

Ethical Supplier Mandate

Office of the Chief Advisor – Procurement

Ethical Supplier Mandate

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The State of Queensland (Department of Housing and Public Works) 2019



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Disclaimer

This document is intended as a guide only for the internal use and benefit of government agencies. It may not be relied on by any other party. It should be read in conjunction with the Queensland Procurement Policy, your agency's procurement policies and procedures, and any other relevant documents.

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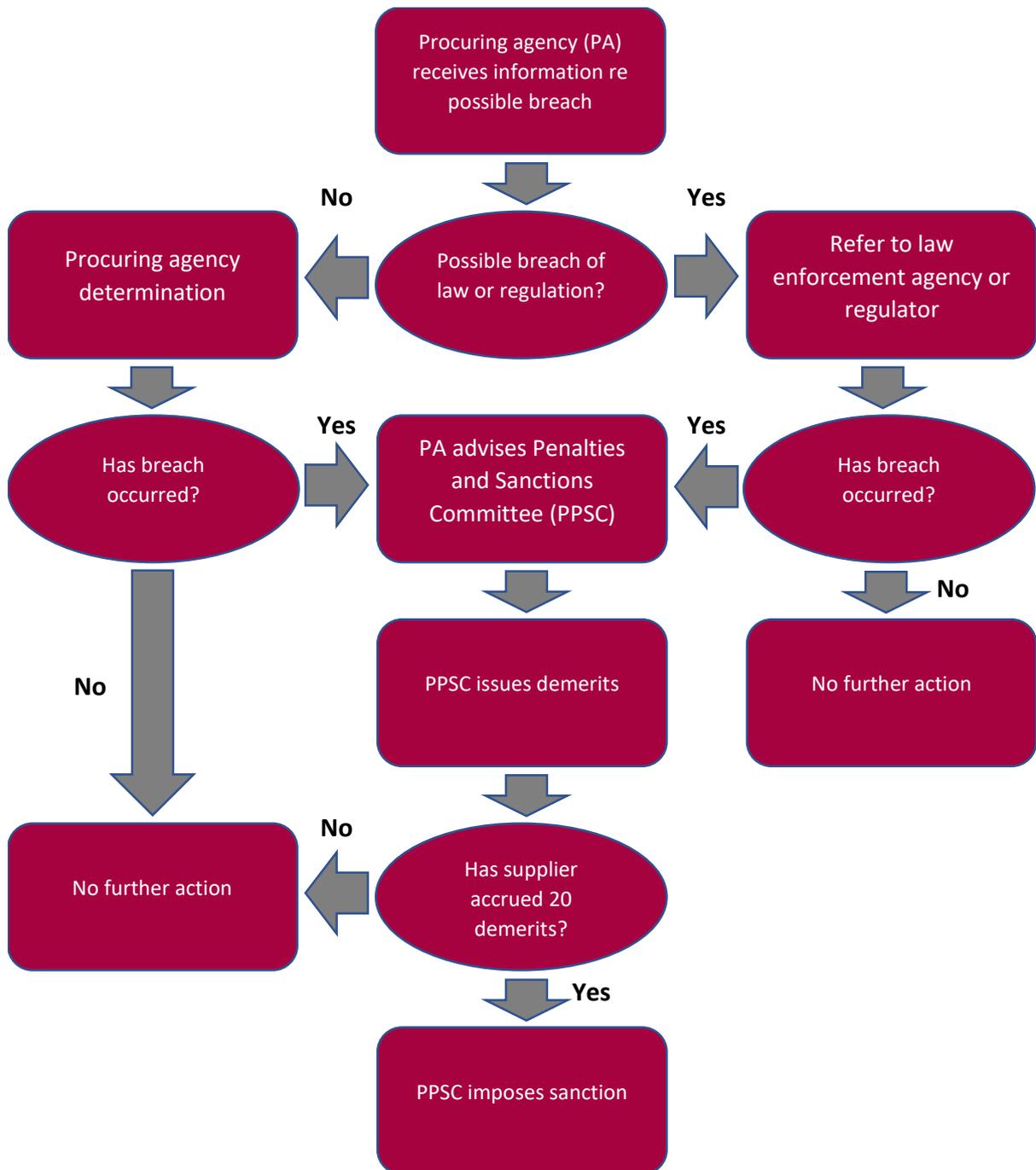
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1 Purpose

The Ethical Supplier Mandate (the Mandate) outlines the manner in which the Queensland Government will manage instances where a supplier fails to meet a policy requirement.

