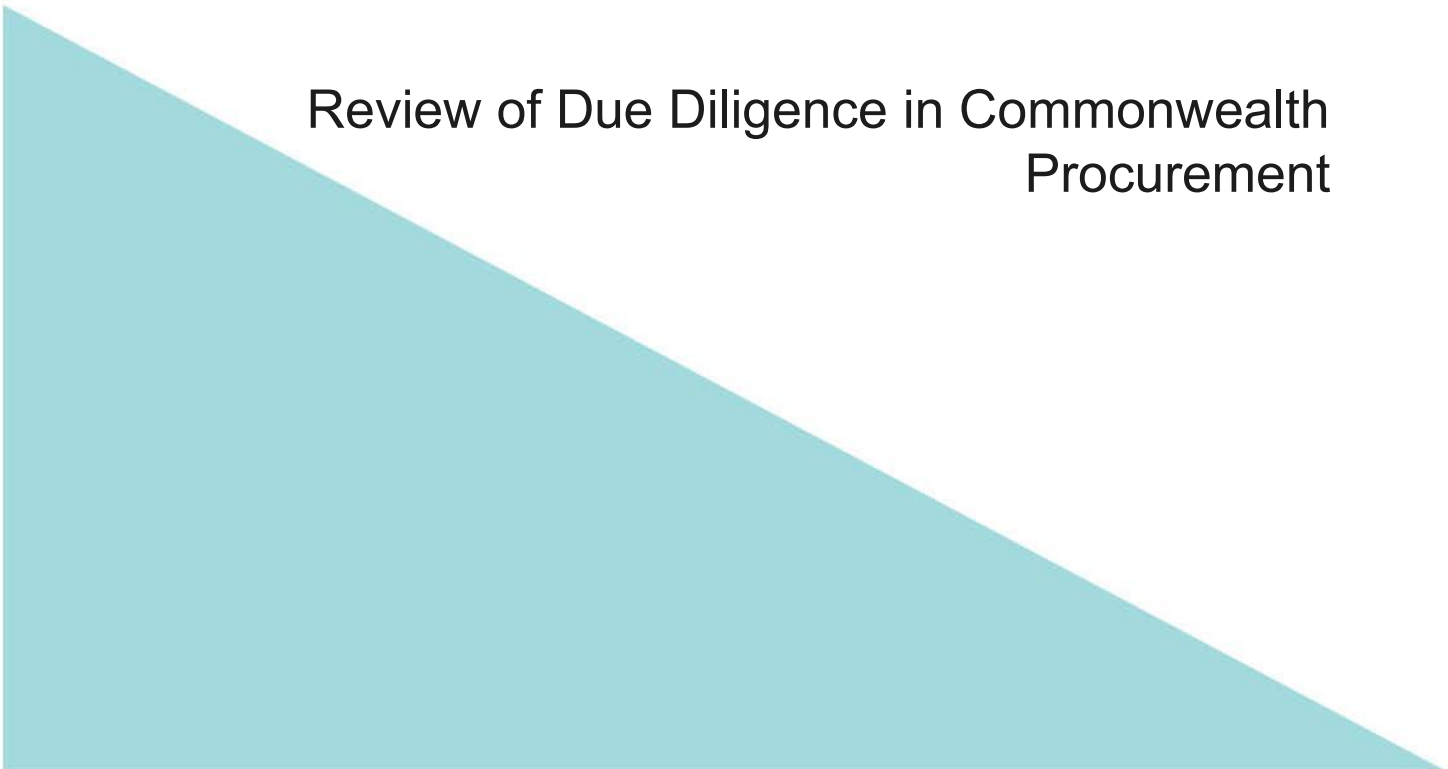




Australian Government
Department of Finance



Review of Due Diligence in Commonwealth Procurement



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1 Introduction

Under Commitment 4.3 of Australia's first Open Government National Action Plan - expand open contracting and due diligence in procurement - the Government assessed its compliance with the Open Contracting Data Standard (OCDS). Following this assessment and a public consultation process, the Government agreed to progress options to increase its compliance with the OCDS by publishing AusTender contracting data in an OCDS-compliant schema.

