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Kia ora

Submission on the Proposed Government Procurement Rules 5th edition

Thank you for the opportunity to comment on the proposed Government Procurement Rules 5th edition 2025 (the Rules).

Who we are

The Association of Consulting and Engineering New Zealand (ACE New Zealand) is an incorporated society – a firm-based membership organisation representing around 270 professional services firms and more than 16,000 people working across the built and natural environments.

Our members range from large global firms to employee-owned small and medium enterprises, employing specialists including engineers, project managers, planners, scientists, architects, surveyors and other technical disciplines. Our teams contribute significantly to Aotearoa New Zealand's economy by advising, designing and delivering on critical technology, policies and practices, and construction and infrastructure across the built and natural environment in Aotearoa.

Our members have a deep understanding of the policy and stakeholder issues linked to the economic wealth, wellbeing and prosperity of our society, as well as project design, delivery and decision-making, from our largest infrastructure projects in New Zealand through to smaller community projects.

General comments

Overall, ACE New Zealand supports the proposed changes to the Rules. In particular, the focus on economic growth, transparency and accountability, the reduction of the number of rules, and the proposed structure. This will simplify the Rules making them easier to understand and apply in practice.

Improving procurement capability and practice is key to more cost effective and efficient infrastructure delivery in New Zealand. Research by our counterpart in Australia on the economic benefits of better procurement shows that:[1]

- Poor procurement affects how firms bid for work. It is estimated that the total price impact of poor procurement practices is around 5.4% of total revenue obtained by professional services firms in public infrastructure projects.
- This comprises a direct price increase of 3.6%, indirect price increases of 1.5% from reduced competition, and inefficient costs of bidding worth 0.3% of project prices.

[1] Deloitte, Economic benefits of better procurement practices, Consult Australia 2015.

- Firms reported that with improvements in procurement, they could reduce delays to projects and improve project quality by 7% respectively.
- In 2015, in Australia, the total price impacts borne by Government because of poor procurement practices were estimated at around $239 million per annum. With estimates that better procurement can also lower the costs of rectifying design errors in construction with an annual saving of around $87 million.

Despite the opportunity for greater economic outcomes from good procurement, we're continuing to see protracted and bespoke procurement processes that waste time and money, and that undermine the sectors' ability to deliver innovative and cost-effective solutions for New Zealanders. Key areas include cases where government clients:

- have unclear project objectives,
- select inappropriate project delivery models,
- fail to guarantee the accuracy of information in project briefs (which requires rework from all bidding firms), and
- manage risk inefficiently through onerous contract clauses.

The downstream effects of these practices are to stifle innovation that can ensure high value outcomes are achieved from public infrastructure investments and these practices lead to businesses responding during the bidding phase by charging additional price premiums, recouping bid costs, accepting uninsurable risks (which are not in the client's best interests) and reducing competition. This has significant economic impacts over the longer term through a higher cost of infrastructure.

As New Zealand's largest procurer, the Government has an opportunity to contribute to more cost-effective and efficient project delivery and better economic, social and environmental outcomes for New Zealand. We see the proposed changes to the Rules as a positive step towards getting on top of some of these inefficiencies, but to realise the positive impact of these Rules they will need to be well implemented, monitored and there needs to be real-time accountability for non-compliance. Success is also dependent on growing procurement capability in the public sector and effective partnerships between the public and private sector to identify and realise opportunities early in the procurement life cycle.

Below are some specific comments on the proposed changes.

Specific feedback

Planning (Rules 6-9)

Rule 8: New economic benefit rule

We support this new Rule

The introduction of the new economic benefit rule, in replacement of the broader outcomes concept, is positive and will help improve consistency in the way agencies look for and assess secondary benefits as part of their tender evaluations.

It is also likely to make it easier for small business to be competitive in tenders and reduce the administrative burden making bidding easier and more accessible. Government procurement has the potential to drive meaningful economic benefits, in addition to the primary benefits of the goods and services, through the suppliers it selects.

For example, research undertaken by one of our members Height PM showed in a survey of 120 Māori businesses, their workforce was 14% training and apprentices and 13% NEET (Not in Education, Employment, or Training). These businesses are investing in workforce development for people who have been furthest from the labour market, reinforcing the case for procurement policies that recognise and reward social impact. Businesses like these deliver significant economic benefit and we welcome their efforts being supported through this Rule.

