



New South Wales Government

NSW Government Procurement Guidelines

Tendering Guidelines

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phone	02 9372 8600 or 1800 NSW BUY (1800 679 289)
e-mail	nswbuy@services.nsw.gov.au

These guidelines were commissioned by NSW Treasury and prepared by the NSW Finance and Services for the NSW Government. These guidelines are a key element of the Procurement Policy Framework of the NSW Government. They are available from the NSW Government procurement website <http://www.nswprocurement.com.au/Government-Procurement-Frameworks/Goods---Services/Tendering-Guidelines---Policy.aspx>

The document shall be updated on an ongoing basis by the Department of Finance and Services to reflect changes to government tendering policy and procedures. To ensure accurate and up to date information, agencies are advised to access the latest version directly from the website.

For further information on these guidelines contact NSW Procurement help desk by phone 02 9372 8600 or 1800 679 289 (1800 NSWBUY) or e-mail nswbuy@services.nsw.gov.au

Issue log

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3	July 2010	Reference the new government procurement website Include NSW Local Jobs First Plan obligations Update on release of Government Information (Public Access) Act 2009 General review and update
3.1	October 2011	Update on release of M2011-16 NSW Government Tenders advertised on tenders.nsw.gov.au only

Table of Contents

1	INTRODUCTION	5
1.1	Context, purpose and scope of Guidelines	5
1.2	Principles	5
1.3	Significant issues	6
1.3.1	Probity and corruption prevention.....	6
1.3.2	Some legal considerations.....	8
1.3.3	Maintenance of records	8
1.3.4	Local Jobs First Plan	8
1.3.5	Australia and New Zealand Government Procurement Agreement	9
1.3.6	Free Trade Agreements.....	9
1.3.7	Electronic Tendering.....	10
1.3.8	Agency Accreditation Scheme for Construction	10
1.3.9	Agency Accreditation Scheme for Goods and Services.....	10
1.3.10	Purchase of Goods and Services from State Contracts.....	11
1.3.11	Consultant Engagements	11
2	PLANNING THE TENDERING PROCESS	12
2.1	Initial planning	12
2.2	Tendering processes generally	13
2.3	Tendering methods	14
2.3.1	Open tendering	16
2.3.2	Multi-stage tendering	16
2.3.3	Limited Tendering	19
2.4	Request for Tender documents	21
2.4.1	Components	22
2.4.2	Conditions of tendering details	22
2.4.3	Specification	23
2.4.4	Other matters during documentation	24
2.5	Tender Evaluation Plan.....	26
3.	TENDERING PROCESS	28
3.1	Request for Tenders	28
3.2	Tender period.....	30
3.3	Enquiries and meetings	31
3.4	Amendments to RFT documents	32
3.5	Submission, receipt and opening of tenders	32
4	TENDER EVALUATION	34
4.1	Evaluation objective.....	34
4.2	Evaluation methodology.....	35

4.3	Probity requirements	35
4.4	Outline of the evaluation process.....	36
4.5	Eligibility of tenderers.....	38
4.6	Qualifications, non-conformities and departures	39
4.7	Late tenders	39
4.8	Clarification of a tenderer’s information	40
4.9	Tender negotiation	41
4.10	Recommendation, review and approval.....	42
5	OUTCOME OF TENDERING	43
5.1	Announcing tendering process results	43
5.2	Contract award	44
5.3	Debriefings.....	44
5.4	Tenderer complaints	45
5.5	Learnings from the tender process	45
6	GLOSSARY OF TERMS.....	46

1 Introduction

1.1	Context, purpose and scope
1.2	Principles
1.3	Significant issues

1.1 Context, purpose and scope of Guidelines

The NSW Government Procurement Policy Framework, available on the NSW Government procurement website <http://www.nswprocurement.com.au/>, has a fundamental objective to ensure that NSW Government procurement achieves value for money. Efficiency and effectiveness, probity and equity, and effective competition are key principles underpinning the Policy Framework.

