Department of **Treasury and Finance**

Investment Lifecycle and High Value/High Risk Guidelines

PROCURE

Draft

Victoria

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Special terms

Term	Description
Code of practice	Code of Practice for the Victorian Building and Construction Industry
Evaluation team	A team that assesses tenders against evaluation criteria to identify the most suitable offer
Performance measures	Quantitative and qualitative measures to assess how well a contractor is performing
Procurement strategy	The high-level plan to achieve procurement objectives through a structured program of activity (more information in the procurement strategy supplementary guidance)
Project plan	A plan for managing project delivery that outlines or refers to management procedures for matters such as resource capacity, schedules, milestones, budget management, communication plans, stakeholder management and risk management
Statement of requirements	A statement describing the essential requirements for goods, products or services (also referred to as a specification); it may include performance measures or standards.
Supplier market capability	The ability of suppliers to deliver the project and meet its time, cost and quality objectives

1. Context

Make sure the market interface involves a shared understanding of the need, with clear specifications and expectations

1.1 Purpose of the guideline

This guideline addresses the processes and requirements of project tendering, the third stage of the investment lifecycle. This phase clarifies and validates the service need, refines the procurement strategy, specifies the requirements to be tested in the market and identifies the preferred provider. It also refers to related processes and guidance material regarding procurement and tendering.

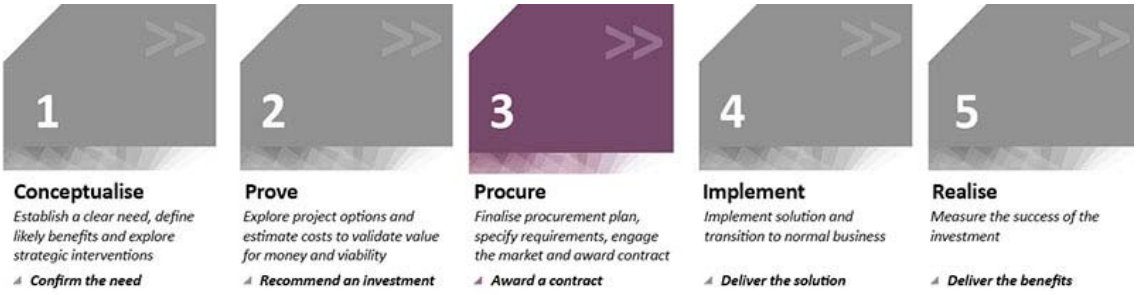

Figure 1 The five stages of the Investment Lifecycle Framework

This guideline is concerned with the third 'procure' stage of the investment lifecycle.It is part of **Investment lifecycle and high value/high risk guidelines** and should be used in this context and its supplementary material. Of particular relevance for this stage is the technical guideline on the procurement strategy used in the development of the business case.

The guidelines address specific requirements for projects classified as 'high value/high risk' [1] investments, but can be used for any investment, whatever its type, complexity or cost.

1.2 The procure stage

Tendering is a phase of the procurement process in which government seeks to attract offers from suitable suppliers and to select the one that offers best value for money in meeting its requirements.

Tendering is a communication process in which the government client and prospective suppliers work to establish a shared understanding of what is required from the project and the process/key selection criteria. A sound understanding of the requirements is critical so that tenderers have much certainty as possible, when planning and pricing offers.

[1] Projects exceeding $100 million are considered High Value/High Risk or otherwise classified as high risk are subject to additional processes.

The tendering process sets the foundations for the project delivery relationship, and in some instances can introduce the key members of project teams on both sides before tender selection is finalised (subject to probity).

This project tendering guideline explains how departments and agencies should carry out a tender process for a project. It applies to public construction and other asset-related projects such as information and communications technology (ICT) projects. It also considers key activities to move the procurement strategy developed for the business case through to a contract endorsement, including establishing good contract management procedures.

The primary tasks for project teams during the tendering phase are to:

- review and refine the procurement strategy developed for the business case;
- document project requirements in greater detail;
- establish a tender selection panel and evaluation criteria;
- develop and issue the expression of interest (EOI);
- carry out Gateway 3 (*Market readiness*) review, if required;
- develop and issue the request for tender (RFT) or request for proposal (RFP);
- evaluate tenders;
- undertake Gateway 4 (*Project tendering*) reviews if required;
- appoint the preferred contractor(s);
- finalise the contract(s), following negotiations and relevant approvals; and
- establish contract management processes.

The tendering process results in a commercial arrangement, achieved through a formal, standard process in government. However, tendering is not just a routine process; it involves strategic considerations that need to be taken into account in designing or refining the procurement strategy.

Note: It is important for public sector agencies to be well informed on commercial issues and the impact of such things as taxation when dealing with commercial suppliers. This is particularly important in complex dealings, with a significant financing component.

Government agencies should obtain professional advice from subject matter experts with relevant commercial and professional skills. This includes lawyers, financial advisers, risk specialists, procurement advisers and industry experts.

2. Project tendering

The tendering process needs to be tailored to the project requirements, the relationships with and within the supplier market, the size of the supplier market and the existing commercial realities. Such matters need to be analysed before starting a tendering process so their implications for the process and outcome are clearly understood.

Clear and considered communication in the tendering phase will allow government clients and prospective suppliers to have a shared understanding of what is required. It may include more than issuing a tender specification, interactive tendering for example, allows specific issues to be clarified during the tender process. This understanding is critical for both parties so that tenderers can plan and price their offer where that is possible, and provide other ways of settling the outcome where it is not possible. Lack of clarity at this stage can result in the inclusion of risk premiums or contractual disputes during construction.

2.1 Understanding the market and the legal and policy context

Even if a detailed procurement strategy is already in place, it should be revisited at the start of the tendering phase. The project tender team should closely examine the market:

- the structure and maturity of the supplier market;
- their capabilities;
- their commercial viability and capacity to take on risks;
- the degree of competition;
- the capacity available (the extent to which the market is affected by the business cycle, other tenders in the market, shortage of resources or sector-specific issues); and
- other commercial circumstances.

With this understanding of the market, requirements can be described in terms of meeting the project objectives and giving the prospective tenderers as much certainty as possible to manage the risks they perceive in the project. It is important to reduce avoidable uncertainties and manage unavoidable ones so they do not increase costs unnecessarily.

The government team responsible for the tender should also have industry and market knowledge so it can form a view as to whether the offers from tenderers will meet government needs, are achievable and offer the best value for money solution. They need to harness this knowledge to determine whether the proposed way of engaging with the market is the most effective way to find the right supplier, encourage competition and provide an outcome that meets all the project requirements.

Victoria has adopted the key elements of the National Code of Practice for the Building and Construction Industry. Set out below is an overview of the impact of the code for Victorian projects. Advertisements for tenders, expressions of interests (EOIs), etc. to which the Victorian Code and Victorian guidelines apply must include a statement that makes clear the Victorian Code and Victorian guidelines must be complied with and will apply to the work and those performing the work.

The Victorian Code of Practice for the Building and Construction Industry

The National Code of Practice for the Construction Industry (the national code) was developed jointly in 1997 by the Commonwealth, state and territory governments.

It contains industrial relations, occupational, health, safety and rehabilitation (OHS&R) and workforce reform elements. These elements are adopted by the Victorian Government's Code of Practice for the Building and Construction Industry (the Victorian code).

Implementation guidelines were developed to help achieve the objectives of the Victorian code and, in particular, the industrial relations, OHS&R and workforce reform elements.

These guidelines reflect the Victorian Government's commitment to greater flexibility and productivity within the State's building and construction industry and to ensure the government maximises value for money on its infrastructure investments.

In particular, the guidelines support the following outcomes:

- compliance – compliance with the law, without exception;
- productivity – projects should be delivered on time and within budget;
- safety – parties should achieve and maintain high standards in OHS&R; and
- freedom of association – parties must recognise the right of individuals to be or not be involved in lawful industrial activity and to be free from harassment in relation to workplace relations matters.

These guidelines apply to all public building and construction work that is the subject of an EOI or RFT on or after 1 July 2012.

Government departments, other public bodies and principal contractors are responsible for ensuring the application of, and compliance with these guidelines through:

- ensuring that compliance is included as an integral component of their contract management procedures; and
- all expressions of interest, tender and contractual documents clearly setting out the requirements.

Any queries in relation to the Victorian code and guidelines can be submitted to the Construction Code Compliance Unit in the Department of Treasury and Finance. The unit has been established to promote awareness of the Victorian code and guidelines and to monitor compliance with the Victorian guidelines and receive reports of alleged breaches.

Model tender and contract documentation is available to assist Victorian government departments, public sector bodies and contractors to comply with the code and guidelines.

Victorian government departments and public bodies must consider and document the extent to which compliance with the Victorian code and guidelines is required on a project-by-project basis. They are also responsible for ensuring all EOIs, tenders and contractual documentation clearly set out the requirements of the Victorian code and guidelines and include relevant model clauses. Contractual documents must incorporate the requirement for the contractor, consultants, related entities and subcontractors (as applicable) to comply with all aspects of the Victorian code and guidelines. This includes but is not limited to allowing authorised personnel to:

- inspect any work, material, machinery, appliance, article or facility;
- inspect and copy any record relevant to the project;
- interview any person; or
- as is necessary to demonstrate compliance with the Victorian Code and the guidelines.

Copies of the Victorian code, guidelines and model tender and contract documentation are available at www.dtf.vic.gov.au. The Construction Code Compliance Unit can be contacted by email at vicccc@dtf.vic.gov.au.

2.2 Project tendering tasks

The following table outlines the main tasks undertaken in the tendering phase.

