

PROVIDER PROCUREMENT AND MANAGEMENT

A guide to developing and implementing
suitable contract management strategies



**FOOTBALL
NSW**

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Football NSW Limited has produced this Guide to provide general guidance to clubs and associations in NSW to assist them plan and deliver successful facilities development projects. The contents of this Guide should not be used for any other purpose or reproduced or communicated without our consent. The information contained in this Guide has been sourced from a third party (Mi Associates Pty Ltd), and Football NSW makes no representation or warranty about the accuracy or completeness of the information contained in this Guide. You should not rely solely on the information in this Guide and should make independent inquiries, including seeking professional advice. To the extent permitted by law, Football NSW disclaims any responsibility and liability for any cost, expense, loss or damage incurred by any entity or person relying on the information contained in this Guide.

Introduction

This Guide has been developed by Football NSW to provide information to support Associations, Clubs, Councils and other facility owners in the development of football facilities. This Guide relates to the procurement, appointment and management of suppliers (consultants and/or contractors).

The diverse nature of projects, requires a diverse range of contract management strategies to manage a wide variety of risks that differ in likelihood and severity from one project to another. This Guide cannot and is not intended to provide all the answers to contract management issues.

Instead, it has been designed to help readers to ask the right questions for their particular project, to assist them in developing and implementing suitable contract management strategies.

While this Guide sets out 'best practice' principles relevant to the management of a supplier, it is not a substitute for the terms of a contract that should be put in place.

The purpose of this Guide is to provide:

- General guidance for the procurement of suppliers involved in developing a project – to enable them to address and support the principles of effective contract management in the executed contract for the project; and
- General guidance for the management of a supplier contract through the lifecycle of a project – to help achieve project objectives incorporating balanced long-term value for money outcomes.

If you are working with a Government partner such as council or are using funding from a Government grant to undertake your project you may be bound by a specific requirement of how you must procure and manage suppliers for design and or building construction projects. Legislation often governs these requirements such as *Local Government Act 1993*, *Public Works Procurement Regulation 2014*, *Independent Commission Against Corruption Act 1988* and *the Crime and Corruption Act 2001*.

These requirements, in full or part, may apply when you have any reason to deal with your council in your personal capacity (for example, as a ratepayer, recipient of a council service or applicant for a consent granted by council). You must not expect or request preferential treatment in relation to any matter in which you have a private interest because of your position. You must avoid any action that could lead members of the public to believe that you are seeking preferential treatment.

It is generally accepted that procurement related to publicly funded activities is guided by the following key principles:

- The procurement should be designed to provide the best value for money;
- The procedures used must be, and must be believed to be, able to withstand public scrutiny;
- Procurement procedures should ensure open competition and no individual supplier should be given advantage over others; and
- Procurement procedures should comply with all relevant organisation and/or authorities' policies, including sustainable management of the environment, that may apply.

Procurement

Procurement is a formal process of obtaining goods or services for a fee that is agreed as part of the process. The aim of the procurement process should be to attract the highest quality respondents by using a process that matches the intended outcomes of the project.

Poorly designed procurement processes can result in wasted time and money, redoing work, damage to the procuring organisation's reputation and relationships with stakeholders, legal challenges and inadequate project outcomes. With this in mind, it is essential that the complexity of the selected procurement process:

- Reflects the project's objectives, budget, complexity and risk exposure;
- Achieves value-for-money outcomes; and
- Reflects organisational strategy and objectives.

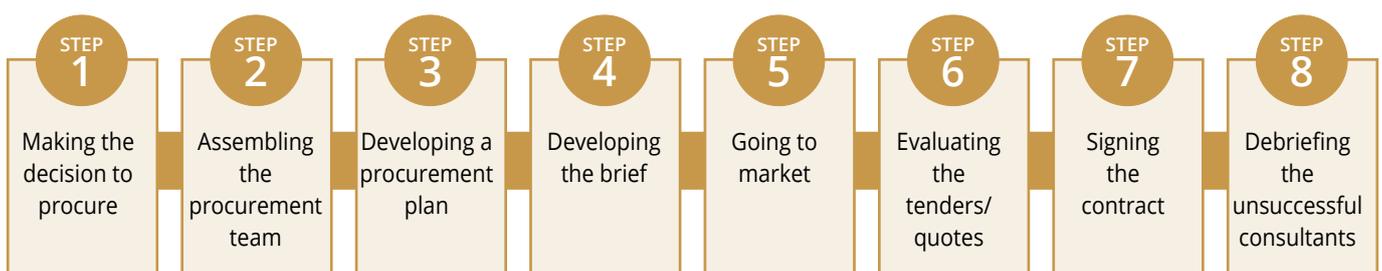
Benefits for using outsourced suppliers on projects may include:

- Mitigating risk;
- Increasing efficiencies through reduced costs and time (e.g. reduced risk of incomplete reports and quicker and smoother approvals processes);
- Generating more innovative project outcomes (e.g. increased local knowledge leading to improved designs or construction methodologies);
- Helping to ensure compliance with relevant legislation; and
- Sharing knowledge that contributes to better decisions and solutions that reflect stakeholder priorities and needs.

It is important to recognise that there is no 'one size fits all approach' to procurement. Achieving effective engagement is about tailoring the approach to the situation at hand. Engagement services take a number of forms including but not limited to: technical review and advice, planning, design services, issues management, strategic communication, building and other support functions.

While there is no single best approach, a rigorous procurement process is critical to the ultimate success of a project. It is the role of the designated manager of the procurement process to ensure that the implemented process delivers the right outcomes.

In summary, this Guide defines an eight-step process for procurement that can be followed. When an Association, Club or Council have specific procurement guidelines and/or policies in place these should be adhered to in the first instance.



**STEP
1****MAKING THE DECISION TO PROCURE**

- Allowing time to plan the assessment, brief and contract
- Good expertise early for informed and sound foundations.
- Understanding of the outcomes and risks to be managed
- What skills and resources are available in-house to support the procurement?
- Are there any skills gaps? How might existing skills and resources be leveraged to maximise their value?

**STEP
2****ASSEMBLING THE PROCUREMENT TEAM**

- The team should be familiar with the project's technical aspects.
- The team should include project management, procurement and legal specialists.
- All team members should know and understand the requirements of procurement before they procure.