The Policy Framework includes a single [*NSW Government Code of Practice for Procurement*](#) to cover all Government procurement. These Tendering Guidelines (the *Guidelines*) build on the objectives, responsibilities, and standards of behaviour in the Code and are a key component of the Policy Framework.

The *Guidelines* are designed to provide agencies with a structured approach to planning and implementing tendering and associated processes. Agencies may in addition require more detailed procedures for specific agency tendering activities.

The *Guidelines* also provide industry with an understanding of the processes undertaken by NSW Government agencies to ensure fairness and probity in tendering.

The *Guidelines* apply to procurement undertaken by all agencies, including government departments, statutory authorities, trusts and other government entities. State Owned Corporations under the State Owned Corporations Act are exempt although they are encouraged to use the *Guidelines*. Internet links throughout the *Guidelines* provide further explanation of the subject matter.

The *Guidelines* may be revised periodically. The latest version can be accessed from the NSW Government procurement website <http://www.nswprocurement.com.au/>.

1.2 Principles

Before an agency embarks on a tendering process there should be consideration as to whether tendering is the most appropriate procurement method. For example, can the agency undertake the work in-house and achieve value for money?

As a general principle, public sector expertise, resources, facilities and products should be used in preference to procuring from the private sector, subject to value for money considerations. There are no tendering policies or legal requirements preventing an agency directly approaching another agency to undertake for it a work, service or product delivery.

Prior to calling tenders the agency must have the intention, commitment and authority to proceed, an approved and adequate budget, and arrangements in place to manage all stages of the process and outcome.

The *Guidelines* encourage decision-making principles for tendering that promote:

- planning to achieve best value for money. Tendering should not be process driven but based on a strategy appropriate for the specific circumstances;
- process probity in all phases of the tendering process with arrangements that avoid conflict of interest and the perception of corruption;
- appropriate tender documentation to produce the best outcome, without limiting the flexibility of the agency to choose a suitable tenderer or tenderers that offer attractive solutions;
- the optimal involvement of service providers in the tendering process by (where appropriate) a staged pre-qualification process to limit the field of tenderers to a suitable short list and allowing for innovative alternative tenders;
- using the advantages of proven technologies such as electronic tendering ([eTendering](#)).

1.3 Significant issues

1.3.1 Probity and corruption prevention

The application of probity principles, generally require that:

- all tenderers are treated fairly and equitably, consistent with the rules of natural justice and procedural fairness;
- a transparent and appropriately planned and documented tender process is established, including a robust evaluation methodology;
- all confidential information is protected;
- strategies are in place to maintain the integrity of the tendering process when in-house bids may be involved;
- potential and/or actual conflicts of interest are identified and dealt with.

Agencies must ensure they have practices in place that mitigate the risk of corruption in their tendering and contracting activities. Such practices would include:

- having an approved scope of work before going to tender;
- having an approved budget and approved contract price estimate before receipt of tenders;
- requiring a documented tender evaluation, recommendation and approval process;
- monitoring the delivery of contractual obligations;
- monitoring of payments against the approved budget;
- a governance structure that establishes independent approval through the procurement process. For example, the person approving the outcome of the tender process should not be the same person who evaluated tender responses or was involved in conducting the actual tender process.

Reference publications on probity and corruption prevention are available from the NSW Independent Commission Against Corruption (ICAC) website www.icac.nsw.gov.au. Some relevant publications are:

- [Contracting for Services: The Probity Perspective](#) (1995).
- [Managing conflicts of interest in the public sector – Guidelines \(2004\)](#).
- [Managing conflicts of interest in the public sector – Toolkit \(2004\)](#).
- [Probity and Probity Advising: Guidelines for managing public sector projects \(2005\)](#).
- [Direct negotiations - guidelines for managing risks in direct negotiations](#) (2006).

The use of probity auditors or advisors should be the exception rather than the rule. Refer to [Premier's Memorandum M1998-12 Use of Probity Auditors by Public Sector Agencies](#).

