



Black economy – increasing the integrity of government procurement

Procurement connected policy guidelines

November 2018

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Manager
Media and Speeches Unit
The Treasury
Langton Crescent
Parkes ACT 2600
Email: medialiaison@treasury.gov.au

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Consultation Process

Request for feedback and comments

Closing date for submissions: 21 December 2018

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| Email | Blackeconomy@treasury.gov.au |
| Mail | Black Economy Division The Treasury Langton Crescent PARKES ACT 2600 |
| Enquiries | Enquiries can be initially directed to Kathleen de Kleuver |
| Phone | 02 6263 3348 |

The principles outlined in this paper have not received Government approval and are not yet law. As a consequence, this paper is merely a guide as to how the principles might operate.

Black economy – increasing the integrity of government procurement

1. Introduction

As part of the 2018-19 Budget and in response to the Black Economy Taskforce's Final Report, the Government announced a range of measures to tackle the black economy including a commitment that, from 1 July 2019, Government procurement processes will exclude businesses that do not have a satisfactory tax record.

Increasing the integrity of Commonwealth Government Procurement processes promotes good tax behaviour and creates an even playing field for businesses that comply with their tax obligations.

This document is a Procurement Connected Policy (PCP) that sets out the key components to increase the integrity of Commonwealth Government procurement and provides guidance to assist Commonwealth entities to implement the policy.

2. Purpose of the policy

The Black Economy Taskforce found that the supply chain is becoming more complex and competitive and recommended that the Government lead by example in its procurement processes to reduce black economy activity in the supply chain.

Supply chain integrity can be undermined due to illegal supplier practices that are often unknown to the purchaser at the procurement stage or during the course of the contract. This can mean that suppliers that do meet their regulatory obligations are at a commercial disadvantage.

The Government has the opportunity to demonstrate best practice by ensuring businesses that provide goods and services to the Government are engaged with the Australian tax system by providing a satisfactory Statement of Tax Record (STR). This will set an example for private sector firms for their own supply chain management practices.

In the first year of operation, the policy components as set out in the guidance below will be limited to ensure a smooth transition of the policy. Learnings from the first year of operation will be assessed and updated guidance may be issued. This could result in further criteria to determine a satisfactory tax record such as whether:

- the business meets its superannuation law requirements and Pay As You Go Withholding obligations;
- it discloses information about its tax affairs under the voluntary tax transparency code;
- court order penalties have been imposed on its directors; and
- there have been convictions for phoenixing behaviour, bribery or corruption.

Similarly, businesses such as tax agents or consulting firms that provide tax advisory services to their clients may be required to provide details of their services and confirm that they are not involved in promotion of tax schemes that are not reasonably arguable.

This policy is not intended to replace existing due diligence and checks that procurement officers already undertake, including those required under paragraph 6.7 of the Commonwealth Procurement Rules (CPRs) (relating to supplier practices that are dishonest, unethical or unsafe and includes not entering into contracts with tenderers who have had a judicial decision against them

(not including decisions under appeal)) relating to employee entitlements and who have not satisfied any resulting order.