**STEP
3****DEVELOPING PROCUREMENT PLAN**

- Establish an approved procurement plan with assessment criteria and budget.
- Ensure the procurement plan is focused on the end outcomes to help select the right supplier for the work required.
- The plan should form the basis for the tender documents and brief.
- Be realistic about what engagement can be achieved for the project in the plan and that it is approved before you progress with the procurement.

**STEP
4****DEVELOPING THE BRIEF**

- The brief must be clear and explain the project expectations and the services sought.
- It describes the rationale, purpose, objectives, costs, risks, constraints, timeframes and other project requirements.
- The brief forms the basis of the contract.
- A quality brief reduces risk of scope creep, variation, time delays and cost overruns / disputes.
- Providing a budget template for completion noting the service delivery elements will provide a strong framework to compare submissions and contract the service.

TIP

Consultants may propose different engagement methodologies to achieve the objectives of the brief and may be costed differently. The inclusions and exclusions will also vary between tenders/quotes. Some respondents will run a thorough and realistic 'bottom-up' budget for all activities, whereas others may present minimalist budgets with subsequent options for variations post-contract award. Having appropriate advice and/or assessing and asking questions to clarify the differences and understand the real cost of delivering the services is helpful and timely in the tender evaluation to avoid escalated costs and over-run later in the project.

GOING TO MARKET

STEP 5

- Only use experienced providers, short listed if possible, but seek at least 3 quotes.
- Send an invitation, instructions for tendering/quoting, a draft contract, mandatory and non-price criteria and provide returnable schedules for response consistency.
- Always identify and note any special provision related to the project - For example, any existing communication policies, protocols, procedures or guidelines.
- If you need to issue addendums, do it in writing to all invited tenderes and have them acknowledge these.

EVALUATING THE TENDERS/QUOTES

STEP 6

- Suppliers should provide a return brief, methodology, cost estimate to the methodology and referees.
- Suppliers should demonstrate experience and provide qualifications (company & team) in tender responses.
- Consider interviewing and seek clarifications from suppliers as you need, before making selection decisions.
- Use the set assessment criteria to guide your decision and document your decision.
- Minute and document your decision and reasons.
- Retain records of your procurement process and evaluation as it may audited.

SIGNING THE CONTRACT

STEP 7

- Finalise negotiations, terms, expected service levels and how the contract will be managed.
- Provide notification and keep written records of negotiations.
- Execute / sign the contract before the project begins and services are provided.
- All contract documentation, including the brief and terms and conditions) should have been thoroughly reviewed by project, legal and commercial experts within the procurement team and the suppliers' team.
- Once the contract is signed you may be required or wish to publically advertise the contract award.
- It is important that the suppliers are reminded of the protocols issued as part of the Invitation for Tender or Request for Quotation, if you are publically advertising the award of contract.

DEBRIEFING THE UNSUCCESSFUL CONSULTANTS

STEP 8

- Notify all unsuccessful suppliers of the procurement outcome.
- It is good practice to offer a formal debrief to unsuccessful consultants to help them understand why there were unsuccessful, and improve future bids.
- In some instances, the appointment of a consultant may be challenged by an unsuccessful consultant.

Determine what contractors you need

If you have a medium to large scale project or are working with a site that may have special planning requirements, or a unique site and or facilities plans are required, then it is highly recommended that you look to procure and include suppliers to help you plan, design and deliver your project.

Key design and construction suppliers that you may require include:

- Architects;
- Planners and certifying authorities;
- Geotechnical engineers;
- Civil and structural engineers;
- Building and land surveyors;
- Electrical engineers and services engineers;
- Lighting designers and / lighting equipment & installers suppliers;
- Quantity surveyors / cost planners;
- Landscape architects / turf and artificial turf suppliers;
- Acoustic consultants; and
- Builders and trade suppliers.

For recommendations on suppliers for specific types of project (lighting, synthetic grass, etc.) refer to the relevant FNSW technical facilities guidelines.

TIP

Design suppliers will usually have specialist skills and will be able ensure your facility development solutions meet relevant standards and building codes, as well as keep your overall development costs in hand.

Works in Kind or Value in Kind services

Sometimes an opportunity may arise where a sponsor (corporate, group or individual) may offer to provide services or undertake work in lieu of cash payment for the service or provide the services at a discounted rate (sometimes known as Value In Kind).

In these instances the project team will need to consider if this opportunity can be accepted for their project and in accordance to their local Councils Works in Kind and Procurement policies; or if it is permitted under the conditions of any grant or funding requirements.

These services may form part of an agreement between the parties where the provider receives access to use the facilities, is allowed to advertise their services to club members or undertakes the services in lieu of making other payments, such as payments required under development consent requirements.

Where it is considered controversial, presents a conflict of interest, or is seen to favour the services of a supplier either directly involved in the project or if they provide other services to the parties involved, Councils

will require these contributions to be valued, declared and agreed before entering into any contractual arrangements.

If it is agreed that Works in Kind services can be provided then a formal service agreement should be established. The provider must in all cases be authorised to undertake the services and hold appropriate licences, insurances, undertake the works and provide certificates of compliance that may apply and provide warranties for the performance of any goods provided.

No conflict of interest

Procuring on behalf of a Government partner or using Government funding

The following are the issues that need to be taken into consideration when procuring suppliers for design and or building construction projects when you are working with a Government partner, or are using Government funding to undertake projects:

- Government and Councils must be seen to achieve maximum benefit in their spending of public funds;
- Government and Councils must be seen to be fair and equitable in their dealings with the private sector;
- Government and Councils must exercise probity in dealing with suppliers at all times.
- To achieve probity, agencies will need to have procedures and processes that ensure:
 - That all procurement provides value for money;
 - That dealings with the suppliers are fair and equitable;
 - That the processes and procedures will bear public scrutiny; and
 - That consultants who make submissions for projects but are unsuccessful, are debriefed on request.

This means that the suppliers engaged must provide a cost efficient and quality solution to satisfy the project needs and ensure that value for money is achieved during the planned life of the facility. An audit trail of the procurement processes and outcomes must also be provided.

Government and Councils must not disclose tender information they receive from tenderers that is considered intellectual property, proprietary, commercial-in-confidence or otherwise confidential, without their prior consent. In addition, people involved in the procurement must not disclose information regarding the specific details of a tendering process, including a recommendation of the tender evaluation or assessment panel before the outcomes of the procurement process have been determined.