Additionally, as part of this commitment, the Government agreed to conduct a review of existing procurement due diligence processes, report on the outcomes of the review, and to consider opportunities to further support the Open Government Partnership values of transparency and accountability.

2 Executive Summary

Noting the diverse range of goods and services procured by the Commonwealth, the review highlighted that there are a range of activities that are recognised by Australian Government officials as forming part of due diligence processes, with the nature and number of activities largely dependent on the scale, scope and risk of the procurement.

There are a number of existing mechanisms under legislation, the Commonwealth Procurement Rules (CPRs), policies, tools and resources that require due diligence to be undertaken, and that can assist officials in undertaking appropriate due diligence. These mechanisms support accountability and transparency in achieving value for money outcomes throughout the procurement lifecycle.

Based on findings from the review, the Department of Finance (Finance) is developing due diligence guidance to assist officials in meeting accountability and transparency obligations and to achieve value for money in procurements. The guidance will outline considerations for due diligence at particular stages of a procurement's lifecycle, covering the whole-of-life process.

3 Scope of the Review

Finance led the review, exploring existing mechanisms that facilitate accountability and transparency in achieving value for money outcomes in Commonwealth procurements. This included:

- common due diligence considerations made by Commonwealth entities subject to the CPRs;
- existing due diligence related legislation, processes, tools, guidance and resources; and
- due diligence considerations and guidance that exists internationally in other governments and multilateral organisations.

In approaching the review, Finance undertook:

- desktop research on existing due diligence arrangements, processes and practices amongst Commonwealth entities;
- consultation with central procurement teams in Commonwealth entities; and
- desktop research on international due diligence arrangements and considerations.

3.1 What is due diligence?

For the purposes of this review, due diligence was broadly taken to refer to the checks that an entity or official may make during the entire procurement process, including contract management, to satisfy themselves that:

- the procurement can meet the entity's intended outcomes;
- the process is conducted properly, including being consistent with the policies of the Commonwealth;
- relevant legal, technical, financial, and regulatory requirements are applied and met;
- supplier claims are verified and preferred suppliers are able to deliver the goods and/or services; and
- contracts are being performed in accordance with the agreed terms and conditions.

3.2 Consultation

Over the course of the review, Finance sought and took into consideration contributions from Commonwealth officials. This included the Senior Procurement Officials Reference Group members, encompassing senior procurement officials from non-corporate Commonwealth entities and prescribed corporate Commonwealth entities required to apply the CPRs.

4 Existing Due Diligence Considerations in the Commonwealth Procurement Framework

The CPRs are a legislative instrument under the *Public Governance, Performance and Accountability Act 2013* (PGPA Act) and are the keystone of the Commonwealth Procurement Framework, prescribing core requirements and considerations for procurements. The framework also includes:

- web-based guidance, developed by Finance to assist entities to implement the procurement framework;
- Resource Management Guides (RMGs), which advise of key changes and developments in the procurement framework; and
- templates, such as the Commonwealth Contracting Suite (CCS), which simplify and streamline processes, creating uniformity across Commonwealth contracts to reduce the burden on businesses when contracting with the Commonwealth.

Attachment A includes a list of relevant RMGs and templates.

4.1 Commonwealth Procurement Rules

The procurement framework incorporates a holistic approach to due diligence. It requires checks and balances that promote transparency and accountability throughout the procurement lifecycle. The procurement framework embeds elements of the Commonwealth Risk Management Policy which non-corporate Commonwealth entities are required to comply with in order to establish an appropriate system of risk oversight and management.

For example, achieving value for money, the core rule of the CPRs, requires that procurements should:

- encourage competition and be non-discriminatory;
- use public resources in an efficient, effective, economical and ethical manner that is not inconsistent with the policies of the Commonwealth;
- facilitate accountable and transparent decision making;
- encourage appropriate engagement with risk; and
- be commensurate with the scale and scope of the business requirement.