Activity	Tasks
Preliminary	✓ Establish tender plan, probity plan and evaluation plan ✓ Allocate resources including establishing an evaluation team ✓ Prepare background information for tenderers, explaining project context ✓ Undertake market testing ✓ Market information session if required ✓ Conduct the EOI phase if applicable (*HVHR)
Preparation of RFT documents	✓ Expand background information for tenderers, detailing project context ✓ Prepare tender process conditions including evaluation criteria ✓ Prepare statement of requirements ✓ Prepare contract ✓ Prepare tenderer response schedules
Tender period	✓ Advertise and issue RFT or RFP (*HVHR) ✓ Conduct industry briefings ✓ Respond to enquiries from tenderers (make any amendments via addenda) ✓ Review and observe probity plan ✓ Receive, close and record tenders
Tender evaluation and negotiation	✓ Evaluate tenders against published criteria ✓ Seek any necessary clarifications ✓ Interview tenderers and check references ✓ Identify and notify preferred tenderer(s)(*HVHR) ✓ Contract negotiations, 'subject to approval'
Review and approval	✓ If relevant, a Gateway 4 should be undertaken before finalising the contract ✓ Obtain all necessary process approvals ✓ Obtain financial approval ✓ Confirm government intention to proceed
Contract award	✓ Accept tender and award contract (*HVHR) ✓ Notify successful and unsuccessful tenderers ✓ Execute contract ✓ Ensure appropriate contract management arrangements are in place ✓ Disclose the contract within rules, for example, by publishing it on the Contracts Publishing System

***HVHR:** approval by the Treasurer is required at these key points for material elements.

2.3 Law and policy regarding tendering

Tendering processes are subject to policy, probity and legal requirements. Breaches of these requirements can lead to delays, litigation, complaints and criticism from tenderers or the Auditor-General, for example.

The following textboxes briefly outline some sources of law and policy regarding Victorian public sector tendering. For details of Victoria's public construction policies visit the Department of Planning and Community Development website.

Policy

Victorian Government policies regarding construction procurement are:

- ✓ Ministerial Direction No. 1: Tendering Provisions for Public Construction Made Pursuant to the *Project Development and Construction Management Act 1994*, the Guide to Tendering Provisions for Public Construction, and the Practice Note for Tendering Provisions for Public Construction.
- ✓ Ministerial Direction No. 2: Contractual Provisions for Public Construction Made Pursuant to the *Project Development and Construction Management Act 1994*, and the Guide to Contractual Provisions for Public Construction.
- ✓ Ministerial Direction No. 3: requires departments and public bodies to include a bushfire attack risk assessment in the design process for government construction of buildings of a public nature.
    - The risk assessment must be based on the methods in Australian Standard AS 3959 - 2009 Construction of buildings in bushfire-prone areas.
    - This direction is supported by the Guide to Bushfire Provisions for Buildings of Public Nature, which sets out the method to be followed in undertaking the bushfire attack risk assessment.
- ✓ the Victorian Code of Practice for the Building and Construction Industry (Victorian code). The associated Implementation Guidelines came into effect on 1 July 2012.
- ✓ The National Code of Practice and its Guidelines apply to all construction projects directly funded by the Australian Government; and if indirectly funded where:
    - the value of Australian Government contribution is at least $5 million and represents at least 50 per cent of the total construction project value; or
    - the Australian Government contribution to a project is $10 million or more, irrespective of the proportion of Australian Government funding.
- ✓ The National Code also applies to any project that has an identified capital component where the Australian Government provides a package of assistance measures in advance of construction commencing.
- ✓ the *Partnerships Victoria* Framework comprising the National PPP Policy and Guidelines agreed by COAG in November 2008 in conjunction with the state specific Partnerships Victoria Requirements which apply to Victorian public–private partnerships. and
- ✓ the Victorian Government policy, which applies to all departments and agencies planning and progressing alliance contracting, published as the National Alliance Contracting: Policy Principles (July 2011).

Victorian Government Purchasing Board (VGPB)

VGPB policies apply to procuring goods and services other than for construction procurement (i.e. construction-related works and associated professional services).

Some other government policies apply generally to procurement, for example:

- ✓ the Premier's Policy Statement, Ensuring Openness and Probity in Victorian Government Contracts, 11 October 2000, and Implementation Guidelines from the Department of Premier and Cabinet (DPC);
- ✓ the Victorian Industry Participation Policy (VIPP);
- ✓ ethical employment;
- ✓ fair payments; and
- ✓ information and communications technology (ICT) procurement policies.

Further information can be found at www.vgpb.vic.gov.au.

Law

In practice, the following areas of law are most relevant to a government tender process.

- ✓ Misleading and deceptive conduct is dealt with under the *Trade Practices Act 1974* (Cwlth) and the *Fair Trading Act 1999* (Vic).
- ✓ *Tender process contract:* A court may treat the relationship between the State and each tenderer as a contractual relationship in which each tenderer agrees to prepare and submit a tender according to the tender process conditions, in return for the State evaluating tenders according to the tender process conditions and following the conditions generally.

  The State is required to act fairly in the tender process. An aggrieved tenderer may seek contractual damages against the State if the tender process is not followed or if the State does not act fairly.
- ✓ *Administrative law: S*ome procurement decisions may constitute 'administrative decisions' that can be subject to judicial review.
- ✓ *Statute law, including subordinate legislation imposing requirements about tendering:* for example, ministerial directions made under section 30 of the *Project Development and Construction Management Act 1994.*
- ✓ *Security of Payments Act:* The Building and Construction Industry Security of Payment Act (2002) assists contractors to be paid their entitlements under building contracts. There are some important consequences for government contracts including consultancy contracts.

Further information can be found at:
http://www.dpcd.vic.gov.au/planning/buildingpolicy/publicconstruction/legislation

2.4 Monitoring and advice on tendering for HVHR projects

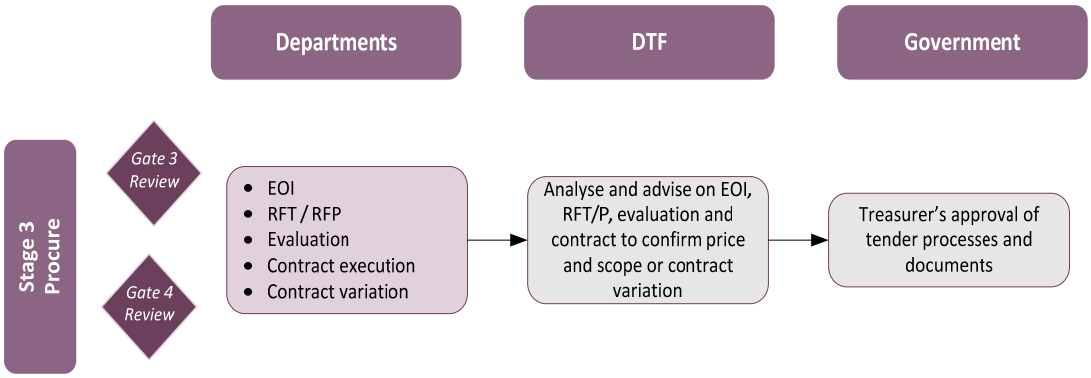

Figure 2 HVHR process requirements

During the tendering process departments develop a range of documents, which for **material** components, require the Treasurer's approval for HVHR projects. These include:

- expression of interest (EOI), prior to release;
- request for tender (RFT), prior to release;
- preferred bid, prior to announcement; and
- contracts, prior to signing and any major variations.

Departments should work with DTF during this phase to avoid delays in preparing advice to the Treasurer due to DTF's unfamiliarity with project requirements and market factors.

2.5 Success of a tender process

During the tendering phase, the broad vision for a project is translated into specific requirements and a supplier is engaged to deliver those requirements. It is common for difficulties to arise with:

- communicating the requirements clearly to the market;
- setting appropriate evaluation criteria; and
- setting the correct parameters for project delivery.

Government needs to conduct the tender process in a fair and reasonable way so that it gets the best outcome, avoids risks that could compromise the integrity of the process, and also avoids damage to reputations or legal challenges to the outcome. Departments and agencies intending to call tenders for a major contract are required to develop a probity plan in advance of commencing the tender process.

The success of a project depends on activities undertaken during the tendering phase, for example, documenting requirements, selecting a contractor and negotiating commercial terms. A project is considered successful if:

- it is delivered on time and on budget;
- the specifications are met, including quality and performances standards; and

- project objectives are achieved, including social, environmental and economic benefits.

It is important to get things right at each step in the procurerment process. The cost of changing or rectifying requirements increases considerably as the project progresses. Failures during procurement may lead to problems during the delivery or operating phases.

Care should be taken to avoid problems in the tender process, carefully managing tender process risks. For example, tender teams should identify and deal with prospective conflicts of interest and avoid breaches of confidentiality. Tender process risks may best be managed through a risk plan or the probity plan, depending on the circumstances.

Good practice in the RFT process includes:

- ✓ making sure there is sufficient funding for the cost of the project and associated risks;
- ✓ having clear, comprehensive and complete tender documents;
- ✓ allowing enough time for tenderers to prepare tenders;
- ✓ providing the opportunity for innovative solutions; and
- ✓ avoiding unnecessary cost to both the State and the tenderers.

3. Pre-tender essentials

The tender phase requires the pre-tender foundation work to be done properly. This includes the requirement to secure government endorsement for the investment, obtain any Treasurer's approvals for HVHR projects, check cost estimates and review the procurement strategy. Probity is another important early consideration.

The essential pre-tender tasks include the following:

- Obtain formal government endorsement of the project:
  - including its objectives, scope, budget, delivery timetable and desired performance. Usually this approval is at Cabinet or ministerial level or as required by relevant organisational processes based on a full business case;
  - secure the commitment and availability of sufficient funds to cover the expected project cost and associated risks; and
  - establish a clear intention to proceed with the project, and later obtain approval to proceed to tender.
- undertake a review of the full project risk assessment;
- address resourcing and planning including requirements to manage probity, EoI and RFT preparation and tender evaluation;
- confirm a single point of contact for the tendering process;
- develop or review the probity plan;
- review the procurement strategy and confirm the procurement delivery method and how tenders will be sought;
- confirm that contract administration procedures are acceptable; and
- undertake Gateway reviews (i.e. *Gate 3: Readiness for market* reviews should have been completed if required).

