

Chapter 1

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Objectives

Tender process activities are used for procurement involving anything from goods and services and ICT, to the acquiring and disposing of major Government assets with capital works procurement.

- This Manual deals with generic rules and processes that apply to all tender process activities. Related detailed work instructions and procedures in other documents will still apply, but must be aligned to ensure compliance with this Manual and to maintain the integrity of quality management systems.

Context

Tender Process

A tender process, as the term applies to NSW Government agencies, involves all of those systematic processes and procedures necessary from the time a product or service need or requirement is defined to fulfil or support a Government program or project, through to approval of the awarding of a contract for a product or service. This includes the planning

of the tender process, the compilation and issue of Request for Tender (RFT) documents, the closing and receipt of tenders, the evaluation of tenders and finally, approval to accept a tender and enter into a contract.

All persons performing functions relating to tender process activities should be familiar with the *Code of Conduct for the Tendering Process*

The Manual covers the following steps in a tender process:

- Planning the Tender Process
- Preparing the Request for Tender Documents
- Request for Tender and the Tender Period
- Handling Tenders
- Tender Evaluation
- Award of Contract
- Disclosure of Contract Information.

Chapters on the Law and Tendering and Electronic Tendering are also included, and should be read in conjunction with other parts of the manual.

Changes

Changes to any of the guidelines contained in this Manual must be sought through the General Manager of the responsible business unit seeking the change from the General Manager, Policy Support Services. The Manual applies to all personnel, divisions, groups, branches, business units, and other organisational units within the Department of Services, Technology & Administration. It applies to the activities of contractors and consultants.

Definitions

Australia and New Zealand Government Procurement Agreement (ANZGPA)

The *Agreement* supports the development of industry in Australia and New Zealand by promoting a single competitive market across jurisdictions in which government suppliers compete on an equal basis for government contracts. It is the responsibility of all agencies, including the NSW Department of Services, Technology and Administration, to ensure that the principles and objectives of the ANZGPA (1997) are reflected and implemented in all government procurement policies, procedures, and RFT documents.

Australia-United States Free Trade Agreement

The Government Procurement Chapter of the Australia-United States Free Trade Agreement applying from 1 January 2005 to the procurement of goods and services and construction projects valued at above stated monetary thresholds by some agencies.

Best and Final Offer (BAFO)

A process to improve the quality of tenders that are potentially acceptable but have some deficiencies. Short listed tenderers are asked to revise their proposals in specific areas, which then become their best and final offer and the basis for further evaluation.

CCMS

Contractor and Consultant Management System – a computerised database for capturing tender process and contract related information.

Client

The agency or other organisation on whose behalf the agency undertakes the tender process.

Conditions of tendering

The rules governing the content and submission of tenders and the conduct of the tendering process. General conditions are the generic rules that apply to most requirements such as tender lodgement details, conditions applying to the treatment applying to late tenders. Special conditions specific to the RFT such as how the RFT documents will be obtained, tenders will be prepared, received and assessed/evaluated. Conditions of tendering provide the basic framework upon which the tender process is built.

Construction

This includes all organised activities concerned with demolition, building, landscaping, maintenance, civil engineering, process engineering, mining and heavy engineering.

Consultant

A person or organisation engaged under contract to provide specialist or professional services.

Contract

An agreement between two or more parties to do or not do something which is legally enforceable. The agreement may be written, oral or inferred by conduct.

Contractor

An individual or organisation responsible for the performance of the work specified under a contract.

Contract authority

The legally recognised body empowered to invite and/or accept tenders or other offers and to enter into contracts on behalf of the Crown. For example, the State Contracts Control Board is the contract authority for goods and services tenders to the NSW Public Sector Service and others. The Minister of a departmental agency would be the contract authority. An agency may be the contract authority. For administrative and operational expediency the contract authority may vest certain of its powers in officers of an agency under delegated authority.

Department

NSW Department of Services, Technology and Administration (DSTA)

e-Tendering System

A NSW Government internet based electronic tendering system (developed and managed by the NSW Department of Services, Technology and Administration and which provides a facility to invite or advertise RFTs, distribute RFT documents, securely receive, and open, tenders, and provide various notices. This facility is available through <https://tenders.nsw.gov.au>

Expression of Interest (EOI)

This is the process of seeking the interest of service providers capable of undertaking specific agency works or services to provide information on that capability or a detailed proposal to undertake work. It is usually the first stage of a multi-stage tender process.

In-house tender

Tender from a business unit of an agency to provide work or goods or services to that agency. The handling of in-house bids must comply with the application of competitive neutrality.