People involved in the procurement process who deal with confidential information may need to share the information for the purpose of deciding whether or not to accept any submitted tender. In these instances the confidential information should be issued as a separate confidential attachment to any reports that may be made available to the public.

Corruption and Conflict of Interest

The Government established the Independent Commission Against Corruption (ICAC) to protect the public interest, prevent breaches of public trust and guide the conduct of public officials. ICAC investigations have identified a number of examples that highlight the need for all public agencies, including councils, to ensure that they adhere to high standards of probity in tendering.

Conflict of interests may occur when an individual could be influenced, or a reasonable and informed person would perceive that an individual could be influenced, by a personal interest when carrying out public duties. There is a requirement that where such a conflict occurs, it will be declared, assessed and resolved in favour of the public interest.

Conflict of interest risks may arise at various stages of the procurement process for projects. If these risks are not managed they can cause significant impacts to the outcome of projects and to peoples' jobs and need to be proactively managed.

The value of the services for a project usually determine whether procurement can be undertaken with quotes, or if a tender or panel assessment is required. The procurement and value limitations that a project will need to consider will generally be set by the facility owner or Councils Procurement Policy. In some cases, the method of procurement and value limitations are established as part of the conditions of funding that specify how and under what circumstances any funding can be used.

TIP

Review and determine the procurement method and value limitations with the facility owner and/or the Council you are working with, to ensure your procurement process is appropriate for your project.

Not having the right process may result in unnecessary risks to your project and/or legal action should you breach a Government Procurement policy and or a condition of a funding grant.



The main risk relating to a conflict of interest stems from people procuring the services from a supplier they have a relationship with. In some cases they may be tempted to structure procurements to avoid a panel or tender assessment, so as to lessen their workload, speed up processes and / or favour one supplier. If this risk plays out it is likely to compromise the relationship and establish a precedent to do the same thing again. In some cases this may be perceived as a form of corruption and misuse of position and resources and can carry serious penalties for the individuals involved.

A risk assessment of conflicts of interest is likely to identify some or all of the following corruption risks:

- A person undertaking the procurement not disclosing a private interest and favouring that interest when making decisions;
- A person undertaking the procurement exercising their public duties in such a way as to benefit a business interest, property interest or prevent that interest from being adversely affected;
- A person undertaking the procurement exercising their public duties in such a way as to benefit a relative, close associate or secondary employer or prevent adverse outcomes;
- A person undertaking the procurement exercising their public duties in such a way as to benefit a future employer or potential future employer or prevent them from being adversely affected; and
- A person undertaking the procurement exercising their public duties in such a way as to adversely affect a person or group that they dislike or are prejudiced against. A person dealing with a public official deliberately cultivating a private connection with the public official (such as a friendship, secondary employment or the offer of future employment) in an attempt to get the public official to perform their public duties partially.

For more information related to conflict of interest refer to: <http://www.icac.nsw.gov.au/about-corruption/definition-public-official-authority>.

Procurement methodology

Documentation preparation

Sufficient detail should be included in the tender documents to:

- Give a clear understanding of what is being procured;
- Give a clear understanding of the proposed procurement process, what is expected of tenderers, the type of decision that will flow from assessment of tenders and the basis of that decision;
- Give a name and contact details of the person to whom questions about the proposed contract may be directed;
- Specify the criteria which will be used to assess the tenders;
- Elicit all information necessary to make that decision; and
- Indicate whether there are formal tender documents that must be submitted and information as to how they may be obtained.



Within the Conditions of Tendering the following should be included:

- A summary sheet of critical instructions, such as the closing date, lodgement requirements and how to make inquiries;
- An outline of any policies that apply to the procurement, such as local content, environmental considerations and relevant standards or policies required of the supplier and to the tender;
- An overview of the purpose of the procurement and the proposed schedule for the purchase;
- Conditions for the submission of tenders (Hard copy, electronic submission, or in soft copy, etc.);
- Evaluation process and the criteria for evaluation of tenders;
- Details of information sought from tenderers, divided into separate schedules for specific work packages or service requirements;
- Detailed statement of requirements, including specifications, plans and drawings as appropriate;
- Proposed terms and conditions of contract (General and Special Conditions);
- A statement that no binding contract exists until the successful tender is accepted;
- Copies of or reference to other documents relevant to the procurement, such as policies and procedures, if applicable;
- A statement that unethical or inappropriate conduct, such as approaching the procurement panel or officers or intimidating behaviour, will result in a tender being disqualified;
- Information regarding what tenderers should do if they suspect corrupt conduct and what action will be taken if it is suspected that tenderers are acting unethically or corruptly. This assists to build anti-corruption capacity within the tendering process and council operations; and
- A statement indicating how the procurement team will communicate with potential tenderers and respond to tenderer initiated enquiries.

In summary, tender documents may also be referred to as an invitation to, or a request for tender. The information should generally be presented as a series of four (4) documents:

- Invitation to Tender or Request for Quotation;
- Conditions of Tendering;
- General Conditions and Special Conditions of Contract; and
- Plans and specifications or a description of the services being sought (sometimes referred to as the scope, project brief or project functional requirements documentation).

Direct Appointment / Direct Negotiation

Some Government and Councils establish prequalification schemes (or lists) that in some cases must be used unless there is a substantiated reason that is justifiable as to why a supplier should be directly appointed.

Direct appointment (also sometimes referred to as a Direct Negotiation) is a type of procurement where only a single supplier is requested to submit a quote or tender without having first gone through a genuine competitive process through a select or open tender. A variation to an existing contract can also be considered as a type of direct appointment.

Negotiating with the supplier is most critical in this type of procurement to reach agreement on all terms and conditions and to obtain the goods and services at a price that is fair and reasonable.

Direct appointments must not be intended to avoid competition or to discriminate against any organisation and if you are working with a Government partner or, if required as a condition of a Government funding, you will need to undertake this in accordance with their relevant code of practice or policy.

In essence, a direct appointment can be undertaken when the supplier market, products and services are well known. The supplier market may be small and specialised in nature with limited opportunity for competition.



People responsible for managing procurement under the requirements of a Government procurement policy and who wish to make a direct appointment should also refer to the Independent Commission Against Corruption (ICAC) guidelines for managing risks in direct negotiations.