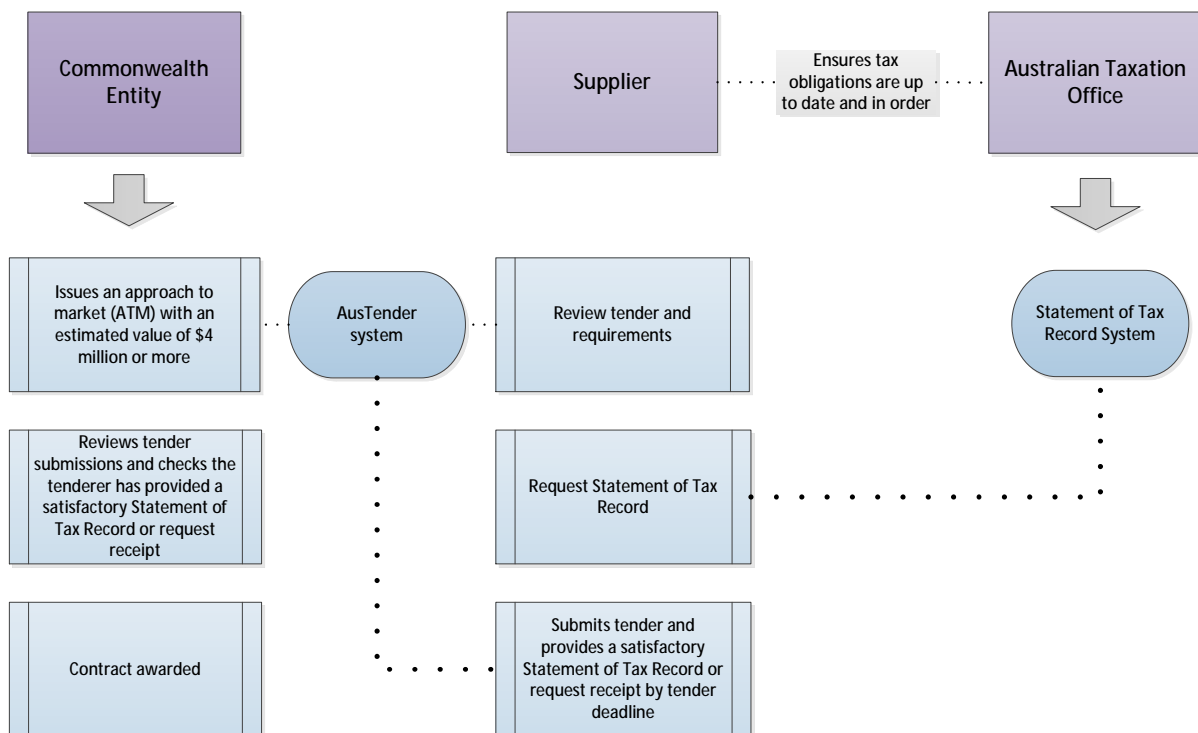
3. Application

- a. All non-corporate Commonwealth entities must comply with this policy.
- b. Corporate Commonwealth entities and Commonwealth companies¹ are encouraged to adopt this policy.

4. Commencement

- a. This policy commences on 1 July 2019 and applies to new approaches to market on or after 1 July 2019, for procurements valued over \$4 million (including GST) for all goods and/or services, including for construction services. This policy does not require Commonwealth entities to amend existing contracts or deeds of standing offer that are in place prior to this policy’s commencement date.

5. Overview of the application of policy



6. Policy Requirements

- a. For Commonwealth Government procurements undertaken through open tenders that are subject to Division 2 of the CPRs that have an estimated value of over \$4 million inclusive of

¹ Department of Finance, Flipchart of Commonwealth entities and companies, accessed 29 August 2018, <<https://www.finance.gov.au/resource-management/governance/>>.

GST (refer to paragraphs 9.2 to 9.6 of the CPRs), Commonwealth entities must require that tenderers:

- i. provide a satisfactory STR that is valid for at least two months or more at the time of the tender closing; or
 - ii. in circumstances where a satisfactory STR has not been issued in time to meet the tender deadline - provide a STR receipt, demonstrating a STR has been requested from the ATO. In this case, the tenderer must provide the satisfactory STR no later than four business days from the close of tender and before the awarding of the contract.
 - iii. hold copies of satisfactory and valid STRs for any first tier subcontractors² that the tenderer will engage to deliver goods or services with an estimated value of over \$4 million including GST as part of the tender if known at the time of submission; and
 - iv. ensure, if first tier subcontractors are engaged after the contract is awarded, that the successful tenderer or prime contractor³ holds satisfactory and valid STRs of their subcontractors where the subcontractors estimated contract value will be over \$4 million including GST.
- b. A satisfactory STR will be issued if the following conditions⁴ are met by the tenderer (unless 6.c below applies):
- i. The tenderer is up-to-date with registration requirements which may include being registered for an Australian Business Number (ABN) and GST, and having a Tax File Number;
 - ii. The tenderer has lodged at least 90 per cent of all income tax returns, Fringe Benefit Tax returns and Business Activity Statements that were due in the last four years or the period of operation if less than four years. Reasonable delays in lodgements due to extensions agreed to by the Australian Taxation Office (ATO) will not affect the receipt of a satisfactory STR; and
 - iii. On the date the STR is issued, the tenderer does not have \$10,000 or greater in outstanding debt due to the ATO (excluding debt subject to a taxation objection, review or appeal under the provisions of Part IV C of the *Taxation Administration Act 1953*). If the tenderer has entered into a payment plan with the ATO, they will meet this criterion.
- c. If the tenderer does not have a record with the ATO at all or a record of less than four years, the tenderer has met the conditions outlined in Part 8.