Many of these processes will require appropriate approvals for example, by the project steering committee.

3.1 Government endorsement

Obtain formal government endorsement and secure funding before requesting tenders. This is done:

- through a decision of Cabinet – for any project requiring additional budget funding;;
- at ministerial or departmental level (according to delegations or other authority) – for smaller projects; and
- from Treasurer – for business cases for larger capital projects undertaken by government business enterprises – threshold criteria apply to these. The relevant threshold varies according to the size and risk profile of the entity.

Note: for HVHR projects additional Treasurer's approval steps are required.

Failure to obtain sufficient funding before issuing an RFT is poor tendering practice and may breach the Code of Practice for the Building and Construction Industry.

3.2 Probity

> Probity can be defined as -
>
> "a defensible process which is able to withstand internal and external scrutiny – … which achieves both accountability and transparency and provides tenderers with fair and equitable treatment."

Source: Australian Government Solicitor, Commercial Notes No. 15, 14 March 2005 (http://www.ags.gov.au/publications/agspubs/legalpubs/commercialnotes/ComNote15.htm)

It is a requirement for all major projects (exceeding $10 million, complex or involving high risk) to have a probity plan in place and to have independent oversight of probity.[2] Although probity is relevant to all stages of procurement, it is critical during the tender phase.

Before starting the tendering phase (EOI, RFT or RFP), appoint a probity adviser or auditor, or both, and develop an appropriate probity plan (if this has not already been done). Review the probity plan before beginning the tendering phase. Follow the plan throughout. Revisit the plan regularly to ensure necessary probity reviews are undertaken and that the requirements are appropriate and are being followed.

The VGPB Code of Conduct for Commercial Engagements and the *Partnerships Victoria Practitioners' Guide* (Chapter 22) detail probity requirements for projects.

Appendix A provides a checklist for probity issues.

3.3 Pre-tender cost estimate

Before preparing RFT documents, project/tender teams should validate the expected total project cost, drawing on the high-level project cost estimate from the business case, which will have been endorsed and funded by government.

As further design and development work is done, the likely total project cost can be estimated more accurately and the total project budget revised. The pre-tender estimate of project cost should be validated, for example, with assistance from a quantity surveyor, an engineer and other relevant professional experts.

The reassessment should consider not only the target or most likely cost for the contract, but also how emerging events or circumstances are affecting costs (positively or negatively). This should be a normal part of the ongoing review and costing of project risk.

As well as reviewing the estimated contract value, consider the other significant elements of cost that could impact on the project including:

- process costs (e.g. project management, legal and procurement advice, rent for accommodation for project/evaluation team, the environmental approvals process);
- other project costs (e.g. professional advisers, land acquisition);

[2] Premier's Policy Statement, *Ensuring Openness and Probity in Victorian Government Contracts*,

- costs outside the project, that is, not chargeable to the project, but that might need to be taken into account in making decisions (e.g. supplementary work to implement the project successfully or system upgrades);
- post-project delivery costs (e.g. maintainability and operational costs); and
- change management processes and training.

An unrealistically low pre-tender budget can lead to problems at a later stage. For example:

- if insufficient funds are available the project may be cancelled after tenders are received or delayed while seeking additional funding.
- There will be a perception of cost 'blow-out' if the government is asked for additional capital or recurrent funding.
- If tenderers are required to cut scope to fit an unrealistically low budget, there will be delays and the outcome may be below expectations. Any material change in scope for a project funded through the State budget process will require government approval.

A schedule of separable portions that can be excluded by the client from the project scope can be included to manage cost and schedule growth in the documentation.

A soundly based pre-tender cost estimate will also assist in tender evaluation.

3.4 Procurement strategy review

Before starting work on the EOI, revisit the procurement strategy. When developing the procurement strategy for the business case, some questions that affect the tender should have been considered; for example:

- Will the contract cover delivery only or will it include maintenance or operations as well?
- Will the design and delivery be done in multiple stages?
- Should the requirements be specified in physical or performance terms?
- How will the components be packaged?
- Which party will manage the program and bear the integration risk?
- What is the appropriate contractual framework for delivery?
- Does the procurement strategy support government priorities, such as security of critical infrastructure, timelines on event-driven projects, or working in an operational environment?
- Will the tender process involve one or more stages?
- Will the contract execution be affected by an operating service or facility?
- Does the tender strategy address the occupational health and safety and industrial relations issues required under the Victorian Code (refer Chapter 2)?

The procurement strategy should be reviewed following completion of the EOI process and may need further refinement before the RFT process is started.

High or medium-risk projects may be subject to a Gate 3 review (*Readiness for market*) before the project tendering stage. If there was no Gate 3 review, the procurement strategy should be reviewed at the start of the project tendering stage.

This review can confirm the business case and check that:

- Government is committed to funding and implementing the project.
- The procurement strategy is robust and the development and delivery approach are still appropriate.
- The project plan is appropriately detailed and realistic.
- The project governance, controls and organisation are defined.
- Financial controls are in place.
- Resources, including funding, are available for the whole project.
- Suppliers' market capability and track record, or the existing supplier's capability and performance, is fully understood.
- The approach will facilitate a good client-supplier relationship.
- Appropriate project performance measures and tools are being used.
- Quality procedures have been applied consistently since the previous review.
- Occupational health and safety and sustainability requirements are considered.

4. The tendering phase

4.1 Overview

Once all the pre-tender essentials are completed, the tendering phase can start. This phase usually involves the steps shown in Figure 3.

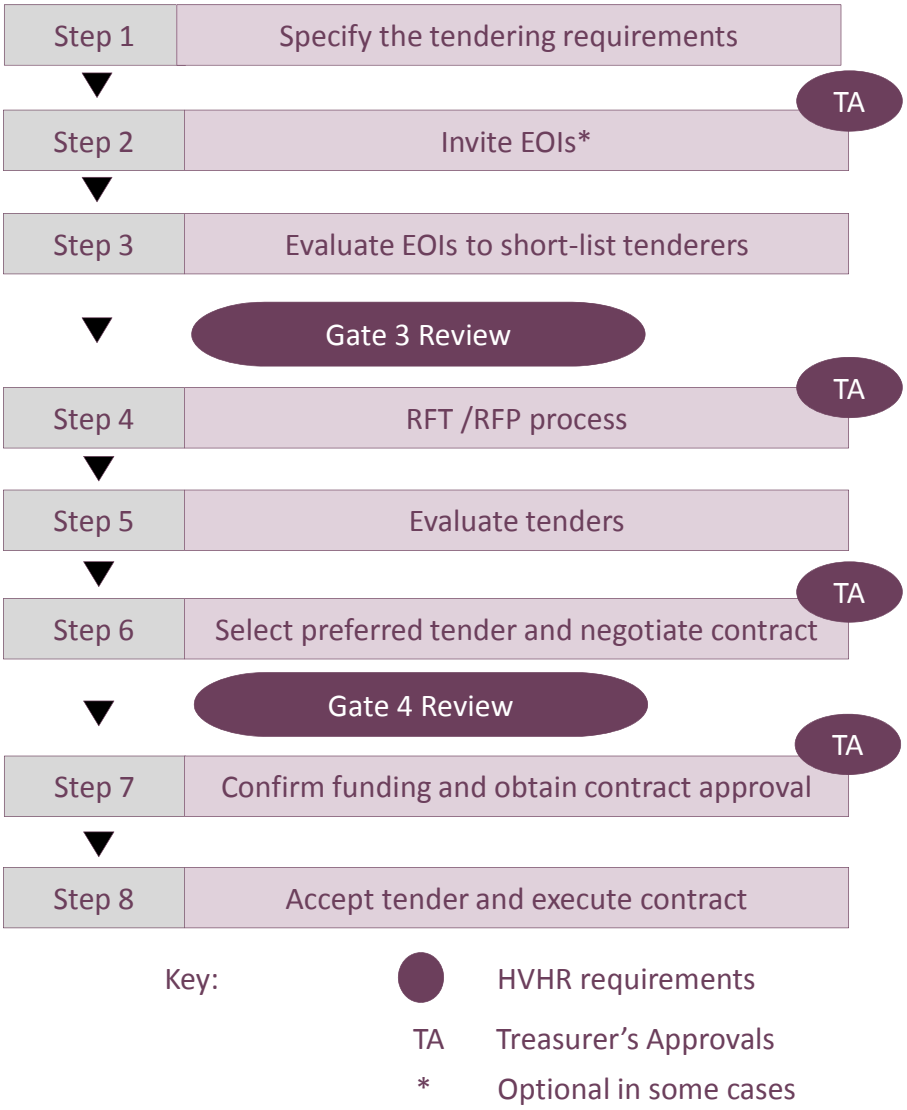

Figure 3 Key steps in the tendering process

4.2 Specify the requirements (step 1)

Specifying the project requirements well is critical to achieving a good outcome. If the market does not clearly understand what is required, the investment is unlikely to meet expectations.

4.2.1 Develop the requirements

A top-down approach to developing the requirements is recommended, taking the steps outlined below.

Action	Sign-off by
1. Confirm the project objectives of the business case	✓ Project owner
2. Confirm the success criteria of the business case	✓ Project owner
3. Specify the business functionality and user requirements to meet the success criteria	✓ Relevant departmental executives ✓ Key users ✓ Project owners ✓ Key stakeholders ✓ Service delivery partners
4. Specify the technical requirements and/or performance criteria required to achieve the business functionality and user requirements	✓ Relevant departmental executives ✓ Key users ✓ The client(s) ✓ Key stakeholders ✓ Service delivery partners

Good practices for developing a statement of requirements include the following.

