

South Australia

## State Procurement Act 2004

An Act to regulate the procurement operations of public authorities; to make a related amendment to the *Gaming Machines Act 1992*; to repeal the *State Supply Act 1985*; and for other purposes.

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## Legislative history

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### The Parliament of South Australia enacts as follows:

## Part 1—Preliminary

### 1—Short title

This Act may be cited as the *State Procurement Act 2004*.

### 2—Commencement

This Act will come into operation on a day to be fixed by proclamation.

### 3—Object of Act

- (1) The object of this Act is to advance government priorities and objectives by a system of procurement for public authorities directed towards—
- (a) obtaining value in the expenditure of public money; and
  - (b) providing for ethical and fair treatment of participants; and
  - (c) ensuring probity, accountability and transparency in procurement operations.
- (2) The Board and the Minister must, in administering this Act, have regard to and seek to further the object of this Act.

### 4—Interpretation

In this Act, unless the contrary intention appears—

**administrative unit** means an administrative unit under the *Public Sector Management Act 1995*;

**Board** means the State Procurement Board established under Part 2;

**local government body** means a council within the meaning of the *Local Government Act 1999* or any body (whether incorporated or unincorporated) established by a council or councils and declared by the regulations to be a local government body;

**prescribed public authority** means a person or body that has been declared by the regulations to be a prescribed public authority for the purposes of this Act;

***principal officer***, in relation to a public authority, means—

- (a) if the authority consists of a single person (including a corporation sole but not any other body corporate)—that person;
- (b) if the authority consists of an unincorporated board or committee—the presiding officer;
- (c) in any other case—the chief executive officer of the authority or a person declared by the regulations to be the principal officer of the authority;

***procurement operations***, in relation to an authority, means—

- (a) the procurement of goods or services required by the authority for its operations, including (without limitation) the procurement of—
  - (i) a supply of electricity, gas or any other form of energy; or
  - (ii) intellectual property; or
- (b) the management of goods of the authority, including (without limitation) the care, custody, storage, inspection, stocktaking or distribution of goods of the authority; or
- (c) the management of the authority's contracts for services; or
- (d) the disposal of goods surplus to the authority's requirements,

but does not include operations excluded from this definition by the regulations;

***public authority*** means—

- (a) an administrative unit or other agency or instrumentality of the Crown; or
- (b) any incorporated or unincorporated body—
  - (i) established for a public purpose by an Act; or
  - (ii) established for a public purpose under an Act (other than an Act providing for the incorporation of companies or associations, co-operatives, societies or other voluntary organisations); or
  - (iii) established or subject to control or direction by the Governor, a Minister of the Crown or any instrumentality or agency of the Crown (whether or not established by or under an Act or an enactment); or
- (c) a person or body declared by the regulations to be a public authority for the purposes of this Act,

but does not include a prescribed public authority;

***responsible Minister***, in relation to an authority, means—

- (a) if the authority is an administrative unit—the Minister responsible for that administrative unit;
- (b) if the authority is a body established by an Act—the Minister responsible for the administration of that Act;

- (c) if the authority is a body established under an Act (other than the *Public Sector Management Act 1995*, the *Public Corporations Act 1993* or an Act providing for the incorporation of companies or associations, co-operatives, societies or other voluntary organisations)—the Minister responsible for the administration of that Act;
- (d) if the authority is a subsidiary under the *Public Corporations Act 1993* of a public corporation established by an Act—the Minister responsible for the administration of that Act;
- (e) if the authority is a subsidiary under the *Public Corporations Act 1993* of an incorporated Minister—that Minister;
- (f) in any other case—the Minister responsible for that authority.

## **5—Act not to apply to local government bodies and universities**

This Act (other than section 18) does not apply in relation to a local government body or a university.

## **Part 2—State Procurement Board**

### **6—Establishment of Board**

- (1) The State Procurement Board is established.
- (2) The Board—
  - (a) is a body corporate; and
  - (b) has perpetual succession and a common seal; and
  - (c) is capable of suing and being sued in its corporate name; and
  - (d) has all the powers of a natural person that are capable of being exercised by a body corporate; and
  - (e) has the functions and powers assigned or conferred by or under this Act or any other Act.
- (3) The Board is an agency of the Crown and holds its property on behalf of the Crown.
- (4) If a document appears to bear the common seal of the Board, it will be presumed, in the absence of proof to the contrary, that the common seal of the Board was duly affixed to the document.