In most cases you will need to justify the need for a direct appointment and may need to demonstrate multiple reasons to justify the case before a direct appointment will be considered as appropriate such as:

- The procurement value was minor and considered allowable under the respective procurement policy;
- The service or goods could only be supplied by a particular supplier and no other reasonable alternative or substitute exists, or the supplier holds the required patent, copyright, or other exclusive right, or proprietary information;
- The cost to tender is prohibitive compared to the cost of the actual procurement and it is reasonable to extend or vary an existing contract; or
- Unforeseen circumstances or a genuine emergency / urgency exists where the service or goods cannot be obtained in time through an open tender or pre-qualification/panel arrangement;
- Where, in response to an open tender:
 - No submissions were received; or
 - No evaluated responses represented 'value for money', or
 - No response satisfied the requirement and it is not feasible to modify the requirement; and/or
 - There was only a single applicant that was evaluated as providing a suitable tender response.

Expression of interest

An Expression of Interest (EOI) is a non-binding procurement step used to identify suitable candidates when the supplier market or products and services are dynamic or not well known, this method can provide an opportunity to test the market to determine if the products or services required are available and which suppliers provide the required services.

Requests for proposals

A Request for Proposal, sometimes also referred to as a Request for Quotation (RFQ), is a traditional method of procurement where the market is approached through an open or select tender process that is advertised to all suppliers in the market and allows those suppliers to provide a response to a specific brief for the supply of goods or services. Terms and conditions are also provided as part of the tender documentation.

A RFQ can be undertaken to seek quotes from a pool of suppliers on an existing Government or agency specific contract listing or prequalification scheme. RFQs are usually undertaken when the procurement of the goods or services are considered to be a volume purchase or services that do not have a defined price.

Where the procurement is a low value a full tender process may not be required, you will need to refer to the relevant policies relating to your situation to determine this requirement. Generally it is considered best practice to seek a minimum of at least 3 quotations from providers to determine that a fair and competitive process is undertaken that delivers value for money.

Selective tenders

Overall management of the selective tender process should be designed to give a fair distribution of opportunities to all recognised suppliers. However, a supplier's past performance is a consideration. Other factors that may be taken into account include the location of the work, special requirements of the work, skill level of the services and the commitments of the supplier.

There are two types of selective tender:

- Those invited by expressions of interest through public advertisement (electronic and/or print media); and
- Those invited from a list of recognised suppliers or from a pre-qualification list, and either after or at the time of public advertisement to tender or provide a RFQ (electronic and/or print media).

Selective tender lists of recognised suppliers are often established where:

- There is a continuing workload in a particular category of work;
- The workload justifies the cost of setting up and maintaining the list; and
- In some cases, where innovative solutions are sought.

It is noted that some Government agencies and Councils establish prequalification schemes (or lists) that in some cases must be used unless there is a substantiated reason that is justifiable as to why a supplier should be direct appointed, or be invited to select tender or as a part of a short listed number of suppliers.

Open tenders

Open tenders are generally undertaken when it is inefficient to establish recognised or prequalified supplier lists or where it is not appropriate to identify a suitable field of suppliers for a selective tender process.

An invitation to open tender is undertaken through public advertisement (electronic and/or print media) that seeks submissions to provide either an EOI to establish a panel of providers for future procurement of services, to Tender or to provide a RFQ.

The following should be included in an advertisement for an open tender:

- The purpose of the proposed contract;
- Details of where and when and conditions of how tender documents can be obtained;
- Tendering guidelines;
- A contact name and details, for information concerning the proposed contract;
- An invitation to anyone willing to meet the requirements of the proposed contract to submit a tender by the deadline; and
- The deadline for submission of tenders, which must allow a reasonable time frame for response, generally 21 days after the date of the first publication of the advertisement.

Tender evaluation

All tenders received by the appointed day and time should be recorded. This can be done by maintaining a document of valid tenders received by the appointed time, opened by the 'tender opening panel' who record such issues as:

- Who tendered;
- The price quoted if a lump sum, fee or service rates;
- The organisations that declined to submit; and
- Rejected bids or deviations or qualifications to offers (sometime called alternative offers).

Tender evaluation integrity and records

A project should have clear procedures controlling access to all documents relating to a tender. Access to tender documents will be restricted to only those persons involved in the tender process including the tender evaluation panel. The procedures should also state how access to tenders submitted by secure electronic means would be regulated.

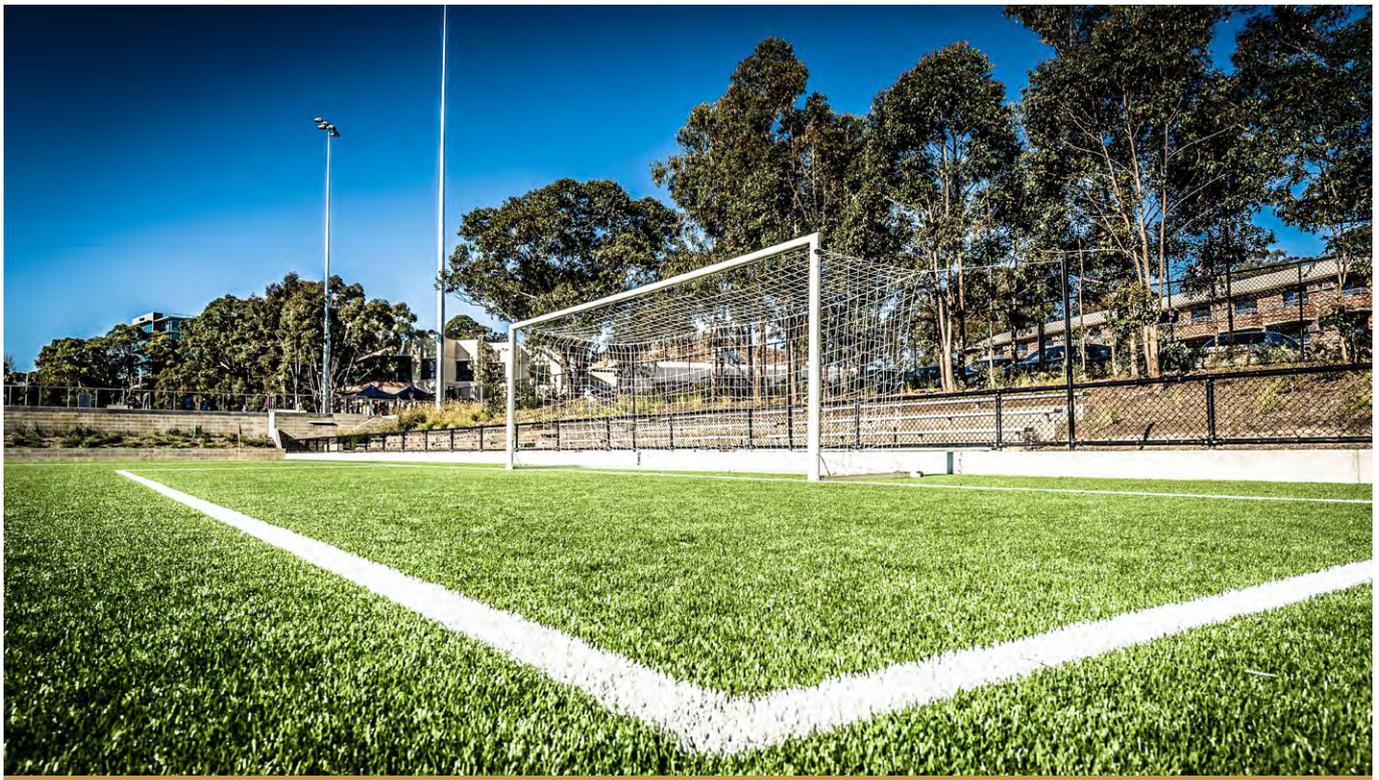
Procurement and tender processes should not be used to undertake bid shopping, which is the practice of trading off one tenderer's prices against another's in order to obtain lower prices.