- Develop the project requirements and obtain sign-off according to the steps above.
- Be clear who the client is (particularly if there is more than one) and who is the authorised client representative.
- Identify and involve all key stakeholders, service delivery partners and parties who can adversely affect the delivery of the project or whose input can improve the project's success.
- Use clear, accurate and unambiguous language.
- Avoid being too prescriptive where this is not necessary.
- Clearly distinguish between what is mandatory and what is desirable.
- Ensure that requirements are traced throughout the development process.

A poor statement of requirements may:

- ✓ increase project costs;
- ✓ exclude potential tenderers;
- ✓ result in fewer tenders or fewer compliant tenders; and
- ✓ discourage innovation.

Appendix B has more information about preparing a statement of requirements.

4.2.2 Managing requirements development

An essential part of this process is managing the requirements, including tracing their development. For effective traceability, it may be important to record:

- the requirement;
- the requirement's rationale;
- the requirement's source;
- relevant stakeholder(s);
- who is authorised to modify the requirement;
- modification history;
- the requirement's relationship to other requirements; and
- related deliverables.

The project/tender team should assess the implications of modifying a requirement using this information. It can be critical to understand the impact of modifying a requirement while the complete set of requirements is being developed. Managing the requirements systematically assists with:

- reporting appropriately to stakeholders (stakeholders' traceability needs differ according to their goals and priorities);
- developing and maintaining a coherent set of requirements;
- developing appropriate tender evaluation criteria that reflect project requirements;
- evaluating tenders against the requirements quickly and thoroughly; and
- effectively assessing project deliverables against requirements.

A number of requirements traceability software tools are available to assist in this task. These are used in the software development industry. Examples include DOORS, RequisitPro, CaliberRM and RTM.

4.3 The EOI phase (steps 2 and 3)

The EOI phase is an optional, but common step in the tender process, which aims to reduce costs to unsuccessful tenderers. It is the first stage of a two-stage tender process:

1. seeking EOIs to develop a short list; and
2. seeking tenders from the short-listed organisations.

Key tasks:

The EOI process is preliminary to the RFT stage and has shorter response times because it seeks less detailed information. Although it is less complex and less formal than an RFT, it still must be conducted properly with clear rules about the process (e.g. closing time, date and place for lodging EOIs, evaluation criteria and confidentiality).

4.3.1 What is the purpose of the EOI phase?

The purpose of the EOI is to:

- formally advise the market of the project/services that government seeks to have delivered;
- communicate to the market the proposed timeframes, evaluation criteria and hurdles to be met for the project to move forward;
- confirm the level of market interest in the project and provide an avenue through which potential EOI respondents can comment on the proposed project structure; and
- gain EOI responses from the market which allow government to shortlist bidders to proceed to the RFT phase who are most capable of meeting project objectives over the project term.

4.3.2 When to use an EOI

Careful consideration should be given to whether an EOI process is appropriate. It will generally be more appropriate for larger, more complex projects where the cost of developing a tender response is likely to be significant. An EOI phase may be chosen to:

- alert industry to a forthcoming tender and gauge the likely market interest in the project;
- obtain information about the types of solutions the market may be able to offer in response to the requirement (particularly in technology-related projects);
- survey the market to see who is available to tender, before finalising the contracting model;
- obtain feedback on the approach being proposed; and
- minimise the cost of tendering to the industry and to government by limiting the number of tenderers completing the full documentation to those who demonstrated suitability. For construction projects, the Code of Practice recommends that, generally, only three to six tenderers should complete full tender documentation.

4.3.3 Content of an invitation for EOI

An invitation for EOI usually includes:

- a statement that the EOI process is the first of a two-stage tender process and a brief explanation of what is anticipated in each stage;
- a description of the project and the requirement to be tendered; and
- the conditions applying to the EOI process, including the evaluation criteria for short-listing, the closing date, time and place for lodging the EOI.

It may also include:

- an overview of the likely commercial structure or indicative commercial terms;
- the proposed project timetable;
- detailed project-specific information, which can be included as appendices;

- a schedule for respondents to complete detailing relevant information such as company details, a capability statement, and the company's approach to meeting the requirements; and
- a request for particular information needed to prepare the RFT documents.

The invitation for EOI should not require potential EOI respondents to expend significant resources in preparing an EOI response.

4.3.4 Evaluation of EOIs

The evaluation of EOIs, based on the evaluation criteria specified in the invitation, should lead to a shortlist of parties to be invited to continue in the process and to whom the RFT will be issued.

The evaluation process is focused on forming a view on whether the parties have the requisite capability to deliver the project. This process will usually result in some parties being advised that they will not be invited to move forward in the process. The number of parties shortlisted will vary from project to project. However, the objectives of the process should be to:

- only shortlist parties which government genuinely believes have the capability to deliver the project — parties should not be shortlisted to make up the numbers;
- shortlist an appropriate number of bidders to both maintain competitive tension and protect against the risk of a withdrawal while also maintaining the motivation for bidders to invest in the process by not shortlisting too many.

Following the shortlisting process, EOI respondents should be advised as to whether they will be included in the RFT process or not. Those on the shortlist should be advised on next steps and the expected timelines.

4.4 RFT (step 4)

The purpose of seeking tenders is to select the best value offer from the organisation assessed as best able to deliver the requirements. In the public sector, the tender process should meet high standards of probity to ensure open competition and a fair process.

Tasks during the RFT phase are:

- Determine an appropriate risk allocation between the parties, including the delivery timeframe, price and project-specific risks.
- Determine liquidated damages or other gain-share/pain-share mechanisms.
- Ensure the contract clearly reflects the risk allocation.
- Select the right solution and tenderer through a fair selection process.

4.4.1 Good tendering practices

The Code of Practice contains requirements for all parties involved in public construction tendering. Some of the requirements are good practice that can be applied to other large public sector asset procurement.

The Code of Practice says:

- ✓ During the planning phase, clients must allow sufficient time for project definition, design and documentation, and must undertake adequate, robust project feasibility evaluation and begin effective construction planning during design.
- ✓ Clients must ensure adequate project funding is available before starting the tendering process (i.e. before EOI release for some procurements, e.g. *Partnerships Victoria* projects).
- ✓ Tender documents must specify requirements clearly and precisely and be appropriate for the particular procurement strategy.
- ✓ All parties must consider the cost of tendering and seek to constrain it.
- ✓ Clients should encourage innovation and alternative solutions by using performance-based specifications where appropriate, by making innovation a high-priority evaluation criterion and by allowing a sufficient tender period.
- ✓ Tender documents should clearly specify what constitutes a complying tender; tenders that do not comply in a material way must be rejected.
- ✓ Tender documents must have sufficient detail to avoid undue design and documentation work before selecting a tender, unless the client offers to pay.
- ✓ Clients are obliged to issue complete tender documents and avoid amendments; the recommended practices regarding addenda should be followed in circumstances where amendments are unavoidable.
- ✓ Documents should be clear – to minimise the need for post-tender clarification.

4.4.2 Content of an RFT

An RFT invites tenders for delivering the project requirements. The content of the RFT varies according to the nature of the requirements and the chosen procurement strategy. However, the RFT usually includes:

- background information about the project, the client and the context;
- conditions applying to the RFT process, including evaluation criteria, tender closing time/date and place for lodgement;
- a statement of requirements, specification, designs and other information about the project requirements;
- contract terms reflecting the client's preferred risk allocation; and
- tenderer response schedules that provide for all the information needed to evaluate the tender.

Documentation

For a major project, the RFT documentation can be extensive. There may be a core RFT document and supplementary material. Sometimes RFT documentation is so extensive that a data room is set up to allow tenderers to inspect the documents.

RFTs can take six months or more to develop, depending on the project complexity and project resources available. The RFT should not be issued until it is complete and properly reviewed.

As a general rule, the more detailed and accurate the information provided to tenderers, the better the quality of the tender. There is no benefit in withholding information from tenderers. However, it may be appropriate to warn tenderers that the State does not warrant the accuracy of certain information provided.

Changes and addenda

An addendum should be issued if changes are to be made to the RFT (or EOI). You should notify all tenderers if addenda are issued. All tenderers should have access to the same information and should have the same time to respond. Tenderer response schedules should require tenderers to note that they have received any addenda so it is clear that all tenderers have received the same information and made offers on the basis of complete information.

Evaluation

The RFT should be drafted to elicit the information necessary to assess tenders against the evaluation criteria and to compare them with each other. In the case of fixed-price tenders, request detailed cost information by separately costing individual items within the tender.

Develop evaluation criteria and weight each criterion to focus on the project's requirements. The evaluation criteria should help the evaluation team assess which attributes will lead to success. Government tells tenderers the criteria for selection and indicates their relative importance (for example, by identifying project-critical criteria). However, it should not limit itself by committing to detailed formulae or other evaluation approaches that may need review or revision. Consider other quantitative and qualitative information that may be identified during the RFT phase.

Examples

Tender documents used on comparable projects are useful references. Many EOI and RFT documents are publicly available and can be a useful reference for a new project.

4.4.3 Industry comment on a draft RFT

There may be significant benefits in seeking industry comment on draft tender documents. Benefits may include:

- providing advance notice to industry on the general structure and content of the RFT;
- improving the statement of requirements before releasing the final tender documents; and
- obtaining frank industry advice on the request documentation, the deliverability of the requirement and the reasonableness of the timeframes and approach being proposed.

Factors that may influence a decision to circulate a draft RFT for comment include:

- whether there is sufficient time to conduct such consultation;
- the number of tenderers expected (as consultation may be impractical with too large a group of potential tenderers); and
- the level of practical experience the client has had with similar projects.

Note: The confidentiality of the tender documentation must be considered in these cases.

Whether or not departments and agencies seek formal industry comment, there is value in seeking external advice from subject matter experts.