2 Supplier Demerit Scheme



2.1 Application

The Mandate applies to all suppliers engaged by any procuring agency within the scope of the Mandate. The definition of 'supplier' includes subcontractors within the supply chain (see Appendix 1: Definitions).

For budget sector agencies, application of the Mandate commences:

- for the Building Construction and Maintenance Category on 1 August 2019
- for the Transport and Infrastructure Services Category on 1 October 2019

The Mandate will be expanded to include suppliers for other categories of spend, and agencies including statutory bodies, government owned corporations and special purpose vehicles, at dates to be determined in 2020.

Suppliers may be penalised for breaches by their subcontractors, except where the supplier has taken reasonable action to prevent the breach by their subcontractors.

An Implementation Review of the operation of the Mandate will take place by 30 June 2020.

2.2 Issue of demerits

Demerits can only be applied to a supplier if the contract where the breach occurred came into effect after the Mandate commenced. A supplier's conduct will be a breach of the Mandate in circumstances where the supplier knows, or ought to know, that the conduct is a breach, and is not due to an honest mistake, oversight or accident.

On receipt of information that a supplier has, or may have, failed to meet a policy requirement, the procuring agency which is party to the contract or arrangement will take steps to:

- determine whether the failure has occurred, or
- refer the matter to an appropriate regulator or law enforcement agency.

Some failures to meet policy requirements must be referred to an appropriate regulator or law enforcement agency. Where the breach of a policy requirement is referred, no further action will be taken under this Mandate until resolution of the regulatory or law enforcement process.

Any steps taken by the procuring agency should be made on the advice of the regulator or law enforcement agency.

Where the breach of a policy requirement is not referred to an appropriate regulator or law enforcement agency, the procuring agency will provide the supplier with an opportunity to respond. This opportunity will be provided prior to making a determination that a supplier has failed to meet a policy requirement.

In making its determination, the procuring agency may seek the advice, audit, or investigatory assistance of the QPP Compliance Unit within the Office of the Chief Advisor – Procurement, Department of Housing and Public Works.

Following supplier input (see section 2.4 below), the procuring agency will advise the Procurement Penalties and Sanctions Committee (the Committee) within five business days of any relevant determination of breach, regulatory sanction, or conviction. The Committee may grant extensions to this timeframe as requested to accommodate procuring agency needs for additional advice or investigation.

On advice from a procuring agency that a supplier has failed to meet a policy requirement or breached a law, the Committee will, unless it determines otherwise, issue a demerit or demerits to that supplier, depending on the severity of the instance of non-compliance.

Where demerits have been issued to a supplier, which subsequently ceases to trade, then the Committee may decide to issue the demerits to an entity related to the supplier where it determines that the entity:

- is a company that continues the business of the supplier, or
- is a related body corporate of the supplier.