Intellectual property

Material that is commercially sensitive or has intellectual value, usually under copyright, patent right, registered design, trade mark or name or other protected right.

Local Jobs First Plan

The Policy seeks to support jobs by enhancing opportunities for local businesses to win government contracts for the supply of goods and services

Late tender

A tender received after the tender closing date and time.

Notification of acceptance or Letter of Award

Document notifying the successful tenderer that the tender has been accepted.

Open tendering

Tenders invited by public advertisement from any prospective tenderers.

Other than open tendering or restricted tendering

Tenders invited from a short-list of potential tenderers or a single tenderer.

Pre-tender estimate

Estimated cost of the proposed contract prepared before tenders close.

Principal

Means the Minister for Commerce for the State of New South Wales, or the State Contracts Control Board, as specified, or another contract authority.

Probity

Integrity; uprightness; honesty.

There are a number of essential requirements to promote probity. These essential requirements should be considered at all stages of the process. These requirements are:

- Fairness and impartiality;
- Use of a competitive process;
- Consistency and fairness of process;
- Tender security and confidentiality; and
- Identification and resolution of conflicts of interest.

Procurement

All activities performed by an agency to acquire services, products or other assets, from the initial decision that they are required, and defining of requirements through component design or development, tender process, administration and management of the arrangement and documentation (contract), to demolition and asset disposal.

Procurement includes activities associated with the supply and disposal of goods/products and supply of services of all kinds, including consultancies, professional services, construction, maintenance and material supply contracts, services and facilities contracts, capital equipment, and property and leasing arrangements.

Request for Tender

The issuing of an invitation, by advertisement or directly, to respond to tender requirements by lodging a tender. Covers all forms of tendering, including an invitation or request for quotations (RFQ), offers, EOI, for pre-registration RFQ, and RFP. Other terms commonly used include “call tenders”, “invite tenders”, “call for detailed proposals”, “let tenders” etc.

Request for Tender documents

The set of documents prepared by the party seeking tenders and provided to tenderers, outlining the invitation or request for tenders and the requirements involved, including the conditions of tendering and proposed contract conditions.

Risk management

The systematic application of management procedures and practices to the tasks of identifying, analysing, assessing, treating and monitoring risk. Risk management is used to ensure that project objectives and goals are achieved. See Total Asset Management Risk Management Guidelines (TAM 04-12).

Technical specification

A detailed description setting forth the dimensions, materials and all other technical requirements for a contract. This is included in the RFT documents.

Or from tendering guidelines:

A formal response to an RFT as received from a tenderer. It is an offer to supply goods/products/assets, provide services, or to execute work on stated terms, or an expression of interest, or an application for prequalification or the like.

State Contracts Control Board

The board established under the Public Sector Employment Management Act 2002 which develops, reviews and implements procedures covering the supply and disposal of goods and services to the Public Sector Service.

Tender

Includes a price, bid, offer, quotation, consultant proposal or expression of interest, or the like, lodged in a Request for Tender.

Tender Box

Location, physical or virtual, that receives tenders lodged by service providers, and maintains them secure and confidential until close of tenders, and the tender opening process occurs.

Tender Closing Office

The office nominated in the RFT documents as the location where tenders are to be lodged.

Tender Opening Committee

A quorum of three people, Secretary, Convenor and member who convene to open and process tenders.

Tender period

The period between the common initial issue date or date of availability of the RFT documents and the closing date and time of tenders.

Tenderer

Entity submitting a tender in response to an RFT.

Tender Receiving Office

Alternative offices to the Tender Closing Office where tenders are accepted.

Value for money

A concept of value which is determined by the objective consideration of all factors contributing to utility, useability, usefulness and other merits of what is offered as inputs to the decisions regarding the best, rather than an automatic choice of the options having the lowest price.

Relative value for money may be determined with tenders by considering the relative merit of the tenders taking into account all factors relevant to the purpose to be served, such as tenderer and product:

- experience;
- quality;
- reliability;
- timeliness;
- delivery;
- innovation;
- service and warranties;
- whole-of-life costs (including initial and on-going costs);
- fitness for use/purpose;
- expedient product recalls and related practices; and
- value adding components such as meeting economic, social development and environmental policy objectives.

All of these (and others) may have a significant impact on the assessment of relative benefits and costs involved.

Applicable Government Legislation and Policies

There is a range of legislation, policies and guidelines, which impact on a tendering process. Some (but not necessarily all) are outlined below.