Weighting for economic benefit considerations in evaluation

We consider that in some circumstances an economic weighting of more than 10% may be appropriate, especially in construction and infrastructure procurement. As we understand, the update of the Rules is intended to ensure a focus on economic growth through Government procurement. The definition of public value within the Rules reinforces this by defining public value as including securing economic benefits to New Zealanders (good outcomes), alongside good quality and good price. We agree with a weighting of a minimum 10%, with a recommendation of up to 30% in appropriate cases.

Implementation will be key

What gets measured gets done. That's why we recommend a clear structure for data capture with more emphasis on how agencies monitor and ensure suppliers implement benefits throughout a project.

We note the new Rule enables agencies to consider a wide range of matters that contribute economic benefit to New Zealand. We would like to see the development of a structure for data capture that enables these "wide range of matters" (9 items) to be categorised (presumably using the 9 items as categories) with data tracked, including:

- Which economic benefit areas are being selected by agencies in their procurements.
- How many economic benefit areas are being used per procurement, and how this relates to the contract value.
- All respondents' scores in the economic benefits sections, and how the scores/rankings in this section correlates to whether they win the tender.
- How the successful contractors are delivering the economic benefits.

Approaching market (Rules 10-27)

Rule 18: Notice of procurement

The costs of tender can be a significant portion of the total project value. Firms spend a significant amount of time confirming the accuracy of information and verifying information provided in briefs, such as geotechnical information, environmental impacts and financial data. Further, poorly prepared RFP's/RFT's can result in misinterpretation and unfair results for tendering parties.

In the analysis conducted by Deloitte for Consult Australia referenced above, it is estimated that firms are required to undertake additional work in around 34% of tenders to confirm accuracy of briefs, which has an average cost of around AUS$41,800 per firm per proposal. These costs are often managed through increasing price or deciding not to bid, particularly in the case of smaller firms that cannot invest the resource required to be competitive. This is inefficient, a waste of resources, and excludes smaller businesses (and businesses that provide significant economic benefit) from participating in the market.

It is more efficient for government to undertake the necessary work to verify the accuracy of information provided in a request for tender, rather than transferring the costs of that work to all bidders, creating duplication. This work should ideally be done once and provided in a tender brief. Incorporating a requirement, for example in Rule 18, will improve efficiency, decrease costs, and ensure greater fairness for all tendering parties.

Rule 11: Opt out procurements

We consider the principle of Rule 11, opt-out procurements, will allow greater flexibility in the way government agencies sources services and provide greater opportunity for government agencies to consider small business suppliers that would ordinarily not be competitive if the full set of Rules are applied.

However, the costs of tender can be a significant portion of the total project value. Therefore, in our view, the current $100,000 threshold is too low given the costs of tenders. We note the threshold has not changed since 2013 – we think it should be adjusted in accordance with inflation or CPI.

Rule 15: Pre-conditions

We have seen a worrying and increasing trend in the use of pre-conditions mandating contractual terms during the tender process with no amendments or tags allowed, including where the contractual terms proposed are not the standard industry-agreed AOG CCCS terms but rather include significant amendments or special conditions that may not be insurable and/or contain provisions that, commercially, are not in the interests of the client and public.

Pre-conditions are intended to eliminate parties who lack minimum capacity or capability, not circumvent the reasonable negotiation of terms. We think this practice is contrary to fair and reasonable practice, the Principles of Government Procurement and the Government Procurement Charter. Among other things, mandating contract terms with onerous special conditions can exclude small to medium businesses from participating in the market because they are unable to take on such significant risk, and it promotes more risk averse behaviour from tenderers reducing the innovation they will bring to a project to the benefit of the client and increasing price.

We recommend Rule 15 specifically state that pre-conditions should not be used to mandate contractual terms. At the very least, pre-conditions should not be used to mandate contractual terms unless those terms are the industry-agreed AOG terms (in the case of professional services, the AOG CCCS) with no amendments or special conditions.

