Investment Lifecycle and High Value High Risk Guidelines

Procurement

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* + 1. Introduction
       1. Context

This guideline forms part of the Investment Lifecycle and High Value High Risk Guidelines. It relates to the *Stage 2: Procurement* stage of the investment lifecycle and supports Victorian Government departments and agencies in successfully purchasing their investments.

The Investment Lifecycle and HVHR Guidelines provide good practice guidance to assist departments to develop and deliver asset investments from business case through procurement to delivery. The Guidelines address specific requirements for projects classified as High Value High Risk[[1]](#footnote-2) investments, but can be used for any investment, whatever its type, complexity or cost.

*Stage 2: Procurement* relates to purchasing the solution that best enables agencies to realise the investment objectives and benefits approved in the business case stage of the investment lifecycle. It involves seeking market offers to undertake a scope of works, including market testing, tender preparation and documentation, project tendering and contract negotiation. It results in the appointment of a supplier to deliver the investment outcomes under a contract.

Figure 1: The three stages of the investment management process

|  |  |  |  |
| --- | --- | --- | --- |
| **Business case** | **Procurement** | **Delivery** | **Gateway–Benefits evaluation** |
| **Establishes need, defines benefits, explores interventions, estimates costs, identifies delivery process.** | **Explores delivery options, finalises delivery plan, engages the market, awards the contract.** | **Implements solution, transitions investment into normal business.** |
| What is the problem, issue or service need?  What are the benefits from addressing the problem?  Is there a compelling case for investing?  Can the project be delivered as planned? | What is the preferred method for delivering the investment? | Is the investment proceeding as planned?  Are changes to the investment needed? |

In 2019, the guidelines were amended to require the following documents for all HVHR projects prior to the Treasurer’s approval being sought for contract execution:

* + - probity report;
    - governance plan;
    - legal advice for departures; and
    - contract management plan.

This is in addition to the tender evaluation report provided by departments to support the contract award.

Additionally, HVHR projects are required to complete and maintain a financial impact report, which should be updated regularly. The report should be provided to project steering committees on a regular basis, submitted to DTF on a quarterly basis (together with the Major Projects Performance Reporting) and where major cost variations are anticipated. To support agencies preparing the financial impact report, a template is available on the DTF website.

* + - 1. Purpose of this guideline

This guideline supports practitioners achieving successful procurement outcomes through implementing sound procurement processes and decision-making practices.

Figure 2: Procurement guideline structure



* + - 1. How and when to use this guide

Each investment has different characteristics and considerations impacting on its procurement. This guidance is not intended to be a compliance exercise – users are encouraged to tailor this guidance to best suit the size, risk, complexity and other characteristics of their investment.

This guidance **does** inform the process of seeking market offers and appointing a successful supplier under contract to deliver an investment.

It **does not** contain information relating to procurement options analysis to select a procurement methodology for purchasing an investment.

Procurement options analysis should be undertaken during business case development prior to a funding decision being made. Further information relating to procurement options analysis, developing a high-level procurement strategy and procurement methodology options can be found in the **Procurement Strategy**technical guide.

* + 1. The procurement stage – getting started

Section 2 outlines the general process for successful procurement and provides an overview of key considerations impacting an investment through all phases of the procurement lifecycle.

Figure 3: Section 2 document overview



* + - 1. Government procurement

In the context of this guideline, procurement is the process of engaging a supplier(s) to deliver capital asset investments, including buildings, civil infrastructure and information and communications infrastructure.

Procurement commences when Government decides to invest and concludes with contracting the successful supplier to undertake the required scope of works. For asset investments, it is usually carried out by tendering, rather than buying products directly from a seller. A department wishing to undertake construction works or purchase related supplies and services will firstly specify its requirements and then seek market offers to provide these services through a competitive process. Interested companies can submit proposals to the client outlining how they propose to deliver requirements for a given price and service quality. The client will then evaluate bids to determine which offer best suits its needs. A successful tenderer is then appointed to perform the work by contract.[[2]](#footnote-3)

Tendering benefits government by enabling best value to be achieved through competition. It enables departments to maintain integrity and government’s reputation by supporting probity and ethical standards and can encourage innovative solutions to government’s needs.

* + - 1. The procurement process

Procurement encompasses five general phases.

Figure 4: Overview of the procurement process



Procurement is an iterative process. There are occasions when agencies may need to revisit and reassess previous decisions and outcomes to account for new information as it arises.

The structure of this document includes the step of running an expression of interest process in the tender development phase. This aligns with the Gateway review process, which recommends conducting a Gate 3 review (readiness for market) after the expression of interest process.

* + - * 1. Successful procurement

Successful procurement realises the investment outcomes through delivery of assets and services whose quality represents good value for the given expenditure.

Good procurement practice maximises opportunities and benefits while minimising and managing risks. Importantly, they comply with government policies and public sector accountability requirements. Procurement success is not solely measured by how well an asset has been delivered, but also encompasses whole of life operational considerations to ensure the asset meets evolving community service demand and delivery requirements.

Victorian Government analysis has shown the following common factors are critical to achieving procurement success.

Table 1: Successful procurement

|  |  |
| --- | --- |
| Factors critical to achieving procurement success | Actions that can improve procurement success |
| A clear link between the project and the organisation’s strategic priorities and objectives. | Ensure the alignment of procurement objectives, evaluation criteria and agreed business case objectives and benefits. |
| Clear governance and accountability for achieving service delivery outcomes and realising investment benefits. | Establish a governance framework that clearly identifies who is accountable for overall project delivery, as well as outlining responsibilities for each procurement task.  Involve the person responsible for service delivery at an early stage to ensure the correct service delivery goals are sought. |
| Clear understanding of procurement models and variants informing the correct choice of procurement model. | Obtain expert advice and knowledge to inform procurement strategy development.  Adapt the preferred procurement model to meet specific project requirements. |
| Good project budget setting procedures. | Ensure the project budget includes all project resourcing requirements.  Adequately resource the procurement process, including all advisory consultancies, document preparation, advertising, negotiations, etc.  Ensure there is adequate contingency for the nature of the project and the level of design.  Employ a quantity surveyor and/or other professionals to accurately cost the project and develop a pre-tender cost estimate. |
| Clear articulation and communication of service delivery expectations and requirements through tender and contract documentation. | Prepare a written summary of the procurement objectives and requirements and confirm these with an end-user representative.  Ensure the requirements are as unambiguous as possible.  Undertake adequate due diligence to inform complete and clear tender documentation.  Have an end user review the project and tender documentation to ensure it accurately reflects their requirements.  Ensure requirements for implementation, transition-in, operations and maintenance lifecycle phases are unambiguous. |
| Ensure a fair, competitive and transparent procurement process. | Do not engage in any conduct that would defeat the purpose of a fair and transparent selection process.  Avoid any practice that gives one party an improper advantage over another.  Respect the intellectual property rights of all parties and do not use intellectual property submitted with a tender to obtain prices from, or negotiate with, other tenderers for like or similar scope.  If no tender is acceptable, do not trade off on a tenderer’s price against another in an attempt to obtain a lower price.  Exhaust negotiations with the initial best value tenderer before negotiating with subsequent tenderers.  Do not negotiate with more than one tenderer at a time in an attempt to obtain a lower fee. |
| Providing sufficient time for tender response. | Compare the project’s tender timelines to other similar projects. |
| Using appropriate evaluation criteria to assess tender proposals. | Develop a comprehensive tender evaluation plan prior to commencing the tender.  Ensure the evaluation process includes both price and non-price criteria, as well as a process for quantifying the value for money represented by each bid.  Ensure evaluation criteria consider long-term operating costs as well as acquisition and construction costs.  Publish the evaluation criteria within the tender documentation. |
| Using an adequate and consistent approach to project planning, risk management and project management. | Adopt and use a known project management and risk management methodology throughout the procurement process. Use an agency-approved methodology where appropriate. |
| Effective stakeholder engagement and management. | Identify all project stakeholders relevant to *Stage 2: Procurement*.  Develop a stakeholder engagement plan for the procurement process.  Engage with end users regarding procurement objectives and the solution sought. |
| Understand and engage with the supply industry at senior levels. | Undertake appropriate market engagement to identify the capability, capacity and competitiveness of the supplier market. |

* + - 1. Project assurance

Procurement teams should review the investment prior to each key decision point to ensure it remains on track to deliver planned service delivery requirements and benefits. At the conclusion of each procurement phase, conduct an assurance check:

* + - Have all procurement tasks for that phase been completed?
    - Has all new information not previously available been obtained? Does this change the procurement approach?
    - Have any risks or issues that will require management in the next phase been identified?
    - Have the project, risk management and stakeholder engagement plans for the investment been updated to reflect these issues?
    - Is the procurement team confident the project can successfully proceed to the next procurement phase with a successful result?
    - Have the necessary financial, ministerial and HVHR approvals been obtained prior to moving to the next phase?
    - Have all relevant Gateway reviews been undertaken? Gates 3 and 4 (Readiness for market and Tender decision) are relevant at the procurement stage. See Appendix A for key elements considered at Gates 3 and 4. Further information is available on the DTF website at [www.dtf.vic.gov.au/infrastructure-investment/gateway-review-process](https://www.dtf.vic.gov.au/infrastructure-investment/gateway-review-process)

In 2019, a new financial impact report template was introduced in the procurement stage. The DTF template sets out the minimum expectation for tracking and monitoring the financial performance of a project. This includes information such as approved total estimated investment, spend to date, and cost to complete, as well as risk and contingency availability and draw-down.

The financial impact report needs to be submitted as part of supporting documentation when seeking the Treasurer’s approval for contract award. The report should be periodically maintained, tabled at the steering committee, and submitted to DTF on a quarterly basis (together with the Major Projects Performance Reporting) or where major variations are anticipated.

* + - 1. Requirements for HVHR projects: Gateway reviews and increased scrutiny

HVHR projects are high-value investments, valued at or greater than $100 million, and/or projects considered otherwise high risk. HVHR investments are subject to more rigorous scrutiny and Government oversight than other projects.

The Gateway review process examines projects and programs at key decision points. It aims to provide timely advice to the Senior Responsible Owner (SRO) as the person responsible for a project or program. A review provides the SRO with an independent view on the current progress of the project or program and assurance it can proceed successfully to the next stage.

Under the HVHR Framework, a project is required to undergo two Gateway reviews during the Procurement stage. These are performed prior to the relevant Treasurer’s approval requirements under the HVHR Framework. These reviews include:

* + - Gate 3 (Readiness for market) – This review is normally performed after the release of an expression of interest (EOI) and prior to the release of a Request for Proposal (RFP).
    - Gate 4 (Tender decision) – This review is normally performed after the completion of a tender evaluation report, and prior to the award of a contract (not required for Partnerships Victoria projects).

Also under the HVHR Framework, agencies must obtain the Treasurer’s approval at up to five key decision points of the procurement process before proceeding to the next phase. The level of Treasurer and DTF involvement during the procurement stage will vary for each project. The Project Assurance Plan requires DTF, in consultation with departments, to assess project risks during procurement and determine whether there is a case for exemption from certain project assurance functions and/or whether there are additional functions (above the standard set) that should apply.

Agencies are encouraged to work closely with DTF to ensure they are well informed and can provide timely advice to the Treasurer.

Figure 5 outlines the procurement process highlighting possible HVHR requirements that may be documented in a project’s HVHR Project Assurance Plan, as well as the possible roles of DTF and the Treasurer in procuring HVHR projects.

Figure 5: Possible HVHR process requirements

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| **Procurement stage** | **DTF role** | | | **Treasurer’s role** |
|  |  | | |  |
| **Tender development** | Analyse EOI documentation and advise Treasurer if required  Participating in the Gateway review process\* | | | Treasurer’s approval of EOI documentation required prior to release\*\* |
|  | **Gate 3 Review** | | |  |
| **Tendering** | Analyse RFT/P documentation and advise Treasurer if required | | | Treasurer’s approval of RFT/P documentation required prior to release\*\* |
|  |  | | |  |
| **Tender evaluation** | Participate in tender evaluation process if required\*  Review tender evaluation report | | | Treasurer’s approval of preferred bid required prior to negotiations\*\* |
|  |  | | |  |
| **Contract negotiation** | Assist negotiations\* | | | Treasurer’s approval prior to announcement\*\* |
|  | **Gate 4 Review** | | |  |
| **Contract award** | Analyse contract documentation and advise Treasurer, including any variations to standard contracts | | | Treasurer’s approval of final contract price and any major variations required prior to awarding contract\*\* |
|  |  | | |  |
| HVHR requirement | | \* Optional. | \*\* If required in project’s HVHR Project Assurance Plan. | |

As part of *Stage 2: Procurement*, agencies must submit to DTF the following documents for HVHR projects:

* + - tender evaluation report;
    - probity report;
    - governance plan;
    - legal advice for contract departures; and
    - contract management plan.

DTF has developed a financial impact report template for agencies, which is included in Appendix B.

* + 1. The procurement legislative and policy framework

Figure 6: Section 3 document overview



Victorian Government procurement operates within an environment of State and federal legislation and policy. Key legislation and policies that govern the procurement process are outlined in Figure 7.

Figure 7: The procurement legislative and policy framework



* + - 1. *Financial Management Act 1994*

The Victorian Government’s procurement principles are contained within the overarching financial management framework and are regulated by the *Financial Management Act 1994* (FMA). The FMA outlines the processes that must be used by public sector agencies in managing and expending public monies accountably.

Under the financial management framework, a public sector agency must ensure that its procurement policies and procedures are based on the following principles:

* + - value for money;
    - accountability;
    - probity and transparency;
    - open and fair competition; and
    - risk management.

Further information on these procurement principles can be found in section 4 of this document.

The Standing Directions of the Minister for Finance (the Directions) supplement the FMA by prescribing mandatory procedures for all Victorian Government departments and public sector bodies. The Directions relate to capital expenditure, acquisitions and divestments, and require public sector agencies to:

‘… implement and maintain an effective internal control framework over procurement activities to ensure procurement of goods or services is authorised in accordance with business needs and within a documented framework of procurement policies and procedures.’

* + - 1. Standing Directions of the Minister for Finance

The Standing Directions of the Minister for Finance (the Directions) form the basis of sound financial management for the State of Victoria. The Directions supplement the *Financial Management Act 1994* by prescribing procedures that must be complied with by all departments and public bodies. The current form of Directions came into effect on   
11 October 2018 and was updated in March 2019.

In particular, section 4.2.1: Acquisition of assets, goods and services outlines specific requirements for prudent asset management that must be addressed when procuring an investment. Section 4.2.3: Asset management accountability mandates the Asset Management Accountability Framework, which also includes requirements for asset acquisition.

* + - * 1. Section 2: Financial management governance and oversight

Governance is about the processes by which a public sector agency is directed, controlled and held to account. The Directions on financial management governance and oversight set standards for public sector agencies, which should be incorporated as fundamental elements in an overall governance framework.

Section 2 of the FMA covers the following topics:

* + - financial code of practice;
    - financial governance;
    - financial risk management;
    - authorisations;
    - internal audit; and
    - external audit.
      * 1. Section 3: Financial management structure, systems, policies and procedures

The Directions for financial management structure, systems, policies and procedures set standards for all public sector agencies to achieve sound systems of internal control to support financial management, such as:

* + - the **financial management structure**, including: financial management team structure, Chief Finance and Accounting Officer, policies and procedures, chart of accounts and managing outsourced financial services;
    - **information technology systems**, including: information technology management, information technology operations, security, development, change control;
    - **education and training**; and
    - **policies and procedures**, including: revenue, cash handling, bank accounts, cash flow forecasting, procurement, expenditure, employee costs, commission on employee payroll deductions, physical and intangible assets, liabilities, reconciliations, administration of discretionary financial benefits and information collection and management.
      * 1. Section 4: Financial management reporting

The Directions for financial management reporting set standards for public sector agencies to assist them in measuring and managing performance and to ensure financial management reporting is consistent with applicable statutory reporting obligations. This includes:

* + - internal financial management reporting;
    - reporting requirements in terms of Part 7 of the FMA;
    - other external reporting;
    - financial performance management and evaluation; and
    - financial management compliance obligations, such as: compliance with directions, taxations, purchasing card, thefts and losses, risk management compliance, treasury risk management, foreign exchange risk management and commodity risk management.
      1. *Project Development and Construction Management Act 1994*

The *Project Development and Construction Management Act 1994* (PDCM) is the primary legislation governing construction procurement. Its main purposes are to facilitate certain development projects in Victoria and to provide for the setting of standards and issuing of directions in relation to public construction. The Assistant Treasurer is responsible for policy prescribing procurement, tendering and contracting procedures and practices for public construction in Victoria, and issued the current form of the Ministerial Directions for Public Construction Procurement in Victoria in July 2018.

Agencies should refer to those Ministerial Directions when procuring public investments. They are available on the DTF website at [www.dtf.vic.gov.au/public-construction-policy-and-resources/ministerial-directions-and-instructions-public-construction-procurement](https://www.dtf.vic.gov.au/public-construction-policy-and-resources/ministerial-directions-and-instructions-public-construction-procurement)

* + - 1. International agreements

Procurement practitioners must comply with a number of relevant international agreements that prescribe how procurement activities are undertaken.