Legislation and Regulations

- *Public Finance and Audit Act, 1983* (and Treasurer's Directions). All State Government contracts must be tendered and awarded in accordance with this Act. The Act, along with Treasurer's Directions, regulates the administration and audit of public finances.
- *Public Sector Employment and Management Act 2002*. The Act establishes the State Contracts Control Board (SCCB).
- Public Sector Employment and Management (Goods and Services) Regulation 2010 sets out the basis on which the SCCB arranges for supply and disposal, the basis being "providing value for money" and ensuring "probity and fairness".

Public Service Departments are required to use:

- the SCCB contracts system managed by NSW Procurement for any goods or services available under this system, or where applicable; and
- NSW Procurement for inviting tenders for "not in contract" goods and services contracts exceeding \$250,000, (See the Section *State Contracts Control Board* (SCCB) later in this Chapter for information about the General Purchasing Delegation for purchases under \$250,000).

All other public authorities and State Owned Corporations may elect to purchase under a SCCB period contract, where one has been arranged.

For additional information please refer to:

- *Public Sector Management (Goods and Services) Regulation 2000* which deals with the powers and delegations of the State Contracts Control Board (SCCB).
- *Public Works Act 1912* (NSW)
- *Electronic Transactions Act 2000* (NSW)

Policies

NSW Government Procurement Policy

The *NSW Government Procurement Policy* is explained in the following documents:

- Treasury Circular 04/07 and Treasury Policy and Guidelines Paper TPP04-1 which describes the Procurement Policy Framework;

- A *Code of Practice for Procurement* which establish obligations and standards of behaviour for doing business with, for and by Government; and
- Implementation Guidelines for NSW Government Procurement including guidelines to assist buyers and service providers achieve value for money outcomes;
- This Manual covers tender process aspects of the procurement processes and gives practical effect to the tender process policies and principles embodied in the above documents.

Consultants and Contractors

The following relate specifically to the use of consultants and contractors.

Guidelines for the Engagement and Use of Consultants, July 2004, NSW Premier's Department. In these guidelines, a "consultant" is a person or organisation engaged under temporary contract to provide recommendations or specialist or professional advice that assists management decision making. Generally, it is the advisory nature of the work that differentiates consultants from other contractors.

These guidelines set minimum levels of competition to be sought for consultant engagements.

For capital works projects, detailed advice on the engagement and management of architects, engineers and other professionals is contained in the Procurement System for Construction. The Procurement System for Construction is the primary reference document when engaging contractors and consultants for all construction projects. The term "consultant" in the Procurement System for Construction is used in accordance with industry practice and has a wider meaning than that used in the above Premier's Department Guidelines.

Consultant Management System. Specially designed for assisting with the engaging and managing of consultants for construction related consultancies.

Procedures for engaging consultants should adhere to the principles and guidelines outlined in this Manual, and comply with the specific procedures in the *Consultant Management System*. This includes preparing briefs, planning for consultant engagements, invitations to submit proposals, lodging tenders, late tenders, and tender evaluation.

Codes

The NSW Government will only do business with those who comply with the principles in the *Code of Practice for Procurement*. The Code outlines how the Government will conduct its procurement activities when interacting with the private sector and applies to procurement by all NSW Government agencies and those doing business with and for the Government.

In addition agency staff and others involved must also comply with all other relevant codes for tender processes and procurement generally, including:

- *Code of Conduct and Ethics*, (DSTA March 2010);

- *Code of Conduct for the Tendering Process, June 2006*, which applies to and must be signed by all persons involved in performing tender process functions, including employees of the Department, employees of any other organisations, both Government and non-Government, and consultants engaged for specific activities associated with assessment of tenders (the Code is complementary to, but not a substitute for, other codes of conduct or ethics with which officers must comply when performing other roles or functions);
- [Model Code of Conduct for NSW Public Agencies](#) (Premier's Department, 2005, *Personnel Handbook, Chapter 8*); and
- [Code of Conduct and Ethics for Public Sector Executives](#) (February 1998).

ICAC

The *Independent Commission Against Corruption (ICAC)* has provided guidance on the processes that should be followed to ensure the integrity of procurement. Many relate to the evaluation of tenders, and should be considered when considering conduct and ethics and when planning specific tender processes.