### **7—Composition of Board**

- (1) The Board consists of the following members:
  - (a) the presiding member, being the chief executive of the administrative unit that has, subject to the Minister, responsibility for administering this Act or a nominee of the chief executive; and
  - (b) 8 members appointed by the Governor, of whom—
    - (i) 4 must be members or officers of public authorities or prescribed public authorities; and

- (ii) 4 must be persons who are not members or officers of public authorities or prescribed public authorities.
- (2) The membership of the Board appointed under subsection (1)(b) must include persons who together have, in the Minister's opinion, practical knowledge of, and experience or expertise in, procurement, private commerce or industry, industry development, industrial relations, information technology, risk management, environmental protection and management, community service and social inclusion.
- (3) At least 1 appointed member of the Board must be a woman and at least 1 must be a man.

### **8—Terms and conditions of membership**

- (1) An appointed member of the Board will be appointed on conditions determined by the Governor and for a term, not exceeding 2 years, specified in the instrument of appointment and, at the expiration of a term of appointment, is eligible for reappointment.
- (2) The Governor may remove an appointed member of the Board from office—
  - (a) for breach of, or non-compliance with, a condition of appointment; or
  - (b) for misconduct; or
  - (c) for failure or incapacity to carry out official duties satisfactorily.
- (3) The office of an appointed member of the Board becomes vacant if the member—
  - (a) dies; or
  - (b) completes a term of office and is not reappointed; or
  - (c) resigns by written notice to the Minister; or
  - (d) in the case of a member appointed under section 7(1)(b)(i)—ceases to be a member or officer of a public authority or prescribed public authority; or
  - (e) is removed from office under subsection (2).
- (4) On the office of an appointed member of the Board becoming vacant, a person must be appointed in accordance with this Act to the vacant office.

### **9—Vacancies or defects in appointment of members**

An act or proceeding of the Board is not invalid by reason only of a vacancy in its membership or a defect in the appointment of a member.

### **10—Allowances and expenses**

A member of the Board is entitled to allowances and expenses determined by the Governor.

### **11—Staff of Board**

- (1) The Board will have such staff (comprised of persons employed in the Public Service of the State) as is necessary for the purposes of this Act.
- (2) The Board may, with the approval of the Minister administering an administrative unit of the Public Service, make use of the officers of that unit.

- (3) The Board may, with the approval of a public authority (being a body corporate), make use of the officers of that public authority.

## 12—Functions of Board

- (1) The Board has the following functions:
- (a) to facilitate strategic procurement by public authorities by setting the strategic direction of procurement practices across government;
  - (b) to develop, issue and keep under review policies, principles and guidelines relating to the procurement operations of public authorities;
  - (c) to develop, issue and keep under review standards for procurement by public authorities using electronic procurement systems;
  - (d) to give directions relating to the procurement operations of public authorities;
  - (e) to investigate and keep under review levels of compliance with the Board's procurement policies, principles, guidelines, standards and directions;
  - (f) to undertake, make arrangements for or otherwise facilitate or support the procurement operations of public authorities;
  - (g) to assist in the development and delivery of training and development courses and activities relevant to the procurement operations of public authorities;
  - (h) to provide advice and make recommendations to responsible Ministers and principal officers on any matters relevant to the procurement operations of public authorities;
  - (i) to carry out the Board's functions in relation to prescribed public authorities and any other functions assigned to the Board under this Act.
- (2) For the purpose of performing its functions, the Board may—
- (a) acquire, hold, deal with and dispose of real and personal property; and
  - (b) enter into any kind of contract or arrangement; and
  - (c) acquire or incur any other rights or liabilities; and
  - (d) direct a public authority to furnish to the Board documents or information relating to the operations of the authority; and
  - (e) exercise such other powers as are conferred on it under this Act or as are necessary for, or incidental to, the effective performance of its functions.

## 13—Committees

- (1) The Board may establish committees—
- (a) to advise the Board on any matter; or
  - (b) to carry out functions on behalf of the Board.
- (2) A committee will consist of—
- (a) at least one member of the Board; and
  - (b) such other persons as the Board thinks fit to appoint.
- (3) The Board will determine who will be the presiding member of a committee.

- (4) The procedures to be observed in relation to the conduct of the business of a committee will be as determined by the Board.