Officials must also consider the relevant financial and non-financial costs and benefits of submissions when undertaking procurements. This includes undertaking due diligence as necessary over the course of the procurement. However, depending on the nature of procurement, there are specific paragraphs within the CPRs that may directly refer to due diligence checks. Some examples are included below:

- Paragraph 7.26: Entities must make reasonable enquiries to determine compliance with an applicable standard.
- Paragraph 10.6: Request documentation must include a complete description of any terms or conditions relevant to the evaluation of submissions including any financial guarantees, information and documents that potential suppliers are required to submit.
- Paragraph 10.11: Tender responses must demonstrate the tenderer's capability to meet a relevant Australian standard, and contracts must contain evidence of the applicable standards.
- Paragraph 10.15: Potential suppliers must be able to meet specified conditions for participation, which are those that will ensure a potential supplier has the legal, commercial, technical and financial abilities to fulfil requirements of the procurement.
- Paragraph 10.18: An entity may exclude a tenderer on grounds such as bankruptcy, insolvency, false declarations, or significant deficiencies in performance of any substantive requirement or obligation under a prior contract.
- Paragraph 10.19: Officials must make reasonable enquiries that the procurement is carried out considering relevant regulations and/or regulatory frameworks.

To assist officials to meet some of the financial-related requirements in the CPRs and manage the financial risk of procurements, Finance has guidance available on its website on how officials can conduct financial assessments and assess the financial risk of tenderers.

4.2 Procurement Connected Policies

Procurement connected policies are policies of the Commonwealth for which procurement has been identified as a means of delivery. Current policies in effect, and how they facilitate due diligence, are detailed below.

- **Black Economy – increasing the integrity of Government procurement**
The policy requires businesses tendering for Government contracts valued over \$4 million to provide a statement of satisfactory tax record. The policy helps to prevent the Commonwealth's use of suppliers who do not comply with their tax obligations.
- **Indigenous Procurement Policy**
The policy is intended to stimulate Indigenous entrepreneurship and business development, providing Indigenous Australians with more opportunities to participate in the economy. The policy includes: percentage targets by both volume and value of Commonwealth procurement contracts being awarded to Indigenous enterprises; Mandatory Set-Aside Contracts for Indigenous Businesses, applying to remote contracts and contracts valued between \$80,000 to \$200,000; and Mandatory Minimum Indigenous Participation Requirements for procurements valued at or above \$7.5 million in designated industries. Due diligence checks under the policy include, but are not limited to:
 - Officials ensuring that a business meets the definition of an Indigenous business in the policy, such as by checking whether the business is on Supply Nation;
 - Internal compliance checks on whether officials are seeking to source from Indigenous business for mandatory set-aside contracts before approaching non-Indigenous businesses; and
 - Checks during contract management of supplier compliance with Indigenous participation contract provisions that were agreed to.
- **Workplace Gender Equality Procurement Principles and User Guide**
The policy is intended to promote gender equitable policies and practices in the private sector, requiring tenderers with 100 employees or more to demonstrate that they are compliant with the *Workplace Gender Equality Act 2012* by supplying a letter of compliance.
- **Australian Industry Participation (AIP) Plans**
The policy is intended to encourage use of local labour and local enterprise in the supply chains of procurements valued at \$20 million or more, and ensure full, fair and reasonable opportunity for Australian industry to compete for work. The plans detail actions that a project proponent and/or operator will undertake to ensure that its procurement entities provide Australian entities with full, fair and reasonable opportunity to participate in the project. Some example due diligence checks under the policy include:
 - internal entity checks that relevant procurements valued at or above \$20 million are requiring winning tenderers to submit an AIP plan;
 - compliance checks and enforcement by contract managers that suppliers are engaging local labour and enterprise as agreed to in the AIP plan; and

- checks that projects are being undertaken in accordance with relevant Australian standards, specifications, engineering codes, regulations and government planning guidelines.
- **Payment Times Procurement Connected Policy**
The policy requires large businesses that enter into a contract with the Commonwealth to match the Government's payment times and pay their subcontractors within 20 calendar days. Non-corporate Commonwealth entities must include the appropriate contract clauses in approaches to market with an estimated value above \$4 million (GST inclusive).
- **Code for the Tendering and Performance of Building Work 2016 (Building Code 2016)**
The policy is intended to promote practices in suppliers that meet applicable laws and regulations for relevant construction contracts.