Free trade agreements (FTAs) have been developed to support Australian exporters in accessing new markets and expanding trade in existing markets. They can impact on tendering conditions, including:

* + - requiring tenders to be accessible to the open market, restricting use of select tendering processes; and
    - prescribing the length of time tenders must remain open.

Australia currently has 11 FTAs in operation, and Australia is currently negotiating a number of other agreements.

FTAs with the United States of America and New Zealand have the greatest impact on procurement processes. Full details of FTAs can be found on the Austradewebsite at [www.austrade.gov.au/Export/Free-Trade-Agreements](http://www.austrade.gov.au/Export/Free-Trade-Agreements)

AppendixC outlines how these FTAs impact on procurement practices.

* + - 1. Building Code (National Code of Practice for the Building and Construction Industry)

The Building Code encourages productivity and lawful workplace relations on building sites. It sets out the Australian Government’s expected standards for building contractors or building industry participants involved in Commonwealth-funded construction projects. The Building Code codifies the obligations previously contained in the National Code of Practice for the Construction Industry. It came into effect on 2 December 2016.

The Building Code applies to Victorian Government procurements, which:

* + - are indirectly funded by the Commonwealth Government, 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.

* + - 1. Other relevant Government legislation

There is other legislation impacting on aspects of construction procurement. This legislation, and their relevance, is summarised in Appendix D. Some legislation, such as the *Occupational Health and Safety Act 2004*, impacts all construction projects. Other legislation will only apply in specific instances, for example the *Heritage Act 1995* only impacts those investments that involve redevelopment or reuse of a heritage listed site. Procurement practitioners should consider what legislation will impact on their investment and ensure any requirements are captured in the procurement plan, due diligence and project, tender and contract documentation.

* + - 1. Relevant Victorian Government procurement policies

Table 2: Victorian Government procurement policies

|  |  |  |
| --- | --- | --- |
| Victorian Government policy | Relevance | Further information |
| Guidance for public construction procurement | The guidance for public construction procurement sets out good practice that Victorian Government departments and public bodies should follow when they procure public construction works and services. The guidance is non-mandatory and supports the Ministerial Directions and Instructions for Public Construction Procurement in Victoria. See Section 3.3 for further information. | <https://www.dtf.vic.gov.au/public-construction-policy-and-resources/ministerial-directions-and-instructions-public-construction-procurement> |
| Victorian Government Procurement Board | VGPB policies apply to procuring goods and services other than for building construction. They impact on building and infrastructure investments as they apply to construction-related works and procurement of associated professional services.  The VGPB manages a number of panels of pre-qualified practitioners that can be used to engage project advisers. | <http://www.procurement.vic.gov.au/Home?Open>  <https://buyingfor.vic.gov.au/browse-government-contracts> |
| Infrastructure Australia National Public Private Partnerships Policy and Guidelines | The Partnerships Victoria Framework comprising the National PPP Policy and Guidelines agreed by COAG in November 2008 in conjunction with Partnerships Victoria Requirements, which apply to Victorian public–private partnerships. | <https://www.infrastructure.gov.au/infrastructure/ngpd/index.aspx>  <https://www.dtf.vic.gov.au/public-private-partnerships/policy-guidelines-and-templates> |
| Infrastructure Australia National Alliance Contracting Policy Principles | The Commonwealth Government policy, which applies to all departments and agencies conducting alliance contracting, published as the National Alliance Contracting: Policy Principles (September 2015). | <https://www.infrastructure.gov.au/infrastructure/ngpd/index.aspx> |
| Local Jobs First | New guidelines for the Victorian Industry Participation Policy (VIPP) apply from  1 January 2013.  The Local Jobs First – VIPP must be applied by all Victorian Government departments and agencies for any type of project with a value of:   * $1 million or more in regional Victoria; or * $3 million or more in metropolitan Melbourne or for statewide activities.   Under the Local Jobs First – Major Projects Skills Guarantee, all construction projects valued at or over $20 million are required to use Victorian apprentices, trainees or cadets for at least 10 per cent of the total estimated labour hours. | <https://localjobsfirst.vic.gov.au/> |
| Australian Government Building and Construction OH&S Accreditation Scheme | The Australian Government Building and Construction OH&S Accreditation Scheme (the Scheme) relates to construction procurement that is wholly or partially, directly or indirectly funded by the Australian Federal Government. Subject to financial thresholds, only builders who are accredited under the Scheme can enter into head contracts for applicable building work.  It enables the Australian Government to use its influence as a major construction client and provider of capital to improve the workplace safety performance of the building and construction industry. | [www.fsc.gov.au/sites/fsc/needaccredited/accreditationscheme/pages/theaccreditationscheme](http://www.fsc.gov.au/sites/fsc/needaccredited/accreditationscheme/pages/theaccreditationscheme) |

* + - 1. Other relevant Victorian Government policies
         1. Asset Management Accountability Framework

The Asset Management Accountability Framework (AMAF) outlines a set of requirements for the lifecycle management of non-current assets (physical and intangible), including information and communication technology (ICT) assets. Whole of life requirements are to be addressed in specifications and procurement. Further information on the AMAF is on the DTF website at <https://www.dtf.vic.gov.au/infrastructure-investment/asset-management-accountability-framework>

* + - * 1. Value Creation and Capture Framework

The Value Creation and Capture (VCC) Framework requires agencies to consider value creation and capture opportunities for any relevant asset investment proposals submitted for budget funding.

**Value creation** refers to creating and delivering additional value and benefits for Victorians than might normally have been achieved from an investment. For example, when building infrastructure or developing precincts, government can enable economic opportunities, deliver green space, community services, housing and education facilities and create more value for the community than would otherwise be the case.

**Value capture** refers to government capturing a portion of the incremental economic value created by its investments, activities and policies. These actions may generate alternative revenue streams, assets or other financial value that Government can tap into to assist funding existing or future investments.

Investments required to comply with the VCC Framework include:

* + - precinct projects;
    - development of public land;
    - non-ICT capital investments meeting HVHR criteria; and/or
    - any other capital investment considered by Government as having potential significant value creation and/or capture opportunity.[[3]](#footnote-4)

#### Procurement process

Any relevant, approved VCC objectives and mechanisms should be pursued during the procurement stage, and clearly outlined in all procurement and contract documentation.

**Market engagement**

Market engagement activities can be used to test the capacity and capability of the market to deliver any VCC outcomes and could provide confidence that the proposed VCC approach will result in successful outcomes. Government can seek input on the deliverability of the detailed creation and capture plans developed earlier in the project.

**Tendering phase**

Tender documentation should clearly outline any relevant VCC objectives, outcomes and requirements for tender responses. Tenderers should provide VCC mechanisms that achieve the VCC objectives and outcomes. The tenderer can provide additional VCC opportunities where appropriate. It may also be appropriate to allow tenderers to propose alternative approaches that offer value to the State, in addition to lodging a compliant tender offering.

**Tender evaluation phase**

Tender evaluation plans should include a separate criterion for assessing any relevant VCC mechanisms, and associated weighting(s) should be provided to the bidders.

Tenderers should identify whether value capture mechanisms are complementary or core to the project or precinct and whether VCC components meet the social, environmental and economic outcomes that reflect the cross-government strategic outcomes.

The investor should provide Government with adequate information about the delivery of the VCC plans when seeking necessary Government approvals.

**Negotiation**

It is important to identify early if a VCC element is likely to influence contractual negotiations.

Further information on the VCC Framework is available on the Department of Premier and Cabinet website at [www.vic.gov.au/value-creation-and-capture-framework](https://www.vic.gov.au/value-creation-and-capture-framework).

* + - * 1. *Climate Change Act 2017* and related climate change initiatives

The Victorian Government’s new *Climate Change Act 2017* commenced operation on 1 November 2017. The Act sets out a clear policy framework and a pathway to 2050 that is consistent with the Paris Agreement to keep global temperature rise well below 2 degrees Celsius above pre-industrial levels. The Act sits alongside other key Victorian Government energy and climate change initiatives, including Victoria’s Climate Change Framework, Victoria’s Climate Change Adaptation Plan 2017-2020 and Victoria’s Renewable Energy Action Plan.

There are two primary aspects of these climate change initiatives that agencies should consider when developing and delivering infrastructure investments:

* + - **greenhouse gas emission reduction:** the *Climate Change Act 2017* sets a target of net zero greenhouse gas emissions by 2050. When delivering new, or renewing/replacing existing, infrastructure, Government should think about actions it can take to reduce Victoria’s emissions footprint; and
    - **climate change adaptation:** climate change is a key *uncertainty* that can impact our investments. Victoria is already experiencing the impacts of climate change, with increases to average temperature and decreases to average rainfall impacting all parts of the State. When developing and delivering investment proposals, agencies should consider whether service delivery functions are vulnerable to changing climatic conditions. Practitioners should also contemplate strategies or actions that could be taken to prepare for, and adapt to, these changes, and increase the resilience of our service delivery capability and supporting assets.

Further information on the Victorian Government’s climate change legislation, policies and initiatives is available on the Department of Environment, Land, Water and Planning website at [www.climatechange.vic.gov.au](https://www.climatechange.vic.gov.au/).

* + 1. Procurement principles

Figure 8: Section 4 document overview



Under the *Financial Management Act 1994*, there are five key principles that must underpin every Victorian Government procurement to ensure public sector financial management accountabilities are achieved.

These are:

* + - achieving value for money;
    - achieving accountability and the efficient, effective and ethical use of resources;
    - maintaining probity and transparency;
    - encouraging open and fair competition; and
    - actively managing risk.

These principles are summarised below. How practitioners should consider and incorporate these principles throughout the procurement process is presented at the end of this section.

* + - 1. Value for money

Value for money (VfM) is an assessment of tendered bids weighing the cost of obtaining goods and services against the benefits they provide. Achieving VfM should be the overriding focus during each phase of a procurement process.

VfM balances the purchasing costs of a good or service against a range of attributes, including quality, performance standards, suitability, risk exposure, policy alignment, timeliness, convenience, resource use and social and environmental impacts. VfM should be assessed on a ‘whole of life’ or ‘total cost of provision’ basis, where the long-term costs, viability and sustainability (operations, maintenance, support infrastructure and disposal) of an investment are considered in conjunction with the immediate budget implications.

* + - 1. Accountability and effective, efficient and ethical use of resources

Agency procurement practices need to give the public confidence in Government’s expenditure of public resources.

Good procurement will avoid waste, ensure resources are used in a proper manner and in the community’s best interests and ensure benefits are maximised. Procurement needs to align with Government’s policies, legislation and values. It must also align with departmental long-term strategic planning, service demand or needs definition.

* + - 1. Probity and transparency

Probity is proper and ethical conduct in dealings with the market.[[4]](#footnote-5) This includes complete and confirmed integrity, fairness and honesty. It is demonstrated by transparency of actions, equity, confidentiality and managing actual and perceived conflicts of interest. Probity enhances public confidence in the expenditure of public money.

Good procurement practices are transparent, appropriately competitive and provide equal opportunity to all parties. Transparent purchasing practices support government in upholding ethical behaviour and promote appropriate competition. Transparency and probity enhance the agency and government’s reputation in the marketplace, thereby maximising interest and participation in future work.

AppendixE provides a checklist for probity issues that should be considered in the probity plan and as the procurement is undertaken.

* + - * 1. Engaging probity services

It is good practice – and a requirement for all major projects – to have independent oversight of probity.[[5]](#footnote-6) Agencies are encouraged to appoint a probity auditor or probity adviser to develop or input into the probity plan and to ensure the plan is adhered to throughout the procurement process. DTF manages the Professional Advisory Services Panel, which includes probity services. Information on the panel is available on the Buying for Victoria website at [buyingfor.vic.gov.au/professional-advisory-services-contract](https://buyingfor.vic.gov.au/professional-advisory-services-contract).

While the terms ‘probity auditor’ and ‘probity adviser’ are often used interchangeably, there are distinct differences in the roles of probity audit and probity advice.

Table 3: Probity auditor and probity adviser roles, responsibilities and services

|  |  |
| --- | --- |
| Probity auditor | Probity adviser |
| The probity auditor provides assurance services.  They provide an assurance audit or independent scrutiny of a procurement process. Expresses an objective opinion as to whether the prescribed probity requirements have been adhered to.  The conclusion expressed should be based on robust facts and documentary evidence gathered against prescribed criteria. It should be able to be relied on by third parties, and it is not sufficient for professional judgement to be used as the sole justification for decisions.  The results and opinion of the probity auditor are documented in a probity audit report. | The probity adviser provides advisory services.  They provide advice and assistance before and during the course of the procurement process, as a basis for improving the procurement outcome.  They advise on issues of probity accountability and transparency during the procurement process, anticipate probity risks, advise on how to address emerging probity issues, and monitor how strategies set out in the probity plan are being applied.  They do not provide a verification role and do not provide an opinion as to whether the probity requirements have been met. They are not required to provide assurance of compliance with probity requirements. |

* + - * 1. Developing a probity plan

Probity should be tailored to each individual procurement, and should be applied to each aspect of the procurement process. It is good practice to prepare a probity plan as part of procurement planning documentation. It is a requirement for all major projects (exceeding $10 million, complex or involving high risk) to have a probity plan in place. The probity plan should identify:

* + - the probity responsibilities of the agency, and strategies for upholding these responsibilities;
    - the probity risks and related management strategies for the procurement, including role and responsibilities of each stakeholder in responding to these risks;
    - the probity services to be sourced, including whether a probity auditor and/or a probity adviser is to be engaged, and the scope and nature of the probity services that will be delivered; and
    - the procurement rules to be upheld throughout the process, such as how to manage tender communications, late tenders, tender security and confidentiality, and intellectual property.

The probity plan should be approved by the project’s governing body and management. In the case of a small project, this may be the responsibility of the investment decision-maker.

* + - * 1. Communicating the probity plan

All members involved in the procurement or project, including the project board, advisers, Tender Evaluation Panel members and other project stakeholders, must read and understand the probity plan. All team members must have a clear, common understanding of the arrangements in place to preserve the probity of the process, and how probity risks, such as industry engagement, tender enquiries and late tenders, will be dealt with.

* + - 1. Encouraging open and fair competition

A project team should approach the market in an effective and appropriate way to enable access for suppliers to Government procurement opportunities. Government should have confidence that competition can be maintained throughout the procurement process, and that it will receive the most competitive response possible.

This includes ensuring that competent suppliers are not deterred, either by poor processes, lack of advertising or information, inadequate response times or cost of tendering.

* + - 1. Risk management

Investment procurement is inherently risky, requiring the project team to effectively negotiate and manage a wide variety of project externalities and uncertainties.

* + - * 1. What are risks?

Public infrastructure procurement risks are any actions or events potentially impacting the process of planning, purchasing, implementing and managing construction works and related goods and services. This guideline focuses on managing adverse risks.

Risks can impact an agency achieving its procurement objectives and service delivery requirements by:

* + - reducing the likelihood of achieving a value-for-money procurement outcome;
    - increasing time and cost over-runs;
    - negatively impacting on the quality of the delivered solution;
    - damaging the agency’s or Government’s reputation and undermining the public’s confidence in the delivered solution; and
    - resulting in non-compliance with probity requirements, policy objectives and/or regulations.
      * 1. Risk management practices

Risks can never be eliminated entirely from a procurement process. Instead, successful procurements focus on identifying risks and uncertainties and reducing their impacts.

The ISO 31000:2018 provides the internationally accepted standard for best practice risk management. It provides a generic method of managing risk, which is applicable for all types of organisations and sectors. It helps organisations increase the likelihood of achieving objectives, improve the identification of opportunities and threats and effectively allocate resources for risk treatments. It can assist organisations to perform well in an environment of uncertainty.

Risk management is a dynamic process. The project environment is constantly changing during investment delivery – external factors such as resource availability, exchange rates and political influence are likely to change during the course of a procurement. Unexpected site characteristics, such as difficult geological conditions, may also emerge. Internal factors may also change, e.g. loss of key team resources. All these changes impact on investment risks and their management. Therefore, risk management is not a linear, static process that is done once at the start of a procurement, but rather a dynamic, living and constantly changing strategy.

Risks should be managed by the party most able to control and manage them. In many cases, Government will be best able to manage a particular risk. In these instances, practitioners should be aware that excessive risk aversion may result in expensive or unfavourable contract conditions.

* + - * 1. Ensure consistent risk management throughout the investment lifecycle

Risk management is required at every stage of the investment lifecycle. A risk management strategy is not only required during procurement, but is also a mandatory element of the business case, procurement strategy and project plan.

When developing a risk management plan for the procurement process, use the business case and procurement strategy risk management plans as the basis. Ensure it aligns with the risk management plan for the overall project delivery. There should be a level of consistency in the risk management strategies for a project as it moves through the investment lifecycle. The impact of any risks arising at any stage of the process should instigate a reassessment of previous decisions – i.e. depending on the risk impact weighting, practitioners may need to reassess the preferred procurement model, the business case parameters, and potentially even the objectives and viability of the project.