#### **14—Delegations**

- (1) The Board may delegate any of its functions or powers under this Act other than this power of delegation.
- (2) A delegation—
  - (a) may be made to—
    - (i) a member of the Board; or
    - (ii) a committee established by the Board; or
    - (iii) a member of the staff of the Board; or
    - (iv) any other person engaged in the administration of this Act; and
  - (b) may be made subject to conditions and limitations specified in the instrument of delegation; and
  - (c) is revocable at will and does not derogate from the power of the delegator to act in a matter.

#### **15—Board's procedures**

- (1) 5 members constitute a quorum of the Board.
- (2) The presiding member will, if present at a meeting of the Board, preside at that meeting, and in the absence of that member, the members present will decide who is to preside.
- (3) A decision carried by a majority of the votes cast by members of the Board at a meeting is a decision of the Board.
- (4) Each member present at a meeting of the Board has one vote on any question arising for decision and the member presiding at the meeting may exercise a casting vote if the votes are equal.
- (5) A conference by telephone or other electronic means between the members of the Board will, for the purposes of this section, be taken to be a meeting of the Board at which the participating members are present if—
  - (a) notice of the conference is given to all members in the manner determined by the Board for the purpose; and
  - (b) each participating member is capable of communicating with every other participating member during the conference.
- (6) A proposed resolution of the Board becomes a valid decision of the Board despite the fact that it is not voted on at a meeting of the Board if—
  - (a) notice of the proposed resolution is given to all members of the Board in accordance with procedures determined by the Board; and
  - (b) a majority of the members express concurrence in the proposed resolution by letter, facsimile transmission, e-mail or other written communication setting out the terms of the resolution.
- (7) The Board must have accurate minutes kept of its meetings.

- (8) Subject to this Act, the Board may determine its own procedures.

### **16—Duty of members of Board with respect to conflict of interest**

- (1) A member of the Board who has a direct or indirect personal or pecuniary interest in a matter decided or under consideration by the Board—
- (a) must, as soon as reasonably practicable, disclose in writing to the Board full and accurate details of the interest; and
  - (b) must not take part in any discussion by the Board relating to that matter; and
  - (c) must not vote in relation to that matter; and
  - (d) must be absent from the meeting room when any such discussion or voting is taking place.

Maximum penalty: \$20 000.

- (2) If a member of the Board makes a disclosure of interest and complies with the other requirements of subsection (1) in respect of a proposed contract—
- (a) the contract is not liable to be avoided by the Board; and
  - (b) the member is not liable to account to the Board for profits derived from the contract.
- (3) If a member of the Board fails to make a disclosure of interest or fails to comply with any other requirement of subsection (1) in respect of a proposed contract, the contract is liable to be avoided by the Board or the Minister.
- (4) A contract may not be avoided under subsection (3) if a person has acquired an interest in property the subject of the contract in good faith for valuable consideration and without notice of the contravention.
- (5) Where a member of the Board has or acquires a personal or pecuniary interest, or is or becomes the holder of an office, such that it is reasonably foreseeable that a conflict might arise with his or her duties as a member of the Board, the member must, as soon as reasonably practicable, disclose in writing to the Board full and accurate details of the interest or office.

Maximum penalty: \$20 000.

- (6) A disclosure under this section must be recorded in the minutes of the Board and reported to the Minister.
- (7) If, in the opinion of the Minister, a particular interest or office of a member of the Board is of such significance that the holding of the interest or office is not consistent with the proper discharge of the duties of the member, the Minister may require the member either to divest himself or herself of the interest or office or to resign from the Board (and non-compliance with the requirement constitutes misconduct and hence a ground for removal of the member from the Board).
- (8) Without limiting the effect of this section, a member of the Board will be taken to have an interest in a matter for the purposes of this section if an associate of the member has an interest in the matter.



- (9) This section does not apply in relation to a matter in which a member of the Board has an interest while the member remains unaware that he or she has an interest in the matter, but in any proceedings against the member the burden will lie on the member to prove that he or she was not, at the material time, aware of his or her interest.
- (10) In this section—  
*associate* has the same meaning as in the *Public Corporations Act 1993*.

### **17—Common seal and execution of documents**

- (1) The common seal of the Board must not be affixed to a document except in pursuance of a decision of the Board, and the affixing of the seal must be attested by the signatures of 2 members.
- (2) The Board may, by instrument under its common seal, authorise a member of the Board or any other person to execute documents on behalf of the Board subject to conditions and limitations (if any) specified in the instrument of authority.
- (3) Without limiting subsection (2), an authority may be given so as to authorise 2 or more persons to execute documents jointly on behalf of the Board.
- (4) A document is duly executed by the Board if—
- (a) the common seal of the Board is affixed to the document in accordance with this section; or
  - (b) the document is signed on behalf of the Board by a person or persons in accordance with an authority conferred under this section.