Advisers to a project should be excluded from submitting bids of their own or acting as advisers to tenderers, to preserve the probity of the tender process. Likewise any industry commentary process for the RFT needs to avoid giving an advantage to any tenderer.

Minutes of meetings held with tenderers, file notes, tenderer queries and responses should be kept on file and referenced during tender evaluation and contract execution.

Additional information about preparing an RFT can be found in the appendices:

- Appendix B: Preparing a statement of requirements;
- Appendix C: Content of an RFT;
- Appendix D: RFT release and communicating with tenderers;
- Appendix E: Evaluation criteria and tender evaluation;
- Appendix F: Contract negotiation and execution; and
- Appendix G: Framework for stakeholder management communication plan.

4.4.4 Interactive tendering

The interactive tender process provides an opportunity for an appropriate amount of direct interaction between the client and tenderers during the tender phase, particularly when preparing their initial response to the RFT documentation.

Individual tenderers have an opportunity to discuss their bid development, including the commercial and technical aspects, and to seek clarification and feedback in the context of the project brief and the client's expectations and requirements. This opportunity for discussion usually happens before bids are submitted.

A shared understanding promotes a better result!

The interactive tender process is mainly relevant for complex projects. An interactive tender process is recommended for PPP procurements. Agencies and their advisors should consider this approach more rigorously and consistently when designing the tender process and timetable. Guidance reflecting the current practice can be found in the National PPP guidelines /Practitioners Guide[3]. Appendix E to the National Guidelines provides detailed guidance on protocols for implementing an interactive tender process and the principles on which these are based. The interactive tender process is continually being refined therefore this guidance should be considered in light of ongoing contemporary practice.

4.5 Evaluate tenders (step 5)

Tender evaluation must be conducted properly for a good outcome and to avoid process problems. It is important to:

- appoint a probity adviser and/or auditor[4];

[3] http://www.infrastructureaustralia.gov.au/public_private/ppp_policy_guidelines.aspx

[4] VGPB Conduct of Commercial Engagements Policy provides guidance on the appointment of probity auditors and advisers.

- appoint suitably qualified evaluation team members, including external technical advisers, if required;
- establish and follow a sound evaluation plan and probity plan;
- evaluate tenders according to the evaluation criteria and the evaluation plan; and
- properly document decisions.

The tender evaluation process is described in detail in Appendix E.

The Code of Practice notes that clients must:

- ✓ not engage in any conduct that would defeat the purpose of a fair and transparent selection process and must avoid any practice that gives one party an improper advantage over another;
- ✓ predetermine the tender evaluation criteria and apply those criteria fairly;
- ✓ use selection and engagement procedures that are auditable, transparent and accountable;
- ✓ have tenders assessed by those with relevant skills and knowledge; and
- ✓ respect the intellectual property rights of all parties and not use intellectual property submitted with a tender to obtain prices from, or negotiate with, other tenderers for like or similar scope.

During evaluation, it may be necessary to clarify aspects of a tender. Clarify the bids of more than one tenderer until all significant commercial issues regarding the terms of the bids are settled satisfactorily.

A further step, which may be included where bids appear to be inconsistent with each other or with project budget estimates, is a formal best and final offer (BAFO) process. This involves a request for tenderers to revise their bids. But more often there is a less formal process in which tenderers are asked to clarify all commercial aspects of their bids.

A tenderer with no prospect of success should not be subjected to the BAFO process.

This should generally be done before negotiations start.

4.6 Negotiate contract and select preferred tender (step 6)

4.6.1 Recommended contract negotiation practices

Following clarification of details in shortlisted bids, a preferred bidder will be identified and a negotiation team will be established to negotiate the contract (refer to Appendix F).

Note: The procurement strategy and probity plan will guide conduct during negotiations.

Prepare for negotiations carefully, with a clear picture of project objectives. The outcome of the tender process should be sustainable for the successful tenderer. Contractor resources are unlikely to be properly focused if the contractor is extracting profit from an under-priced bid or coping with unforeseen risks.

The Code of Practice has strict requirements about contract negotiation, including the following.

- ✓ If no tender is acceptable, the client must not trade off one tenderer's price against another in an attempt to obtain a lower price.
- ✓ The client must exhaust negotiations with the initial best value tenderer before negotiating with subsequent tenderers.
- ✓ Clients must not negotiate with more than one tenderer at a time in an attempt to obtain a lower fee.

It is important to maintain a competitive environment among tenderers until all significant commercial issues are settled, so that:

- the risks presented by a tender, including all significant commercial issues, can be fully evaluated; and
- the preferred tender is determined and contract negotiations are finalised before the preferred tenderer is publicly advised and competitive tension is released.

PPP projects are subject to specific guidance on contract negotiation and tender selection.

HVHR projects will require Treasurer's approval at key stages of the procurement process. In some cases central agencies may be involved in the tender selection process.

Note: Competitive tension during the negotiation process will not always drive best value offers or lead to concessions benefiting government in the long run. Inappropriate risk transfer or concessions can threaten profitability and lead to the contractor adopting strategies to improve their position through contract claims that result in delays and cost increases. Consequently negotiations need to aim for sustainability for contractors while meeting the government's needs in a best value outcome.

4.7 Confirm funding and obtain contract approval (step 7)

The first steps after tender evaluation are to confirm that the tenders fit within the funding amount made available by government and identify any risks or shortfalls noted during the tender process. If tenders are broadly in line with expectations, a formal review of the business case is not generally required. However, if there are significant discrepancies between tenders and the expectations reflected in the business case, this must be addressed. The business case will need to be reviewed if tenders do not meet cost estimates or other significant expectations.

In the event that a decision is made not to accept any bids following a tender process, the Code of Practice recommends that the client should consider reimbursing tenderers for the reasonable costs of tendering.

Appropriate financial and process approvals must be obtained before a tender is accepted and the contract awarded. Process approval requirements differ according to the contract value, asset type and departmental arrangements. Financial approval requirements depend

on the delegations and other financial management arrangements within the client department and the complexity of the project or HVHR status.

4.8 Award and execute contract (step 8)

There are four main activities for this step.

4.8.1 Award contract

After advising the successful and unsuccessful tenderers of the outcome, arrange for matters that are needed before contract execution, for example:

- Treasurer's approval for HVHR contracts;
- a bank guarantee or other contract securities;
- insurance; and
- notifying successful tenderers of the superintendent (if required).

4.8.2 Execute contract

The person or people signing the contract on behalf of each party should be authorised to do that. Contracts for major projects are often signed by ministers or authorised senior staff. Media coverage of the contract signing may be involved.

4.8.3 Contract management arrangements

Ensure that appropriate arrangements are in place to administer and manage the contract properly. This includes managing the relationship with the contractor during the course of the contract. Ideally, this should cover making sure that those responsible for contract management thoroughly understand the tender process and its outcome, including the strategy embodied in the contract and the reasons for particular contractual conditions.

4.8.4 Payments on contract execution

Some contracts may provide for paying the contractor a deposit or mobilisation payment on contract execution. Ensure that appropriate paperwork is completed to allow for this.

5. Project assurance

There is a range of options for reviewing projects and making sure they have effective governance. Gateway reviews are mandatory for HVHR projects. Whether required or not, it may be useful to review the issues that would normally be considered in a Gateway review.

The third and fourth Gateway reviews (*Readiness for market* and *Tender decision*) are relevant here. They assess:

- whether the business solution is well defined in readiness for procurement;
- whether the market appetite and capacity is understood;
- value for money provided by the market in meeting the proposal requirements;
- the robustness and effectiveness of contractual and contract management arrangements; and
- whether the project is ready to be implemented.

There is more information at www.gatewayreview.dtf.vic.gov.au and in the Gateway review process guidance material.

5.1 Gate 3: Readiness for market

Gate 3 assesses the level of understanding of the supplier market and proposed procurement approach for delivering on the project's objectives. If appropriate, the review considers whether the project is ready to invite proposals or tenders from the market.

The aims of the review include:

- confirmation of the business case now the project is fully defined, and its alignment with required objectives and outputs;
- confirmation that the procurement approach is robust and appropriate;
- confirmation of funding availability for the whole project;
- checking that the supplier market capability and track record is understood;
- confirmation that the procurement approach will help create good client–supplier relationships;
- confirmation that the project controls and organisation are defined and financial controls are in place;
- confirmation that the development and delivery approach mechanisms remain appropriate and manageable;
- confirmation there are plans for the management of risk, business and technical issues, and that these plans will be shared with suppliers and / or procurement partners;
- confirmation that quality procedures have been applied consistently since the previous review;

- for a procurement project, confirmation that there is an appropriate procurement plan in place that ensures compliance with legal compliance and applicable VGPB rules, while meeting the project's objectives and keeping procurement timescales to a minimum;
- confirmation of stakeholder support for the project;
- confirmation that appropriate project performance measures and tools are being used;
- confirmation that the risk and issue management plans have evolved as the project lifecycle has progressed; and
- confirmation that internal organisational resources and capabilities will be available as required for future phases of the project.

Documentation reviewed during Gate 3 includes:

- tender documents (including specifications, the contract, conditions of tender and tenderers' responses), tender evaluation strategy and updated risk register;
- the business case;
- project costs to date against budget;
- the business change management plan;
- the procurement/acquisition approach and documented justification for it;
- the tender evaluation strategy and specified expected outputs;
- the updated risk register, issues log and risk management plans;
- an outline of project plans (to completion);
- the results of business, commercial or technical benchmarking;
- the proposed implementation strategy;
- updated market intelligence and supplier assessment;
- a specification of expected outputs and outcomes;
- a strategy for measuring project performance;
- an updated communication strategy and plan; and
- updated project quality documentation.

5.2 Gate 4: Tender decision

Gate 4 confirms that the recommended tender decision is appropriate *before* the contract is awarded to a supplier or partner. This gives an assurance on the process used to select the supplier or partner rather than the selection itself.