Agencies should be aware that collusive practices between service providers in the preparation and lodging of tenders are prohibited and a breach of the [NSW Government Code of Practice for Procurement](#).

The Code of Practice also prohibits the practice of bid shopping by any party.

Service providers must be prepared to attest to their probity, particularly on issues concerning collusive tendering and bid shopping.

If agencies find that such practices have occurred they should refer to the [NSW Government Code of Practice for Procurement](#) for appropriate action, including the imposition of sanctions.

1.3.2 Some legal considerations

Agencies involved in tendering must be aware of their legal obligations. In general:

- the issue of a Request for Tender (RFT) by the party requesting tenders is no more than an ‘invitation to treat’, it is not an ‘offer’;
- the submission of a tender in response to the RFT by a tenderer amounts to an ‘offer’ by that tenderer;
- no binding contract arises between the parties until the party requesting tenders accepts a tender.

However, in certain circumstances courts have been willing to impose binding legal relationships between the party requesting tenders and a tenderer during the pre-award period, including those involving an Expression of Interest, where a process contract can be shown to exist. With careful legal drafting the existence of a process contract can be minimised. Agencies may need to seek legal advice on conditions of tendering and process contracts in special circumstances.

1.3.3 Maintenance of records

Comprehensive records of the tendering process are essential. These will assist agencies in managing the tendering process, and in disclosing information associated with the process. This is consistent with the requirements of the State Records Act 1998.

The *Guidelines* identify the types of records to be maintained.

1.3.4 Local Jobs First Plan

The NSW Local Jobs First Plan was released as part of the 2009-10 State Budget (refer to Treasury Circular TC10-03 and Premiers Circular C2010-09). It aims to enhance the opportunities for small and medium enterprises (SME’s) in Australia and New Zealand to compete to win government contracts for the supply of goods and services. The Plan does not apply to government construction contracts.

Local Jobs First requires agencies, and State Owned Corporations that are directed to comply by their portfolio minister, to consider and include industry development criteria in their goods and services tenders for contracts over \$700,000 in value.

Key tender elements include:

- 20 per cent preference discount applied to the price of SME ANZ content;

- Up to five per cent additional discount to benefit regional NSW manufacturers;
- A six per cent minimum weighting for SME Participation Plans for contracts of \$4M and over.

Use should be made of the [Industry Capability Network](#) (ICN), formerly the Industrial Supplies Office. ICN assists agencies and industries in identifying competitive local manufacturers and providers for products and services being sought.

Information on the Plan is available from the government procurement website <http://www.nswprocurement.com.au/>.

1.3.5 Australia and New Zealand Government Procurement Agreement

New South Wales is party to the Australia and New Zealand Government Procurement Agreement (ANZGPA). The overriding aim of the ANZGPA is to promote opportunities for Australian and New Zealand service providers to compete for government business on the basis of value for money in a single competitive market.

Under the Agreement, the Commonwealth, States, Territories and New Zealand Governments have agreed to provide equal Government supply opportunities and treatment to each other's services, products and suppliers. This is achieved by ensuring the absence of inter-state and trans-Tasman preference schemes and other forms of discrimination in Government procurement, based on the place of origin of goods and services.

Further information on the ANZGPA is at <http://www.apcc.gov.au>. Premier's Memorandum 98-7 [Australia and New Zealand Government Procurement Agreement](#) advised agencies of the requirement for them to implement the principles of the agreement in all procurement.

1.3.6 Free Trade Agreements

NSW Government is a participant in a number of Government Procurement Chapters of Free Trade Agreements. Currently, the NSW Government is a participant in the Government Procurement Chapters of the Free Trade Agreements between Australia and United States and Australia and Chile. The Agreements are available at: <http://www.dfat.gov.au/trade/ftas.html>.

The Agreements apply to nominated NSW agencies and to procurements above stated values for construction and for goods and services. Certain goods and services are exempt (including health and welfare services, education services and motor vehicles). For procurements covered under the Agreements, participating governments must treat suppliers of the other Party, and the goods and services of the other Party, the same as domestic suppliers and domestic goods and services.