The Investment Lifecycle and HVHR Guidelines provide further information.

* + 1. The tender development phase

Figure 9: Section 5 document overview



It is essential that government purchasers undertake significant planning and preparation prior to commencing a tender. Principal elements of the tender development phase are:

* + - establishing governance and resourcing arrangements for the procurement phase of the investment lifecycle;
    - developing a procurement plan to direct the tender process, incorporating a marketing engagement strategy, tender strategy and project staging and structuring analysis;
    - developing project design documentation to inform the tender documents; and
    - developing tender and contract documents.
      1. Establishing governance and resourcing for the procurement phase

The first step in the procurement process is establishing and resourcing a team to undertake the procurement task. The skill sets required to deliver the procurement stage may be quite different to those required in the project development stages of a project. Getting the right governance, level of resourcing and mix of skills early in the procurement stage is essential to ensuring the team has the capability and capacity to procure a desirable solution.

* + - * 1. Governance and accountability

Robust governance arrangements must be established prior to commencing any procurement activities, and should clearly identify:

* + - the investment owner, or person with ultimate responsibility for successful procurement delivery;
    - a process for decision-making, including project board or steering committee terms of reference where applicable; and
    - team member roles and responsibilities.

Some projects involve more than one source of funding. In these instances the project manager must ensure that there are clear written arrangements for project procurement decision-making and management. This must identify the approvals required from individual investors at each stage in the procurement process.

Governance and accountability arrangements will vary depending on the project characteristics and procurement model chosen. For smaller, less complex procurements, the investment decision-maker and project director roles may be combined, and a project board or steering committee may not be required. Figure 10 outlines some key roles and a generic team organisation and governance model. Table 4 outlines the accountability requirements of some generic roles and responsibilities required in a procurement.

Figure 10: Project team organisation



Table 4: Key team governance requirements[[6]](#footnote-7)

|  |  |  |
| --- | --- | --- |
| Role | Responsibilities | Required skills |
| Senior responsible owner (SRO) | The person in the client organisation who is ultimately accountable to Government for the successful delivery of the project. They are responsible for approving all decisions relating to the procurement or, where necessary, obtaining Ministerial and financial delegate approvals. | Strong service delivery knowledge  Project management skills  Stakeholder management  Leadership |
| Investment decision-maker | The investment decision-maker is responsible for reviewing and evaluating the investment at each approval milestone within the procurement process and, if justified, providing the approval to proceed. | Project management understanding  Decision-making |
| Project board/ steering committee | Project boards are not involved in the day-to-day management of the project. Instead they consider the recommendations of the project team. They provide expert advice to support the SRO and investment decision-maker in making informed choices, taking into consideration the broader views of project stakeholders. | Broad mix of procurement, engineering, management, finance, commercial and service delivery skills. |
| Project director | The project director should be a senior officer providing the project with the necessary leadership through tendering and delivery. Also known as the ‘client’s representative’, they have clear accountability for delivering the project requirements in accordance with the approvals given, and is a single focal point for the daily management of the client organisation’s interest in a project. They are responsible for:   * establishing and resourcing an appropriate organisational structure and necessary communication and approval processes; * ensuring that end users and other stakeholders are appropriately involved and committed to the procurement. Coordinating and rationalising the requirements of all the end users in developing the project definition, design brief, owner objectives and success criteria for the project; * ensuring the procurement proceeds in accordance with the project schedule (with assistance from the project manager); * acting as mediator or arbiter on disputes that occur on the client’s side; and * ensuring Gateway reviews and other assurance processes and post-project completion reports are undertaken. | Project management, well-developed commercial skills applicable to developing and negotiating contractual arrangements and knowledge  of government processes. |
| Reference group | Comprises representatives from end users, and other stakeholders where appropriate, to ensure the requirements of the users and occupants of the end asset inform the design brief and technical specification. | Service delivery knowledge. |
| Project manager | This is the individual responsible for the day-to-day detailed management of the procurement. They provide the interface between the project director and client team and the supply side of the project team. | Project management  Communications  Stakeholder management  Construction knowledge  Procurement  Commercial |
| Project administrator/ team | One or more persons who assist the project manager in managing the administrative and reporting requirements of the procurement. | Administrative skills  Project management  Service delivery  Finance |

* + - * 1. Resource requirements

Undertaking a procurement process requires resourcing to ensure procurement tasks can be delivered according to the project schedule. It also requires a broad range of skills. It is common to engage a range of advisers to supplement in-house capacity. The required consultancies may include: commercial, financial, technical, legal, risk, procurement (i.e. related to a specific procurement model), and taxation advisers. Capability requirements will depend on the project and procurement type and procurement stage – for example, financial advisory skills required for privately financed projects will differ markedly from those required under traditional models.

#### Pre-qualified registers

There are a number of registers of pre-qualified suppliers who have proven experience and skills in a specific works stream. These registers can be used to efficiently identify and engage experienced and appropriate advisers. The significant advantage of using pre-qualified registers is that the field is limited to suppliers with proven experience and capability, as well as demonstrated compliance with various ISO standards, insurance requirements, etc. However, pre-qualified registers do not identify some consortia and may not recognise the capacity of suppliers to address unusual or unique project requirements.

The Construction Supplier Register is a pre-qualification scheme for building and construction industry consultants and contractors, managed by the Department of Treasury and Finance. It provides a range of technical advisory services and is available by arrangement to State Government departments, statutory authorities, school councils and hospitals, as well as to other approved Government and non-Government organisations. Further information is available on the DTF website at [www.dtf.vic.gov.au/infrastructure-investment/construction-supplier-register](https://www.dtf.vic.gov.au/infrastructure-investment/construction-supplier-register).

The Victorian Government Purchasing Board supports a number of pre-qualified registers, including the:

* + - **Professional Advisory Services Panel:** includes consultants experienced in project strategic development, business case development, procurement, project auditing, project management and commercial advice;
    - **Legal Services Panel:** provides a range of legal services including for commercial projects; and
    - **Major Information and Communication Technology panels:** provide advice on ICT projects, hardware and software.
      1. The procurement plan

A good procurement plan is one that documents the most effective and efficient approach for procuring assets and services that is ‘best for project’ and ‘best for State’.

Agencies are required to develop a procurement plan to guide a procurement from tender development, through contract award, commissioning, transition-in and requirements to establish operations and maintenance. The purpose of the procurement plan is to identify and document the tender approach and strategy with the highest potential of delivering the best procurement outcome.

* + - * 1. Procurement strategy and procurement plan – how do they differ?

The procurement strategy and the procurement plan are two different documents produced at different times within the investment lifecycle. The documents have different purposes, audiences and content requirements.

A **procurement strategy** is prepared as part of the business case and determines the procurement method that maximises the opportunity in meeting the Government’s service objectives. It ensures procurement options, issues and risks inform the ultimate project approval and funding decision. Developing and implementing the procurement strategy is addressed in the *Stage 1: Business Case* guideline and **Procurement Strategy** technical guide.

A **procurement plan** is developed after funding approval to support solution delivery. It is a key product of the procurement stage of the investment lifecycle and outlines in detail the procurement objectives and the intended methodology for procuring the investment. A procurement plan guides and supports the project team through the expression of interest, tendering, contract negotiation and implementation phases of a project, as well as to manage probity and procurement risks. The procurement plan should be derived from the procurement strategy, and should be continuously improved and amended throughout project delivery to reflect changes in the delivery environment.

The two documents should be consistent, yet they have discrete purposes and include different content. While the procurement strategy focuses on procurement analysis to identify the preferred procurement model, the procurement plan will have a more operational focus and will aim to direct the project team through the procurement process using the method selected. Key differences and respective elements of the procurement strategy and plan are outlined in Appendix F.

* + - * 1. Starting a procurement plan

The first step in developing a procurement plan is to review the project’s business case and procurement strategy and reassess and reconfirm the validity of the procurement decision. This stage is particularly relevant in instances where the procurement team differs from the business case development team.

**Note:** if the procurement team decides that an alternative procurement approach is required (i.e. an alternative approach to the one identified in the business case), the justification for taking a different approach needs to be documented. Government funding approval for a project is provided on the basis of the preferred procurement approach, and ministerial approval (the Treasurer’s approval is also required for HVHR projects) will be required before the procurement can commence using an alternative approach.

* + - * 1. Key elements of the procurement plan

Once a procurement team has confirmed the high level procurement approach to be used, it should document the intended procurement process in more detail. There is no one-size-fits-all approach outlining what a procurement plan should include, and content will be project-dependent.

Some important, generic inclusions are:

* + - procurement objectives, noting that these should be consistent with the investment objectives outlined in the Investment Logic Map, business case and project plan[[7]](#footnote-8);
    - market sounding and engagement strategy;
    - tender strategy;
    - whole of life consideration; and
    - governance and resourcing plan, probity plan, stakeholder engagement plan and risk management plan for the procurement stage, if not contained in the overarching project plan for the project.

Figure 11: Key elements of the procurement plan



Appendix G contains further detail on procurement plan content elements and considerations. It is indicative only and is not exhaustive. It should not be seen as a template, but adapted according to project requirements.

Sections 5.3 and 5.4 of this document provide further detail on developing the market engagement strategy and tender strategy respectively.

* + - * 1. Reviewing the procurement plan

The procurement plan is a living document. It should be reviewed at each stage of the procurement process to reflect and consider new information arising during procurement implementation. In particular, it should be reviewed and updated following completion of any market testing process such as an EOI process.

* + - 1. Market engagement strategy

Determining government’s market engagement approach for a project is an important element of the procurement plan. Appropriate market engagement can indicate whether a proposed tender approach will result in procurement success or failure. It can be used to identify supply-side issues that may impact on the market’s ability to meet project timelines and quality constraints. It can also be used to initiate preliminary industry dialog and interest, and provide government with confidence that there is a competitive market capable of supplying its needs in a way that will meet value-for-money outcomes.

There are two main reasons why government engages the market when procuring infrastructure:

* + - to seek information from the market on project feasibility, delivery and options; and/or
    - to communicate an offering to the market to support a competitive response.

Market engagement can vary greatly, from simply advertising a tender opportunity or conducting an industry briefing session to managing a formal process seeking market comment or input. The extent of market engagement required depends on the scale and complexity of the investment, level of risk or uncertainty, experience in the procurement methodology and delivery constraints such as managing a difficult physical environment or ambitious timelines. Generally, seeking market input to inform the development of a procurement is a more complex process than simply advertising an opportunity. Government can seek market input on a range of issues, including:

* + - identifying options for how a requirement could be delivered;
    - confirming the deliverability of a design solution;
    - determining whether there is sufficient market interest, structure and maturity to drive a competitive tender response;
    - confirming the market’s capability to meet project time and quality constraints and value-for-money outcomes;
    - determining the market’s capacity to meet project requirements, including the extent to which the market is affected by the business cycle, other tenders in the market, shortage of resources or sector-specific issues;
    - determining the capacity of the market to take on risks;
    - identifying any emerging technologies or ideas that could impact on a procurement; and
    - providing confidence that a proposed tender approach will result in a successful procurement.

There are many processes that can comprise a market engagement strategy. These are summarised in Figure 12 and outlined in the following sections.

Figure 12: Common elements of the market engagement strategy



Regardless of the market engagement strategy, procurement practitioners:

* + - must consider confidentiality and probity;
    - must treat procurement as an iterative approach, and reconsider earlier procurement decisions in light of any new information emerging from market engagements; and
    - may find it beneficial to engage a procurement adviser to scope the market engagement process and advise on strategies to influence or develop the market.

Once government has a firm understanding of market interest, capacity and capability in a procurement, it needs to communicate the offering effectively to ensure a competitive and value-for-money response.

Developing market engagement documentation and running the market engagement strategy are also key components of the tender development stage, and are addressed in sections 5.6 and 5.7 respectively.

* + - * 1. Market soundings

Market soundings are used to obtain an indication of the level of market interest in a proposal, or to determine its capacity or capability to deliver a proposal at this point in time. They include participating in industry forums and undertaking market surveys.

* + - * 1. Request for information

A Request for Information (RFI) is a process used to formally collect written information to structure a formal approach to the market and is about the capabilities of various suppliers to deliver a scope of objectives. It can be used to:

* + - shortlist a number of suppliers to participate in a subsequent tender process;
    - assess the capability of the market to deliver a solution, essentially to confirm proof of concept or to validate that a desired, value-for-money outcome can be achieved at this time;
    - improve a design specification or statement of requirements before releasing the final tender documents; and
    - obtain frank industry advice on the request documentation, the deliverability of the requirement and the reasonableness of the timeframes and approach being proposed.

An RFI is primarily used by the client to gather information to help decision-making regarding how best to engage the market on a particular procurement. It is normally used in combination with subsequent market engagement processes.

* + - * 1. Proof of concept

A proof of concept is a demonstration of a solution to verify its feasibility and confirm its potential for real-world application prior to investing significantly in its delivery.

A proof of concept may be undertaken in the procurement stage to validate technical, functional or financial feasibility. This provides potential suppliers with confidence in Government’s requirements before tendering. It may also be used to generate or determine interest and acceptance in a solution. It is also undertaken in the delivery stage to inform how the final solution is ultimately delivered to the customer.

A proof of concept is only a representation of the final solution and is often incomplete and not fully tested. It is not intended to be an early version of a production design – merely to test that a solution is achievable. It differs from pilots, which are usually a production-quality version of the end solution, scaled or limited in some form to test solution success, operational issues, integration, etc., prior to full-scale delivery. Proof of concept is regularly used for ICT investments.

Advantages of using a proof of concept include:

* + - providing the procurement team, end users and potentially suppliers with confidence that a solution is achievable and will meet requirements and expectations;
    - facilitates a very clear, shared understanding of requirements and expectations early in the project delivery cycle;
    - communicating design decisions and the overall look and feel of the final solution to the end user much more effectively than through design documentation and design reviews;
    - understanding the capabilities and limitations of new technology, and likely impacts on the final solution;
    - identifying potential risks and uncertainties; and
    - reducing the overall risk of project failure.
      * 1. Expression of interest

An expression of interest (EOI) is used to confirm market interest in an offering prior to tendering, and is one method used to shortlist suitably qualified suppliers who are the most capable of delivering the government’s procurement objectives. In an EOI, government purchasers advertise publicly for suppliers to register their interest in a project. Interested suppliers then submit a proposal outlining their capability and capacity to deliver the work. The purchaser assesses submissions, and identifies a shortlist of suppliers that have demonstrated they have the necessary skills, resources and capabilities required. Only these shortlisted suppliers are invited to tender for the works.

EOIs are regularly used by government to minimise the cost of tendering. Submission and evaluation requirements at the EOI phase are less onerous than for tender processes. EOIs limit the number of suppliers who are required to develop a more detailed response to an invitation to tender. They reduce tender development costs to industry and tender evaluation costs to government. EOIs are therefore generally used for larger, more complex projects where the cost of developing a tender response is significant.

* + - 1. Tender strategy

The tender strategy is another important and mandatory element of the procurement plan. This should outline three fundamental decisions:

* + - **Considering investment uncertainty** – how project uncertainties can be managed throughout the procurement and delivery stages by embedding flexibility into planning.
    - **Tender approach** – how the agency intends to offer the procurement opportunity to the market, particularly whether market engagement requirements would be best met using a single-stage or multi-stage tender approach.
    - **Form of invitation to tender** – whether the purchasing agency will seek offers from the market based on detailed functional specifications of a particular solution or an output specification outlining the functional requirements only (leaving suppliers open to identifying a solution that will meet functional requirements).

Figure 13: Key elements of the tender strategy



* + - * 1. Considering investment uncertainty

Many of government’s investments are vulnerable to *uncertainty*: external factors that are beyond the investor’s control, and can impact the delivery of intended investment outcomes. Uncertainties can influence market conditions, including the demand or need for an investment and/or the ability of the supply market to provide an effective solution. Market changes can be unfavourable, presenting threats to investment delivery, or favourable, presenting opportunities for achieving greater value for money or enhanced benefits.

If these uncertainties are realised on an investment, they can challenge or invalidate a business case’s assumptions and impact an investment strategy’s feasibility. Investment options that are preferred and would be successful under one set of conditions can become unviable and regretted if circumstances change.

Uncertainty may be an influential determinant of investment success or failure, and needs to be carefully considered in investment proposals. Previously, investment guidance treated uncertainties in the same way as risks. However, uncertainties fundamentally differ from risks in that they are outside the investor’s control to manage or ameliorate. They require different treatments, and therefore we cannot consider and plan for uncertainties using risk management tools and techniques.

To successfully deliver investments with high degrees of uncertainty, Government needs **flexible** and **resilient** investment strategies that anticipate or identify when change may impact an initiative and can then adapt and respond advantageously to prevailing conditions.