4.3 Protective Security Policy Framework (PSPF)

The CPRs specify that officials should consider and manage their procurement security risk in accordance with the Australian Government's PSPF. The PSPF was developed to assist Commonwealth entities to protect their people, information and assets, at home and overseas. The PSPF articulates government protective security policy. It also provides guidance to entities to support the effective implementation of the policy across the areas of security governance, personnel security, physical security and information security. This includes security governance for contracted goods and service providers.

4.4 Commonwealth Contracting Suite and ClauseBank

The CCS provides standard terms and conditions for Commonwealth contracts. Its use is mandatory for procurements valued up to A\$200,000 and voluntary for procurements valued up to A\$1,000,000.

ClauseBank provides a set of clauses that may be useful for including in contracts, depending on the nature of the goods or services being procured. Some example clauses related to due diligence can be found at [Appendix A](#).

Both the CCS and ClauseBank are helpful in mitigating the impact of a supplier breaching contract terms after the awarding of the contract. To be used effectively however, their use and inclusion should be considered as early as possible in a procurement process, in order to effectively gauge the core requirements of the contract.

4.5 BuyRight

BuyRight is a publicly available tool developed by Finance to assist procuring officials through the procurement process. It is designed to step officials through the process to ensure that they understand their obligations under the Commonwealth Procurement Framework, as well as other relevant policies and regulations as they plan and conduct their procurement. The tool provides prompts for officials to think about the relevant requirements depending on the scale, scope and risk of the procurement.

5 Feedback from Senior Procurement Officials Reference Group

Senior procurement officials across a number of participating entities were consulted to investigate what entities considered to be due diligence and what due diligence activities are performed across the Commonwealth. The following summary observations were made based on the responses:

- It was evident that due diligence occurs at various stages of the procurement lifecycle, from procurement planning to contract management, not just before the awarding of the contract.
- Entities generally reported viewing due diligence in terms of compliance with legislation, rules, policies and processes. Some examples raised include the PGPA Act and associated Rules, the Commonwealth Procurement Framework (particularly the CPRs), procurement-connected policies and internal entity procurement requirements (such as accountable authority instructions).
- Due diligence conducted varies on the scope (such as simple versus complex procurements, the category of the goods or services being procured and the longevity of the procurement and the contract), value and risk of the procurement.
- A number of entities reported that they considered the checking of consistency between approach to market documentation and the evaluation report as a form of due diligence.
- Responses included various process-oriented checks and balances throughout the procurement process. Examples include: seeking clarifications from potential suppliers on errors or to resolve issues; quality assurance; spending approvals; and procurement justifications including limited tender exemptions.
- A number of responses noted the use of probity and expert advisors during tender processes to conduct due diligence.
- Use of panels was raised as a key issue requiring due diligence checks. Some checks noted included: ensuring the appropriate panel is used for procuring the goods or services; value for money considerations; checking payment schedules and rates; and so forth. Some entities also noted that creating competitive tension by inviting multiple suppliers on a panel to participate in a procurement process as a form of due diligence.
- A number of entities noted that due diligence activities were facilitated through the use and dissemination of factsheets, better practice guidance and probity standards for procuring officials.
- Financial viability checks of potential suppliers were noted in a number of responses as a core due diligence activity.
- The Department of Foreign Affairs and Trade (DFAT) provided information on their aid investments due diligence framework. The framework contains non-financial and financial considerations for aid investments, accounting for safeguards required to be met for delivery of the aid program and the often-complex risk environments.

Overall, the feedback highlights that there are a range of activities undertaken by Australian Government officials for the purposes of conducting due diligence.