² First tier subcontractors relate to subcontractors working for the prime contractor. Second tier subcontractors are hired by the first tier subcontractor and are not in scope for this policy for the first year (this will be reviewed for subsequent years).

³ The prime contractor refers to the business that is tendering or is in direct contract with the Commonwealth Government.

⁴ From 1 July 2020 and subject to further consultation including concerning the availability of data and data sharing, the STR criterion may be extended. See above at 2. Purpose of the Policy.

- d. The requirement to provide a satisfactory STR as part of the tendering process needs to be clearly expressed within the *'request documentation'* to ensure tenderers understand that failing to provide a STR by the due date will prevent consideration of their submission by the procuring Commonwealth entity. If the Commonwealth entity chooses, the *'request documentation'* should also state if it will be a condition of the contract that the successful tenderer will be required to maintain an up-to-date satisfactory STR during the course of the contract, in the event that the STR expires. In this case the consequences of failing to do so will be detailed in the contract.
- e. If the STR is no longer valid at the time the contract is awarded, the Commonwealth entity may request a renewed satisfactory STR before awarding a contract.
- f. Tenderers and potential tenderers are encouraged to apply for a STR as soon as possible and keep their STRs up to date in order to more easily submit their STR for current and future tender processes. It is not necessary to wait until an approach to market is released. This will improve their ability to meet tender timelines and/or to respond to possible issues with the ATO. A satisfactory STR will be required to have a minimum remaining validity of two months in order to be accepted by the procuring entity.

7. Statement of Tax Record

- a. A STR (or STR receipt) is required to be included with a tender submission when the tender request document indicates it is required. The STR is available on request from the ATO and will be provided within four business days from application. It includes a statement indicating whether or not a business/tenderer has a tax record that is satisfactory, based on the conditions outlined in Part 6(b) of this document.
- b. The STR is based on limited criteria designed to be used for this PCP.
- c. A satisfactory STR is not evidence of the financial viability of the tenderer.
- d. A tenderer with a STR which was unsatisfactory will be provided with the supporting reasons on the 'Statement of Tax Record – Taxpayer Report'. The ATO can be contacted to assist the tenderer/business to take corrective action where possible.
- e. STRs will be valid for 12 months from the time of issue. Tenderers/sub-contractors that do not hold an Australian tax record with the ATO of at least four years will receive STRs that are valid for only six months.
- f. The STR will include disclaimers including that the Commonwealth and its contractors should undertake a range of ordinary due diligence measures even if the STR is satisfactory. This will ensure that the STR itself is not seen as a document that certifies that no other checks are required.

8. Applying the rules to New and Foreign Tenderers

- a. Directors, partners, trustees or appropriate officers with the relevant authority of new businesses and foreign tenderers that do not have an Australian tax record of at least four years will need to state on behalf of the relevant tenderer that it:
 - i. is a non-resident with no tax record or a tax record of less than 4 years in Australia (applicable to foreign entities);
 - ii. will comply and pay all their Australian tax obligations (applicable to Australian and foreign entities);
 - iii. has no tax related and/or criminal convictions in the last four years (applicable to Australian and foreign entities); and
 - iv. is complying with its tax obligations outside of Australia (applicable to foreign tenderers and new Australian businesses).
- b. Once the ATO receives the statements, the new business or foreign tenderer will be issued a STR stating they do not have a tax record with the ATO but will be accepted as having a satisfactory tax record, or, if they have a tax record with the ATO of less than 4 years, they meet the criteria at 6 b) i) – iii).
- c. The STR will be based on the tax records available to the ATO for the tenderer and be valid for six months only.

