

Dear Mr Christie

Thank you for your email earlier this month seeking my advice on government agency procurement of software, following abandonment of the Microsoft G2009 negotiations. You asked for confirmation that agencies are required to tender for software procurement.

Government agencies conduct procurement within a framework of government procurement policy and good practice guidance which is designed to promote open and effective competition for best value for money, with due consideration of alternative solutions to requirements. Open tendering is therefore generally encouraged as the preferred procurement method for all government agencies, unless not practical or cost effective in the particular circumstances.

As you know, there is also a specific requirement under the Mandatory Rules for Procurement by Departments (2006) that procurement covered by the Rules must normally be conducted by way of open tendering procedures. Public service departments (as listed in the schedule to the State Sector Act 1988, plus NZ Police and NZ Defence), must comply with these Rules.

The Rules do, however, allow limited discretion for departments not to use open tendering in certain circumstances, as specified in Appendix 2 (Exceptions to Open Tendering Requirement). The exceptions allow for departments to consider a specified range of possible circumstances in which competition is not viable e.g. where because of patent or copyright protection, or for technical reasons preventing competition, there is only one possible supplier and no reasonable alternative or substitute exists. Other exceptions allow factors such as interchangeability requirements or extreme urgency (in strictly qualified circumstances), for example, to be considered.

I must emphasise that each individual department is responsible and accountable for its compliance with the Rules. Departments must use methods other than open tendering only where necessary and justified specifically in terms of Appendix 2, with the justification documented for audit of compliance with the Rules. This would of course apply to any decision not to tender for software procurement in the post G2009 market situation.

Suppliers may challenge this or other aspects of a department's procurement process in a particular case. Departments are required to give fair and objective consideration to complaints from suppliers that they have not been given fair and reasonable opportunity, and unresolved complaints may be taken up by the Government Procurement Development Group, and possibly by the Auditor-General, the Ombudsmen or the courts.

Should an agency seek guidance on software procurement in the current market conditions, taking account of the abandonment of the Microsoft G2009 negotiations, the foregoing would be the basis of our advice. We would also refer the agency to further general guidance available on this Ministry's website at www.procurement.govt.nz

These comments are of a general nature and are not to be taken as prejudging any agency's decisions regarding post G2009 software procurement in a particular case.

Thanks again for your enquiry.