This may be as simple as avoiding uncertainty by **waiting to take action** when there is greater certainty on future market conditions, or *staging* decision-making rather than locking in all the decisions at the start. It could also include techniques to **respond to change during project delivery**, such as creating financial buffers to absorb impacts, shifting impacts to other project partners, minimising Government’s obligations under unfavourable conditions, providing the ability to exit from unproductive pathways cost-effectively, or leveraging opportunities that may arise. It could further involve **future-proofing** assets to be more resilient to change during their operational life.

When planning an investment that may be impacted by uncertainty, agencies should consider whether there is capability to use a ‘real options’ approach to increase investment flexibility and resilience. A real option is the capability to do something differently, coupled with the choice to exercise the option or not.

It can provide management with the flexibility and ability to respond in real time to unfolding events. Such options are not mutually exclusive and can operate sequentially.

Real options can be used in parallel with any procurement model and tender strategy. Types of real options are outlined in Appendix H.

#### When to consider real options in the procurement process

In the Procurement stage, practitioners may need to ensure that real options or other investment flexibility requirements are built into the procurement and contractual documentation so that they form part of the deliverable solution:

* + - The **procurement plan** should identify all real options and flexibility opportunities. It should clearly indicate trigger points when they are likely to come into play, as well as investment trajectories and outcomes that will result from exercising any options.
    - **Expressions of interest** and **tender documentation** should clearly outline any real options or flexibility requirements to inform potential suppliers of all potential procurement outcomes, and to allow them to structure their tender accordingly.
    - **Contract documentation** should clearly outline when and how any real options can be exercised, and the resulting impacts.

Due diligence can be used to obtain greater information previously not available to the procurement team and may lead to real options being exercised or removed from consideration. Real options can help inform the decision on how much should be invested in the proposal’s development (e.g. feasibility studies or pilots) before it is approved or rejected.

Further information on managing uncertainty is available in the **Real Options** technical guide.[[8]](#footnote-9)

* + - * 1. Tender approach – single-stage or multi‑stage tender approach

Government practitioners may seek tenders by using either a single-stage or multi-stage tender process. The tender approach may be informed by legislative or policy requirements (such as FTAs or the HVHR process). It will also be influenced by the project requirements, risks and uncertainties, with more complex projects generally requiring more extensive market engagement.

**Single-stage tendering** occurs where an invitation to tender is issued to the market with all of the contractor capacity and tender specifications combined. Responses can be received from any interested party – there is no mechanism for limiting how many submissions are received or who responds. Therefore the purchaser must simultaneously assess **both** the **general capacity of the supplier to undertake the work** and their **response to the project specific criteria**. If a single-stage approach is used, explicit and targeted tender schedules and evaluation criteria are required to ensure responses can be accurately assessed, and tenderers with appropriate qualifications, skills and experience can be identified. Single-stage tender approaches are commonly used for lower-risk or simple works.

**Note:** open public advertisement of a tender can lead to an unlimited number of potential tenderers whose qualifications to undertake the contract can be difficult to assess. However, requirements arising from legislation, such as FTAs, may necessitate a level of open tendering.

**Multi‑stage tendering** occurs where a pre-tender formal market engagement process is undertaken to create a shortlist of suppliers with demonstrated capacity to satisfy government’s requirements. Shortlisted participants will then be invited to participate in a subsequent tender process. Multi‑stage tendering is commonly used on large, complex or specialised projects, where tendering is likely to be costly. It usually occurs in two stages, although additional processes may also be warranted.

Processes used to shortlist suppliers in a multi‑stage tender process are a publicly advertised request for information and an expression of interest. These are outlined in Section 5.7.

* + - * 1. Form of invitation to tender

When developing a procurement plan, practitioners also need to consider the form of the invitation to tender: whether they wish tenderers to submit offers based on detailed technical requirements of a specific solution or based on functional requirements and output specifications. It is essential that the tender strategy is developed very early in the tender development phase as the strategy selected will impact on all elements of the procurement process, including:

* + - resourcing requirements;
    - project schedule and time constraints; and
    - project documentation requirements and tender documentation.

Two significant questions need to be considered:

* + - Will the form of the project documentation be a **design specification** or a **statement of requirements**?
    - Will the form of the invitation to tender be a **Request for Tender** (RFT) or a **Request for Proposal** (RFP)?

Other types of invitations to tender, such as a Request for Quote or Request for Submission, are variants of these two tender types. They differ in the level of prescription and specificity in the offer document put to the market. See Appendix I.

* + - * 1. Due diligence

Prior to tendering a project, a department or agency must build a comprehensive body of knowledge and documentation about the project to verify its understanding of project requirements and interfaces, identify risks and inform project and tender documentation. This is achieved by undertaking due diligence.

Due diligence is an important input into project documentation and provides tenderers with clarity of project scope, risks and uncertainties. The process of collating due diligence is ongoing and not limited to the Procurement stage of an investment – a large proportion of information may have been developed during the business case development stage, and further due diligence may be necessary during implementation.

Due diligence may be collated internally or through another department, such as the Environmental Protection Agency or Heritage Victoria. Departments are also likely to be required to engage specialist technical advisory services. The nature of due diligence required will vary widely depending on the type of project being delivered, geographical traits of the area and other project characteristics. Appendix J outlines some common due diligence requirements.

* + - * 1. Project design documentation

The procurement team must clearly and explicitly define and document the works that are being procured. Project design documentation forms the backbone of tender documentation by specifying the requirements being sought and describing the tender offering. If done well, it ensures the market clearly understands what the agency is asking to be delivered. It can therefore influence the accuracy and extent to which tender bids will deliver on the investment objectives.

There are two main forms of documentation that may be developed to define the user requirements an agency is wishing to procure: a design specification or a statement of requirements. Table 5 outlines the key differences between these two different types of documentation, and when each one should be used.

There is a direct relationship between the type of project design documentation used and the form of invitation to tender. A design specification is used when the client has specified a defined solution, and is used in conjunction with an RFT. A statement of requirements is used when the client has defined the services or outputs it requires, but has not defined a single specific solution. It should be used in conjunction with an RFP.

Table 5: Differences between a design specification and a statement of requirements

|  |  |  |
| --- | --- | --- |
| Element | Design specification | Statement of requirements |
| Purpose | Define asset functional requirements. | Define service requirements and performance criteria. |
| When should be used | When the client has:   * a detailed understanding of its functional requirements and how these should be delivered by an asset; * a well-developed and understood design already scoped; and * implemented many similar examples of the investment type (e.g. tram stops). | When the client:   * has a high level understanding of its functional requirements, but is flexible on how these are addressed or met; and * is seeking to extract innovation and efficiencies from the private sector. |
| Level of detail | Detailed | More flexible, defining desired service or functional outcomes |
| Level of innovation | Not sought to a large extent | Unconstrained  Encouraged to a high degree |
| Approach to market | Request for Tender | Request for Proposal |

Regardless of the type of documentation being delivered, requirements definition can be a complex and lengthy process. It is essential to review the business case objectives and success criteria, and heavily include end users in the project documentation development. This ensures their requirements are adequately identified and accurately documented. Agencies must ensure they trace the development of each requirement throughout the entire documentation process and monitor the impact of any specific requirement change on the overall design to ensure document clarity. For further information, see Appendix K.

* + - * 1. Pre-tender cost estimate

Before preparing tender documents, procurement teams may wish to validate the expected total project cost to provide confidence that the current market can deliver the tender within the Government-endorsed funding allocation. This may not be necessary if a detailed cost plan has recently been developed as part of the business case. However, it may be relevant if a more advanced design is available or significant time has elapsed since the business case was developed.

An unrealistically low pre-tender budget can lead to problems during the project delivery 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 after the initial budget is publicly announced.
    - 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.

Where a project design specification has been prepared, the pre-tender cost estimate can be developed by a quantity surveyor, who will estimate a price for each component of works based on the current market cost.

For PPP projects, the procurement team must develop a public sector comparator (PSC). The PSC estimates the hypothetical risk-adjusted cost if a project were to be financed, owned and implemented by government. The procurement team can then use this estimate to assess the cost-effectiveness and value for money of tender proposals. The PSC is developed in accordance with the required output specification, and the proposed risk allocation reflected in the contract released with the project brief, and is based on the most efficient form and means of government delivery. Further information on developing a PSC is outlined in the National PPP guidelines volume 4.

* + - 1. Preparing pre-tender and tender documentation

The procurement team should develop comprehensive tender specification, evaluation and contract documentation prior to the tendering phase. This includes request for tender or request for proposal documentation and contract documentation. It is critical the tender evaluation criteria and tender evaluation plan are developed in conjunction with tender documentation. This ensures that the tender response schedules will adequately address procurement objectives and will provide process transparency and probity.

Tender documentation should consider and address asset management requirements, including but not limited to:

#### Planning

Investment solution aligns service demands or needs with the assets required to deliver the level of service.

#### Acquisition

Addressing the requirements of availability, capability, capacity, maintenance, reliability, performance, risk and safety.

#### Establishing verification and validation process requirements

Treatment of technical obsolescence (where this occurs within the asset lifecycle, e.g. software and electronic subsystems).

#### Implementation

* + - Operational readiness studies and preparation.
    - Transition-in/transition-out requirements.

#### Mobilisation

* + - Supporting facilities and complementary investment.
    - Information system requirements defined (data records).
    - Realisation (operations and maintenance).

#### Delivery of training

* + - Preparation of all necessary technical and supporting documentation.
    - Established supply chains (as necessary).
    - Information systems established.

#### Disposal

* + - Rehabilitation/environmental considerations (as necessary).
    - Termination of capability.

More detail on the asset management requirements that should be considered in contracts for outsourced assets is available on the DTF website at [www.dtf.vic.gov.au/infrastructure-investment/asset-management-accountability-framework](https://www.dtf.vic.gov.au/infrastructure-investment/asset-management-accountability-framework)

* + - * 1. Tender evaluation criteria documentation

The Ministerial Directions for Public Construction Procurement in Victoria under the *Project Development and Construction Management Act 1994* set mandatory criteria for tendering.

It is essential that tender evaluation criteria, weightings and processes are developed in the tender development phase, prior to releasing tender documentation. This is to ensure that the invitations to express interest or tender are drafted in a way that will elicit all the information that the tender evaluation team requires to assess submissions and meet probity requirements.

Tender evaluation criteria should be outlined in the EOI or tender documentation; however, government is not required to disclose the relative importance or weighting of each criteria. Where the criteria is documented, the tender evaluation plan often contains more detailed criteria than what is provided in the tender documentation.

Procurement teams should develop a tender evaluation plan outlining the tender evaluation criteria and associated weightings, and the tender evaluation process, including resourcing.

The evaluation criteria should incorporate:

* + - **Compliance requirements:** the tender documents must clearly state any compliance requirements and outline what constitutes a complying tender. Tender documentation should clearly specify that non-complying tenders will not be considered, and that any non-complying tenders must be accompanied by a complying tender. Example of compliance issues include demonstrating no conflict of interest, holding adequate levels of company insurances, and meeting the Local Jobs First Policy.
    - **Project-specific criteria:** these are issues relating to the complexity or unique character of the project. They often include potential risks or uncertainties. They may also relate to managing specific site requirements, meeting timeframes, demonstrating expertise in a construction method or managing strict security requirements.
    - **Supplier capacity to undertake works:** suppliers need to be asked to demonstrate they have the time and resources to complete the works, including adequate technical, managerial, physical and financial resources. This should include documenting current commitments.
    - **Quality of design:** including accurate interpretation of functional requirements, ability to incorporate innovation, environmentally sustainable design, etc., and level of flexibility.
    - **Financial capacity:** including insurances, and record regarding bankruptcy, liquidation and default.
    - **Record of ethical conduct:** record of payment of sub-contractors and contract claims.
    - **General**
      * occupational health and safety system and management record;
      * quality assurance system;
      * use of local materials and/or local content;
      * lowest whole of life cost, best whole of life benefit and value-for-money outcomes.

#### Price to complete the works under contract

The procurement team should determine the relative importance of each criteria to successfully deliver the investment, and accordingly assign each criteria with a weighting.

The procurement team should also document the intended evaluation process at this stage. This should include clarifying:

* + - Who will assess the tenders?
    - Will there be one single tender evaluation panel assessing all information, or a number of panels assessing different aspects of the submission supported by an   
      overarching panel?
    - Will technical experts need to assess certain criteria? For example, it is common for financial or legal tender aspects to be assessed separately from the project-specific criteria?
    - Which panel members will have access to what subset of information?
    - How will each criterion be assessed? For example, will scoring be from 1-5, 0-5,   
      1-10, etc.?
      * 1. Contract documentation

Contract documentation formally outlines the arrangement between the project owner and the successful supplier. It helps to ensure high-quality and cost-effective outcomes for the project by:

* + - specifying performance and quality standards;
    - appropriately apportioning risk between the parties; and
    - incentivising the contractor to perform as appropriate, in line with value-for-money considerations[[9]](#footnote-10).

Contract documentation should facilitate the parties working together in the most collaborative and constructive way possible. It should be developed during the tender development phase and should be disseminated as part of the tender documentation.

#### Standard forms of contract

The Ministerial Directions for Public Construction Procurement in Victoria require contracts to be in a form approved by the Secretary to the Department of Treasury and Finance. Collectively, these contracts are referred to as the Victorian Public Construction Contracts.

A number of standard forms of contract are used for different procurement methods, as outlined in Table 6.

Table 6: Forms of contract used with different procurement methods

|  |  |  |
| --- | --- | --- |
| Recommended for | Standard forms of contract | Indicative value |
| Minor works | Victorian Public Sector General Conditions of Contract for Minor Works (VPS MWC August 2018).  Standards Australia Minor Works Contract Conditions AS 4305-199 (available through Standards Australia).  Royal Australian Institute of Architects Minor Works Contract MWC-2 1994. | For works below the thresholds applying for the Victorian Industry Participation Policy, being $1 million in regional areas and $3 million in metropolitan areas. |
| Major works | Standards Australia General Conditions of Contract AS 2124-1992 used with Victorian Public Sector – Annexure Part B Special Conditions of Contract for use in association with Australian Standard General conditions of contract for AS 2124-1992 (August 2018).  Standards Australia General Conditions of Contract for Design and Construct AS 4300-1995 used with Victorian Public Sector – Annexure Part B Special Conditions of Contract for use in association with Australian Standard General conditions of contract for design and construct AS 4300-1995 (August 2018). | For works above the thresholds applying for the Victorian Industry Participation Policy, being $1 million in regional areas and $3 million in metropolitan areas. |
| Construction services | Victorian Public Sector Consultancy Agreement (Short Form) (June 2018). | For services below the thresholds applying for the Victorian Industry Participation Policy, being $1 million in regional areas and $3 million in metropolitan areas. |
|  | Victorian Public Sector Consultancy Agreement (Long Form) (June 2018).  Standards Australia General Conditions of Contract for Engagement of Consultants AS 4122(Int)-1997. | For services above the thresholds applying for the Victorian Industry Participation Policy, being $1 million in regional areas and $3 million in metropolitan areas. |
| Project alliancing | Forms of contract consistent with the requirements of the Victorian Alliancing Policy are approved forms of contract, provided that the relevant agency has complied with the requirements of the applicable policy, including obtaining all necessary approvals. | Any value |
| Early contractor involvement | No approved standard form. However, departments and public bodies must apply National Alliance Contracting Guidelines Guidance Note 6 Early Contractor Involvement and Other Collaborative Procurement Methods. | Any value |
| Public Private Partnerships | Forms of contract consistent with the requirements of the Victorian PPP Policy are approved forms of contract, provided that the relevant agency has complied with the requirements of the applicable policy, including obtaining all necessary approvals. | Any value |

* + - 1. Undertaking the market engagement strategy

Market engagement activities should be undertaken prior to the tendering phase in accordance with the market engagement strategy developed as part of the procurement plan. Information obtained from the market engagement processes may inform tender documentation, and therefore tender documentation is often developed concurrently with market engagement processes.

Ensure that the key principles of government procurement, as outlined in section 4, underpin all market engagement activities.

The most common market engagement process used in government is the EOI, and this is covered in further detail below.

* + - * 1. Running the expression of interest process

Appendix L of this document outlines suggested content elements of EOI documentation.

EOI processes must be conducted transparently and in accordance with probity requirements. Clear and explicit process rules, such as closing time, date and place for lodging EOIs, evaluation criteria and confidentiality requirements, should be documented in the EOI invitation. Probity and confidentiality expectations should be communicated to all procurement team members, and should be rigidly adhered to throughout the EOI process. Communications with suppliers during the EOI process should be treated with the same level of probity, confidentiality and transparency as the tender process. Please refer to the Ministerial Directions for Public Construction Procurement in Victoria, which set the protocol for tendering.

EOI evaluation is focused on determining whether the parties have the requisite capability to deliver the project. Evaluation should be based on the evaluation criteria specified in the invitation. It should lead to a shortlist of parties to be invited to continue in the tender process and 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 that government genuinely believes have the capability to deliver the project – parties should not be shortlisted to ‘make up the numbers’; and
    - 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.