Rule 30: Awarding the contract

Most Favoured Nations pricing provisions – Contrary to "Value for Money"

ACE New Zealand has concerns with the increasing application of "Most Favoured Nations" (MFN) pricing clauses in government contracts, including within All of Government panels which cover a broad and complex range of services. We believe that MFN clauses could have unintended consequences, and lead to outcomes which are contrary to the proposed Procurement Rules, such as Rule 8 Economic Benefit to New Zealand and Whole of Life Costs. For example, MFN clauses could adversely affect the priority areas of growing workforce capability and capacity and better risk management and fairer risk allocation and does not support the goal of strong, sustainable businesses with the capacity to innovate and adapt to change and disruption.

A requirement for lowest pricing across all agencies also potentially directly conflicts with the underlying principle of achieving 'value for money'. The Auditor-General, *Procurement Guidance for Public Entities*, defines 'value for money' as:

> "*Value for money means using resources effectively, economically, and without waste, with due regard for the total costs and benefits of an arrangement, and its contribution to the outcomes the entity is trying to achieve. In addition, the principle of value for money when procuring goods or services does not necessarily mean selecting the lowest price but rather the best possible outcome for the total cost of ownership (or whole-of-life cost). Value for money is achieved by selecting the most appropriate procurement method for the risk and value of the procurement, and not necessarily by using a competitive tender.*"

Both agencies and suppliers must have the ability to accept and provide 'Value for money' rates for projects. We consider it is contrary to New Zealand's interests to draw suppliers into a 'race to the bottom' for pricing. This is even more the case now given the current difficult economic conditions.

A MFN approach, particularly when used in broad scope panel agreements, does not consider the various factors relevant to setting rates or the different types of services, projects and contract structures suppliers are engaged under. MFN terms should not be used in construction and infrastructure and related professional services procurement.

Rule 38: All-of-Government contracts

Modifications to AOG contracts introduce inefficiencies and cost

Rule 38 provides that agencies must purchase from an All-of-Government (AOG) contract, unless there is a good reason not to. In construction and infrastructure, industry has worked with Government to agree terms for the NZS3910 and the AOG CCCS and we promote the use of these terms to our members. And yet, agencies continue to modify these contracts through special conditions which shift the risk balance and often raise issues of insurability for the professional services consulting sector.

The reluctance of Government agencies to adopt industry standard contracts introduces a consistent inefficacy in the procurement lifecycle and is one of the key opportunities we have to enable more efficient procurement today.

In our experience, where industry forms of contract are used, it is not uncommon for agencies to engage private law firms to draft special conditions which, in some cases, are longer than the general terms themselves. Whilst we acknowledge that agencies may have specific requirements for their projects, in our experience, special conditions often either add limited value (e.g. redrafting for drafting sake or duplicating obligations that are already covered elsewhere in the agreement), or seek to unreasonably transfer risk or elevate the supplier's obligations beyond common law and/ or a reasonably insurable position.

Not only does this practice promote poor use of public funds, with the fees which agencies pay to their external advisors, but it can also disadvantage smaller suppliers, who do not have ready, or commercially affordable, access to legal advisors to help review bespoke contracts or special conditions. It is also common for agencies who use external legal advisors to be unwilling to go back to these firms for further advice when suppliers tag contract terms in their bids. This can result in a "take it or leave it" approach to contract terms, which is contrary to the government's core values of integrity, accountability, transparency and fairness.

Consult Australia's Economic Benefits of Better Procurement report, referenced above, found that the use of onerous contract terms leads to higher priced proposals, reductions in competition and the implicit transfer of risks back to the government when firms proceed without adequate insurance. The investigations underpinning this report found that the impact of greater liability from 'contracting out' increases project prices.

We need clarity on when special conditions are acceptable within the AOG environment, and accountability for using the AOG terms

We would like to see greater cross-government accountability for the consistent application of the Rules and the use of standard contract terms and conditions, to avoid wasteful contract negotiations, project specific special terms and inappropriate risk transfer.

We recommend that to meet the desired outcomes of the updated Procurement rules in practice, Government provide clarity to its agencies on the terms within an AOG that are inviolable and that agencies cannot modify (in the case of the AOG CCCS that would include the duty of care and liability limits at a minimum). It should be clear that where those inviolable terms are modified the contract no longer represents the AOG principles, jeopardises misleading tenderers and the public, reduces competition and economic benefits, and therefore can no longer be called an AOG contract for the purposes of the Rules. In that case, special permission will need to be sought for the use of that contract in accordance with the exclusion provisions set out in the Rules.