9. Applying the rules to Sub-contractors

- a. Where a tenderer is proposing to subcontract a part of their contract, they will be required to obtain (at the time of tendering or engagement if later) and hold a satisfactory STR from all first tier subcontractors that will be undertaking work individually valued over \$4 million including GST.
- b. The requirements relating to first tier subcontractors engaged after the awarding of the contract should be specified as contract clauses and included in the finalised contract between the prime contractor and the Commonwealth entity.
- c. The rules for sub-contractors will be reviewed after the first year of operation with a view to strengthening the requirements.

10. Applying the rules to partnerships, trusts, joint ventures and tax consolidated groups

- a. A STR must be requested on behalf of the business tendering for the contract.
- b. If the tenderer or sub-contractor is a partnership, a satisfactory STR must be requested on behalf of the partnership. A satisfactory STR must be provided in respect of each partner if required according to the tender request documentation; or

- c. If the tenderer or sub-contractor is a trust, a satisfactory STR must be provided in respect of the trust and trustee; and
- d. If the tenderer or sub-contractor is a joint venture, a satisfactory STR must be provided in respect of each party to the joint venture. Where the joint venture operator is not a participant of the joint venture, the operator must also provide a satisfactory STR.
- e. If the tenderer or sub-contractor is a subsidiary of a tax consolidated group, a satisfactory STR must be provided by the subsidiary and the head business.
- f. If the tenderer or sub-contractor is a member of a GST group, a satisfactory STR must be provided by the group representative and the group member.

11. Panel Arrangements

- a. This policy will apply to the process to establish a panel arrangement from 1 July 2019 when the total value of orders under the arrangement is collectively estimated to be over \$4 million including GST.
- b. For existing panels, including panels established before 1 July 2019 but that are refreshed or renewed from 1 July 2019, there is no requirement to obtain a satisfactory STR unless requested by the procuring agency.

12. Accountability and Transparency

Performance of this policy will be measured by:

| Performance criteria | Responsible entity |
|--|---|
| a. STRs are issued and provided to businesses in a timely manner | ATO |
| b. Procurements with an estimated value of over \$4 million inclusive of GST contain the requirement for a STR | Treasury with assistance from other agencies. |
| c. Unsatisfactory STRs issued result in corrective action by tenderers where possible. | ATO |
| d. Satisfactory feedback received from suppliers, procurement officers, ATO and Finance. | Treasury |

13. Roles and Responsibilities

- a. Tenderers and suppliers
 - i. Providing a satisfactory and valid STR to the relevant Commonwealth entity when submitting tender documents where tender request documentation requires it, or providing a STR request receipt if a STR has been requested but not issued in time to meet the tender deadline.

- ii. Maintaining a satisfactory STR and providing an updated STR if required in the contract terms during the life of the contract.
 - iii. Requiring, collecting and maintaining STRs of relevant sub-contractors engaged by the tenderer according to the contract terms and during the course of the contract with the Commonwealth Government. Such records must be made available to the Government Department on request.
- b. Commonwealth Government entities and officials
- i. Ensuring request documents for procurements with a value of over \$4 million inclusive of GST include the requirement that tenderers must submit a STR or a STR request receipt as part of their tender.
 - ii. Only accepting tenders that are accompanied by a STR or a STR request receipt followed by a STR within 4 businesses days of close of tender.
 - iii. Only awarding contracts to suppliers who have a satisfactory STR with two months validity at the point of tendering.
 - iv. Retaining submitted satisfactory STRs.
 - v. Providing de-identified information to Treasury in relation to performance indicators as indicated in the accountability and transparency table above as requested.
- c. Australian Taxation Office
- i. Issuing STRs within 4 days of an online application and providing request receipts to tenderers at the time of the request.
 - ii. Providing tenderers receiving an unsatisfactory STR with information on why they have not received a satisfactory STR and possible remedial action which can be taken by the tenderer.
 - iii. Maintaining the system that issues STRs.
 - iv. Providing de-identified information to Treasury in relation to performance indicators as indicated in the accountability and transparency table above as requested.
- d. The Treasury
- i. Implementing and monitoring this policy.
 - ii. Evaluating and reporting on the effectiveness of this policy and undertaking a review of the policy as required.

14. Review and Evaluation Process

This policy will be reviewed on an annual basis by the Department of the Treasury to assess its effectiveness, consistent with the Commonwealth Grants and Procurement Connected Policies.