

New enforceable procurement provisions to regulate NSW Government agency procurement

Upcoming changes to the *Public Works and Procurement Act 1912* by the *Public Works and Procurement Amendment (Enforcement) Act 2018* (*PWP Enforcement Act*) will allow suppliers to dispute agency procurement decisions which breach "enforceable procurement provisions" (EPPs). The EPPs are mandated by a new NSW Procurement Board Direction PBD 2019-05 (EPP Direction). Both the *PWP Enforcement Act* and the EPP Direction are scheduled to commence on 29 November 2019.

KEY POINTS

- ▶ NSW Government agencies listed in the EPP Direction must comply with the EPPs for a procurement that exceeds the relevant monetary threshold unless an exemption applies.
- ▶ If an agency does not comply with the EPPs, a supplier may make a complaint (which the agency must investigate and try to resolve) and may apply to the Supreme Court for an injunction and/or compensation.

The new *PWP Enforcement Act* and EPP Direction implement obligations assumed by Australia under various international procurement agreements. Earlier Direction PBD 2017-06 International Procurement Agreements will be replaced by the EPP Direction from 29 November 2019.

The EPP Direction covers agencies listed in Schedule 1 to that Direction (including all principal Departments) and applies to procurements that exceed an estimated value of:

- \$9.247 million (ex GST) for construction services and
- \$657,000 (ex GST) for goods and other services.

A covered agency conducting a covered procurement must comply with the EPPs in the EPP Direction unless an exemption in Schedule 2 or 3 applies.

The EPPs include:

- a non-discrimination requirement: a covered agency must not discriminate against any supplier due to its degree of foreign affiliation or ownership, location, or the origin of its goods and services
- a prohibition against "offsets". An offset is any condition or undertaking requiring, in summary, the use of domestic content, domestic suppliers or similar actions to encourage local development.

A key exemption permits preferences to benefit small and medium enterprises (Australian or New Zealand firms with less than 200 full-time equivalent employees).

The EPPs also include rules for approaching the market and conducting a covered procurement.

A supplier can lodge a complaint with the head of a covered agency that the agency is contravening or proposes to contravene an EPP. The agency head must investigate and try to resolve this complaint in accordance with provisions in the *PWP Enforcement Act*. The supplier can also apply to the Supreme Court for an injunction requiring the agency to comply with the EPP Direction and for an order for the agency to pay compensation.

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