Assessing Fees, Value for Money and Experience

Fees should not be over-emphasised relative to other criteria such as the delivery performance requirements of any proposed services or provision of goods. A failure in an aspect of delivery performance requirements can have a long-term effect on the economic viability of a project.

For example:

A person undertaking design services does not adequately ensure the building design meets the compliance requirements of the applicable Standards and / or Australian Building Code.





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This may result in building works which cannot be approved by a Preferred Certifying Authority. If this happens you will not be able to obtain an Occupation Certificate for the building and the works will need to be rectified at additional cost and time to the project.

As a result the following may occur:

- Insurances can be void;
- Facilities or the asset could be significantly damaged (i.e. a fire was to result from poor electrical design, etc.)
- People could be injured or die in an incident; and
- Legal actions may be taken against the people responsible for the project including managers of the project, the designers and the builders, depending on the circumstances.

The concept of selecting a consultant on the basis of the fee only assumes that all suppliers have the same experience, qualifications and resources. Although suppliers may have received similar initial training, some will be better suited, more experienced and more capable of undertaking particular projects than others. Selection must be made on the basis of the particular supplier's experience and ability to provide the service required.

For example: The fee level for design services determines the time planned to be spent on research, considering the opportunity, refining the design and detailing of design documentation. Inadequate effort spent on these factors can reduce real savings, may cost contract variations during the construction phase and may lead to higher life-cycle cost in the form of increased maintenance and energy costs.

It is important to ensure not only that the consultant receives an adequate fee to perform the task, but that all sub-consultants in the commission will also receive fees that are adequate for effective performance of the tasks in the commission.

TIP

Increasing the fee beyond value for money will not increase the quality of the service provided. The most appropriate means of ensuring value for money is to understand the cost structure of suppliers, the resources involved in the delivery of a service or goods, and the needs of the project (as set out in the project brief / scope) which you must determine before you go to tender or request a quotation.

It is recommended you establish an assessment criteria and timelines and use them to guide your decision making process for the evaluation, so it is fair to all applicants and used to document your decision. Your decision should be a joint decision made by a Tender Assessment Panel (TAP) and each member of the panel should understand and agree to a confidentiality and conflict of interest deed prior to undertaking procurement activities.

The TAPs' decisions should be minuted and documented and the reasons for their decision clearly articulated and retained as a project record that can be audited if required.

The TAP should consider interviewing and seeking clarifications to quotations and tender responses before they finalise their decision, to ensure a fair and reasonable process is undertaken.

TIP

When you do not have the in-house expertise consider contracting-in a project manager to assist you in selecting suppliers.

Details of tender evaluations should include:

- Criteria, the relative weightings that were proposed in the tender evaluation plan completed prior to the issue of the tender;
- Full details of all tenders received;
- For non-complying or alternate tenders, a detailed analysis of the non-compliance and the reasons it was considered to be appropriate or not appropriate;
- Financial analysis of the tenders providing a comparison of all options on the basis of unit price, service price, annual cost, total cost or “whole of life” cost of the procurement;
- Details of the evaluation and the analysis of tenders against the criteria, including a summary of the experience of each tenderer;
- Details of any post-tender contact, reasons and responses such as for the purpose of clarifications and the outcomes of the respective clarifications;
- Summary of the tender considered most suitable in the circumstances, including the rationale for the conclusions, or the rationale for considering none of the tenders suitable; and
- A recommendation for the acceptance of a tender including, if applicable, any conditions or requirements associated with the acceptance of proposals to vary the contract conditions as a result of the tendering process or errors in documentation, or a recommendation not to accept any of the tenders or quotations provided.

Negotiation

Whether you're negotiating the payment terms for a project, amending changes to a design based on feedback, or resolving a dispute negotiation skills are required.

Be prepared and professional

Negotiations can be difficult. If you have unrealistic expectations and/or do not understand the contract you are trying to put in place or the services that you really need.

Good negotiation starts with knowing what you want and expressing it successfully in conversation and through written correspondence. The conversation and/or correspondence should focus on your project brief, risks to be managed and any terms of your contract that the other party does not fully agree with.

If there are contractual items the other party wish to change you should have an understanding of your position, your risks and where you can afford to be flexible. Always note and keep a written record of your negotiation and minutes for meetings. Where possible all contracts and changes to contract should be formally agreed and accepted by both parties in writing.

A negotiation should be fair and reasonable, be careful not to turn your negotiations into an “us vs. them” scenario. A negotiation is a formal communication process that should remain factual and respectful to strengthen your continued professional working relationships.

Understand your leverage, price limitations and know when to clarify or compromise

Understand your leverage and the position of the other party. It is recommended that any high risk areas, key functional requirements and items that have a compliance obligation should not be compromised on. Any optional nice to haves can be negotiated and compromised to improve the value to the project. A supplier should be providing expertise that you do not have within your project team and their expertise will be their strongest point of leverage.