The aims of the review include:

- confirmation that the business case includes an updated benefits management plan, now that the bid information has been confirmed;
- confirmation that the desired objectives and outputs are still aligned with the wider organisational business strategy;
- confirmation that there is continuing support for the project;

- checking that necessary statutory and procedural requirements were followed throughout procurement;
- confirmation that the approved procurement strategy has been followed;
- confirmation that the recommended contract decision will deliver the specified outputs on time, within budget and that it will provide value for money;
- confirmation that development and implementation plans of both the client and the supplier and / or partner are sound and achievable;
- confirmation that the business has prepared for developing new processes, for implementing and operating new services or facilities and the transition process;
- confirmation that technical implications have been addressed;
- confirmation that management controls are in place;
- confirmation that plans for risk, issue and change management have been updated; and
- checking that the proposed procurement is within the approved funding amount.

Documentation reviewed during Gate 4 includes:

- the evaluation report (containing recommendations and justification of the selected supplier);
- project management documents (including risk and issues management, change management, service management, and the delivery strategy);
- an updated business case and benefits plan;
- an updated communication plan;
- realistic plans from the supplier for development and implementation (including an updated time schedule);
- an outline of tender decision plans and plans for the next phase; and
- confirmation of funds and the authority to proceed.

Further reading

Association for Project Management: *Directing Change: A Guide to Governance of Project Management*, www.apm.org.uk/gopm

Australian National Audit Office: *Public Sector Governance Volume 1 Best Practices Guide – Framework, Processes and Practices*, July 2003

Australian Stock Exchange Corporate Governance Council: *Corporate Governance Principles and Recommendations*, Second Edition, August 2007

Building Commission, *Process Guide – A guide to client control of construction projects,* Government of Victoria, www.buildingcommission.com.au

Department of Justice, *Charter of Human Rights and Responsibilities,* Government of Victoria, 2006

Department of Planning and Community Development, building policy http://www.dpcd.vic.gov.au/planning/buildingpolicy

Department of Planning and Community Development, *Guide to Bushfire Provisions for Buildings of Public Nature*.
http://www.dpcd.vic.gov.au/planning/buildingpolicy/publicconstruction/building-legislation-and-regulations/bushfire-provisions-for-buildings-of-a-public-nature

Department of Sustainability and Environment, *Our Environment Our Future – Victoria's Environmental Sustainability Framework*, Government of Victoria, 2005

Department of Treasury and Finance, *Government Asset Management Policy Statement*, Government of Victoria, 2000

National Public Private Partnerships Policy and Guidelines
http://www.infrastructureaustralia.gov.au/public_private/ppp_policy_guidelines.aspx
and
Department of Treasury and Finance, *Partnerships Victoria* Requirements and Annexures
http://www.partnerships.vic.gov.au

Mott MacDonald, *Review of Large Public Procurement in the UK*, Report commissioned by HM Treasury, UK, 2000

Appendix A: Probity checklist

This checklist of probity issues was adapted for Victorian public construction projects from one produced by ICAC NSW.

> "…a checklist of tasks that can be incorporated into a probity plan. The checklist can be used by agencies when preparing their own probity plan or by probity advisers overseeing the preparation of a probity plan. It is a guide only. Not every item on the checklist will need to be included and additional items may need to be addressed on particular projects. In addition, some items may also be addressed by standard agency procedures or RFT documentation.
>
> The tasks in the checklist are grouped by the stages of a typical project. Depending on the specific project, these tasks may need to be performed in a different sequence. Because probity plans are preventative in nature, the majority of probity-related tasks need to be performed early in the process."

Stage ✓ Description
Prior to issue of EOI / RFT
✓ **Assess the need for an independent probity adviser.(Refer DTF Financial Management Compliance Framework)[5]**
✓ **Check that the selection process for all advisers and consultants (including the probity adviser if there is one) is in line with Ministerial Directions No. 1 & 2.**
✓ **Assign probity-related roles and responsibilities to individuals working on the project.**
✓ **Ensure that the EOI/RFT documentation is designed to elicit information necessary for proper evaluation.**
✓ **Review detail of specifications and other EOI/RFT documents. (Address probity issues such as: Is the documentation consistent with the business case? Are any tenderers disadvantaged? Does the incumbent have an unfair advantage? Is the agency locked in to a particular technology? Is there sufficient scope for innovation? How will 'essential' and 'desirable' criteria be managed? Is the agency obliged to accept the lowest tender / lowest compliant tender? etc).**
✓ **Prepare an assessment of the proposed evaluation methodology that will be used to assess tenders. That is, the criteria, weightings, scoring mechanisms, response format, shortlisting process etc. Include a mechanism for ensuring that the evaluation methodology is applied correctly and consistently.**
✓ **Check whether there is scope to make minor alterations to the specifications or advertised evaluation process, if necessary.**
✓ **Supervise the advertising arrangements to ensure optimum levels of interest and competition.**
✓ **Check whether there is sufficient discretion to commence direct negotiations and/or abort the process if there are no satisfactory or complying tenders.**
✓ **Agree processes for dealing with tenders that are late, non-conforming or need clarification/amendment.**
✓ **Ensure that any market sounding or pre-tender discussions do not advantage a particular tenderer. If necessary, exclude firms that have participated in pre-tender activities from further aspects of the project.**

[5] http://www.dtf.vic.gov.au/CA25713E0002EF43/pages/budget-and-financial-management-financial-management-compliance-framework-engagement-of-probity-practitioner-services

Stage ✓ Description
Prior to issue of EOI / RFT (continued)
✓ If there is likely to be an in-house or public sector tenderer establish specific controls for communicating with the tender team, protecting confidentiality and access to information. ✓ Establish a communications protocol, including how to manage phone enquiries, requests for meetings, face-to-face meetings, product demonstrations and site visits, documentation of communications, protocol for offering and accepting hospitality etc. If necessary, conduct staff training in record keeping and maintaining an audit trail. ✓ Re-emphasise the gifts and benefits policy to staff and advisers. ✓ Ensure secure storage arrangements for tender documents and other confidential information. This includes physical and electronic storage. ✓ Establish and maintain a Movement Control Register for key documents. ✓ Ensure that any community consultation or marketing campaign is consistent with probity fundamentals and government policy. ✓ Ensure that there is a mechanism for accepting and managing protected disclosures. ✓ Establish a grievance handling procedure as well as a protocol for referring disagreements to senior persons
Prior to closing date for proposals
✓ If not already completed, ensure that evaluation weightings are calculated and documented. [Note Code requires weightings to be published with evaluation criteria.] ✓ Review the credentials or qualifications of team members and the evaluation panel. ✓ Ensure that any extension of time is granted to all potential tenderers in a timely manner with no one party being given additional time or advance notice. ✓ Ensure that if the specifications or evaluation process need to be altered in a minor way, there is no unfair advantage for any of the tenderers. [Evaluation criteria must not be altered after the RFT is issued.] ✓ Design the process for opening tenders (electronic or manual) and ensure that they are not read or accessed before the due date. ✓ Establish a procedure for identifying intellectual property or commercial-in-confidence information.
During assessment / evaluation
✓ Ensure that the evaluation methodology designed (see above) is applied correctly, that no irrelevant matters are taken into consideration and that the process is documented. ✓ Arrange for an official record to be made of any meetings with tenderers. This could include video or audio recordings and/or an independent minute taker. Ensure meeting agendas are prepared in advance and adhered to, and that improper discussions do not occur before, during or after meetings. ✓ Ensure that no order splitting has occurred with the intent of avoiding thresholds for competition. ✓ Review any proposed sub-contracting arrangements of tenderers or other advisers to address hidden conflicts of interest and ensure value for money is obtained. ✓ If [VIPP] … is being used, ensure that it is applied correctly so that local tenderers do not obtain an unintended advantage. ✓ Sometimes tenderers' identities are removed from tender documents before they are evaluated to promote objectivity. If this is the case, the probity plan should ensure compliance. ✓ If a two-envelope system is being used (that is, separate documentation on price and non-price criteria), verify that it has been carried out properly.

Stage ✓ Description
During assessment / evaluation (continued)
✓ Supervise the erection of 'Chinese wall' arrangements to manage conflicts of interest where necessary ✓ Negotiate anti-poaching agreements to prevent tenderers from holding out employment opportunities to key staff of the agency. ✓ If 'best and final offers' are being sought ensure confidentiality is preserved and there is no 'bid shopping'.
After selection
✓ Oversee the due diligence process and referee checking. ✓ Arrange debriefings for unsuccessful tenderers, ensuring that confidentiality is maintained. Record and address any complaints. ✓ Oversee any negotiations that occur with the preferred tenderer leading up to the signing of a contract. Check for departures from the winning tender that was tendered. ✓ Ensure mechanisms are in place to supervise the work carried out by the successful tenderer.
Ongoing / throughout the process
✓ Assess the process for compliance with relevant government policies and legislation – (such as the Victorian Code of Practice for the Building and Construction Industry and Ministerial Directions for public construction made pursuant to the *Project Development and Construction Management Act* 1994). ✓ Perform milestone or health checks at key decision points, as required (e.g. gateway review to be facilitated by the Department of Treasury and Finance) and prepare written reports identifying probity issues and how they were managed. ✓ Brief senior managers, the project Steering Committee or ministers as required. If necessary, submit reports detailing how probity-related issues have been dealt with. ✓ Check that financial delegations are within policy limits and that they are being exercised with care. ✓ Obtain confidentiality undertakings from personnel with access to valuable information (this task may need to be repeated as new information, proposals and parties surface). ✓ Obtain conflict of interest declarations from project team members, advisers, shortlisted tenderers and other personnel involved in the project (including actual, potential, perceived, pecuniary and non-pecuniary conflicts of interest). Any conflicts should be managed according to their seriousness and materiality. ✓ Agree on a timetable for all of the above.