The EOI process is usually the final stage of the tender development phase and will lead into the tendering phase. It is important to remember that any new information arising during the process should be used to reassess the procurement process. In particular, it may be used to inform tender documentation.

* + - 1. Government endorsement

The final task in the tender development phase is reconfirming Government’s intent to proceed with the investment.

Do not call tenders without a firm intention to proceed with the project.

Tendering is a costly process for purchasers and suppliers in terms of time, resources and money. Before commencing the process, it is important to have a firm intention to proceed, with funds committed and available. The Treasurer’s approval to proceed is required for HVHR projects in accordance with their HVHR Project Assurance Plan.

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

* + - 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 the 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.

Failure to obtain sufficient funding before issuing an invitation to tender is poor tendering practice.

* + 1. The tendering phase

Tendering is a formal communication process of seeking market offers to deliver required goods and services. It enables government to provide suitably qualified potential suppliers with an opportunity to bid for work. It enables information to be disseminated to potential suppliers in a fair and equitable way, and provides a mechanism for suppliers to confidentially submit responses.

Tendering should be undertaken in accordance with the procurement plan developed in the tender development phase.

Figure 14: Overview of Section 6



* + - 1. **Good tendering behaviour**

Public sector purchasers are required to behave with integrity throughout procurement processes, and should consider and adopt the following tendering principles:

**Table** 7**: Tendering principles**

|  |  |
| --- | --- |
| Subject | Principle |
| Pre-qualification | Pre-qualification can be used where appropriate to ensure that prospective tenderers have the capability to carry out the required works or services. |
| Principal’s commitment | Only call for tenders after making a firm commitment to proceed with the project. |
| Cost of tendering | Recognise that this cost is a significant industry and agency overhead.  Do not engage in multiple rounds of tendering without good reason.  For high-value and/or complex contracts, use expression of interest (or similar) processes to shortlist prospective tenderers and limit the number of shortlisted tenderers. |
| Tender documents | Tender documents are to include all critical and relevant information, including information relating to the project and the proposed contract.  The principal is to ensure the scope of work or services included in the tender documents is clear and supports proper evaluation and pricing.  Any required amendments must be provided to all prospective tenderers as an addendum.  Extend the tender period where an addendum that materially affects the tender is issued. |
| Innovation | Innovation in tenders is to be encouraged, including (for appropriate projects) through submission of an alternative tender in addition to a conforming tender. See section 7.5 for further information on complying, non-complying and alternative tenders. |
| Timeframes | The time allowed for tendering is to be sufficient for tenderers to evaluate the project and adequately prepare their tenders.  Tender validity periods are clearly specified in the tender documents. |
| Tender process | Enable site inspections to be undertaken by each tenderer, where appropriate.  For complex, high-value contracts, offer interactive or collaborative tender briefings where suitable, within appropriate probity frameworks and free trade agreement timeframes.  Clearly specify the method and timeframe for the lodgement of tenders. |
| Requirements for tenderers | Tenderers must not engage in anti-competitive practices.  If the tender is submitted by a joint venture or consortia of tenderers, all tendering parties should be clearly identified in the tender response. |
| Tender submissions | Limit the information required to be submitted with the tender to that necessary for evaluation or requested by the agency. |
| Confidentiality | All information contained in tenders or information provided between tenderers and the principal must be regarded as confidential and not disclosed without the other party’s consent. |
| Evaluation criteria | Where non-price criteria are to be weighted and used in tender evaluation, consider the disclosure of weightings. |
| Compliance | Any tender not complying with the tender documents is liable to be rejected. |
| Negotiation | Unless expressly allowed for in the tender documents, exhaust negotiations with the initially preferred tenderer before negotiating with another tenderer.  During the negotiation process, the principal must not trade off different tenderers’ prices in an attempt to seek lower prices. |
| Advice | Use reasonable endeavours to expedite the award of contracts to successful tenderers to notify unsuccessful tenderers as soon as practicable. |
| Intellectual property | Where a tenderer offers an alternative proposal, comparable prices for the alternative must not be obtained by the principal from other tenderers on the basis of the intellectual property used to develop the alternative proposed, nor shall the alternative be used as the basis for the recall of tenders.  Unsuccessful tenderers’ rights to intellectual property included in tender submissions should not transfer to principals unless consideration has been provided for such transfer. |
| Debriefs | Post-tender debriefs should be offered and provided on request. Any debrief is to be meaningful and provide information that may assist with potential future tenders. |
| Complaints | Establish a tender complaints process and include details in the tender documentation. |

It is generally considered good practice to:

* + - invite between three and six tenderers to participate in a tender process; and
    - disclose the number of tenderers invited to participate where that number exceeds three.
      1. The tendering period

The tender period is the time allowed between the initial advertisement or invitation to tender and the closing date for tenders. During this period, the procurement team will issue the tender documentation and manage tender communications and suppliers will prepare their offers.

* + - * 1. How long should the tendering period be?

The tender period needs to be long enough to prepare accurate and competitive tenders. If the tender period is too short, it may result in either overpriced tenders to cover unforeseen risks or inaccurately priced tenders completed without due care.

To adequately prepare a tender, tenderers will typically need to:

* + - carefully consider the scope of the services being sought;
    - assess the project documentation and associated due diligence;
    - assess the tender and contract conditions;
    - undertake a site inspection;
    - obtain prices from their own suppliers and sub-contractors;
    - assess the capacity to undertake the work;
    - clarify any inconsistencies or other queries with the purchaser;
    - prepare a fit-for-purpose response to requirements; and
    - document the tender bid.

The length of the tendering period should be assessed against the procurement complexity. It may range from two to three weeks for simple investments to several months for complex infrastructure and assets such as rail lines, tunnels and rolling stock. Time requirements will increase if the tenderers are required to submit a design as part of their tender. It will also increase if financing is required. The more complex the offering, the more numerous the elements requiring costing and assessment, and the greater time required for suppliers to develop their tender. Depending on the value and other characteristics of the project, the tender period will be influenced by legislative and policy requirements, e.g. the Australia-United States Free Trade Agreement. For high value projects (i.e. projects valued at over $100 million) being tendered under a design and construct (D&C), alliance or PPP delivery model, the timeframes for tendering should have regard to the time benchmarks in the Efficiencies in Major Project Procurement report (Infrastructure Australia 2012).

* + - 1. Tender period communications

Communications with potential suppliers must be carefully managed to maintain probity requirements. The procurement team needs to ensure that the same information is given to all prospective tenderers.

* + - * 1. Nominated representative

A nominated representative of the purchaser should be available for answering enquiries during the tendering period. This must be a person with knowledge and understanding of the project, who is available to answer queries and who will ensure that any additional information provided to one supplier is provided to all suppliers.

All enquiries should be directed to the nominated representative to ensure consistent responses. The nominated representative must record all tender enquiries and responses.

* + - * 1. Issuing tender documentation

A written record should be kept of all persons requesting a copy of the tender documents. This will assist if changes are made during the tendering period or if any follow-up is required.

Each set of tender documents released should be numbered for identification and tracking purposes.

* + - * 1. Data rooms

Tender documentation, including design documentation and due diligence, may be extensive. Sometimes a physical or electronic data room is required to allow potential tenderers to view project information.

* + - * 1. Addenda

At times it may be necessary to amend the tender documents during the tendering period. To avoid unnecessary amendments, attention should be paid during the tender development phase to ensure adequate due diligence and project documentation is carried out prior to finalising tender documents to minimise the need for addenda. Where amendments are unavoidable, they must be provided as an addendum to all tenderers.

Where changes are significant or complex, or are issued during the five working days prior to the tender closing, the procurement team should consider extending the tender period.

Receipt of addenda should be acknowledged with submitted tenders. This avoids the possibility of purchasers assessing tenders that have been based on different assumptions and information.

* + - * 1. Industry briefings or site visits

Industry briefings and site visits are a mechanism for providing potential suppliers with further information about a project that is not able to be adequately captured in the tender documents.

Industry briefings or site visits:

* + - provide an opportunity for the procurement team to meet potential suppliers and gain a measure of potential interest in the opportunity;
    - provide the market with an indication of the level of competition;
    - be used to reinforce the government’s requirements and expectations;
    - provide an opportunity for suppliers to clarify any issues or areas of uncertainty arising from their interpretation of the tender documents;
    - are a good mechanism for managing tender clarifications and ensuring that all potential suppliers receive the same information; and
    - give suppliers the opportunity to visually interrogate the physical delivery environment. They can use the opportunity to assess any issues identified in the due diligence, as well as identify any further sources of risk, which can improve the certainty of their costings.

Details of industry briefings or site visits, including date, time and location, should be clearly outlined in the invitation to tender to ensure equitable access to all potential suppliers. A register of attendees should be retained for probity purposes. Any additional information provided at the event that is not clearly addressed in the tender documentation should be compiled and circulated to all interested parties or issued as a tender addendum.

* + - 1. Closing and receiving tenders
         1. Tender close

The tender close is the date, time and place that tenders are due. The invitation to tender must clearly state the nominated tender closing time and date, and the place and method of lodging tenders. Tenders may be received at any time prior to the nominated closing time.

The nominated tender closing time and date must be strictly upheld – no individual tenderer should be given the unfair advantage of receiving additional time. **Any tenders received after the tender period has closed must be returned to the tenderer.**

Recommended practice for closing tenders is as follows:

* + - not before 2.00pm;
    - not on a Monday or a day following a public holiday;
    - at least one clear day after a weekend, building industry holiday or standard industry rostered day off; and
    - at least one week after a recognised industry holiday period.

To avoid allegations of unfair practices, purchasers need to be able to demonstrate that they have established a secure method for lodging and receiving tenders. It is recommended that a secure tender box is used to receive tenders.

* + - * 1. Receiving tenders

The process of receiving and recording tender submissions must be conducted in a manner that ensures the integrity, fairness and impartiality of the tendering process, and maintains the security of tenderers’ intellectual property. Tenderers are entitled to believe that information provided by them in a tender will not be divulged to another tenderer and that commercial-in-confidence information, innovative alternative solution, nominated sub-contractor prices, etc., are treated securely and confidentially.

Tenders should be opened and registered as soon as possible after the closing time by at least two people. To avoid allegations of unfair practices, it is good practice for the tenders to be received and registered by departmental representatives who are not involved in the procurement – for example, the department may have a formal tender opening committee comprising staff not involved in project procurement. It is also good practice for the tender opening to be witnessed by a probity adviser or auditor for the project.

The procurement team or tender opening committee should record the names of all tenderers and their tendered price or prices, including those submitted as an alternative to the purchaser’s specified requirements and those received after closing time. The list or summary of tenders is retained as a record of the tender opening process, and should be signed and dated by those present.

Once received and registered, tenders should be held in a secure location, such as a safe, lockable cabinet or lockable room.

* + - * 1. Late tenders

Late tenders are those submitted after tender close. Late tenders must not be accepted. The time and date of receipt and words such as ‘late tender’ and the signature of the recipient should be clearly recorded on the tender. Late tenders should be returned to the bidder unopened.

Where doubt exists whether a tender is late, a suitably experienced person should be authorised to determine the validity of the tender.

* + - * 1. Interactive tendering

Interactive tendering occurs where there is opportunity for an appropriate amount of active interface and dialogue between the tendering agency and tenderers. Individual tenderers have an opportunity to obtain a better understanding of the tender requirements, project brief and the client’s expectations and requirements and discuss their bid development including commercial and technical aspects.

Historically, there has been little or no verbal communication with tenderers during the tender phase. In some cases, this has led to disputes, products that do not meet requirements and cost escalations during the contract term. The primary aim of interactive tendering is to improve the quality of the tender submissions and the project outcome by:

* + - expanding and clarifying tenderers’ understanding of government’s requirements;
    - ensuring tenderers avoid incurring any significant costs because of a fundamental misunderstanding or misinterpretation of the tender requirements; and
    - minimising the need for any re-bid process where the tenders submitted do not meet the tender requirements.

Generally tenderers have two ways of obtaining feedback from the agency during the tender phase:

* + - tenderers submit questions to the procurement team in writing, with the procurement team providing written responses to these questions (Q&A process); and
    - tenderers participate individually in structured workshops involving the procurement team and other project stakeholders if necessary (the interactive tender process).

The interactive tender process is most relevant to complex projects. It is often used for PPP projects, particularly social infrastructure PPP models where there is commonly a considerable interface risk between private sector infrastructure providers and State operators.

Further information regarding best practice for interactive tendering is available in the national PPP guidelines. The interactive tender process is continually being refined, therefore this guidance should be considered in light of ongoing contemporary practice.

* + - 1. Tendering phase checklist

Before completing the tendering phase and proceeding to the tender evaluation phase, it is important that the following tasks have been undertaken:

|  |
| --- |
| Tendering phase key tasks |
| ✓ Release tender documentation |
| ✓ Manage tender communications in accordance with probity plan and requirements |
| ✓ Close and receive tenders |
| ✓ Manage late tenders in accordance with probity plan and requirements |

* + 1. Tender evaluation phase

During the tender evaluation phase, the procurement team evaluates the tenders received using the predetermined criteria as the basis of the assessment, and identifies a preferred supplier.

**Figure** 15**: Overview of Section 7**



* + - 1. Good tender evaluation practice

Tender evaluation processes must be conducted with probity, integrity and transparency in order to achieve a contestable outcome and to avoid process problems. It is important to adopt the following good tender evaluation practices:

Table 8: Good tender evaluation practices

|  |  |
| --- | --- |
| Evaluation task | Good tender evaluation practices |
| Probity | Establish and follow a sound probity plan.  Appoint a probity adviser and/or auditor.  Do 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.  Use selection and engagement procedures that are auditable, transparent and accountable.  Respect the intellectual property rights of all parties. Do not use intellectual property submitted with a tender to obtain prices from, or negotiate with, other tenderers for like or similar scope. |
| Tender evaluation documentation | Establish and follow a sound tender evaluation plan.  Predetermine the tender evaluation criteria and apply those criteria fairly. |
| Tender Evaluation Panel | Establish a Tender Evaluation Panel to assess the tenders, particularly for large projects.  Appoint suitably qualified evaluation team members, including external technical advisers if required. It should comprise members from the procurement team, as well as representatives from the user reference group and other stakeholder groups as appropriate. |
| Receiving tenders | All conforming tenders must be considered.  Non-conforming tenders should be rejected. |
| Before evaluating tenders | Identify any conflicts of interest – any identified conflict of interest should be resolved before tenders are evaluated.  Identify any non-compliance issues – instances of non-compliance should be resolved before tenders are evaluated. |
| Evaluating tenders | Adequate time must be allocated for a full evaluation of all conforming tenders.  Evaluation must be based on conformity with the tender documentation and the specified criteria.  Evaluate tenders according to the evaluation criteria and the evaluation plan. |
| Tender clarifications | Any discrepancies must be clarified and their resolution recorded before a final decision is made. |
| Selecting the preferred supplier | Comprehensively document decisions. |

* + - 1. Tender evaluation panel

A tender evaluation panel should be established to assess the tenders. The panel should comprise:

* + - members of the procurement team;
    - other staff with appropriate skills and experience (for example departmental staff with a strong technical background);
    - staff from departments with an interest in the project (for example, where a project has a significant impact on urban planning and amenity, it may be useful to include representatives from Department of Environment, Land, Water and Planning. It may also be appropriate to include a DTF representative);
    - specialist advisers to the procurement team; and
    - representatives from the user reference group, in particular end users.

The tender evaluation panel may include roles for assessing certain evaluation criteria. For example, a person may be appointed to only assess financial tender aspects or legal issues.

The tender evaluation panel will also include a small number of people who are responsible for evaluating the tenders against the main evaluation criteria specified in the invitation to tender.

* + - 1. Managing conflicts of interest

Tender documentation should include a requirement for all suppliers to identify any conflicts of interest. Conflicts of interest include:

* + - supplier involvement in an earlier stage of the project development;
    - supplier has a competing commercial or private interest in the project;
    - current supplier involvement with an interested party with a competing interest;
    - where a supplier’s affiliations or interests will or may compromise, or has the appearance of compromising, their ability to fulfil their duties in relation to the project;
    - a supplier’s impartiality being called into question because of personal, financial or other consideration; and
    - any situation where a reasonable observer would consider there to be a possibility of bias.

Conflicts can be:

* + - **Actual** – established circumstances where there is a real conflict, e.g. a supplier or a related company has advised on early preparation project works, such as developing due diligence, and therefore has greater project knowledge than will be provided to other tenderers.
    - **Potential** – future events may result in an actual conflict, e.g. a supplier has bid on, and may be awarded, a contract that has competing interests to the project.
    - **Perceived** – a third party thinks there is a conflict.

There may be instances where a supplier has a minor conflict of interest that can be managed throughout the process. However, it will generally not be appropriate for any supplier with a noted conflict of interest to be considered for project involvement. It is therefore recommended that all tenders are checked for any conflicts of interest as a priority. If any conflict is acknowledged, it should be assessed. Where a conflict will result in a supplier being unable to complete a contract without impacting on project process and probity requirements, it should be ruled out and the tender should not be considered in the evaluation process.