## **Part 3—Miscellaneous**

### **18—Undertaking or arranging procurement operations for prescribed public authorities and other bodies**

The Board may, with the approval of the Minister, undertake or make arrangements for procurement operations for—

- (a) a prescribed public authority; or
- (b) a body other than a public authority or prescribed public authority.

### **19—Public authorities bound by directions etc of Board and responsible Minister**

- (1) A public authority (including every member or officer of the authority) is bound to comply with—
- (a) any applicable policies, principles, guidelines, standards or directions issued or given by the Board; and
  - (b) any directions given by the responsible Minister on the advice or recommendation of the Board.
- (2) A prescribed public authority (including every member or officer of the authority) is bound to comply with any directions given by the responsible Minister on the advice or recommendation of the Board.

## **20—Responsibility of principal officers in relation to procurement operations**

- (1) The principal officer of a public authority is responsible for the efficient and cost effective management of the procurement operations of the authority subject to and in accordance with the policies, principles, guidelines, standards and directions of the Board.
- (2) In subsection (1), a reference to a principal officer includes a reference to a delegate of the principal officer.

## **21—Ministerial directions to Board**

- (1) The Minister may give general directions in writing to the Board about the performance of its functions.
- (2) A direction may require the Board to take into account a particular government policy or a particular principle or matter.
- (3) The Minister must, within 6 sitting days of giving a direction, cause a copy of the direction to be laid before both Houses of Parliament.
- (4) The Board must comply with a direction given by the Minister under this section.
- (5) Except as provided by this section, the Board is not subject to Ministerial control or direction.

## **22—Accounts and audit**

- (1) The Board must keep proper accounting records in relation to its financial affairs, and must have annual statements of account prepared in respect of each financial year.
- (2) The accounts must be audited at least once in every year by the Auditor-General.

## **23—Annual report**

- (1) The Board must, on or before 30 September in each year, deliver to the Minister a report on the administration of this Act and the work of the Board during the financial year ending on the preceding 30 June.
- (2) The report must incorporate the audited accounts of the Board for the relevant financial year.
- (3) The Minister must, within 14 sitting days after receiving a report under this section, have copies of the report laid before both Houses of Parliament.

## **24—Immunity from personal liability**

- (1) No personal liability attaches to a member of the Board, a member of a committee established by the Board or any other person engaged in the administration of this Act for an act or omission in good faith in the exercise or discharge, or purported exercise or discharge, of a power, function or duty under this Act.
- (2) A liability that would, but for subsection (1), lie against a person, lies instead against the Crown.

## **25—Regulations**

The Governor may make such regulations as are contemplated by, or necessary or expedient for the purposes of, this Act.

## **Schedule 1—Related amendment, repeal and transitional provisions**

### **Part 1—Preliminary**

#### **1—Amendment provisions**

In this Schedule, a provision under a heading referring to the amendment of a specified Act amends the Act so specified.

### **Part 2—Amendment of *Gaming Machines Act 1992***

#### **2—Amendment of section 3—Interpretation**

Section 3(1), definition of *the Board*—delete the definition and substitute:

*Board* means the State Procurement Board;

### **Part 3—Repeal of *State Supply Act 1985***

#### **3—Repeal of Act**

The *State Supply Act 1985* is repealed.

### **Part 4—Transitional provisions**

#### **4—Transitional provisions relating to Board**

- (1) The State Procurement Board is the same body corporate as the State Supply Board established under the *State Supply Act 1985*.
- (2) A reference in an instrument to the State Supply Board is (where the context admits) to be read as a reference to the State Procurement Board.
- (3) On the commencement of this clause, all members of the Board then in office vacate their respective offices so that fresh appointments may be made to the Board under this Act.
- (4) Despite section 14(3) of the *Acts Interpretation Act 1915*, if appointments are to be made to the Board under that Act prior to the commencement and for the purposes of section 7, those appointments will take effect on the commencement of section 7 and not before.

## Legislative history

### Notes

- For further information relating to the Act and subordinate legislation made under the Act see the Index of South Australian Statutes.

### Principal Act

Year	No	Title	Assent	Commencement
2004	28	<i>State Procurement Act 2004</i>	29.7.2004	uncommenced