Compliance with the Local Jobs First Plan (see 1.3.4) and with the requirements of these *Guidelines* is consistent with obligations under the Free Trade Agreements.

1.3.7 Electronic Tendering

Electronic tendering systems enable tenderers to view tender advertisements and invitations, electronically obtain tender documents and lodge tenders. The NSW Government *eTendering* system, through the Tenders NSW website at <https://tenders.nsw.gov.au/> is managed by the Department of Services, Technology & Administration and is available to all agencies.

Under Premier's Memorandum M2006-11 [NSW Procurement Reforms](#), all NSW Government agencies, other than State Owned Corporations, are to make Requests for Tender documents available and tenders able to be lodged through the NSW Government eTendering system (contact email: RFTEnders@services.nsw.gov.au for further information).

1.3.8 Agency Accreditation Scheme for Construction

The NSW Government has established an accreditation scheme that applies to agencies undertaking building and construction projects valued at more than \$1M. Agencies not accredited are required to undertake their procurement with the assistance of an accredited agency or a private sector expert pre-qualified for this purpose by the Department of Finance and Services. The private sector expert must use the guidelines, procedures and lists of pre-qualified service providers in the government's Procurement System for Construction.

Details of the Agency Accreditation Scheme for Construction are available at: http://www.nswprocurement.com.au/Government-Procurement-Frameworks/Files/Agency-accreditation-construction_dnd.aspx

Details of the Procurement System for Construction are available at <http://www.nswprocurement.com.au/Government-Procurement-Frameworks/Construction/Framework.aspx>

1.3.9 Agency Accreditation Scheme for Goods and Services

All agencies have delegated authority from the State Contracts Control Board (SCCB) to procure agency-specific goods and services (not available under State Contracts as per item 1.3.10 below) valued up to \$250,000. The SCCB's General Purchasing Delegation provides guidance on the number of quotes required up to \$250,000.

Agencies accredited under the Agency Accreditation Scheme for Goods and Services Procurement have delegated authority from the SCCB to undertake procurement activities for agency-specific goods and services valued above the General Delegation of \$250,000 and up to their level of accreditation.

Agencies not accredited (and agencies needing to undertake procurement above their accreditation level) are required to submit details and

specifications to the Department of Finance and Services (NSW Procurement) for the invitation of tenders.

Details of the Agency Accreditation Scheme for Goods and Services are available at: <http://www.nswprocurement.com.au/Government-Procurement-Frameworks/Goods---Services/Framework.aspx>

1.3.10 Purchase of Goods and Services from State Contracts

Premier's Memorandum M2006-11 *NSW Procurement Reforms* introduced the requirement that all agencies, other than State Owned Corporations, must use State Contracts Control Board whole-of-government contracts where they are available, when procuring goods and services. This applies even if the agency is accredited.

Information on State Contracts is available at:
<http://www.nswprocurement.com.au/state-contracts.aspx>

1.3.11 Consultant Engagements

For consultant engagements, the Board has granted an exemption which allows heads of agencies to invite and accept tenders for consultancy services, subject to compliance with the delegations and requirements specified in the Department of Premier and Cabinet's *Guidelines for the Engagement and Use of Consultants*. There is also a prequalification scheme: *Performance and Management Services* managed by the Department of Finance and Services from which consultants can be engaged for a number of specialty services. Use of the prequalification scheme is voluntary and operates independent of the delegations within the *Guidelines for the Engagement and Use of Consultants*.

2 Planning the Tendering Process

2.1	Initial planning
2.2	Tendering processes generally
2.3	Tendering methods
2.4	Request for Tender documents
2.5	Tender Evaluation Plan

2.1 Initial planning

Initial planning of a tendering process is essential in achieving the desired outcome.

This planning should consider how fairness and probity will be ensured, and whether a probity plan and/or probity auditor is needed. Circumstances where a probity auditor may be warranted include:

- when there is likely to be detailed negotiations between the agency and tenderer/s;
- for high value complex projects (for example, a \$5M information and communications technology project);
- when private sector financing is involved.