It should be noted that a conflict of interest may be perceived or actual.

* + - 1. Compliance criteria

An invitation to tender should identify any items that tenderers must comply with in order to successfully deliver the project objectives and requirements. All submissions must wholly conform with these compliance criteria. Therefore, compliance criteria should be reviewed as a priority, and any submissions that do not conform must be ruled out and should not be included in the tender evaluation process.

Compliance criteria may include:

* + - project-specific criteria, such as particular design elements or outcome requirements that must be achieved; or
    - general criteria, including:
    - insurances;
    - policy compliance, such as appropriate adherence to the VIPP; and
    - key contractual elements, e.g. guarantees and warranties.
      1. Alternative proposals

Alternative proposals are essentially non-conforming. Ordinarily, they should only be considered when they accompany a conforming tender. At times, tenderers submit alternative proposals where they assert they can add value to a procurement, for example, where they can provide a solution that better meets procurement requirements than as specified in the tender documents, or where they can incorporate innovation.

The key consideration for a tender evaluation panel is to ensure that the evaluation process provides a framework to consider or exclude such proposals.

* + - 1. Tender clarifications

Prior to evaluation, it may be necessary to clarify aspects of a tender so that all commercial issues are clear and understood, and to enable tenders to be assessed on a like-for-like basis. A single point of contact should be nominated to undertake tender clarifications. Tender clarifications should be submitted in writing to each tenderer, and should be recorded. It is likely that the tender clarifications requested will be different for each tenderer – tender clarifications should not be circulated to the other tenderers, and to do so may result in breaches of confidentiality. All tender clarifications should be overseen by a probity adviser or auditor if appointed.

* + - 1. Evaluation process

The tender evaluation process is usually undertaken in the following general phases:

* + - tender conformance is assessed;
    - any non-complying tenders eliminated;
    - any necessary tender clarifications are identified and undertaken;
    - each tender evaluation panel member assesses each submission against agreed non-price criteria to develop an individual tender assessment result;
    - the results of the individual tender assessments are reviewed and either agreed or combined to develop an average and final tender assessment result;
    - a value-for-money assessment, comparing the tender evaluation scores against price, is undertaken;
    - the tenderers are interviewed – this can include only the highest scoring tenderer, or the highest two or three scoring tenderers;
    - best and final offers (BAFOs) undertaken if necessary; and
    - reference checks are made on the two or three highest-scoring tenderers.

It is recommended that, if applicable, the probity adviser or auditor observes the tender evaluation process to ensure consistent and objective assessment.

* + - * 1. Individual tender evaluations

Each tender evaluation panel member should review the tender submissions. This should be undertaken in accordance with the probity rules and procurement processes outlined in the probity plan and tender evaluation plan. For most projects, all tender evaluations should be undertaken in a locked-down room to maintain security and confidentiality requirements. Low-risk projects may be managed by assigning a numbered set of tender submissions to each panel member.

At no time should tenders be taken home or left at unattended desks.

The tender evaluation panel should individually assess tenders against the weighted evaluation criteria developed as part of the tender evaluation documentation and made available to suppliers in the tender documents prior to tender close. Panel members should objectively assess the extent to which each submission satisfies each of the evaluation criteria. A simple scoring mechanism, such as a matrix, should be used to document this assessment process to provide a quantitative tender evaluation result.

An example of a practical scoring mechanism is to assign each evaluation criteria for each submission with a score between zero and five, where: zero = submission does not meet evaluation criteria requirements; and five = submission exceeds requirements.

The scoring system and the definition of each score should be outlined in the tender evaluation documentation. The tender evaluation documentation should also indicate whether half and/or quarter marks can be assigned.

Once each evaluation criteria has been assessed, the weightings for each criteria should be applied to the raw scores to achieve a weighted score. The weighted scores should then be added to achieve a total score for each submission. This will identify the rankings assigned to each submission for a given panel member.

A scoring matrix is usually used to undertake the assessment.

* + - * 1. Average (combined) tender evaluation

Once each panel member has individually evaluated each tender, it is then necessary to combine and compare the results to produce a final, average assessment of the tenders. To compare results, either agree a score or:

* + - develop a matrix that includes each panel member’s assessment of all the submissions;
    - enter each panel member’s individual scores into the matrix;
    - review the data to identify any anomalies (e.g. where there is significant variation in the assessment of particular criteria);
    - discuss anomalies to determine why they have occurred; and
    - consider reassessment of criteria if appropriate.

Review of individual tender assessments requires discussion and debate to ensure consistency and objectivity, and to provide confidence that the overall result will be contestable. It is best practice to hold tender evaluation workshops to review individual tender assessments.

It is very common for there to be variations in the scores assigned by different panel members. Some people are stricter in their scoring than others. This is acceptable. Generally, the variation will be consistent across all assessments, and will therefore not impact in the overall result.

However, there will also be instances where there is considerable variation in scoring that occurs for other reasons. These instances should be examined to determine the cause of the variation. For example, one panel member may have missed some information provided, and therefore scored the submission low for that criteria – this commonly occurs where a tenderer has not adhered to the tender response schedules and has not provided information in a logical or expected way. In other instances, a panel member may score a submission high based on previous experience with the supplier rather than on tendered information. It is essential to discuss any scoring variations so that everyone has a common understanding of the submissions and the resulting scores. It is common for individual panel members to agree to modifying their scores as a result of the discussion.

Once the moderation process has been undertaken, individual scores are then added to develop a combined score for each evaluation criteria. The weighted combined scores are then added to develop a final score and ranking for each submission. The preferred tenderer is identified as having the highest ranking.

Tender evaluation is a lengthy and resource-intensive process, and adequate time should be assigned for both the individual assessments and the moderation workshops.

* + - * 1. Value-for-money assessment

Tender evaluation should not be based on lowest cost. Instead it should be based on achieving good service quality for the money expended.

Value for money (VfM) weighs the cost of obtaining goods and services against the benefits they provide.

Acceptance of a tender based solely on the lowest price may result in purchasing a lower-quality solution. It may also result in appointing a tenderer who has underpriced the work, which may lead to underperformance or an adversarial relationship with increased contract variations or other contract disputes. This may lead to project delays, additional costs to the purchaser and an increased risk of project failure.

The tender evaluations should be assessed against price and financial information to ensure that the preferred tender represents an affordable and value-for-money tender and that the tender is not based on false assumptions.

* + - * 1. Tender interviews

Once the tender evaluation panel has agreed the draft tenderer rankings, the preferred tenderer and one or two of the next-highest ranking tenderers may be interviewed. The purpose of tender interviews is to provide an opportunity for the procurement team to meet the high-ranking tenderers and to ask any remaining questions that can confirm the tender evaluation results. Tender interviews can be used to:

* + - confirm aspects of a bid where an evaluation panel is uncertain; and
    - confirm the supplier’s knowledge of, and experience and skills in, a particular area.

Tender interviews should be conducted in accordance with the probity plan and, if applicable, attended by the probity adviser.

* + - * 1. Reference checks

Reference checks should be:

* + - conducted for the preferred supplier and the next highest-ranking tenderers; and
    - undertaken by one nominated representative of the tender evaluation panel.

Reference checks should be used to:

* + - confirm the tenderer’s involvement and experience in like projects, in particular the experience of any personnel being put forward for the works;
    - confirm the tenderer’s level of skill and technical expertise in a particular area;
    - identify the tenderer’s approach to managing types of risks;
    - identify the tenderer’s client management and communication approach;
    - identify the tenderer’s professionalism; and
    - identify the tenderer’s approach to dispute resolution.
      * 1. Tender evaluation report

Upon completion of the various evaluation activities, the procurement team must comprehensively document the results of the tender evaluation process in a final report. They must prepare a tender evaluation report that documents:

* + - the results of the moderated individual assessments;
    - the results of the average, final tender assessments;
    - the results of the value-for-money assessment;
    - any tender clarifications sought;
    - any tender interviews conducted;
    - the impact of any new information arising from tender clarifications, interviews and reference checks on the final tender assessment; and
    - the tender recommendation and any further supporting evidence or reasoning for the recommendation.

It is acceptable to nominate a preferred supplier that did not receive the highest ranking as a result of the tender evaluation process. This commonly occurs where the value for money assessment identifies another (generally high-ranking) bid as offering an acceptable solution at a lower price. It can also occur where the results of the tender clarifications, interviews and reference checks provide new information that is unfavourable to the highest ranked tenderer. However, it is important to comprehensively document the reasoning for recommending a preferred tenderer and to provide adequate evidence to ensure a contestable result.

* + - * 1. Best and final offers

Ideally, after the outcome of the evaluation process, a preferred bidder is selected. If a single bidder cannot be identified, but the project steering committee believes a value-for-money solution can still be achieved, a Best and Final Offer (BAFO) may be used. Providing a value-for-money outcome can still be achieved, it may be appropriate to use BAFOs where:

* + - costs submitted by all bidders are too high; or
    - a preferred bidder cannot be clearly determined based on the evaluation of RFP/RFT responses against the evaluation criteria; or
    - all RFP/RFT responses are deficient in one or more areas.

To minimise costs to the private sector and to government:

* + - only those bidders believed capable of delivering the desired results should be invited to participate in the BAFO;
    - the BAFO should be completed within a short, well-defined period; and
    - agencies should request only one BAFO.

**The bidders selected for the BAFO process should be provided with detailed questions relating to their proposals and/or informed of the deficient parts of their proposal.** The bidders are then given the opportunity to revise their bids and eliminate any unacceptable conditions contained in their original proposals. The amended sections are then re-evaluated and re-scored according to the evaluation process defined in the invitation to tender and tender evaluation plan.

Note that markets are generally hostile to BAFO processes as they increase bidding costs, which losing parties cannot normally recover.

* + - 1. Tender evaluation phase checklist

Before completing the tender evaluation phase and proceeding to the contract negotiation phase, it is important that the following tasks have been undertaken:

|  |
| --- |
| Tender evaluation phase key tasks |
| ✓ Confirm membership of, and brief, the tender evaluation panel |
| ✓ Identify and manage any conflict of interest |
| ✓ Identify and manage any issues of non-conformance |
| ✓ Identify and review any alternative proposals |
| ✓ Each panel member to review and evaluate the submissions to develop individual evaluations |
| ✓ Combine and moderate individual evaluations to identify the tender rankings |
| ✓ Undertake tender clarifications |
| ✓ Undertake tender interviews |
| ✓ Undertake reference checks |
| ✓ Prepare tender evaluation report |
| ✓ Probity auditor sign-off |

* + 1. Negotiate and select preferred tender

Figure 16: Overview of Section 8



* + - 1. Establish the negotiating team

Negotiations are typically led by the project director, and as a general rule smaller teams lead to more efficient negotiations.

The project’s legal and commercial advisers play a key role in supporting the negotiations. However, it may be appropriate to hold initial negotiations to identify key issues without legal advisers present. This enables negotiations around commercial issues rather than detailed points of law or contractual terminology. Once the commercial issues are agreed, reflecting this in the contract should be relatively straightforward.

* + - 1. Set the negotiation framework

The negotiating team and the preferred bidder need to work together to set terms for negotiations as a framework for contract negotiations. The terms usually feature the following:

* + - **Definition of negotiating issues:** the issues to be negotiated should be clearly set out, together with Government’s position on each of them. Without this structure, the negotiations could move into areas that are otherwise settled. The issues that the preferred bidder seeks to negotiate should be confined to departures from the contract provided with the invitation to tender, as reflected in the proposal.
    - **Control of drafting:** the drafting process should be managed by the legal advisers to the procurement team, including version control management and assessment of which parties need to review changes. The project director must ensure that amended documents are only circulated to parties with a direct interest, to avoid unnecessary discussions and delays.
    - **Recording of agreed matters:** all matters agreed upon during the negotiations should be recorded in meeting notes and agreed at the end of each meeting. This reduces the risk of issues being revisited and provides clear instructions for contract drafting purposes.
    - **Do not revisit agreed issues or introduce new ones:** the project director should not admit any new issues into negotiations and the parties should agree not to reopen issues already agreed.
    - **Agree timetable for the negotiation:** this is important to prevent delaying tactics and ensure the overall timetable for project implementation is upheld.
    - **Agree dispute resolution process:** an agreed process for overcoming any impasse in negotiations typically involves seeking resolution from senior management. The parties need to ensure that the appropriate senior managers are accessible throughout the negotiations.
    - **Authority to commit:** both negotiation teams need to appoint members with the authority to make decisions on behalf of their organisations (although approval of government may be required in some instances before the project director can agree on these issues).

If the preferred bidder’s circumstances change and require the project to proceed on a materially different basis from the initial bid, the procurement team must undertake a full   
re-evaluation. This re-evaluation should reconsider other bidder’s proposals. Should the   
re-evaluation indicate a worse position for government than the reserve bid, then government should be advised and a determination made whether to proceed with the preferred bidder or another bidder. The probity practitioner should be involved in discussions where the preferred bidder’s circumstances materially change.

* + - 1. Recommended negotiation practices

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 underpriced bid or coping with unforeseen risks.

Good negotiation practice

* 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 the Treasurer’s approval at key phases 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.

* + - 1. Report to government

At the end of the negotiations, a report should be prepared by the project director to the project steering committee and for approval or endorsement by government. This should set out any material changes to the details of the proposal and confirms that the proposal provides a VfM outcome. It should also confirm that adequate funding is available and that the department or agency recommends that a contract is entered into.

* + - 1. Re-calling tenders

A tender can be re-called if no acceptable preferred tenderer can be identified from the tender process. Any decision to repeat the tendering process should be made only in compelling and unavoidable circumstances. In particular, departments should avoid re-calling tenders to obtain a better price and should negotiate with the initially preferred tenderer.

If a decision is made to re-call a tender, the original tenderers should be advised of the reasons for doing so and, as a general principle, be invited to submit a new tender.

* + - 1. Negotiation phase checklist

Before completing the contract negotiation phase and proceeding to the approvals and contract award phase, undertake the following tasks as required:

|  |
| --- |
| Negotiation phase key tasks |
| ✓ Establish a negotiating team |
| ✓ Set the negotiation framework |
| ✓ Negotiate contract and commercial terms in accordance with good negotiating practices |
| ✓ Prepare a report to government |

The outcome of the contract negotiation phase will either be that:

* + - a preferred tenderer is identified and a final agreed contract price negotiated; or
    - no successful tenderer identified, with a recommendation to re-call the tender.
    1. Approvals and contract award

Figure 17: Overview of Section 9



The final phase in the procurement process is seeking formal approvals to appoint the preferred tenderer to undertake a scope of works, and then awarding the contract. This includes obtaining financial and ministerial approvals as required, notifying the successful and unsuccessful tenderers, awarding the contract and establishing contract management arrangements.

* + - 1. Confirm funding and obtain contract approval

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.

Before formally awarding a contract for tendered works, the agency must obtain formal financial and ministerial approval to proceed. Process approval requirements differ according to the contract value, asset type and departmental financial management arrangements. Minor works may be priced within departmental financial delegations, and therefore will only require internal approvals. The majority of infrastructure projects will require ministerial approval. HVHR projects will also need the Treasurer’s approval prior to contract award, when this is a requirement of the project’s HVHR Project Assurance Plan.

All approval submissions should be supported by the tender evaluation report, as well as by project director or steering committee endorsement. A project assurance process should also be undertaken to confirm that the project is ready to proceed to the delivery stage. For HVHR projects, this should include a Gate 4 Gateway review.

* + - 1. Award and execute contract

Once the necessary approvals have been obtained, the agency can award and execute the contract. There are four main activities for this step: **contract award**, **execute contract**, **contract management arrangements**,and **payments on contract execution**.

* + - * 1. Contract award

The successful tenderer must be informed in writing of the agency’s intention to enter into a contract for the tendered works. The successful tenderer must then confirm in writing their acceptance of the offer.

The agency should also undertake any administrative requirements, e.g. obtaining a bank guarantee or other contract securities.

* + - * 1. Execute contract

A suitable date and venue are nominated for contract execution where the government’s representative signs the contracts after all other parties have signed.

The contracts should be executed by appropriately authorised personnel. Contracts for major projects are often signed by ministers or senior staff with delegated authority.

It is common practice for a public announcement of the contract and the successful bidder to be made when contracts have been executed. Media coverage of the contract signing may be involved. Be mindful of appropriately timing any announcements, particularly when dealing with stock exchange-listed companies that may have additional requirements to shareholders that need to be managed.

* + - * 1. Contract management arrangements

The agency should 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. Those responsible for contract management should thoroughly understand the tender process and its outcome, including the strategy embodied in the contract and the reasons for particular contractual conditions.

* + - * 1. Payments on contract execution

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

* + - 1. Informing unsuccessful tenderers of the outcome

Once the contract has been awarded, all other unsuccessful tenderers should be notified in writing of the outcome. They should be advised of the name of the successful tenderer.

**Note:** this step should be undertaken earlier (after receiving written confirmation of the successful tenderer’s intention to enter into the contract) if there is likely to be media coverage of the contract execution.

