

Guidelines for Direct/Limited Submission Sourcing and TI 1115 Contract Extensions

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Background

The *Financial Management and Audit Act 1990* provides that a Head of Agency shall be responsible for the financial management of that Agency in an efficient, effective and economical manner. The Treasurer's Instructions (TIs) are issued under the authority of the Act and cover the principles, practices and procedures to be observed in the financial management of all agencies, including procurement activity.

The TIs relating to procurement ensure that the following objectives of the Tasmanian Government are met through the government purchasing process:

- encouraging open and effective competition between suppliers with the objective of obtaining value for money;
- ensuring that procurement is undertaken ethically and fairly; and
- enhancing opportunities for local business.

Generally, all agency procurement requires either a quotation or tendering process to be conducted to encourage fair and open competition between suppliers with the objective of achieving best value for money. However, occasionally exceptional circumstances arise where the relevant mandated procurement process may not be the most appropriate method to secure the purchase.

TIs 1114 and 1217 provide a Head of Agency with the discretion, where specified circumstances exist, to approve the direct sourcing or seeking of limited submissions from a supplier or suppliers without the need to seek quotations or call for tenders. In addition, TI 1115 provides Heads of Agencies with the discretion to approve contract extensions under certain circumstances.

These Guidelines contain information to assist in the making of determinations as to whether a direct/limited submission sourcing process is an appropriate procurement method and includes examples of when direct/limited submission sourcing may be appropriate. The Guidelines also provide examples of where a contract extension under TI 1115 may be considered appropriate.

Direct/limited sourcing processes should only be considered following full and proper consideration and must not be used to avoid undertaking the usual competitive procurement process.

Direct/limited submission sourcing

What is direct sourcing?

Direct sourcing is the process where an agency enters into direct negotiations with a single supplier generally, without first undertaking a competitive procurement process.

One or more specified circumstances must exist for a direct selection process to be approved. A list of the circumstances is contained in TIs 1114 (goods and services) and 1217 (building and construction/roads and bridges).

What is limited submission sourcing?

Where the usual procurement process requires an open tender, limited submission sourcing is the process where an agency seeks offers from a selected number of suppliers rather than conducting an open tender.

Where the usual procurement process requires an agency to seek a specified number of quotes, limited submission sourcing is the process where the agency approaches a lesser number of supplier than mandated.

As for direct sourcing, the circumstances that must exist for a limited submission sourcing process to be approved are contained in TIs 1114 and 1217.

When would direct/limited submission sourcing be used?

Regardless of the complexity and/or value of the proposed purchase, all purchases require some degree of planning. It is generally during the market research stage of the planning process that the use of a direct or limited submission sourcing process might be considered.

Market research is generally used to identify the characteristics of the supply market for the proposed procurement and to gain an understanding of how the market works, the direction in which the market is heading, the competitiveness of the market and potential suppliers.

Following comprehensive market research, it may become apparent that the mandated procurement process relevant to the proposed purchase may not be the most appropriate method to secure the purchase. For example, where extensive market research reveals that there is only one supplier of the product or service required and there is no appropriate substitute which may be utilised by the agency instead of the identified product. In this instance, it would be a waste of Government resources to undertake an open procurement process where there could only be one response which would meet the Government's requirements.

The TIs provide that agency procurement officers may seek approval to undertake an alternative process rather than the process mandated in specific TIs. These include the requirement to:

- seek a minimum of at least three written quotes or go to an open tender (TIs 1106, 1107, 1206, 1207 and 1216(6)) – approval to be sought under TI 1114 and TI 1217; and
- go to the second stage of multi-stage procurement process (TIs 1108 and 1208) – approval to be sought under TI 1114 and TI 1217.

Under no circumstances is a direct/limited submission sourcing process to be used to avoid competition or used in a manner that discriminates against suppliers. As with all Government procurements, agencies need to ensure that any direct/limited submission sourcing is undertaken in a manner that is consistent with the procurement principles contained in TIs 1101 and 1201. This is particularly important given the exclusive/restrictive nature of direct/limited submission sourcing which lends itself to allegations of corruption. Accordingly, conflicts of interest or any other situation that may impinge, or might be deemed to impinge, on impartiality must be avoided at all times. Further information on conflicts of interest is provided in the Treasury publication *Recording Conflict of Interest Declarations - Guidelines for Agencies* which can be located at www.purchasing.treasury.tas.gov.au > Buying for Government > Resource Library > Publications.

Circumstances

Specific circumstances must exist for a direct/limited submission sourcing process to be approved. It is expected that such circumstances will rarely arise and that approval to undertake a direct/limited submission sourcing process will only be granted in exceptional

circumstances, where it is considered that it is in the best interest of the State and where the proposed purchase will clearly achieve the best overall value for the money.

A list of the circumstances relevant to goods and services procurements is contained in clause (1) of TI 1114 and the circumstances for building and construction/roads and bridges procurements are detailed in clause (1) of TI 1217.