When tenders from other agencies are anticipated, refer to Treasury's Policy and Guideline Paper TPP02-1 [Policy Statement on the Application of Competitive Neutrality](#).

Planning should specifically consider:

- how value for money can be obtained and demonstrated through the tendering process. In most cases, value for money will be obtained by seeking both price and non-priced information in a tender. Non-priced information will, for example, include the capability of the tenderer to complete the contract, or perhaps incorporate innovation in the design. Value for money considerations will also require life-cycle cost estimates for proper comparative analysis of offers;

- giving early notice to stakeholders, including potential tenderers, of planned procurement;
- the number of service providers required to undertake the work or services;
- the availability of service providers in the market with the special skills sought;
- the availability of a list of suitable prequalified or preregistered service providers, compiled by the agency or by other agencies;
- the duration of the tender period to enable tenderers to properly price and prepare tenders;
- how the cost of the process for tenderers and the agency can be minimised;
- the capacity and capability of agency personnel or procurement agents to respond to tender enquiries and to effectively evaluate tenders.

Previous work experience of service providers with the procuring entity, or in NSW, or in Australia should not be an evaluation requirement.

2.2 Tendering processes generally

A Request for Tender (RFT) is the usual documentary mechanism used to seek tenders from service providers. The RFT documents are issued as part of the tendering process to inform potential tenderers of the:

- purpose and nature of the proposed tender and contracting processes;
- terms and conditions of the proposed tendering process and the resulting contract/s;
- information required for evaluating a tender;
- process and criteria (and broad weightings if appropriate) to be used in evaluating tenders.

This information must be provided regardless of the size and complexity of the procurement or the tendering process to be used. It gives industry a basis on which to decide if it wants to submit a tender.

Selecting the most appropriate tender process requires consideration of the:

- advantages and disadvantages of the different tendering options;
- availability of pre-qualified or pre-registered tenderers;
- capabilities of the market;
- risks identified and their implications;

- the approach adopted for managing risk and ensuring best value for money, process probity, fair dealing and effective competition.

2.3 Tendering methods

There are a number of tendering methods available for use in a tendering process. These are described in a wide variety of ways depending on the agency, procurement stream, or industry background.

The *Guidelines* identify three generic main categories, being **‘open tendering’**, **‘multi-stage tendering’** and **‘limited tendering’**. The stages in these three categories are shown and described below in Figure 1.