Appendix B: Preparing a statement of requirements

In preparing the statement of works, all aspects of the requirement need to be documented so that potential tenderers properly understand the requirements and are able to cost their bids properly. For quality responses, it is essential that requirements documentation:

- states clearly what the government is seeking to achieve;
- avoids ambiguity and internal inconsistency; and
- minimises duplication.

What to include in the statement of requirements

Information about requirements will usually be found in the business case. As the project progresses and decisions are made on how the project is to be delivered, the statement of requirements will also develop. A statement of requirements can be written in different ways. Depending on the preference of the project and industry, it can, for example, be a:

- *product or technical specification* that describes the product required on delivery expressed in absolute physical terms, detailing dimensions, loads and strength, capacity and materials; or
- *functional or performance specification* expressing what functions the deliverable will perform.

The advantages and disadvantages of each approach are detailed in the table below.

Specification type	Advantages	Disadvantages
Technical product specification	✓ Provides a clear expectation to industry of the required deliverable ✓ Suitable for requirements that are non-developmental or commercially available ✓ Suitable when a design already exists and is to be used	✓ Limits industry innovation ✓ Leaves the customer responsible for design errors
Functional or performance specification	✓ Allows industry to provide innovative solutions when a design is not developed or when multiple design solutions exist ✓ Passes responsibility for design to industry ✓ Encourages a wider range of possible solutions ✓ Focuses on results rather than design	✓ Customer loses control of design activity and may not have the necessary skills in that area to monitor contractor performance ✓ May result in highly unusual design approaches that are inconsistent with existing related infrastructure

Specifications for construction and civil works are often technical. They may deal with detailed standards and specific technical information, and often assume a solution to a problem rather than seeking innovation or a solution. Other construction and civil projects prefer to use performance specifications, especially where the project is being delivered under a design and construction contract or under a *Partnerships Victoria* framework (which will generally detail the performance or output outcomes required). The Code of Practice says that clients should encourage innovation and alternative solutions by using performance-based specifications where appropriate.

Determining which requirements are critical

A typical statement of requirements includes many elements that tenderers need to address in their tenders. These elements are not equally important. Some may be critical; others will be less significant. The statement of requirements should reflect the relative importance of different requirements and their corresponding evaluation criteria. A common approach is to classify requirements as:

- essential – the project cannot be delivered effectively if this requirement is not met;
- highly desirable – this requirement adds significant value to the project; or
- desirable – this requirement adds some value to the project.

Considering the objectives of the project, mainly through referencing the endorsed business case and consulting key stakeholders, should assist in determining which aspects of the statement of requirements are essential and which are not.

Appendix C: Content of an RFT

Background information

This section of the RFT provides tenderers with an understanding of the background to the project and the environment in which it will be delivered. It may describe the customer, how they operate, who the key stakeholders are and social or environmental considerations. This broad discussion should be separate from the statement of requirements and other elements of the RFT.

Background information can include consultants' reports, historical performance reports, existing conditions reports, field surveys, service plans, operating schedules and other background documents.

Conditions of tender

These conditions describe how the tender process will be conducted. They include the tender closing date, time and place, format and other requirements for tenders, the evaluation criteria, points of contract for queries, how late or incomplete tenders will be treated and other administrative details. The conditions of tender should specify the basis on which alternative bids can be put if these are invited. Some departments have standard tender conditions.

The conditions of tender should be as clear and as simple as possible. Only mandate aspects that are essential and avoid unnecessary formality and inflexibility. It is essential to have clarity and certainty about the tender process. Within that sound framework, it is also important to have appropriate and limited discretion to vary the tender process. This can maximise the value for money the tender can achieve, and minimise the chance of the process being challenged if government does vary it.

Statement of requirements

The statement of requirements is a detailed statement of the required deliverables. Appendix B has more detail.

Contract and commercial framework

This section outlines the commercial framework in which the project is to be delivered and how the project interacts, at a contractual level, with that framework.

The preferred risk allocation between the parties (usually presented in a proposed risk allocation matrix) should also be included here, or in a section of its own.

The draft contract outlines the commercial basis on which the State proposes to engage the contractor. It should include the pricing mechanisms, unless these are to be tendered. The draft contract will be blank in areas that can only be completed after the successful tenderer is selected.

Tenderers are sometimes required to disclose areas of noncompliance. However, the contract should be presented as the State's preferred commercial terms, with tenderers expected to comply with them. There may be a limited number of negotiable clauses.

Standard form contracts are to be used for construction, ICT and some other procurement.

Tenderer response schedules

It is important to specify the structure for tenderers' responses. Consistent responses will make evaluation simpler and more reliable.

Each schedule relates to an aspect of evaluation. For example, schedules may seek information on:

- corporate and contact information;
- the proposed approach to particular project elements;
- the tenderer's experience;
- responses to the evaluation criteria;
- the tender price breakdown; and
- potential conflicts of interest.

The information requested in the response schedules should be sufficient for the evaluation team to make judgements using the evaluation criteria. Tenderers should not be asked for irrelevant or unnecessarily onerous information. Identify any non-mandatory information clearly.

Appendix D: RFT release and communicating with tenderers

Issuing RFT documents

Departmental protocols may require RFTs to be approved for release. They can be issued in hard copy or electronically. Tenderers can download RFT documents published on the Victorian Government tenders website (www.tenders.vic.gov.au). The site can also be used to distribute amendments or updates, easing the distribution burden.

Hard-copy RFT documents are issued in some tenders for particularly large or complex projects. This is often restricted to invited, short-listed or prequalified tenderers. For large construction and civil works projects, it is usual to distribute both hard and electronic copies to short-listed tenderers only. The means of RFT release depends on a number of factors, including the number of tenderers and the amount of documentation.

Keep a register of entities receiving RFT documents for advising them of changes.

Tender briefing sessions

Industry briefing sessions are often conducted following the release of the RFT. These sessions can give government an early indication of industry reaction and areas of misunderstanding or concern. Tenderers learn about project objectives directly from the organisation and can seek immediate answers to questions. Briefings are usually held approximately a week after the RFT is issued.

When preparing for the briefings, consider likely questions and the sort of information that should or should not be disclosed. Prepare appropriate answers.

Where the RFT is issued to a small number of tenderers, it may be preferable to brief each of them separately. This can allow for more open questions from tenderers without fear of intellectual property or ideas being disclosed to competitors. Procedures for conducting such briefings should be developed with the probity auditor so that tenderers have equal opportunities. This step guards against real or perceived probity problems.

Briefing sessions and interviews are sometimes recorded (audio or video) to provide a full and accurate record of what was said (and accessed only in the event of a dispute).

Enquiries and questions

The industry commonly raises questions before tenderers submit responses. All enquiries should be managed strictly according to tendering conditions and the probity plan. Questions and answers should be communicated through the nominated contact person. All questions and answers (whether oral or written) should be logged and auditable.

Questions and answers are generally made available anonymously to all registered tenderers. This can be done through the government tenders website. If very sensitive information or intellectual property is involved, confidentiality of questions and answers may be necessary. The probity plan provides processes for managing tenderers' questions.

Appendix E: Evaluation criteria and tender evaluation

Tender evaluation must be conducted fairly, thoroughly and in a defensible way. Evaluation must be against the stated criteria and according to the process advised to tenderers. Failure to do this can lead to administrative and legal challenges. Such challenges can cause delay and significant costs. In some cases, a tender process may be re-started or even abandoned because of a challenge.

The evaluation process can include assessments, industry briefings, interviews, site visits, referee checks, report writing and debriefing unsuccessful tenderers. This can take up to six months or longer on larger projects. The evaluation process often requires input from people from different organisations and with different professional skills and qualifications.

Tender evaluation planning

A tender evaluation plan should be developed to describe the evaluation and selection process. The plan should reflect project risks and the overall goals of the evaluation process, including achieving the best outcome and high standards of probity. The method and detailed processes set out in the plan guide the evaluation of tenders and assist with consistency and probity.

Depending on the nature of the tender and whether there is a probity plan covering such items, the tender evaluation plan may include:

- the evaluation team, working groups and special advisers;
- evaluation criteria;
- the evaluation schedule;
- a process for handling questions;
- a process for assessing alternative proposals and non-conforming tenders;
- a process for debriefing unsuccessful tenderers; and
- a process for holding briefings, interviews, site visits, visits to tenderers or reference sites. Issues to cover, for example, include: how the briefings and interviews will be scheduled, managed and recorded; whether tenderers will be given an opportunity to present; whether there should be an independent recorder; and whether all evaluation team members are expected to attend all interviews.

Establishing an evaluation team

The tender evaluation team is normally made up of a team leader and team members from specialist areas with the requisite skills to undertake detailed evaluation of bids. Specialists from financial, commercial, legal, technical and environmental disciplines are often required. The skills required will depend on the project. External support may be required for aspects of the evaluation.

Evaluation criteria

Each tender must be assessed against the evaluation criteria published in the RFT. The evaluation criteria cannot be changed after the RFT is issued, without written notification to tenderers of this change in the conditions of tender. If there is a change, tenderers may need additional time to take it into account in their offers.

Evaluation criteria focus on project requirements and aspects of a tender that most closely predict its likely success in project delivery. Depending on the circumstances, evaluation criteria might address:

- whether the solution (or product or service) meets all mandatory items in the statement of requirements;
- the technical fit of the solution with the remaining requirements;
- the suitability of the solution proposed;
- the supplier’s capability (e.g. whether they have the skills and experience to do the job);
- the supplier’s capacity (e.g. whether they have enough staff to deliver according to the project schedule, given other commitments);
- the supplier’s financial viability;
- if relevant, the reasonableness of the rates or price, relative to market prices (the tendered price is usually evaluated separately to determine value for money); and
- the risk to government of the supplier's position regarding contractual terms.