As a number of the circumstances contained in these TIs only apply if the procurement is not impacted by a free trade agreement, agencies are reminded that where the total maximum value of a contract over its entire duration cannot be estimated, the procurement is deemed to be a procurement to which the provisions of free trade agreements apply and thus, the circumstances under which approval for direct/limited sourcing may apply, will be limited. Further information is contained in TIs 1104 and 1204.

While a number of the circumstances contained in TIs 1114 and 1217 are self explanatory, there are a number that require further explanation and further information is provided below.

I. Single Supplier

Where the goods or services can be supplied only by a particular supplier and no reasonable alternative or substitute goods or services exist for the following reasons:

- (i) the requirement is for works of art;*
- (ii) the protection of patents, copyrights, or other exclusive rights, or proprietary information; or*
- (iii) due to an absence of competition for technical reasons.*

The above are generally referred to as “single supplier” circumstances. In these instances, it is extremely important that thorough and extensive market research is undertaken to be totally sure that the goods or services required by the agency can only be supplied by a particular supplier and that no reasonable alternative or substitute goods or services exist.

The Tasmanian Government is bound by a number of free trade agreements and cooperative arrangements, details of which are contained in TIs 1102 and 1202. As a result, market research undertaken by agencies must include, at a minimum, the Australian (ie all states and territories) and New Zealand markets regardless of the value of the proposed procurement. In addition, where a procurement is impacted by a free trade agreement as set out in TIs 1102 and 1202, market research must also include the market of all countries party to a free trade agreement to which the Tasmanian Government is bound.

Additional information on market research, including examples of what the research should include, is contained in clause (3) of TIs 1114 and 1217 and on the Purchasing website.

An example of where circumstances such as reason (ii) above may apply is where software development and implementation services to upgrade an existing Licensing system are required due to the upgrade of an agency’s operating system, and the “particular supplier” is the owner of the intellectual property relating to the software and therefore the only entity that can undertake the required development.

Circumstances outlined in reason (iii) above generally apply in situations such as where there is only one manufacturer/supplier of specialist equipment (eg specialist medical equipment) that is required by the agency and there is no reasonable alternative or substitute product available that would meet the agency’s needs. As indicated above, market research supporting the

assertion of a single supplier circumstance is a critical factor is considering requests under this clause. Despite the lack of competition in the market for the required goods/services, agencies should still ensure they are pursuing value for money outcomes by weighing up the benefits of the purchase against the cost of the purchase.

2. Interchangeability

For additional deliveries of goods or services by the original supplier or authorised representative that were not included in the initial procurement if a change of supplier for additional goods or services:

- *cannot be made for technical reasons such as requirements of interchangeability or interoperability with existing equipment, software, services or installations procured under the initial procurement, or due to conditions under original supplier warranties; and*
- *would cause significant inconvenience or substantial duplication of costs for the procuring entity.*

In this circumstance, as an example, an agency may have equipment in place and, due to an expansion of services, additional equipment is required. If there was a high level of interchange between the various sites, the agency may require commonality of equipment base and software. Where the introduction of an alternative product would require the replacement of the existing equipment base to ensure compatibility of systems and function, this would result in an additional cost to the agency. In such circumstances value for money considerations lend themselves to obtaining equipment that is already interchangeable. Where the market for such interchangeable equipment is limited, a direct approach or seeking limited submissions may be appropriate.

3. Urgency

In so far as is strictly necessary where, for reasons of extreme urgency brought about by events unforeseeable by the agency, the goods or services could not be obtained in time using an open or selective tender. For the purposes of this circumstance, a selective tender is one conducted using the processes set out in Instructions 1108 and 1208 such as a multi-use list or an expression of interest.

The critical considerations in the circumstances such as above relate to “reasons of extreme urgency brought about by events unforeseeable by the agency”. This circumstance would generally apply in emergency situations requiring urgent procurements by agencies to protect life, health, security or safety due to an unforeseeable event or incident. For example, where severe storms have caused substantial damage to a bridge, or the company contracted to supply essential security services goes into liquidation. Events such as these would have been unforeseeable by the agency, whereas an instance such as a contract for essential services expiring in one month’s time is not considered to be an unforeseeable event.

4. Costs outweigh benefits (TI 1114 only)

Where a procurement is not impacted by a free trade agreement and the cost to the agency and to suppliers of seeking quotations or calling public tenders would outweigh the value for money benefits of seeking quotations or calling public tenders.

An example of where this circumstance may apply is where a system (eg data collection system) is required by an agency to meet national reporting requirements and a suitable system that already meets the agency’s requirements is available from a supplier at a cost of \$60 000. If market research undertaken by the agency reveals that the cost of purchasing an alternative system (that would require major redevelopment), or engaging a supplier to develop a system,

is estimated to be greatly in excess of that amount, it could be considered that the cost to the agency of seeking at least three written quotations, and the cost to suppliers of preparing submissions in response to the request, would outweigh any value for money benefits that could be attained.

As with all direct/limited submission sourcing process requests, the agency would need to prepare and maintain appropriate and auditable documentation justifying the use of, in this instance, a direct selection process. Given that market research has identified alternative suppliers, evidence of value for money considerations is particularly important in the consideration of requests under this circumstance. As such, an examination of the costs and benefits should be undertaken in regard to both the modification of an alternative system/s and the engagement of a supplier to develop a new system.