Negotiation preparation is required to fully understand the terms of your contract, the risks to your project and what you need to manage through the negotiation. It also requires good communication skills and experience to ask the right questions. Above all a negotiation must be ethical and honesty must be maintained with the other party. Lastly, negotiation requires clarity in decision making and having the ability to clarify, resolve and agree how to proceed when parties have a difference of opinion to close the negotiation.

When you negotiate from a position of strong preparation, the other party will be more comfortable meeting you on your terms, based on your expertise and professionalism.

For example, if through your process you have a robust design budget and have some strong logic behind your cost base that you can compare, then you will be better placed to negotiate a service.



Understanding the difference between the service fee of one supplier to another can come down to their approach, methodology and if they have any specialist tools or provided added benefits that will help improve the outcomes of the proposed design or construction works.

Most consulting providers will have multiple levels of professionals and support staff. Construction providers' will most likely have different rates for different types of work packages. You should benchmark and check to see that the rate and effort proposed is appropriate for the type of work they will be doing and that the work is being undertaken by experienced staff.

If your scope is good you should be able to compare resourcing and effort estimates to determine fair value. Sometimes it can be a question of scope definition and the understanding of the scope and the effort to deliver the work. If your scope is unclear, incomplete or too broad you may wish to negotiate with a supplier during the contracting period to modify and clarify the scope, to lock down the price and to avoid the risk of high variation costs and/or surprises later in the project.

In addition to service fees, ensure to discuss and negotiate how expenses will be managed for the project. This could be included within a lump sum fee offer, or you can define an allowance and limit reimbursable expenses. Other items related to expenses to negotiate are percentage mark-up rates for expenses and/or an allowance rate/percentage for overhead costs/margins for all other reimbursable expenses the provider may reasonably incur.

If the proposed fee includes a contingency allowance, it is preferable to exclude this from the initial contract and hold it in reserve for the project to be negotiated and justified only as a variation should it be required.

Consult, share any decisions and make decisions within your delegation of authority

During discussions withhold agreement when necessary and avoid saying yes on anything related to schedule, scope management, cost and other contractual items that limit the other parties' liability and increases your risk until you can review the information with your project team. Always ensure that any decisions that have to be made are made within the project delegation of authority (approval limits or level of responsibility) to avoid a breach of contract or probity issues.

Managing high risk decisions, disputes and knowing when to walk away

If the stakes are high, take your time to understand the detail and make good decisions. The longer and more drawn out the negotiation, the more important it is not to be hasty or just give in.

Negotiation situations can be challenging if you dislike disagreement, or are not familiar with the situation or are overly eager to 'just get on with it'.

Be willing to walk away from a negotiation if you think the options available are too risky for the project in the long term. Being willing to say no is important in contract negotiations. The natural human desire to avoid conflict is something that some people you negotiate with may try to exploit. It's okay to say no.

TIP

If in a dispute allow time for both parties to think it over, you may also want to consult with other specialists such as a lawyer if you do not fully understand the implications of your decision options. Don't jump on the phone and immediately try to iron it out, or agree because you want to appear amenable. In these cases, whomever you're negotiating with may think that they can push their position even further which may result in you accepting more risk than you should.

Warranty and liability requirements

Warranties and guarantees

All contracts for services should contain a number of statutory warranties. It is reasonable to expect that:

- Any service must be carried out with due care and skill;
- Any materials supplied in connection with the service must be reasonably fit for the purpose for which they are supplied; and
- The service, and any materials supplied in connection with the service, should be reasonably fit for any particular purpose the consumer made known to the seller.

All contracts for goods should be protected by the inclusion of a number of statutory conditions and statutory warranties. The statutory conditions require that:

- Goods must be of merchantable quality – they must meet a level of quality and performance that would be reasonable to expect, given their price and description. They should also be free from defects that were not obvious at the time of purchase;
- Goods must be fit for their intended purpose – they should be suitable for any particular purpose the buyer made known to the seller;
- The goods must match the description given to the buyer, or the sample shown; and
- A buyer must receive clear title to the goods – that is, the seller must be entitled to sell the goods.

A warranty against defects, also known as a 'manufacturer's warranty', is different from an express warranty. A warranty against defects deals with what the manufacturer promises to do when something goes wrong with goods. An 'express warranty' focuses on a promise or promises, for example, about what the goods will look like, will do (or are capable of doing) and for how long.

Sometimes a warranty against defects may contain an express warranty. Suppliers and manufacturers often make extra promises (sometimes called 'express warranties') about such things as the quality, state, condition, performance or characteristics of goods.

If they guarantee that the goods will satisfy those promises, those promises should be included in the contract. For example: A supplier tells you that an artificial turf surface will last for 10 years, if the surface only lasts for six years, you should be entitled to a remedy. In some cases though these express warranties will be subject to conditions of use and maintenance and if these conditions are not met then the warranty becomes null and void.

For more information related to warranties and guarantees refer to: <http://www.accc.gov.au/> or <http://www.consumerlaw.gov.au>.

Liability

Liability is about managing and limiting your risks. These can be controlled through service obligations, acceptance for replacement and rectification liabilities, entitlements for monetary compensation or insurances. Some general types of risks can be insured against. Insurances to limit liability as part of the overall risk management strategy should be required from suppliers as a condition of contract.

Insurance is a contract whereby one party (insurer) agrees to indemnify or guarantee another (insured) against loss caused by a specified cause or future contingency in return for the earlier payment of a premium.

Limit of indemnity is the sum insured under a policy of insurance, and constitutes the insurer's maximum liability in respect of any one event or series of events, against which the insurer usually determines the amount of the premium.

Insurance for privately financed projects, some joint ventures, and alliance contracts require special consideration with special insurance arrangements to suit the public and private sector involvement, in these cases you should refer to an insurance broker for specialist advice.

The following should be considered when reviewing and accepting insurances:

- A certificate of currency or certified copy of the policy, identifying the relevant type of insurance, has been received;
- The insurer is authorised by the Australian Prudential Regulation Authority, as shown in the list on the APRA website;
- The policy accurately names the consultant / contractor as the "insured";
- The policy covers all contracts entered into by the consultant / contractor, or covers the specific contract;
- The commencement and expiry dates of the policy confirm that it is current and will be current at the date the work commences;
- The policy is for the minimum amounts required by the contract;
- The policy identifies the Principal (by name, or by reference to 'clients' or 'principals to contracts', or otherwise) as a person to whom the insurance cover extends;
- The policy identifies subcontractors (by name or otherwise) as persons to whom the insurance cover extends;
- The policy contains cross-liability and waiver of subrogation provisions;
- The policy does not contain exclusions detrimental to the Principal, such as:
 - Exclusion of any substantial category of work that is likely to be required under the contract; or
 - Exclusion of professional work performed by subcontractors or consultants engaged by the supplier.