6 Other Australian Government legislation, policies and tools incorporating due diligence

The Australian Government has a significant volume of legislation, policies and tools that either prescribe due diligence activities or provide support to officials to undertake due diligence. A number of these are detailed below and should not be considered as exhaustive.

6.1 *Modern Slavery Act 2018*

The national Modern Slavery Reporting Requirement, established under the *Commonwealth Modern Slavery Act 2018*, provides procuring officials with guidance on identifying procurements and industries with modern slavery risks. The reporting requirement applies to Australian and foreign businesses operating in Australia with annual consolidated revenue of at least \$100 million, and requires these businesses to report on their modern slavery supply chain risks, and their efforts to mitigate these risks. The reporting requirement also extends to Australian Government entities, including Government Business Enterprises that meet the revenue threshold. The statements are publicly available on the [Modern Slavery Reporting website](#).

The Australian Government's modern slavery statement will provide greater transparency around government supply chains and may highlight certain categories of goods or services where procuring officials may need to undertake particular due diligence. In addition, publicly available statements will provide procuring officials an additional source of information with which to assess and manage risks associated with procuring from potential suppliers who have published statements.

6.2 Sustainable Procurement Guide

The Sustainable Procurement Guide provides guidance to officials on including options for sustainability in procurement decisions, and how to include sustainability considerations in all stages of the procurement process. Due diligence activities related to the guide varies on what is being procured. Two examples include:

- Checking whether a supplier holds, or has the ability to obtain, the correct International Organisation for Standardisation (ISO) standard before they are engaged, and can continue to maintain that standard throughout the term of the contract; and
- Compliance checks and enforcement, such as procuring 100 per cent recycled paper, or the supplier recycling goods as agreed in the contract.

6.3 Commonwealth Child Safe Framework

The Australian Government introduced the Commonwealth Child Safe Framework as part of the Government's response to the Royal Commission into Institutional Responses to Child Sexual Abuse. The framework is a whole-of-government policy that sets minimum standards for creating and embedding a child safe culture and practice in Commonwealth entities. The framework is intended to create and maintain environments where children and young

people are safe, protected and respected, and where people have the skills, confidence and knowledge to safeguard children.

The policy, mandatory for non-corporate Commonwealth entities (it is recommended for corporate Commonwealth and wholly-owned Commonwealth entities), requires Commonwealth entities to:

- Undertake risk assessments annually to identify the level of contact with children and put in place appropriate strategies to manage identified risks;
- Establish and maintain a system of training and compliance, including Working with Children Checks; and
- Adopt and implement the National Principles for Child Safe Organisations (the National Principles are ten high level principles that provide a nationally consistent approach to creating organisational cultures that foster child safety and well-being).

A Complaint Handling Guide and access to a series of eLearning Modules is currently available to support entities build their capacity in handling complaints involving children and creating safe cultures.

Entities are expected to have adopted the framework by 1 February 2020.

Examples relating to due diligence in procurement include ensuring that child safety clauses are included in relevant contracts, and making enquiries to check whether the supplier has appropriate controls in place to protect vulnerable children from harm.

6.4 Commonwealth Property Management Framework

The Commonwealth Property Management Framework (CPMF) supplements Division 1 of the CPRs, such that officials of non-corporate Commonwealth entities must comply with and demonstrate value for money to ensure the best outcome from property decisions.

The CPMF relates to real property and establishes a foundation for achieving value for money and promotes efficient, effective, economical and ethical management of owned and leased Commonwealth property in Australia, including external territories.

The CPMF currently includes links to information on a range of legislative and policy approval requirements to make clear that entities must ensure that property-related planning activities have appropriate regard to these due diligence requirements, this includes those under the CPRs.

7 International Resources

There are various international resources that provide policies and guidance on conducting due diligence in procurement. A selection of these are detailed below to provide some context on the global approach to conducting due diligence for procurements, and highlight existing information that may be useful in assisting Australian Government entities in delivering due diligence practices.