Figure 1: Depiction of tendering categories

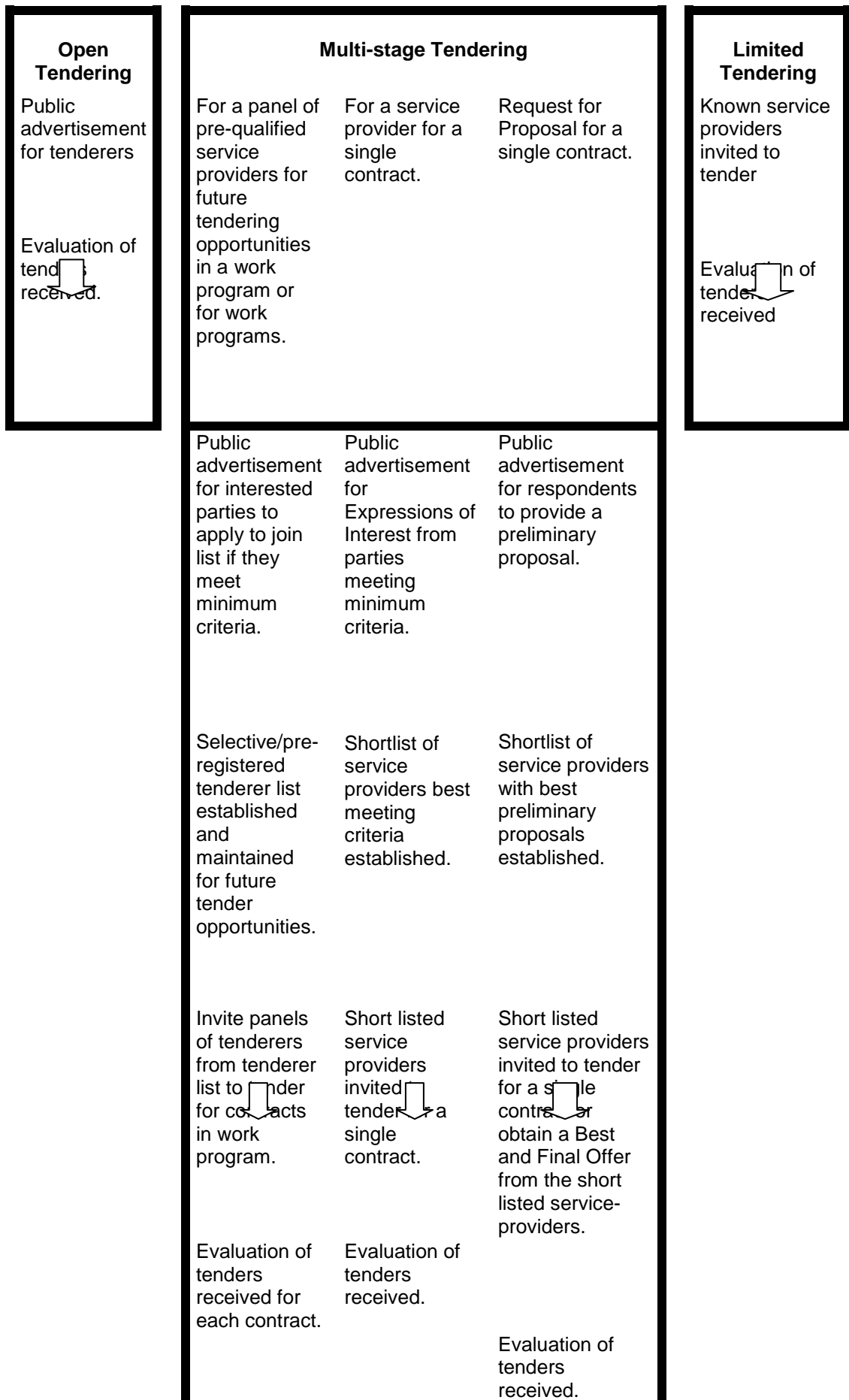


Figure 2 below provides guidance on the minimum number of quotes or tenders required.

Figure 2: Number of Quotes or Tenders Recommended

Value	Construction	Construction Related Consultancy (where Pre-qualification Scheme exists)	Other Consultancy	Goods and Services (no existing State Contract)
Up to \$30,000	1	1	1	1
\$30,000 - 50,000	3	1	3*	3
\$50,000 - 150,000	3	3	3*	3
\$150,000 - 250,000	3*	3	Open Tender*	3
Over \$250,000	Open Tenders *	3	Open Tender*	Open Tender

* Where a pre-qualification scheme is used, adopt the number specified by the scheme. If not specified in the prequalification scheme, a minimum of 3 is recommended.

2.3.1 Open tendering

An open tendering process is an invitation to tender by public advertisement with no restriction placed on who may submit a tender. Tenderers must however demonstrate in their tenders how they satisfy the evaluation criteria and how they meet the specific RFT requirements.

Seeking open tenders is a sound way of gaining assurance of best value for money, particularly in the absence of accurate market price knowledge or clear knowledge of available competent tenderers. It increases competition and gives all potential tenderers the chance to compete for Government business.

Open tendering is generally used where there is a broad competitive market and it is not efficient or cost effective to establish pre-qualified or pre-registered tenderer lists.

2.3.2 Multi-stage tendering

Multi-stage tendering may be used to cull a large number of respondents and identify the best service providers in a mature supplier market. It enables the number of final tenderers to be limited to those that can demonstrate the requisite capability to perform the contract.