TIP

For specialist advice on insurance related matters refer to an insurance broker who can provide insurance advice and can make arrangements for insurance cover with insurers on behalf of the insured and act on behalf of the insured.

Types of Insurance

For information on specific types of design and construction insurances refer to the NSW 'Insurance for Government Construction Projects Guidelines', available at <https://www.procurepoint.nsw.gov.au>.

This Guideline provides guidance to agencies arranging construction related insurance involving external service providers. It provides information about the NSW Government's approach to insurance and provides an in-depth overview of insurances that should be included in all contracts for design and construction works, including:

- Contract Works Insurance;
- Professional Indemnity Insurance;
- Public Liability Insurance; and
- NSW Workers Compensation Insurance.

Contractor appointment and notification

Tenderers will need to be notified of the result of the tender process which may include an invitation to negotiate and/or advice they have been awarded the tender, that their tender was unsuccessful or that no tender was accepted as soon as practicable after:

- Entering into a contract with the accepted tenderer; or
- Deciding not to accept any of the tenders.

You may also be required to make the information on the outcome of the tendering process publicly available by listing the name and amount of the successful tender or a notice stating that none of the tenders were accepted. This may be required to be notified via a website, a register, or through public council or Government minutes or reports.

At the conclusion of the tender process, you may be required or may choose to debrief unsuccessful tenderers either out of courtesy or at their request. Debriefings should focus on assisting tenderers to improve future tenders and explain how the tender performed against the evaluation criteria and as recorded in evaluation documentation. You should not compare the performance of the tenders directly to other tender responses and maintain sensitive and/ or confidential information appropriately.

Key contract requirements (based on standard industry contracts)

Australian Standard (AS) 4122-2010 General Conditions of Contract for Consultants provides general conditions of contract for the engagement of consultants in the construction industry. The Standard sets out the general obligations governing the relationship between consultants and their clients. It is not suitable for a Design and Construct project procurement method.

If a Design and Construct project procurement method is undertaken it is recommended that the AS 4902-2000 General Conditions of Contract for Design and Construct be used. It is important that the conditions of contract be fair, clear and equitable for both government and consulting firms.

These standard agreements provide contractual terms that are:

- Aligned with the standard of care and duties of a professional consultant under common law;
- Consistent with government policy and the intent of relevant legislation;
- Reflect the importance of sharing risk between the parties;
- Based on the principle that each party in a project remains responsible for its own actions;
- Consistent with the terms of professional indemnity insurance readily expected; and
- Inclusive of a monetary limit on the liability of the consultant.

These contracts may not be appropriate in every situation, but should form the basis of a standard agreement when engaging suppliers. Special project considerations including scope and deliverables expectations should also be drafted specific to your project. A bespoke contract should only be used in situations where there are project specific special needs that necessitate it, and it would result in decreased risk for your project.

These standard contracts are available for purchase from: <http://infostore.saiglobal.com/store/default.aspx>



Contract Management

Effective contract management incorporates identifying, monitoring and managing all risks and opportunities over the life of the project contract to achieve project objectives and value for money outcomes.

Making payments

Ensure that the consultant or contractor provides a detailed project payment schedule linked to delivery milestones for work delivery and providing for expenses and margins that are reasonable for the project requirements.

Review and confirm the milestone and payment schedule for completeness against your contract directly relating to the progress of work planned to be carried out at each stage and aligned as an agreed payment schedule. All deliverables should be checked and accepted before payments are made or rectifications/effort made to deliver or provide the requirement to an acceptable standard.

In some cases a provider may issue a requisition for a purchase order to be raised and approved and reference to this purchase order should then appear on the tax invoice presented for payment.

A tax invoice should be issued when the works, or receipt of the goods if goods are being provided, have been delivered and accepted, and payment should be processed in accordance with the claim and organisational procedures, usually issued to an Accounts Payable division for final approval under your organisation delegation of authority.

The contract should specify when and how you will pay a supplier and will help you manage cash flow and maintain good supplier relationships.

Payment terms should be defined specifying what credit facilities you will use and the standard terms for payment within 7, 14 or 30 days after the invoice date. Setting your terms shorter than your supplier's terms can help you avoid being charged late payment fees.

Many businesses exposed to credit risks will offer other types of payment options or request that customers pay part of the invoice before or during service delivery.

Things to consider when setting payment terms include:

- Types of payment;
- Credit limits, if relevant;
- Early payment schemes or late payment terms; and
- Legal requirements.

Invoices should include:

- Supplier business name and if relevant trading name;
- Postal address, email address, website address, contact telephone and facsimile numbers;
- Australian Business Number (ABN) or Australian Company Name (ACN);
- Customer details (Name, contact, Purchase Order , if required);
- Invoice number and date;

- Terms of payment, payment details and payment options (direct deposit, credit card, EFTPOS, cash direct banking details, BSB number, bank account number, bank account name and the name and branch of the bank and references required.);
- Amount due and description of goods and or services provided relevant to the services and project deliverables; and
- Goods and Services Tax (GST).

Managing changes / variations

Change Management

During a project it is likely that a number of changes will occur, requiring proper management. Changes may be contemplated at the time of procurement and provided for in the contract, or discovered through the project and seen as desirable or necessary alterations to the service. These may need to be acknowledged and added to the contract as a variation.

Change can be both a source of risk and a potential opportunity to extract additional benefits from the project.

Good change management processes incorporate the following features:

- Appropriate protocols are in place to manage change;
- Appropriate project and/or staff have the authority to request and authorise changes and price changes;
- Potential changes are assessed and consultation with appropriate stakeholders is undertaken;
- Changes are appropriately prioritised and their implementation is properly resourced, documented and formally agreed;
- Changes do not compromise value for money outcomes or increase risk (where possible); and
- Changes are monitored for the quality service provision of the services.

Effective change management in a project ensures that change events are managed smoothly without creating unnecessary risk.

Contract Variations

Obligations under the contract may be varied either intentionally or unintentionally. The Project Manager / Contract Manager should develop a process to ensure that the contract is only varied intentionally and that these variations are documented.