7.1 United Nations (UN)

In 2011, the UN Human Rights Council unanimously endorsed the inclusion of human rights due diligence in the UN's *Guiding Principles on Business and Human Rights*, requiring businesses to exercise human rights due diligence to identify, prevent, mitigate and account for how they address impacts on human rights.

As part of recommendations from the UN Working Group report on human right due diligence to the General Assembly (October 2018; A/73/163), the Working Group recommended that Governments use all available levers to address market failures and governance gaps to advance corporate human rights due diligence as part of standard business practice, including by using their role of economic actors to advance human rights, and integrating human rights due diligence into public procurement.

7.2 Organisation for Economic Cooperation and Development (OECD)

The OECD has developed a due diligence guidance for responsible business conduct. Parts of the guidance can be generalised for Government to business procurements.

The OECD provides a different perspective on due diligence, noting a range of organisational benefits including:

- Decision making for establishing or continuing business relationships;
- Maximising positive contributions to society;
- Improving stakeholder relationships;
- Protecting entity reputation;
- Helping to create more value by identifying opportunities to reduce costs, improve understanding of markets and supply chains, strengthen management of operational and financial risks, and decrease exposure to systemic risks; and
- Helping an organisation meet legal requirements pertaining to particular responsible business conduct issues, such as local labour, environmental, governance, criminal and anti-bribery laws.

The OECD has also launched a [program](#) to advance the integration of responsible business conduct considerations and supply chain due diligence into public procurement practices and processes.

7.3 United Kingdom (UK)

The UK's Department for International Development has a due diligence framework similar to DFAT. They also have an enhanced due diligence framework (Enhanced Due Diligence – Safeguarding for External Partners) focused on child protection and vulnerable adults. The aim of the framework is to minimise the likelihood and impact of sexual exploitation, abuse, harassment and bullying towards both the people they are trying to help, and also people who are working in the sector. The principles are meant to be applied throughout delivery chains.

The framework has key areas of compliance: safeguarding (appropriate policies, training and processes in place); whistleblowing (policy, complaints process, zero reprisals); Human Resources (recruitment, selection and vetting); risk management; code of conduct; and governance (requisite controls and oversight).

7.4 New Zealand (NZ)

The NZ Government recently included in the *NZ Government Procurement Rules* that reasonable due diligence must be conducted for procurements over the relevant procurement value threshold. The due diligence should occur prior to entering into a contract with a preferred supplier.

Intended outcomes of due diligence considerations are to verify that a supplier:

- is who they claim to be;
- has the financial ability to deliver; and
- has the necessary capacity and capability to deliver over the life of the contract.

Officials are encouraged to verify information from more than one source. Referees should be current or previous clients. Information gathered from third parties could be from sources such as a supplier's accountant or bank. Previous experiences with suppliers can be used as evidence as long as officials remain objective and unbiased.

If issues identified through due diligence are serious, officials must:

- consider excluding the supplier as per NZ's Government Procurement Rules; or
- not award the contract to the supplier.

If issues identified are not serious, officials should consider:

- what additional information is needed to determine whether the identified issues are serious; and
- what can be done to avoid or mitigate any issues being realised and impacting the procurement.

8 Findings

The findings of the review indicate that there is no 'one size fits all' approach to due diligence across the Commonwealth. This stems from the devolved nature of the Commonwealth Procurement Framework and the diversity of procurements undertaken by entities. Entities approach due diligence in various ways, depending on the size, scope and risk of the procurement, the type of goods or services being procured, and the nature and purpose of the procuring entity. The review also reveals that a number of entities have developed purpose-built due diligence requirements in order to support procuring officials in ensuring accountability and transparency throughout the procurement lifecycle, engage appropriately with risk, and promote the efficient, effective, economical and ethical use and management of public resources.