Two, five, or ten demerits will be issued when an instance of non-compliance with a policy requirement occurs. The Committee does not have discretion to issue any other number of demerits for a single instance of non-compliance. The types of non-compliance are as follows.

| Types of non-compliance* | Minor non-compliance (apply 2 demerit points per instance) | Moderate non-compliance (apply 5 demerit points per instance) | Major non-compliance (apply 10 demerit points per instance) |
|---|--|---|--|
| Delivery of local benefits | Provider failed to deliver some local benefits as outlined in their tender response | Provider failed to deliver most local benefits as outlined in their tender response | Provider failed to deliver any local benefits as outlined in their tender response |
| Compliance with procurement, tendering and other applicable government policy – points here cannot duplicate those applied in other rows | Minor non-compliance with government policy by provider | Moderate non-compliance with government policy by provider | Major non-compliance with government policy by provider |
| Commitment to apprentices and trainees | Provider achieved 90% or less compliance with the required number of apprentice and trainee hours on a project | Provider achieved 70% or less compliance with the required number of apprentice and trainee hours on a project | Provider achieved 50% or less compliance with the required number of apprentice and trainee hours on a project |
| Commitment to Indigenous (Aboriginal and Torres Strait Islander) businesses | Failure to meet some commitments to use Aboriginal and Torres Strait Islander subcontractors and/or businesses in supply chain | Failure to maintain at least 50 per cent ownership of business by an Aboriginal or Torres Strait Islander person(s) Failure to meet most commitments to use Aboriginal and Torres Strait Islander subcontractors and/or businesses in supply chain | Repeatedly failing to maintain at least 50 per cent ownership of business by an Aboriginal or Torres Strait Islander person(s) Repeatedly failing to meet commitments to use Aboriginal and Torres Strait Islander subcontractors and/or businesses in supply chain |

| Types of non-compliance* | Minor non-compliance (apply 2 demerit points per instance) | Moderate non-compliance (apply 5 demerit points per instance) | Major non-compliance (apply 10 demerit points per instance) |
|---|---|--|---|
| Workplace Health and Safety (WHS) systems and standards* | <p>During the past 3 years, the regulator has directed WHS compliance** where the compliance period for a previous direction, within 12 months, has expired</p> <p>One regulator sanction*** for WHS non-compliance in the past 12 months</p> | Two regulator sanctions*** for WHS non-compliance in a 12 month period over the past 3 years | One court sanction**** for WHS non-compliance in the past five years |
| Industrial relations | No industrial relations management plan (where this is a condition of contract) | Issued an infringement notice under the <i>Fair Work Act 2009</i> (Cth) | <p>Declarations issued under the Fair Work Act:</p> <ul style="list-style-type: none"> convicted of an offence subject of an enforceable undertaking |
| Security of payment - adjudication | Repetitive (five or more) adjudication decisions against the respondent, within a 12 month period | Non-payment of an adjudicated amount### (section 90 of the <i>Building Industry Fairness (Security of Payment) Act 2017</i> (BIF Act)) | Non-payment of more than one adjudicated amount### within 12 month period (refer to section 90 of the BIF Act) and/or where recovery action is taken concerning the unpaid amount |
| Security of payment - breaches of the BIF Act requirements | Repetitive (five or more) warning notices or other non-penalty from the Queensland Building and Construction Commission for breach of the BIF Act | Minor to moderate breach of the BIF Act (offences up to and including 100 penalty units allocated to contractor)##### | Major breach of the BIF Act (offences awarded a penalty of more than 100 penalty units allocated to the contractor) |
| Non-payment of suppliers and subcontractors not covered by the BIF Act | Late or non-payment of suppliers and subcontractors | <p>Late or non-payment of suppliers and subcontractors facilitated by the doctoring or records or the implementation of arrangements to avoid payment</p> <p>Imposition of unfair terms in contracts of supply or subcontracts</p> | Conviction or disqualification of a company, or the director of a company, where the facts supporting the conviction or disqualification relate to non-payment of creditors |

| Types of non-compliance* | Minor non-compliance (apply 2 demerit points per instance) | Moderate non-compliance (apply 5 demerit points per instance) | Major non-compliance (apply 10 demerit points per instance) |
|--|--|---|---|
| Failure to cooperate with a QPP Compliance Unit complaint resolution, audit or investigation process##### | Unreasonably delayed provision of documents or information supporting a QPP Compliance Unit activity, prior to being provided with a warning | Following being provided with a warning, unreasonably delayed provision of documents or information supporting a QPP Compliance Unit activity | Refusal to provide documents or information (including making employees available) or the provision of false or misleading documents or information supporting a QPP Compliance Unit activity |

Notes:

Ethical Supplier Threshold: The QPP sets out the Ethical Supplier Threshold. # A breach of the Ethical Supplier Threshold results in the application of 20 demerit points.