The first stage in multi-stage tendering is an Expression of Interest (EOI) or Request for Proposals. This invites interested service providers to register their interest against the evaluation criteria in the RFT document. This is the process that is followed for the creation of panels in pre-qualification schemes.

The Expression of Interest document must explain the further steps proposed beyond the first stage of the tender process.

The agency then short lists interested service providers based on their demonstrated ability to undertake the particular contract or future work or service. These pre-qualified service providers are invited to tender in the second stage for either a specific contract or for several contracts in an ongoing work program.

Multi-stage tendering can be used to (a) establish a panel of service providers for several contracts in an ongoing work program; (b) establish potential service providers for a single contract; or (c) identify respondents with the best proposals, usually for more complex or unusual procurements. These are discussed below.

a) Panel of service providers

The panel of service providers may be established for selective or pre-registered tendering.

Selective tendering

The first stage of selective tendering is to establish a list of pre-qualified service providers capable of undertaking contracts for a particular program or category of works, products or services. The cost of establishing and maintaining the list must be justified by the extent of the work program.

In the second stage, tenders are sought for a particular contract from a limited number of those pre-qualified. As far as practical, and except for very small contracts or in special cases, at least three tenderers from the relevant pre-qualified list should be invited in order to provide reasonable competition. Tenderer panels should be sized appropriately for the potential number of tendering opportunities.

Pre-qualified tenderers should be advised that tendering opportunities are not guaranteed. Distribution of opportunities to tender should take account of factors such as:

- relative past performance as a service provider under similar contracts;
- previous tendering opportunities;
- special requirements of the work, product or service;
- relative capacity, ability and skill of the service provider to deliver the work, product or service;
- current contract commitments of the service provider;
- results in a system for service provider performance measurement and reporting;
- location of the work or service relative to service providers' preferred areas of operation.

Pre-registered tendering

Pre-registered tendering is similar to selective tendering except that all qualified service providers are invited to tender.

In establishing the pre-registered short list, agencies should ensure that the number of tenderers is not excessive and each has a reasonable opportunity for success.

(b) Service provider for a single contract

In this scenario, tenders are called for a specific contract in a second stage from short listed service providers identified in the Expressions of Interest stage.

Service providers in this case are required to submit tenders to suit evaluation criteria identified for the contract such as price, capacity, expertise and experience.

(c) Request for proposals

This method is similar to (b) above except that a more detailed response such as a preliminary proposal or ideas for a business solution is sought in the first stage. Evaluation criteria relating to service provider's capacity, expertise and experience to deliver the service, product or works are also included.

The second stage involves short listed tenderers being invited to tender for the contract or, where a best solution is sought, negotiation with the preferred service provider on the final requirements and price. Such final negotiations should never be precluded and can be part of any tender process.

The second stage or any additional stage may include an invitation for Best and Final Offers.

Best and Final Offers

The Best and Final Offer (BAFO) is essentially a stage in the procurement process that allows tenderers to further develop their proposals based on amended requirements from the agency.

The agency amends its requirements following review of the initial proposals from the tenderers. Short listed tenderers are asked to revise their proposals in specific areas, which then become their best and final offer.

A BAFO may be sought if this process is foreshadowed in the RFT documents and the Tender Evaluation Plan as an option and the evaluator/s determine that additional information is necessary in order to make a decision on proceeding to award a contract. In the interest of avoiding unnecessary costs only those tenderers having a potentially successful tender should be given the opportunity to submit best and final offers. Tenderers may elect not to submit a BAFO and instead have their tender stand.

Reverse Auctions

The use of reverse auctions is to be restricted to the procurement of products or commodities with little or no value-added or service component.

Suitable products for reverse auctions have the following characteristics:

- very strict and unambiguous specifications that ensure homogeneity;
- a competitive market;
- primary selection criteria is price;
- no or limited impact from whole-of-life costs or consideration;
- no services or added benefits specified in the requirement, for example, there must be no labour hire component such as a requirement for installation services.