Some of the ICAC views are summarised as follows:

- If one supplier offers a good deal, it is likely that there will be others able to compete.
- Calling expressions of interest is a useful way of gleaning a wide range of innovative solutions and protecting original ideas, and can also be used to cull a potentially large field of bidders.
- The best way to find out who is in the market is to ask the market, not to rely on the opinion of one individual, however the cost of tendering to industry and cost to Government should be considered, and agencies should be intending to proceed to contract before any RFT is initiated.)
- For a process to be fair to all parties, the rules must not be changed mid-stream to advantage one party.
- Once confidential information belonging to one party is known to others, the process is no longer fair.
- A privatisation or contracting out process should neither inhibit in-house bidding nor give it a special advantage.
- Tender specifications should not be so narrowly drawn as to eliminate acceptable solutions, and specifying the desired result, rather than the method of achieving it, will generally be more effective.
- RFT documents should state whether non-conforming tenders will be considered and, if so, explain how they will be evaluated.
- Those with a (commercial) interest in the outcome of a tender process should not be involved in the evaluation process in a way that allows them to affect the outcome.

- Tenders must be evaluated in a consistent fashion, on pre-determined criteria and RFT documents should be designed to elicit the necessary information to allow proper evaluation in relation to each of the criteria.
- The agency calling tenders should, as far as is practical, know with whom it is dealing, and how competitive the field really is.
- Tenderers should be advised in advance of the possibility of negotiation and the circumstances under which it may occur.
- Tender evaluations/processes should be impartial and seek the best value for public money, noting that if the process is flawed, the outcome is likely to suffer.

The above points are from ICAC's publication *Pitfalls or Probity: Tendering and Purchasing Case Studies*, June 1993. A number of case studies are used to illustrate the views expressed.

Other useful ICAC publications include:

- *Contracting for Services: The Probity Perspective: A Corruption Prevention Project* (ICAC May 1995);
- *Direct negotiations: guidelines for managing risks in direct negotiations* (ICAC May 2006); and
- *Practical Guide to Corruption Prevention* (ICAC 1998, Internet publication initially).

Agencies Supplying to Themselves

All things being equal and subject to client agency approval, prime consideration should be given to negotiating a "contract", or Service Level Agreement, with an in-house service provider, thereby avoiding situations where agency business units are bidding in competition with the private sector on agency managed projects.

Neither National Competition Policy nor Government policy require that competitive bids be called if Government resources are available. Therefore, the conduct rules of Part iv of the Trade Practices Act dealing with anti-competitive practices do not apply.

Also see Chapter 7, *In House Tenders*.

State Contracts Control Board

The State Contracts Control Board (SCCB) was originally constituted in 1898 as the Public Service Tender Board. The SCCB develops, reviews, and implements procedures covering the supply and disposal of goods and services to the Public Service. It aims to maximise value for money within a framework of probity and equity. The Board invites and accepts tenders under conditions that it determines, and may enter into contracts on behalf of Government departments and other agencies outside of the Public Service (including State-owned corporations).

The Board's role in inviting and accepting tenders and quotations, is set out in the *Public Sector Management (Goods and Services) Regulation 2000* (the

Regulation). The SCCB represents and is an agency of the Crown. It provides a formal structure for user participation in the contracting system.

Given the whole-of-government purchasing role of the SCCB, membership includes officers from the Department of Premier and Cabinet, and NSW Treasury. The Board meets monthly.

SCCB Delegations

The Board may delegate any of its functions other than the power of delegation.

The SCCB has delegated to Officers of the Department of Services, Technology and Administration the power to invite and accept tenders and administer contracts for goods and services, and ICT, within prescribed limits.

The publication "*State Contract Control Board Delegations*" provides details of the delegations by SCCB to officers of NSW Procurement. The document is available at the NSW Procurement section of the Intranet.

The Board has also issued a range of delegations to agencies to undertake the procurement of "not in contract" goods and services. The delegations for:

- Consultancies;
- General Purchasing Delegation;
- Printing Delegation;
- Disposals Delegation.

are available through the Intranet:

Role of NSW Procurement

These tendering guidelines are developed and maintained by NSW Procurement which:

- provides guidance and support for those undertaking tender processes;
- provides support in the use of the guidelines and the associated procurement system;
- considers suggestions for changes and improvements to, the tender process guides detailed in the guidelines;
- provides information on, and supports the use of, the standard conditions of tendering, contract forms, commercial conditions and user guides developed and maintained by NSW Procurement;
- provides information services and tender panels for selective tender processes; and
- provides support and guidance with the preparation of RFT documents.

Reference and Guidance Documents

- NSW Government Code of Practice for Procurement
- NSW Government Tendering Guidelines
- Code of Conduct for the Tendering Process

Appendices

1A – Links to Procurement Related Policies and Documents

Acronyms

RFT	Request for Tender
SCCB	State Contracts Control Board
ICAC	Independent Commission Against Corruption
ANZGPA	Australia and New Zealand Government Procurement Agreement