* + - * 1. Post-tender interviews

The Government has a policy of offering debriefings to any tenderer who has made a submission in a competitive tendering process. The offer of a debriefing should be specifically included in the letter to the unsuccessful tenderers informing them of the tender result. Such discussions are an essential courtesy and make a contribution to developing the market.

The purpose of the debriefing is to outline the strengths and weaknesses of the tenderer’s submission. The feedback provided must be objective and consistent with the evaluation criteria and tender evaluation report, and be focused on the performance of the bidder.

**Probity:** the debrief sessions must be conducted in accordance with the relevant probity protocols. Debriefs are confidential, verbal face-to-face discussions and no written feedback should be provided. Feedback is restricted to comments that pertain specifically to the performance of the bidder. It is possible to provide comparative comments subject to confidentiality obligations. The tender evaluation report should be used as the basis for debriefing.

**Timing:** the debrief sessions should be held in a timely manner following contract award or financial close. It is not appropriate to hold debrief meetings until the contract has been finalised.

**Attendees:** the debriefs should be conducted by senior members of the project team, with the same project team members present for each debrief session. The session should be chaired by the project director. Attendees must have participated in the tender evaluation process as these participants will have sufficient understanding of the commercial, design and technical aspects of the bids to provide targeted and knowledgeable feedback. A single person represents the tenderer, unless a joint venture, in which case a representative from each joint venture partner may attend. When accepting the invitation for a debriefing, the tenderer must nominate the representative(s).

**Agenda:** as far as practicable, an agenda should be prepared in advance, with the unsuccessful bidder asked to identify ahead of the session any particular issues they wish to discuss to allow for preparation. The normal format is for the agency representative(s) to outline in sequence:

* + - the selection criteria and sub-criteria and the reasoning for their selection;
    - the weightings chosen and the reason; and
    - for each criteria and sub-criteria in turn, the features of the tenderer’s submission that led to a favourable and unfavourable assessment against each.

Tenderers can ask questions of clarification about the agency’s perception of their submission. Questions about the submissions of others or about comparisons made are not allowable and the agency representative should decline to answer them.

* + - 1. Approvals and contract award phase checklist

Before finalising the procurement stage and starting project delivery, undertake the following tasks as required:

|  |
| --- |
| Approvals and contract award phase key tasks |
| ✓ Confirm funding |
| ✓ Obtain government and financial delegate approvals |
| ✓ Award and execute contract |
| ✓ Inform unsuccessful tenderers of outcome |
| ✓ Offer and undertake post-tender debriefs |

* + 1. Appendix A: Gateway reviews

The Gateway review process provides a comprehensive project assurance process for infrastructure development and delivery. There are two Gateway reviews relevant to the procurement stage of the investment lifecycle:

* + - Gate 3: Readiness for market; and
    - Gate 4: Tender decision.
      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 are 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 stages 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.
      1. 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 benefit 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 stage; and
    - confirmation of funds and the authority to proceed.
    1. Appendix B: Financial impact report template
    2. Appendix C: Impact of international agreements on procurement practices

Free trade agreements (FTAs) are used to support Australian exporters’ access to new markets and expand trade in existing markets. They can impact on procurement activities.

Australia has 11 FTAs currently in force with Japan, Korea, Chile, Malaysia, New Zealand, Singapore, Thailand, the US, China, (with New Zealand) the Association of South East Asian Nations (ASEAN), and the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP). It is currently negotiating a number of other agreements. FTAs with the US and New Zealand have the greatest impact on Victorian Government procurement practices.

* + - 1. Australia–New Zealand Government Procurement Agreement

Victoria is party to the Australia and New Zealand Government Procurement Agreement (ANZGPA) that enables suppliers from all Australian and New Zealand jurisdictions to compete equally for government contracts.

The aims of the agreement are to:

* + - enable suppliers from all jurisdictions to compete equally for government contracts, and particularly to forbid practices that are biased against, discriminate against or deny access or opportunity to any Australian or New Zealand (ANZ) supplier; and
    - and encourage consistency in performance standards and specifications, and simplicity and consistency in purchasing policies, practices and procedures.

ANZGPA requires all parties to agree to use value for money as the primary determinant in purchasing decisions. Each Victorian Government department is required to comply with the conditions of the ANZGPA. Particular exemptions to the ANZGPA may be sought from the Procurement Minister in the relevant jurisdiction.

Further information relating to ANZGPA is available on the Austrade website at  
[www.austrade.gov.au/Export/About-Exporting/Trade-Agreements/ANZCERTA](http://www.austrade.gov.au/Export/About-Exporting/Trade-Agreements/ANZCERTA)

* + - 1. Australia–United States Free Trade Agreement

The Australia–United States Free Trade Agreement (AUSFTA) sets out rules, procedures and transparency requirements for government purchasing, with the aim of providing United States businesses non-discriminatory access to Australia’s Commonwealth, state and territory government procurement markets. Similarly, Australian businesses are provided wide-ranging access to US markets.

The AUSFTA should be considered in conjunction with the Ministerial Directions for Public Construction Procurement in Victoria and its associated Instructions and guidance. It applies whenever the cost of Victorian public construction procurement is estimated to equal or exceed specified financial thresholds. Under the agreement the financial thresholds are adjusted every two years.

The current financial thresholds for public construction are:

* + - $9 396 000 for building and construction works; or
    - $666 000 for construction related consultancy services.

Full details are available on the Austrade website at [www.austrade.gov.au/Export/Free-Trade-Agreements/AUSFTA](http://www.austrade.gov.au/Export/Free-Trade-Agreements/AUSFTA) Departments and public bodies are particularly directed to the AUSFTA Chapter 15: Government procurement.

* + - 1. Other free trade agreements

In November 2014, Australia entered into a bilateral FTA with China. The China–Australia Free Trade Agreement (ChAFTA) contains a commitment to negotiate a reciprocal agreement on government procurement after the completion of China’s negotiations to join the World Trade Organization’s Government Procurement Agreement.

Australia has also entered into bilateral FTAs with Chile, Malaysia, Singapore and Thailand, and has entered into its first plurilateral FTA with ASEAN and New Zealand. These FTAs do not significantly impact construction procurement activities in Australia. Their primary purpose is to improve trade between the respective countries by eliminating tariffs. They also aim to support companies operating and providing services in the respective countries.

Further information regarding these FTAs and negotiations can be found on the Department of Foreign Affairs and Trade website at [dfat.gov.au/trade/agreements/Pages/status-of-fta-negotiations.aspx](https://dfat.gov.au/trade/agreements/Pages/status-of-fta-negotiations.aspx)

* + 1. Appendix D: Other legislation impacting on procurement activities

There is a number of State and federal legislation that impact on procurement activities. This legislation, and their relevance procurement framework, are summarised as follows:

Table 9: Legislation impacting Government procurement

|  |  |  |
| --- | --- | --- |
| Legislation | Purpose | Interface with the procurement framework |
| **Victorian legislation** | | |
| *Audit Act 1994* | To monitor wastage of public resources or any lack of probity or financial prudence in the management or application of public resources. | Procurement processes may be subject to a performance audit. |
| *Building Act 1993* | To set out the legal framework for the regulation of building construction, building standards and maintenance of specific building safety features. | The Act requires all building work in Victoria to comply with the Building Code of Australia, which sets out the technical requirements for the design and construction of buildings and other structures.  The associated Regulations (2006) outline the requirements relating to building permits, building inspections, occupancy permits and maintenance of buildings.  Due diligence should identify building standard requirements, as well the need for inspections, permits, etc.  Building standard requirements, as well as whole of life considerations relating to building maintenance requirements, should be incorporated into the project specifications.  Tender documents should clearly outline any requirements under the Act that will be transferred to the contractor, for example, arranging building inspections and occupancy permits. |
| *Building and Construction Industry Security of Payments Act 2002* | To improve the payment practices in the Victorian building and construction industry.  It provides contractors and suppliers with a statutory right to be paid for works duly undertaken.  It establishes a process to enable the fast recovery of payments and quick adjudication of payment disputes at a low cost to the parties. | Refer to this Act when developing construction procurement contract documentation, particularly clauses relating to payment terms, penalties and related dispute processes. Note that the Act establishes default payment terms where a contract is silent.  The Act applies to most contracts for building work or for the supply of related goods and services in Victoria, with the exception of domestic building contracts, including:   * residential and non-residential building; * civil engineering; * demolition; * electrical; * professional services (e.g. architecture, design, surveying); * hire of plant and equipment; * landscaping; * maintenance; * mechanical/air-conditioning; * plumbing; and * supply of building materials. |
| *Environmental Effects Act 1978* | To require proposed projects or works that are capable of having a significant effect on the environment to be assessed prior to commencement. | Refer to this Act when the investment involves a development that may impact on environmental factors of local or State significance.  An Environmental Effects Statement (EES) should be first considered and identified in the business case. Requirements, issues and risks identified in the EES should be included in the procurement plan. Environmental due diligence should be undertaken in the tender development phase as required. Tender and contract documentation must identify and address any requirements of the EES. |
| *Heritage Act 2017* | To provide for the protection, conservation and registration of places and objects of cultural heritage significance. | Refer to this Act when the investment involves the development of land, buildings or other improvements and artefacts of cultural heritage significance.  Heritage issues and risks should be first considered and identified in the business case. These should be reassessed and addressed in the procurement plan. Heritage due diligence should be undertaken in the tender development phase (if not prior), and any planning considerations should be outlined in the tender documentation. |
| *Land Act 1958* | To provide a framework for the management of Crown land, including leasing and sale. | Refer to this Act when the investment requires the sale of Crown land, including to another public authority, or to manage or terminate leasing arrangements on Crown land sites. |
| *Local Government Act 1989* | To establish a legislative framework for the operation of local government in Victoria. | A local government may have local laws or planning requirements that project works need to consider and comply with.  Types of issues that may impact are minimum lot sizes impacting on subdivisions, land uses under local planning schemes, etc. |
| *Occupational Health and Safety Act 2004* | To prevent work-related death, injury and disease in workplaces. | Refer to this Act to ensure health and safety requirements and issues are adequately considered throughout project planning, procurement and delivery.  The inherent hazards in construction work mean that health and safety must be a priority well before work commences on a site. OHS risks of a specific project or site should be identified during the investment development phase, and management strategies considered.  During the procurement stage, general safety requirements, along with site or project-specific OHS risks and issues, should be identified in tender documentation for response. Tender evaluation criteria should include safety criteria as appropriate for the investment. The tender evaluation process should give appropriate consideration to OHS considerations. |
| *Planning and Environment Act 1987* | To establish a framework for planning the use, development and protection of land. | Refer to this Act when the investment has land use and development considerations, including:   * planning scheme amendments; * obtaining planning permits or certificates; and * planning infringements and penalties.   Planning issues and risks should be first considered and identified in the business case. These should be reassessed and addressed in the procurement plan. Planning due diligence should be undertaken in the tender development phase (if not previously undertaken), and any planning considerations should be outlined in the tender documentation. |
| *Public Administration Act 2004* | To provide a framework for good governance in the Victorian public sector. | Requires the highest standards of public service conduct and integrity when undertaking procurement activities. |
| *Sale of Land Act 1962* | To provide a framework for the sale of freehold land. | Refer to this Act when the investment requires the sale or purchase of freehold land. |
| *Subdivision Act 1988* | To set out procedures for the subdivision and consolidation of land and the creation and removal of easements or restrictions over land. | Refer to this Act when the investment has land use and development considerations, e.g. land subdivisions and consolidations.  Land subdivisions and consolidation issues and risks should be first considered and identified in the business case. These should be reassessed and addressed in the procurement plan. Planning due diligence should be undertaken in the tender development phase (if not previously undertaken), and any subdivision considerations that may inform tender responses should be outlined in the tender documentation. |
| *Transfer of Land Act 1958* | To provide a framework for alienating Crown land. | Refer to this Act when the investment requires the alienation of Crown land to freehold land. |
| *Victorian Civil and Administrative Tribunal Act 1998* | To establish a Victorian Civil and Administrative Tribunal as a ‘one-stop-shop’ for dealing with disputes. | Refer to this Act for any project works that are impacted by land use or building work disputes that are referred to VCAT. |
| **Commonwealth legislation** | | |
| *Environmental Protection and Biodiversity Conservation Act 1999* | To protect and manage nationally and internationally important flora, fauna, ecological communities and heritage places. | Refer to this Act when the investment involves a development that may impact on environmental factors of local or State significance.  Ensure due diligence, and project and tender documentation outline and address any requirements of the Act. |
| *Trade Practices Act 1974* | To protect consumers from unfair business practices. | Prohibits misleading and deceptive conduct in public sector procurements by both public and private sector organisations. Prohibits price fixing, boycotting or anti-competitive behaviour.  During tenders, agencies must seek to provide complete and accurate information, and not provide any incomplete, incorrect or misleading information. |

* + 1. Appendix E: Probity

The below checklist outlines probity considerations that may need to be addressed throughout a procurement. This list can be used to inform the development of a probity plan, determine required probity services, and pre-empt and manage probity issues through a procurement.

This checklist of probity issues was adapted for Victorian public construction projects from one produced by the Independent Commission Against Corruption NSW. **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 tender documentation.

The tasks in the checklist are grouped by the procurement phases 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.

|  |
| --- |
| Phase  ✓ Description |
| **During tender development phase** |
| ✓ Develop a probity plan.  ✓ Establish and communicate the probity rules for a procurement.  ✓ Assess the need for an independent probity adviser.  ✓ Check that the selection process for all advisers and consultants (including the probity adviser if there is one) is in line with the Ministerial Directions for Public Construction Procurement in Victoria.  ✓ Assign probity-related roles and responsibilities to individuals working on the project.  ✓ Ensure that the EOI/tender documentation is designed to elicit information necessary for proper evaluation.  ✓ Review detail of specifications and other EOI/tender 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, e.g. 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.  ✓ 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. |
| **During the tendering phase** |
| ✓ If not already completed, ensure that evaluation weightings are calculated and documented.  ✓ Review the credentials or qualifications of team members and the tender 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 secure location for storing, reading and assessing tenders.  ✓ Establish a document control process for assessing tenders.  ✓ Establish a procedure for identifying intellectual property or commercial-in-confidence information. |
| **During the tender assessment phase** |
| ✓ 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.  ✓ Ensure that the Victorian Industry Participation Policy 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.  ✓ 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’. |
| **Contract negotiation phase** |
| ✓ 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 Building Code, Local Jobs First Policy and Ministerial Directions for Public Construction Procurement in Victoria).  ✓ 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. |

* + 1. Appendix F: Procurement strategy and procurement plan

Table 10 explains the purpose of the procurement strategy and procurement plan, outlines their content requirements and clarifies commonalities and differences.

Table 10: The Procurement Strategy vs the Procurement Plan

|  |  |  |
| --- | --- | --- |
| Plan element | Procurement strategy | Procurement plan |
| Relevant guideline | Procurement strategy technical guide | *Stage 2: Procurement* |
| When undertaken | Prior to funding approval. Forms an integral part of the business case. | After funding approval. Forms an integral part of the Project Management Plan. |
| Purpose | To provide decision-makers (prior to funding approval) with confidence that the project team:   * has given due consideration to procurement options; * has determined that the preferred option is appropriate and deliverable in the current market; and * has the necessary skills and resources to undertake the procurement and manage any related risks. | To provide the project team with a detailed step-by-step plan to undertake the procurement, from options analysis and market sounding through tendering and contract management to post-occupancy performance. |
| Content requirements | Outline procurement options considered to deliver the project solution. | Reconfirm recommended procurement option and assess the optimal tender strategy within the preferred methodology to deliver the project solution. |
| Outline the high level summary of the methodology used to select the preferred procurement strategy for the project solution. | Procurement management approach, including governance. Confirm procurement phases and provision of information. |
| Outline the criteria used to select the preferred option. | Probity plan. |
| Outline the recommended strategy required to procure the project and demonstrate, via a combination of the evaluation criteria and justification, how the preferred procurement strategy is appropriate for this investment. | Tender plan, including EOI, invitation to tender, tender evaluation and contract negotiation and award. |
| Outline the organisation’s experience and capability in delivering projects under the preferred procurement delivery method. | Document the market sounding and analysis to confirm deliverability and market engagement approach. |
| Procurement risks and mitigation strategies (**Note:**this may be included within a broader risk plan within the business case.) | Type of contract and contract management plan. |
| Stakeholder engagement | Stakeholder engagement to understand how they will receive the procurement, and how they will be impacted by different procurement methodologies. | Plan to inform all stakeholders to ensure a common understanding of procurement objectives, e.g. reference group, newsletters, notices, FAQs, etc. |
| Market engagement | Targeted market engagement to understand how the market will receive the procurement and whether there is market appetite for the possible procurement options (particularly for unusual or complex procurements). | Create market awareness of expression of interest or tendering process to maximise market participation. |
| Risk management approach | Identification of risks and assessment of their impacts to inform procurement analysis, including:   * determining how different procurement models will treat each risk, and the model that will manage each risk most effectively; and * appropriate and optimal risk allocation.   Risk management at this stage will include identifying high-level treatment options. | Identification of risks and assessment of their impacts. Detailed consideration of preferred and alternative risk management and treatment strategies.  Managing and minimising risks as they occur throughout the procurement process. |
| Real options | A triage process should be undertaken at the business case stage to determine if a real options approach to project delivery is appropriate. If identified as appropriate, the full business case should explore the real options alternatives. This should include identifying the options, considering the external circumstances that will impact on each of the alternatives and will influence decision-making, and outlining the impact of alternative procurement methodologies on real options approaches. | Detailed analysis and documentation of real options as relevant to the selected procurement methodology. Includes clear identification of timing of real options decision-making and implementation, as well as impacts of real options alternatives on tender and contract requirements. |
| Other considerations | The costing of the project should be consistent with the procurement approach and the risk allocation under the procurement approach. |  |

* + 1. Appendix G: Common elements and considerations of the procurement plan

Agencies are required to develop a procurement plan to guide a procurement from tender development through to contract award. The purpose of the procurement plan is to identify and document the tender approach and strategy with the highest potential of delivering the best procurement outcome on balance for the given project.