There are a number of mechanisms under existing legislation, the CPRs, policies, tools and resources that require due diligence to be undertaken, and that can also assist officials in

undertaking appropriate due diligence. These mechanisms, amongst others, holistically support accountability and transparency in achieving value for money outcomes throughout the procurement lifecycle. These include:

- the CPRs providing the foundation which supports due diligence across the Commonwealth Procurement framework;
- procurement connected policies which provide additional requirements for officials and tenderers, ensuring key Government priorities and policies such as tax transparency and gender equality are supported through procurement;
- resources such as the CCS and BuyRight simplifying and standardising procurement processes for officials and suppliers to the Government;
- the PSPF providing a standardised approach to effectively managing procurement security risks; and
- other resources and supporting legislation, such as the *Modern Slavery Reporting Requirement*, the Sustainable Procurement Guide, Commonwealth Child Safe Framework and the Commonwealth Property Management Framework.

The purpose of consultation with entities was to investigate what central procurement teams considered as due diligence, and what due diligence was being undertaken.

The international context for due diligence in procurement was considered, including resources from the United Nations, the Organisation for Economic Cooperation and Development, the United Kingdom and New Zealand. Resources identified highlighted a number of similarities internationally in due diligence policy considerations, such as a focus on social outcomes and sustainable procurement.

9 Next steps

Based on findings from the review, Finance is developing due diligence guidance to assist officials in meeting accountability and transparency obligations and to achieve value for money in procurements. The guidance will outline considerations for due diligence at particular stages of a procurement's lifecycle, covering the whole-of-life process.

Finance will also continue to encourage collaboration and discussion on due diligence between Commonwealth entities through various fora such as outreach sessions with senior procurement officials across the Commonwealth, our Community of Practice, and the Procurement Bulletin.

Attachment A – List of Current Relevant Resource Management Guides and Commonwealth Contracting Suite Templates

RMGs

- RMG 135: Annual report for non-corporate Commonwealth entities
- RMG 136: Annual report for corporate Commonwealth entities
- RMG 400: Approving commitments of relevant money
- RMG 403: Meeting the Senate Order for Entity Contracts
- RMG 404: Domestic Travel Policy
- RMG 405: Official International Travel – Use of the best fare of the day
- RMG 411: Grants, Procurements and other financial arrangements
- RMG 414: Contingent Liabilities: indemnities, guarantees, warranties on behalf of the Commonwealth
- RMG 415: Commonwealth Grants and Procurement Connected Policies
- RMG 417: Supplier Pay On-Time or Pay Interest Policy
- RMG 418: Payment terms for Australian Government Travel Arrangements – card services
- RMG 420: Mandatory use of the Commonwealth Contracting Suite for procurement under \$200,000
- RMG 422: Handling complaints under the Government Procurement (Judicial Review) Act 2018
- RMG 423: Procurement Publishing and Reporting Obligations
- RMG 500: Commonwealth Property Management Framework

Templates

Commonwealth Contracting Suite

- Commonwealth Approach to Market Terms
- Commonwealth Contract Terms
- Commonwealth Purchase Order Terms
- Commonwealth Contracting Suite Glossary
- Commonwealth Deed of Standing Offer Approach to Market Terms
- Commonwealth Deed of Standing Offer Terms
- Commonwealth Deed of Standing Offer Glossary

Commonwealth National Lease (CNL) Suite

- CNL Heads of Agreement (template)
- CNL template
- CNL User Guide

- CNL User Guide - Commonwealth tenant entity information (not shared publicly, available by request from Finance in order to protect sensitive alternate/optional clauses and guidance material)
- CNL Sublease (template)
- CNL Deed of Assignment (template)
- CNL Deed of Surrender of Lease (template)
- CNL Divestment Guide
- CNL MOU template and guidance for assignment of leases to other Commonwealth entities (not shared publicly, available from GovTEAMS)
- CNL MOU template and guidance for subletting to other Commonwealth entities (not shared publicly, available from GovTEAMS)

ClauseBank

- ClauseBank - Standard terms and conditions for use by procuring entities. Some example clauses related to due diligence include:
 - Child safety;
 - Procurement connected policies;
 - Compliance with laws;
 - Criminal code;
 - Fraud control plan;
 - Prohibited dealings;
 - Risk management plan;
 - Subcontracting; and
 - Work health and safety plan.