* Demerit and sanction decisions can only be imposed in relation to actions that are a breach of a policy requirement that occurred after the date of the commencement of the Mandate. The Committee must not be advised of, or consider, existing demerit allocations when making their decisions.

** Directing compliance includes improvement notices and prohibition notices.

*** Regulator sanctions include suspension, cancellation, revocation of authorisations, and enforceable undertakings.

**** Court sanctions refers to criminal penalties and court orders.

In considering instances the Ethical Supplier Threshold, the Committee will reference the definition in Appendix 1: Definitions.

##Adjudicated amount is an amount that is decided is owed from an adjudicated decision. Demerit point imposed only after statutory appeals period for a decision has passed.

For each offence.

Without valid legal excuse (i.e. a justified claim of confidentiality or privilege). Procuring agencies should not further engage suppliers or approve suppliers as subcontractors while QPP Compliance Unit information requests remain outstanding.

Where the Committee finds that an instance of non-compliance falls in between the categories (minor, moderate, and major) outlined above, the number of demerits applied will be the lesser of the two options.

Demerits will expire 12 months from the date they are issued.

2.3 Imposing Sanctions

The Queensland Government will, unless it determines otherwise, sanction suppliers once the supplier has received 20 demerits. Sanctions will be determined by the Committee. Sanctions include, but are not limited to:

- suspending a supplier’s prequalification for a defined period
- making a supplier ineligible for contract award for a defined period
- suspending a supplier from the relevant panel or contracting framework for a defined period, and
- precluding a supplier’s existing contract from being extended.

Sanctions only affect a supplier’s access to future contracts. Breaches associated with established and current contracts will be dealt with using contract management processes.

Where a supplier is registered under the National Prequalification System for Civil (Road and Bridge) Construction Contracts (NPS), the decision of the Committee will be referred to the agency responsible for

the administration of that System in Queensland, to be actioned in accordance with that System. This referral will not affect the implementation of sanctions outside of that System.

2.4 Procedural Fairness

A supplier will be given ten business days to respond to allegations of a breach. This will occur prior to a procuring agency determining the supplier has failed to meet a policy requirement.

A supplier will be contacted before demerits are issued and offered ten business days to detail any extenuating circumstances that it would like the Committee to take into account. Extenuating circumstances may not include whether the failure to meet the policy requirement occurred.

Where demerits have been issued to a supplier that subsequently ceases to trade, then the Committee may decide to issue the demerits to an entity related to the supplier where it determines that the entity:

- is a company that continues the business of the supplier, or
- is a related body corporate of the supplier.

The entity will be offered ten business days to detail any extenuating circumstances that it would like the Committee to take into account. Such extenuating circumstances may not include whether the failure to meet the policy requirement occurred.

A supplier will be contacted before the imposition of a sanction and offered ten business days to detail any extenuating circumstances that it would like the Committee to take into account prior to the imposition of the sanction. Such extenuating circumstances may not include whether the failure to meet the policy requirement occurred nor whether demerits should have been issued.

Suppliers must be allowed time to respond. An extension may be granted if the supplier provides a reasonable request for more time.

2.5 Appeal process

A supplier can appeal against the application of demerits or a sanction if they believe the process outlined in the Mandate has not been followed, or the Committee failed to take extenuating circumstances into account.

The appeal may be made to the relevant Director-General. This must occur within ten business days from the date the sanction notice was received.

The appeal process is not an opportunity to revisit the matter that gave rise to the demerits or sanction. Suppliers may appeal only on the basis that the process was not followed (as outlined in this Mandate) or that it failed to take into account extenuating circumstances provided by the supplier.