There is no one-size-fits-all approach outlining what a procurement plan should include, and content will be project-dependent. This appendix outlines some suggested content elements; however, it is indicative only and is not exhaustive. It should not be viewed as a template.

Table 11: Common elements of the procurement plan

|  |  |
| --- | --- |
| Content element | Description |
| Confirm the preferred procurement method | Outline the preferred procurement methodology identified in the procurement strategy (attachment to business case).  Procurement teams should confirm whether they agree with the preferred approach. If not, provide justification for the proposed alternative. |
| Confirm funding and approvals | Confirm the project funding.  Confirm financial and ministerial approvals for the project.  Demonstrate that financial controls are in place for the procurement. |
| Summarise the governance, reporting and resourcing arrangements and decision-making processes | See section 5.1 of this document.  Identify the investment owner(s) for the project.  Identify the resourcing structure for the procurement stage of the project (noting this may have changed significantly from the business case stage).  Identify the advisory services required for the duration of the procurement.  Confirm that project governance, controls and organisation are defined. |
| Probity plan | See section 4.3 and Appendix F of this document.  Identify the general probity rules for the procurement, e.g. identify who will be nominated to manage tender communications, confirm processes for managing tender close and late tenders, confirm how conflicts of interest and non-conformance issues will be managed.  Identify the probity advisory services to be engaged for the project.  Identify probity rules and processes that will impact on and manage project advisers. |
| Identifying market sounding, market engagement and market or industry briefing processes | See section 5.3 of this document.  Identify the market approach to:   * seeking market input into the tender development; and/or * seeking market interest in an offering.   Procurement teams should consider whether they will need to approach the market to provide information on solution feasibility and design, e.g. through a market sounding, Request for information or proof of concept request.  Procurement teams should consider if they will need to communicate a tender offering to the market through an expression of interest or industry briefing session.  Demonstrate that the suppliers’ market capability and track record, or the existing supplier’s capability and performance, are fully understood. |
| Tender plan or strategy | See section 5.4 of this document.  Procurement teams must identify whether they will be inviting tenders on a specific design solution or a specification of functional outcomes and requirements.  Procurement teams must identify whether they will issue a Request for Tender or Request for Proposal. |
| Identifying project documentation requirements | See Section 5.5 of this document.  Outline the due diligence required to inform project documentation, who will carry out the due diligence (**note:** this may be a department or agency or may require advisory services), approximate length of time required to undertake the works, and potential costs.  Outline the project documentation to be developed – e.g. a design specification or a statement of requirements. Also outline any supporting documentation required, who will develop the document, how end users and other stakeholders will be engaged and what information they should provide, approximate time to develop documentation and approximate cost. |
| Risk management plan, including how project staging options or real options can be used to manage uncertainty | See section 4.5 of this document. |
| Stakeholder engagement and communication plan | Identify all stakeholders for the procurement, outline their interest, and outline an engagement strategy for managing their involvement in the procurement. |
| Procurement budget | Develop a budget for the procurement stage of the project. This should include all advisers and due diligence for the duration of the procurement. This may be a sub-set of the project budget for project delivery. |

* + - 1. Reviewing the procurement plan

The procurement plan is a live, dynamic document. It should be reviewed after each phase of the procurement process. It should also be reviewed following any market engagement processes.

* + 1. Appendix H: Real options

Government often delivers projects to meet long-term service delivery requirements within an uncertain and dynamic operational and political environment where the needs of users are constantly evolving. Real options is a method of managing uncertainty by embedding flexibility into procurement and contract systems. It can limit the extent of investment regret.

There are a number of different types of real options that can be applied to investment delivery, including:

Table 12: Types and examples of real options

|  |  |  |
| --- | --- | --- |
| Real options category | Description of real options | Example of real options |
| Option to defer or wait before commencing or committing to the investment | An investment may be deferred indefinitely without relinquishing the right to invest in the project. The investor is free to choose the optimal time to start the project given what is known about the uncertainties. | Government procures land within a growth-area subdivision to cater for future service demand. Government buys the land prior to property value increases driven by development. They therefore procure the right to construct a facility at some time in the future when there is a service demand. Common uses of this type of real options include schools, police stations, health services, road and rail corridors and train stations. |
| Option to stage the implementation of the investment (acquire incrementally) | Project implementation can be staged to introduce a series of decision points into the process. At each decision point (i.e. at the end of one phase and beginning of another), government has the option and flexibility to continue or abandon the project depending on new information. | Government requires a new bespoke ICT system. It appoints a contractor to deliver the system, with the project comprising three stages:   * + 1. develop a system specification;     2. develop a prototype; and     3. deliver the end product.   Government can exercise the option to continue or abandon the project at either the end of stage one or two based on an assessment of whether the specification and/or prototype is capable of satisfying the service requirements. |
| Option to alter the scale of the investment (e.g. to expand, to contract, to shut down and to restart) | A contraction option provides the flexibility to reduce service delivery or production output if conditions become unfavourable.  An expansion option provides the flexibility to expand the current state to increase service delivery or production output.  The flexibility to shut down means that once an investment is in operation, the government has the option to shut down the facility. The shutdown may be temporary, such as during periods when it cannot recover enough revenue to meet its operating costs, or permanent. | Government delivers new public TAFE services through a private sector facility. Government is initially uncertain whether there will be demand for these new courses.  **Contraction option**  The government may need to reduce the level of services it provides at a point in the future. The government ensures it only pays for the capacity and space it uses on an annual basis.  **Expansion option**  Demand is greater than anticipated. Government may exercise an option to expand the level of service it provides by exercising an option to take up additional space within the facility at a previously agreed, competitive cost.  **Shutdown and restart option**  Demand for the new courses may decline in any given year. Government can exercise an option to shut down the service provision in years of low demand at low cost, to be restarted if demand increases. An option to shut down may be permanent, for example, where changes to industry practices or technological advancement drive obsolescence in a skill set. |
| Option to abandon the investment proposal or exit the project during delivery | Some projects have a high degree of uncertainty regarding their potential success or failure. In these instances, an option to abandon can enable government to permanently dispose of an investment if the project becomes unsuccessful or market conditions decline severely. Agencies can realise the resale value of capital equipment and other assets in a declining market. | Government purchases land for future expansion of a facility. Demand increase never eventuates. Government has the option to sell the land. |
| Option to switch outputs or inputs during delivery | If prices or demand change, agencies can change the output mix of the facility (product flexibility). Alternatively, the same outputs can be produced using different types of inputs (process flexibility). | **Output shifts**  When building a rail network, Government includes the functionality to allow for future changes to rolling stock. It enables different types of trains to be run on the network, allowing for different suppliers, and changes to characteristics (such as double-deck carriages).  **Input shifts**  A coal-fired power station may plan for increased financial penalties for sulphur emissions by using an option to switch from high to low sulphur coal sources in the event that such penalties impact on revenue. Similarly they could switch to a mixture of coal and biomass in the event that a carbon tax impacts on electricity generation costs. |
| Growth options | Options that invest early in the flexibility to upgrade in the future at a much lower cost. | Government constructs a new bridge to a growing suburb, and provides the capacity to add extra lanes. There is no current demand for area wider crossing; however, government is planning for increased service demand in the future. |

* + 1. Appendix I: Form of invitation to tender

Table 13 outlines the principal differences between these two common forms of an invitation to tender, and identifies when they should be used.

Table 13: Types of invitations to tender

|  |  |  |
| --- | --- | --- |
|  | Request for Tender | Request for Proposal |
| Purpose | Invitation for offers to provide works and services against a defined need or detailed description of a specific solution to requirements. | Invitation for offers to provide a solution to an agency’s functional requirements and/or service outcomes. |
| Project documentation | Design specification: contains a detailed design and other information that explicitly describes the asset to be delivered. | Statement of requirements: contains a description of the functional requirements  to be delivered, including performance measures or standards that must be met. |
| When it should be used | When the purchaser knows with a large degree of certainty what solution or asset they want, and how they want it to be delivered:   * when the asset is clearly defined; or * when there may be a detailed design. | When the purchaser knows what services and performance requirements they want delivered, but do not have a defined solution for meeting these requirements:   * when the requirement is well defined, but the desired solution is not known or agreed, or there is no overarching preferred solution (i.e. where there is indifference to the solution); * when looking for innovative and best value solutions to deliver objectives; and/or * when it’s likely that suppliers will offer varied solutions to a defined problem. |
| Types of procurement models | Traditional models, such as construct only.  Design and construct variants  Managing contractor  Construction management | * Privately financed models * Design and construct variants * Managing contractor * Alliances * Services contracts |
| Payment mechanisms | Payment upon completion of defined stages.  Liquidated damages provisions and regimes where there is failure to achieve overarching deadlines.  Any contract management requirements. | Payment mechanisms reflect achieving quality standards or abating payment when not fully achieved.  Incentives are in place to achieve desired functional standards. |
| Contractual and performance requirements | The successful tenderer is required to deliver an asset to the purchaser’s design, and the design specification will form part of the contract documentation. Performance is assessed against the capacity of the asset to meet the design specifications and strict delivery criteria, including architectural, engineering, environmental, ergonomic, aesthetic safety and other elements. | The contractual requirements are defined by a set of performance measures. |

* + 1. Appendix J: Due diligence

Prior to tendering a project, an agency must undertake considerable due diligence to investigate project elements, verify its understanding of the procurement environment and inform project design documentation. Due diligence requirements will vary considerably depending on the project. Table 14 outlines some common due diligence requirements.

Table 14: Examples of due diligence

|  |  |
| --- | --- |
| Due diligence | Key tasks |
| Constructability/ technical | **Geo-technical:** assessment of site conditions, including sub-surface soil, rock and water conditions. It provides critical information to inform earthworks and structural design.  **Condition assessment of existing structures:** may inform demolition works or works involving the reuse of existing buildings. Can identify OH&S risks such as structural instability, presence of asbestos, etc.  Architectural  Engineering |
| Contamination | Soil contamination  Ground water contamination  Environmental Effects Statement |
| Adjoining site activities | Activities within the vicinity may impact on site usage, environmental issues, planning requirements, architectural design, etc. |
| Regulatory approvals | Building works  Planning |
| Legal | Legal status of any land holdings  Encumbrances  Easements |
| Environmental | Indigenous endangered flora and fauna assessments  Identification of any environmentally sensitive areas that may be impacted by project delivery  International treaties (e.g. RAMSAR) |
| Heritage/ archaeological | Assessment if Aboriginal heritage  Assessment of natural or built |
| Government | Native title  Government land/public land assessment (undertaken by Department of Environment and Primary Industries)  Permanent or temporary land reservations requiring revocation |

* + 1. Appendix K: Project design documentation

The procurement team must clearly and explicitly define and document the works that are being procured. Project design documentation forms the backbone of tender documentation by specifying the requirements being sought and describing the tender offering. If done well, it ensures the market clearly understands what the agency is asking to be delivered. It can therefore influence how well tender bids will deliver on the investment objectives and can improve accuracy of tender costings.

It is essential that project design documentation is clear and concise. Agencies should:

* + - clearly state what the government is seeking to achieve;
    - avoid ambiguity and internal inconsistency; and
    - minimise duplication.

Ensure the investment objectives, as outlined in the business case, inform the functional requirements to be scoped in the design documentation.

Ensure it is clear which requirements are mandatory and which are only desirable. Not all requirements will be equally important. The design documentation 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.
      1. Design specification or statement of requirements?

Project design documentation can be either the:

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

A **design specification** is used when the procurement team has a detailed understanding of the solution they are seeking and are able to communicate their exact specifications to the market. A **statement of requirements** is used when the procurement team can define the functions they need a solution to deliver, but are not limited in how these requirements must be delivered.

For some procurements, the best method of delivering project requirements will be well known. In these instances (often simple procurements or where like assets that are delivered on a regular basis), it may be most efficient to dictate the project delivery solution. 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 detail the output based specifications).

* + 1. Appendix L: Pre-tender and tender documentation
       1. Expression of interest documentation

EOI documentation must include sufficient information for a supplier to decide on an interest in the project. It must also be designed to ensure suppliers document their capabilities and capacity to undertake the scope of works in a common format to facilitate evaluation and assessment.

An invitation for EOI usually includes:

#### Background

* + - A brief description of the procuring agency’s background, function and purpose.
    - An overview of the project, its objectives and how it fits into the government’s strategic plan.
    - 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.
    - The conditions applying to the EOI process, including the evaluation criteria for short-listing, the closing date, time and place for lodging the EOI.

#### Project scope and timetable

* + - Details of the services or assets that the private sector is being invited to deliver.
    - The proposed timeframes for the project, including dates for key milestones.

#### Financial and commercial information:

* + - the proposed risk allocation and high-level commercial principles that will apply.

It may also include:

* + - an overview of the likely commercial structure or indicative commercial terms;
    - 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 focus on the general ability of a supplier to meet the procurement objectives. Generally it should not require potential EOI respondents to expend significant resources in responding to project specifics.

* + - 1. Invitation to tender

An invitation to tender formally requests responses from suppliers in relation to delivering the required scope of works.

Invitations to tender outline the requesting department’s needs and objectives, as well as any requirements, criteria, instructions that are to be followed. As outlined in section 5.4 of this document, an invitation to tender may take the form of either a Request for Tender or a Request for Proposal.

The invitation to tender 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.

The quality of the tender documents is critical to successful tendering. They are the basis of the contract between the purchaser and the successful supplier and must accurately reflect the physical, financial, contractual and time parameters of the service required.

The content of an invitation to tender varies according to the nature of the requirements, the chosen procurement strategy and the tender approach. However, it usually includes:

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

For a major project, the invitation to tender documentation can be extensive. There may be a core tender document and supplementary material.

Government must provide the appropriate information to enable potential suppliers to understand and address their needs. 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. Suggested content elements for a Request for Tender and a Request for Proposal are contained in Appendix I.

The invitation to tender (RFT or RFP) should be developed concurrently with the development and evaluation of EOIs. This enables the project to proceed in the most efficient manner. It will require the team to be sufficiently resourced to manage the multiple project components concurrently.

1. High Value High Risk projects are those that are classified as high risk based on an assessment of Project Profile Model results. They require greater scrutiny, assurance and approvals as they proceed through the investment lifecycle than other non-HVHR projects. [↑](#footnote-ref-2)
2. Department of Finance and Deregulation, ‘Commonwealth Procurement Rules’, Commonwealth of Australia, 2012. [↑](#footnote-ref-3)
3. Note that the VCC Framework represents best practice for all projects. Practitioners are encouraged to consider the VCC opportunity presented by any project over $100 million. However, those projects that do not meet the above criteria, and do not offer a reasonable VCC opportunity will not be required to comply with the Framework. [↑](#footnote-ref-4)
4. Victorian Government Purchasing Board, www.procurement.vic.gov.au, August 2012. [↑](#footnote-ref-5)
5. Premier’s Policy Statement, Ensuring Openness and Probity in Victorian Government Contracts. [↑](#footnote-ref-6)
6. Adapted from Government of Scotland, Construction Procurement Manual, February 2011. [↑](#footnote-ref-7)
7. Consistency must be maintained across project documentation, particularly where documents are developed during different stages in the investment lifecycle by different practitioners. In particular, it is essential that project service delivery objectives are consistent across project documentation, from the Investment Logic Map through business case, procurement plan, project plan, communication strategy and operation plan. Practitioners should be aware that it will be impossible to assess project delivery success once a project is complete if the intended objectives and benefits have drifted over time. [↑](#footnote-ref-8)
8. See the DTF website at [www.dtf.vic.gov.au/infrastructure-investment/investment-lifecycle-and-high-value-high-risk-guidelines](https://www.dtf.vic.gov.au/infrastructure-investment/investment-lifecycle-and-high-value-high-risk-guidelines) [↑](#footnote-ref-9)
9. Australasian Procurement and Construction Council, ‘Building and Construction Procurement Guide – Principles and Options’, May 2013. [↑](#footnote-ref-10)