For reference, the International Federation of Consulting Engineers (FIDIC) has ascribed a set of Golden Principles that define the provisions within its contract suite that cannot be modified if the contract is still to be called a FIDIC contract. FIDIC contracts are used worldwide and have a strong reputation for being fair and reasonable contracts for both contracting parties. Our AOG contracts should have the same reputation. The Golden Principles is a powerful approach to streamlining contracting processes during procurement and ensuring transparent contracting behaviour.

We also recommend that the Government provide clear direction to its agencies that when they are seeking external legal advice on AOG contract terms, the inviolable provisions in the industry-agreed terms cannot be modified. This could be by way of a directive to agencies on briefing external legal advisors reviewing AOG terms. This will prevent protracted contract negotiations and wasted resources on external lawyers.

We are happy to work with Government to identify the critical terms with the AOG CCCS that should not be modified if the contract is to be acceptable to the sector and reasonably called an AOG contract.

General feedback

Promoting a low emissions economy

The reviewed Rules has removed from the Charter the requirement to 'Undertake initiatives to contribute to a low emissions economy and promote greater environmental responsibility.' The Government has targets for net zero greenhouse gas emission by 2050. Procurement is one mechanism the Government can use to support that. The removal of the "low emissions" expectation from the charter could potentially undermine efforts to reduce emissions and promote environmental responsibility through procurement.

Qualifications-based selection

There can be a lack of transparency around tender evaluation, resulting in the perception that tenders may not always be awarded to the team most able to achieve the outcomes sought.

One way of helping to address this is through Qualifications-Based Selection. Qualifications-Based Selection is a procurement process through which firms compete for work based on experience and technical expertise, rather than competing for the lowest cost bid. Under QBS, after firms are evaluated and shortlisted based on their qualifications, the top-ranked firm is selected for price negotiations and, ideally, a fair and reasonable price is reached based on a detailed scope of the project. If an agreement on price cannot be reached with the most qualified firm, negotiations commence with the second most qualified firm. In most cases, the top-ranked firm is selected at a price that fits the client's budget.

There is significant evidence internationally that QBS saves time and money, simplifies complex projects, and keeps projects on budget. It is a procurement approach endorsed internationally because of its efficiencies and cost savings in the procurement life cycle for construction and infrastructure.

We would like to further discuss with the Government the benefits of incorporating Qualifications Based Selection for professional services and engineering as a preferred approach to professional services procurement with the Rules or associated procurement guidelines.

Part Four – General Information

Application of the Rules

We recommend that local government is included in the list of agencies encouraged to apply the Rules.

For clarity, we recommend that secondments are included in the list of non-procurement activities – "employing or seconding staff (excluding the engagement of contractors and consultants)."

Accountability for following the Rules

The consequences for not following the Rules are retrospective and the processes to follow are cumbersome – legal action, Parliamentary Select Committee hearings, employment processes, audits of the Auditor General.

Issues may arise during a procurement process that highlight inconsistency with the Rules and that can cause significant angst, time and money for suppliers and clients during a process if not addressed. Unresolved, those issues can lead to

poor outcomes for the Government and a waste of public funds. We recommend a more responsive pathway to addressing concerns about compliance with the Rules so that where issues are raised during a process they can be addressed fairly and quickly without affecting issues of probity. This may include by giving an independent government department or agency, like New Zealand Government Procurement (NZGP), greater levers or pathways for holding agencies to account when legitimate issues are raised with them about compliance with the Rules during a procurement process. For example, in the case of a tender that includes modified contract terms as a pre-condition contrary to the Rules, suppliers would be able to escalate that concern through to an independent body like NZGP who have authority to direct that the client remove that pre-condition from the tender because it is contrary to the Rules.

Conclusion

Overall, we see this review of the Government Procurement Rules as positive and believe the simplified structure will make the Rules easier to understand and apply. While the update is a step in the right direction, there are several steps that could still be taken to give effect to the spirit and intent of the Rules in practice, and to better support cross-government accountability for the consistent application of the Rules. This includes the use of standard contract terms and conditions, to avoid wasteful contract negotiations, project specific special terms and inappropriate risk transfer.

We would be happy to discuss any aspect of this submission.

Nga mihi,

Helen Davidson
Chief Executive