5. Exceptional circumstances

- (a) *Where a procurement is not impacted by a free trade agreement and exceptional circumstances exist that justify the use of a direct/limited submission sourcing process rather than a quotation or tender process as prescribed in Instructions 1106 and 1107. (TI 1114 only)*
- (b) *Where a procurement is not impacted by a free trade agreement and the circumstances justify limiting the number of suppliers. (TI 1217 only)*

An example of where an exceptional circumstance may apply (in regard to TI 1217) is where an agency had tendered for the redevelopment works of an office building and just prior to the completion of the works the successful tenderer is placed into administration. In a situation such as this, the works may need to be completed as soon as possible to minimise further disruptions and mitigate risk of damage, public liability and potential security breaches at the site. Accordingly, re-tendering is not considered to be a viable option. In this situation, if the estimated cost of the completion of the works is below the FTA threshold for building and construction, it could be considered that the circumstances justify limiting the number of contractors.

Contract extensions

Where a contract does not provide for any (or any further) extensions, clause (2) of TI 1115 allows approval of a contract extension for a period of no longer than one year where the provisions of relevant free trade agreements do not apply, the extension does not include a significant expansion to the scope of the original contract and certain circumstances exist. The principal intent of TI 1115 is to enable a short term contract extension solution for agencies that encounter exceptional circumstances.

An example of where, due to exceptional circumstances, an extension is required to enable a full procurement process to be properly undertaken is where as a result of circumstances outside of the agency's control, a number of significant legal issues are identified during the planning phase of the re-tendering process that will need to be resolved prior to advertising for tenders.

Examples of other circumstances that could be considered as exceptional include: unavoidable delays in the finalisation of a new contract following a tender process; or unforeseen circumstances or decision making requirements that have delayed the procurement process.

Poor planning is generally considered insufficient justification to extend an existing contract outside the terms of the original contract.

Agencies should establish internal processes for seeking approval for the extension of a contract under TI 1115. For example, agencies may consider it appropriate to forward such requests through the Procurement Review Committee.

Clause (6) of TI 1115 provides that in instances where:

- the circumstances above do not apply, or
- the provisions of relevant free trade agreements apply, or
- an extension includes a significant expansion to the scope of the original contract, or
- the proposed term of the extension is for more than one year,

any proposed extension must be treated as a new contract and approval sought under the provisions of TI 1114 *Direct/limited submission sourcing: goods and services*. Any contract resulting from that process would be required to be treated as for any other new contract including meeting confidentiality and reporting requirements.

Documentation and audit requirements

If the agency considers the circumstances of the procurement warrant the pursuing of a direct/limited submission sourcing process or the extension of a contract, the relevant Head of Agency must be supplied with sufficient information, including that prescribed in the relevant TIs, to enable a decision to be made. Appropriate and auditable documentation regarding the approval process must be maintained by agencies. Such decisions must be able to withstand public scrutiny.

Each agency should establish its own internal processes for seeking approvals in accordance with the requirements of TIs 1114, 1115(2) and 1217. For example, agencies may consider it appropriate to forward requests through the Procurement Review Committee. However, it should be noted that the authority to determine whether the required circumstance exists and to approve such alternative processes cannot be delegated by those authorised in the TIs to any other officers and approval cannot be granted retrospectively.

Appropriate and auditable documentation regarding the approval of a direct/limited submission sourcing process or a contract extension under TI 1115(2) must be maintained by agencies.

TI 1128 and 1214 provides that a percentage of all direct/limited submission sourcing procurements during a financial year are subject to a compliance audit. In addition, TI 1128 also requires that contract extensions under TI 1115(2) must also be audited.

To assist auditors in this regard, and also assist with agency annual reporting requirements (TIs 1111 and 1213) agencies may wish to keep a register of such requests for easy identification.

An example of such a register which could be adapted to suit agency requirements is provided below:

No.	TI	Procurement	Supplier	Estimated value	Approved/ Not Approved	Date of Decision	Reasons for Decision
1	1114						
2	1115						
3	1114						

Reporting

Website reporting

All contracts with a total value of \$50 000 or over (excluding GST) that are awarded as a result of a direct/limited submission sourcing procurement process approved in accordance with TIs 1114 and 1217, as well as contract extensions approved in accordance with TI 1115(2), must be reported on the Tenders website in accordance with TIs 1110 and 1212.

Annual reports

Details of all contracts, regardless of the value, that are awarded as a result of a direct/limited submission sourcing procurement process approved in accordance with TI 1114 (including relevant contract extensions) and TI 1217 in a given financial year must be reported in agency annual reports in accordance with TIs 1111 and 1213.

Details of all contract extensions approved in accordance with TI 1115(2) in a given financial year must also be reported in agency annual reports.

Confidentiality

Agencies must ensure that any contract that is awarded as a result of a direct/limited submission sourcing procurement process or contract extension approved in accordance with TI 1115 comply with the Crown’s Contracts confidentiality requirements contained in TIs 1401, 1402, 1124 and 1229.