Evaluation criteria should allow for uncertainty in bids. In particular, government agencies should consider whether there is any possibility of additional risks to government in what is finally delivered compared with what the tenderer offers initially. This might be because there are significant unresolved commercial terms of the contract, or because some other aspects of the deal are not settled (such as the terms of any required financing).

Projects often develop a number of sub-criteria that help to define and measure performance against the main criteria. A set of consistent, defined assessment ratings may then be developed for evaluation team members to use.

In establishing the evaluation criteria, the project should consider what evidence needs to be viewed for a valid assessment. It should seek this information explicitly in the tender response schedules.

If evaluation criteria are to be weighted in construction tenders, the Code of Practice requires that these weightings are disclosed to tenderers. Where weightings for evaluation criteria are published, these must be applied.

Mandatory criteria relate to matters that are essential for undertaking the contract. They are generally pass or fail criteria that are not weighted or scored. Tenderers that do not meet mandatory criteria are not assessed further.

Difficulties can arise if the RFT over-prescribes mandatory criteria and tenderers are unable or unwilling to meet those criteria. Tenders should only include as mandatory evaluation criteria matters that are absolutely essential for performing the requirement, for example, registration or licences to do certain work, or no unacceptable conflicts of interest.

A tender should never be chosen on the basis of price or capability alone. The evaluation criteria should clearly indicate that the preferred tenderer is selected on the basis of an overall judgement about value for money, taking into account assessments against the evaluation criteria.

Clarification questions

During detailed evaluation, team members will frequently raise questions that cannot be answered in the information provided by the tenderer. In such cases, it is necessary to send a clarification question to the tenderer. Copies of all clarification questions and responses should be kept on the evaluation record.

Treatment of non-conforming tenders

Tendering conditions outline the approach to take for non-conforming tenders. In some situations, non-conforming tenders may be excluded from further consideration. In others, there is flexibility to consider them. In planning for the tender, minimise the chance of non-conforming tenders. For example, only strictly necessary requirements should be in the mandatory evaluation criteria. For construction projects, the Code of Practice provides guidance on the managing non-conforming tenders.

Where a tender is assessed as non-conforming and excluded from further consideration, projects must document the basis for that decision.

Documenting the outcomes

The evaluation process and outcome is usually documented in a tender evaluation report. The report usually includes an executive summary, a description of the processes, assessment summaries, tenderer rankings and recommendations of the preferred tenderer. The report will often also attach reports from individual evaluation working groups and external advisers, evaluation database reports, risk assessments, probity audit reports and other outputs of the evaluation process. The report may be audited.

Releasing and advising unsuccessful tenderers

There is a significant cost to tenderers in preparing tenders and keeping bid teams operational after tenders are lodged. Tender processes should be designed to minimise these costs. One way of doing this is to short-list tenderers during the tender evaluation process. Where a tender is clearly unacceptable, it should be excluded from further evaluation and the tenderer notified.

Excluding unacceptable tenders after the initial tender evaluation means the evaluation can concentrate on a smaller number of more suitable tenders. It will also save project time and cost. However, the apparent competitiveness of a bid can alter as evaluation proceeds, clarifications are provided and prices are risk adjusted. (For example, in public–private partnerships, a tenderer with a substantially better price may move back in the field following clarification about the level of risk the tenderer is willing to accept.)

Once the selection process is complete, tenderers should be informed of the outcome. Detailed written reasons are not generally provided. However, tenderers may request or be invited to a debriefing interview. Debriefing usually addresses the strengths and weaknesses of the particular tender.

Tender evaluation problems

Mistakes and problems can arise in a tender process. Here are some common ones:

1. RFT documents contain errors or ambiguities, requiring amendments to be issued or causing difficulties for evaluation.
2. Required endorsements are not obtained from probity auditors.
3. Misleading representations are made to tenderers in RFT documents or in other ways.
4. Requirements change between RFT release and tender evaluation.
5. The tender evaluation team does not have the required expertise or competence or does not function well; technical specialists are not used for evaluation where required.
6. Too few tenders (or conforming tenders) are received.
7. Favouritism towards one or more tenderers is displayed or perceived.
8. Responses received fail to meet need or to fit within the approved budget.
9. Evaluation criteria are inappropriate or insufficient to distinguish between tenderers.
10. Formal evaluation procedures are not established or not understood by evaluation teams; the evaluation is not conducted according to the evaluation plan; tenders are not evaluated consistently.
11. Referee checks, site visits and other checks are not conducted or not conducted well.
12. Evaluation is not completed within timeframes.
13. Tenderers' queries are not answered sufficiently.
14. Late tenders are not handled correctly.
15. Security of tender documents is not maintained.
16. Communication with tenderers is not restricted to the nominated individual; procedures for responding to enquiries are not adopted or followed.
17. The validity period for tenders expires before a decision is made.
18. The tender process is not designed with enough flexibility for the best value, most suitable offer to be selected.

Appendix F: Contract negotiation and execution

During tender evaluation and in subsequent discussions with the preferred tenderer, issues can arise about the specification or other elements of the contract that need to be negotiated.

Set agenda and timeframes

Contract negotiations are often a long and complex process. It is therefore important to take a structured approach to the negotiations, setting out expected timeframes. A negotiation plan or agenda agreed between the parties can help them to align their resources and activities. The negotiation agenda should be agreed before negotiations start. As negotiations often depart from the plan, it must be updated as they progress.

Establish negotiation team and advisers

The government project team should bring together a small, skilled group of staff to conduct negotiations. The team should be capable of addressing all disciplines included in the project requirements. The negotiation team should be lead by an experienced manager who has the authority to finalise a suitable deal. It may also be appropriate to have a number of specialist advisers available to support the negotiation team. The team members must be good communicators, preferably trained in basic negotiation. Including an experienced contract manager (or the person to be appointed as the contract manager) can promote awareness of contract management issues.

Contract negotiation directive and authority to negotiate

In setting up the negotiating team, the following issues should be taken into account:

1. Who is formally authorised to negotiate on behalf of the government?
2. What are the limits within which the contract may be negotiated (such as price, performance, or schedule)?
3. Are there any specific issues that must be successfully resolved during negotiations?
4. What limits, if any, are there on the period of time for negotiations?
5. What are the briefing and reporting requirements to senior government managers during the negotiation period?

Preparation

Contracts including specifications are often complex, with significant interrelationships. It is therefore important for the negotiation team to be prepared and briefed for all aspects of the negotiations. There should be no point during negotiation where the team is negotiating without full knowledge of the issues at hand and the government's preferred position.

Good preparation takes time, and the negotiation agenda must allow for each party to research issues and draw up their strategies before meeting face to face. Pre- and post-negotiation briefs are important for the negotiation team to form a firm understanding of all the matters it is addressing.

Trading in negotiation

Contract negotiation is the process of finalising the agreement between the parties. A tenderer will not normally give up planned profit or take on risk during negotiations, without some form of offset from the government. The government, too, should not compromise on important areas of scope during the negotiations, without suitable recompense from the tenderer.

In the case of public construction, the Code of Practice prohibits parallel negotiations, that is, simultaneously negotiating with two or more tenderers.

Record of negotiations

All negotiation activities should be documented. This means that any commitments or understandings made during the negotiation can be revisited later if there is a misunderstanding. It is also an important aspect of maintaining an audit trail. Senior government managers may want to understand why a particular solution was reached. The record can show the detailed processes that were followed and how the negotiations stayed within the limits specified in the negotiation directive.

The record of negotiation should include a suitably marked-up version of the draft contract. All changes to the contract as a result of negotiations should be revision-marked and configured in such a way that both parties can be sure of the nature of the changes that have been made. Version control and data management are important skills for maintaining control over contract changes.

For all major or complex negotiations, it is recommended that the discussions be taped. The negotiating parties must agree to this.

Appendix G: Stakeholder management communication plan

This framework was adapted from the Good Practice Guidelines, Developing a State Purchase Contract Business Case from DTF's Victorian Government Procurement Group.

Group	Timing	Method	Information/messages
Departmental stakeholders			
✓ Accredited Purchasing Unit or equivalent for process oversight ✓ Procurement manager ✓ Contract managers ✓ Buyers	✓ Initial briefing ✓ Regular status updates (forum)	✓ Face-to-face forums (roadshow and programmed meetings)	Initial briefing: Overall process, intended outcome, senior managers' support, mandate, desire for feedback/input and set of messages to address implicit and explicit concerns and confidentiality Updates: Provide feedback to attendees of programmed update meetings on progress, issues and status
Senior stakeholders			
✓ Ministers ✓ Secretary or Deputy Secretary, CEO etc. ✓ Lead department ✓ Client department	✓ Initial briefing ✓ As required status updates	✓ Face to face, 1-1 or small groups	Initial briefing: Overall process, intended outcome, role of senior managers' support (and actions required), mandate issues, set of messages to address implicit and explicit concerns of senior stakeholders Updates: As required, short status reports
Procurement team			
✓ Project sponsor ✓ Project manager ✓ Procurement team members	✓ Frequent (team meeting) ✓ Regular with procurement group (user and tender teams)	✓ Face to face in programmed meetings	Updates: Regular status reports (initially weekly) for each team member to report on progress / issues regarding each of their key responsibilities for the period – to be tabled and discussed at each project meeting; wider procurement group to be kept updated on activity as project unfolds
External stakeholders			
✓ Suppliers ✓ Public, community and interest groups ✓ Media ✓ Service delivery partners	✓ Initial briefing to suppliers ✓ As required by project leader	✓ Face-to-face initial briefings ✓ Ongoing via written communication	**Initial briefing:** Suppliers to be invited to a briefing session to gain understanding of the process, objectives, requirements, timing, evaluation, methodology, restrictions on discussions with internal stakeholders and behavioural requirements