The Director-General's decision will be considered final.

2.6 Further information

Suppliers seeking further information on the Mandate should contact:

Manager, QPP Compliance Unit
Office of the Chief Advisor – Procurement
Department of Housing and Public Works
Telephone: 1300 10 50 30
Email: ethicalsupply@hpw.qld.gov.au

There are four key points where suppliers are afforded procedural fairness:

1. *when a breach is alleged*
2. *before the Committee considers issuing demerits*
3. *before the Committee considers imposing a sanction and*
4. *an opportunity to appeal a sanction.*

Appendix 1: Definitions

| Term | Description |
|-----------------------------------|---|
| Business day | A day that is not a Saturday, Sunday or a public holiday in Brisbane. |
| Declared by the Minister | Declared in writing by the Minister responsible for the category in consultation with the Premier and Minister for Trade. |
| Director-General | The Director-General, or Directors-General, responsible for the whole-of-government management of any category of spend which has included the supplier within the last twelve 12 months. Where this is more than one category of spend, the Directors-General shall make their decision jointly. |
| Ethical Supplier Threshold | <p>The Committee determines in accordance with the Ethical Supplier Mandate, in its sole discretion, that a supplier has:</p> <ul style="list-style-type: none"> • contravened a civil remedy provision of Chapter 2 or Chapter 3 of the <i>Fair Work Act 2009</i> (Cth), or committed an offence against the Fair Work Act • contravened a civil remedy provision of Chapter 2, 3, 4, 5, or 7 of the <i>Industrial Relations Act 2016</i>, or committed an offence against the Industrial Relations Act, or failed to pay employment related levies, or other payments, established under Queensland legislation • failed to make superannuation contributions on behalf of employees in accordance with law • purported to treat employees as independent contractors, where they are not • required persons who would otherwise be employees to provide an Australian Business Number so that they could be treated as independent contractors • engaged persons on unpaid work trials or as unpaid interns, where they should be treated as employees • entered into an arrangement for the provision of labour hire services with a person who is not licensed under the <i>Labour Hire Licensing Act 2017</i>, or a supplier who is an unlicensed provider under the Act • paid employees wages below those provided for in an applicable modern award. |
| Guide | A document detailing information and guidance that assists a user to fulfil a policy requirement or understand concepts about a related process. Guides may include specific steps that need to be followed to complete a given process in support of a policy requirement. |

| Term | Description |
|--|---|
| Policy requirement | <p>A requirement of:</p> <ul style="list-style-type: none"> • the Queensland Procurement Policy (QPP) • the Queensland Government Procurement Strategy • procurement-related policies and instruments as listed in Schedule 3 to the QPP • procurement-related guidance and codes approved by the Chief Advisor Queensland Government Procurement <p>or a contractual term, designed to effect a policy requirement, in a Queensland Government contract, a subcontract to a Queensland Government contract, or a contract in a supply chain supporting a Queensland Government contract</p> <p>or a requirement of a law or regulation specified in section 2.2 of this Mandate.</p> |
| Procurement Penalties and Sanctions Committee (the Committee) | <p>A skills-based committee of public service officers appointed and chaired by the Chief Advisor Queensland Government Procurement in consultation with the Queensland Government Procurement Committee.</p> |
| Procuring agency | <p>An agency subject to the QPP, including a budget sector agency, a statutory body, special purpose vehicle or government owned corporation.</p> <p>The 'department sponsoring the project' for the purposes of the Capital Works Management Framework is the 'procuring agency' for the purposes of this Mandate.</p> |
| Queensland Government contract | <p>A contract between any person and the Crown in the right of the State of Queensland or a related entity, including deeds for common-use supply arrangements and other arrangements as declared by the Chief Advisor Queensland Government Procurement.</p> |
| Supplier | <p>A contractor or consultant or other party to a Queensland Government contract other than the Crown and its related entities, or a subcontractor to a supplier.</p> |