In procurement and when developing the contract the following should be undertaken:

- Identify the procedures under the contract for varying the contract and within the Project Management Plan controls;
- Identify the circumstances in which there will be the greatest risk of unintentional variation and limit this risk; and
- Incorporate these identified risks into the project risk management register, implement mitigation strategies and monitor the risk.

Monitoring performance

Monitoring a project and a consultant’s/contractor’s performance is important across the life of a project. As a project evolves changes may need to be implemented, and therefore ongoing review and monitoring should be undertaken to ensure that management is sufficiently informed of current and emerging risks and issues.

Regular project status meetings and reviews should be undertaken and reviewed:

- Project objects and expectations against actual project outcomes and benefits;
- Time, Cost, Quality and Project Budget updates;
- Issue and Risk Management updates and associated action logs;
- Change requests in the project, external to the project that affect the project, or as a result of the project moving from one stage to another; and
- Knowledge sharing, and project deliverables review, acceptance and approvals.



Typical project status reports include updates on:

- Key decisions (including approvals) and actions from previous meeting / status reports;
- Project progress, including status of design and construction activities compared to design and/ or construction programs;
- Work undertaken in the report period;
- Work planned but not undertaken in the report period and the action being taken to rectify;
- Work planned to be undertaken in the next report period;
- Planning, building regulations, EPA consents (if required) and fire officer consents;
- Project master program (updated);

- Tendering report including status report on sub-contracts;
- Inspections, testing, samples, mock-ups and acceptance;
- Change requests (Principal);
- Change requests (Service Provider(s));
- Financial report, incorporating status and cash flow for the project and availability of funds statement;
- Risk and issues report; and
- Health and safety report, insurances, compliance and obligations.

Project completion and closing out a project

Commissioning and hand-over report

The commissioning of a project must be given consideration throughout the project, starting during procurement. Although commissioning does not actually occur until the final stages of project implementation, its planning and preparation should take place much earlier.

The objective of the commissioning is to ensure that the facility is equipped and operating as planned upon completion of construction. Commissioning, completion and hand-over are very much interlinked.

Some projects involve multi-provider service delivery. In these projects the projects manager's involvement in commissioning planning and hand-over becomes much more pronounced than if a single party delivers the whole of the services.

The actual commissioning, completion and hand-over procedures required will be specific to each project. However, the main considerations will generally cover the following requirements:

- Preparation of lists identifying deficiencies (defect list, which should include pictures as a record to compare when the defect has been rectified);
- Program for carrying out all remedial and completion work;
- Training plan / program for staff and / or users of the facilities;
- The provision of 'as-built' drawings and installed record drawings, plans, schedules, specifications, performance data, test results;
- Commissioning and test reports, operating and maintenance manuals, including related health, safety and emergency procedures;
- Planned maintenance schedules and warranty provisions;
- Statutory inspections and approvals (including certification, notices and determination reports); and
- Copies of any reports (such as independent engineer's reports) required by the financiers.

Procurement and Contract Management is considered successful if:

- The arrangements for service delivery continue to be satisfactory to both parties;
- The expected business benefits and value for money are being achieved;
- The supplier is co-operative and responsive;
- The supplier understands its obligations under the contract and there are no disputes or surprises that negatively impact the project; and
- The relationship is consultative whereby communication is reciprocal and transparent; professional and objective debates over changes and issues occur and change is effected to minimise negative impacts and efficiencies are being realised.

Useful Terms

Bid shopping: is a term used in construction law, defined as revealing bid prices to subcontractors prior to the award of a contract to obtain a lower cost. It might also occur after a contract is awarded when a contractor shops for companies willing to do the subcontracting work more cheaply. Different bid shopping rules exist, based on the type of project and the laws in the region where the project is planned. Government forbid bid shopping because it might encourage the use of inferior materials or poor workmanship to increase profits for the contractor and create unfair competition.



Fair: Being unbiased, reasonable and even-handed. Being fair does not mean satisfying everyone or not reasonably pursuing one's legitimate interests. A fair decision may still adversely affect parties.

Party: Client, tenderer or service provider. An entity's role in a procurement will determine whether it is a client, tenderer or service provider for that procurement.

Procurement: All activities involved in acquiring goods or services either outright or by lease (including disposal and lease termination). Includes acquiring consumables, capital equipment, real property, infrastructure, and services under consultancies, professional services, facilities management and construction.

Service provider: Includes contractors, subcontractors, suppliers and consultants that contract to provide goods or services.

Tender: Includes a price, bid, offer, quotation, consultant proposal or expression of interest lodged in response to an invitation or request for tender.

Tenderer: Entity submitting a tender.

Value for money: The benefits, compared to whole-of-life costs.

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Appendix & Further Reading

Key reference documents related to procurement and consultant/contractor management include:

- The Model Code of Conduct for Local Councils in NSW and the supporting guideline provides further information regarding conflict of interest's requirements in accordance with the Local Government Act 1993 and where a copy of the Model Code of Conduct for Local Councils in NSW can be found at: <http://www.olg.nsw.gov.au/sites/default/files/Model-Code-of-Conduct.pdf>
- Tendering Guidelines for NSW Local Government can be found at: <http://www.olg.nsw.gov.au/>
- Insurance: For information on specific types of design and construction insurances refer to the NSW 'Insurance for Government Construction Projects Guidelines', available at <https://www.procurepoint.nsw.gov.au>. This Guideline provides guidance to agencies arranging construction related insurance involving external service providers, and information to service providers about the NSW Government approach to insurance and provide an in-depth overview of insurances
- Also refer to the Australian Procurement and Construction Council Incorporated (APCC) Professional Indemnity Insurance (PII) Guidelines in the Building and Construction Industry (APCC Guidelines) available at www.apcc.gov.au. This document outlines approaches that can be used to establish the level of cover for PII. Information can be found at: <http://www.apcc.gov.au/>
- Standard contracts are available for purchase from: <http://infostore.saiglobal.com/store/default.aspx>
- For more information related to warranties and guarantees refer to: <http://www.accc.gov.au/> or <http://www.consumerlaw.gov.au>.
- The ICAC publication "Direct Negotiations with Proponents – When, Why and How" is a useful resource for public agencies, including local councils. For more information related to conflict of interest refer to: <http://www.icac.nsw.gov.au/about-corruption/definition-public-official-authority>.

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