Guidance on the use of reverse auctions is provided in the *NSW Government Procurement Guidelines, Reverse Auctions* at:

<http://www.nswprocurement.com.au/PDF/Policy/Reverse-Auctions.aspx>

2.3.3 Limited Tendering

Limited tendering includes invited tendering and direct negotiation.

Invited tendering

Invited tendering is used: (i) in emergency situations, (ii) for specialist work, (iii) in special circumstances where only one or a limited number of service providers are known to be able to carry out the work, or (iv) for low value, low risk, off-the-shelf procurement.

RFT documents are issued to the known available service providers assessed as the most capable of delivering the work, product or service required.

This may include those on pre-qualified tenderer lists, including lists of other agencies, and service providers contracted on a standing offer basis such as in State Contracts maintained by the NSW State Contracts Control Board.

Invited tendering includes:

Quotations

A request for written or oral (confirmed in writing with a purchase order) quotations is made to a number of potential service providers selected from the market, based on basic RFT documents or other information. This approach is normally used for “off the shelf” type, low value, low-risk procurements and used with simple contract forms or orders such as a purchase order.

Single invited tender

Only one service provider is requested to tender.

Single invited tenders usually apply to low value, low risk procurement.

Single invited tenders may also be justified when a previous open RFT has resulted in:

- no tender being submitted;
- no tender submitted that conformed to the essential requirements in the RFT documents;
- no tenderer satisfying the conditions for participation, and where the agency does not wish to modify these essential requirements.

A single invited tender may be appropriate when the requirement can only be fulfilled by a particular service provider and no reasonable alternative or substitute works, product or services exist. For example:

- the requirement is for a work of art;
- patents, copyrights, or other exclusive rights, or proprietary information that are to be protected;
- an absence of competition for demonstrable technical reasons;
- for additional deliveries of products or services by the original supplier or authorised representative that are either as replacement parts, minor extensions, or continuing services for existing equipment, minor software upgrades, services, or installations, where a change of service provider would deliver products or services that do not meet interchangeability or interoperability;
- when an agency procures work, products or services, without making any commitment for future supply, as a prototype intended for limited trial or as a development for research, experiment, study, or original development;
- in emergencies brought about by events not foreseen by the agency;
- for purchases made under exceptional conditions such as unusual disposals, unsolicited innovative proposals, or liquidation, bankruptcy, or receivership sales.

Where available, a relevant pre-qualification list or standing offer contract should be used to select a tenderer for a single invited tendering process.

Agencies need to establish appropriate monetary limits for single invited tenders, subject to:

- The value under which consultants can be asked for a single invited tender is set out in [Department of Premier and Cabinet Circular C2004-17](#) *Guidelines for the Engagement and Use of Consultants*.

- All public sector agencies, other than State Owned Corporations, must use State Contracts Control Board whole-of-government contracts (State Contracts), where they are available, when procuring goods and services. (refer Premier's Memorandum M2006-11 [NSW Procurement Reforms](#))
- For goods and services not available under an SCCB State Contract, the SCCB has issued delegations for Public Sector Service agencies for approaching the market. Information on the General Purchasing Delegation; Printing Delegation; and Disposals Delegation are available at <http://www.nswprocurement.com.au/Government-Procurement-Frameworks/Goods---Services/Delegations.aspx> Certain agencies have additional delegations under the SCCB's Agency Accreditation for Goods and Services.

Direct negotiation

Special circumstances may warrant entering into direct negotiations with a single selected service provider, without any prior competitive tendering process. Such an approach requires high-level authorisation and should only be used in clear and unambiguous circumstances that indicate such direct negotiation will result in the best value for money outcome for Government.

Generally, direct negotiations without preceding competitive tendering should be avoided, as there are very few circumstances in which this approach will achieve the best value for money. Direct negotiations can raise perceptions of improper behaviour, can appear to avoid scrutiny, and can be seen as involving preferential treatment and favouritism. Refer to ICAC's [Direct negotiations - guidelines for managing risks in direct negotiations](#) (2006) for further information.

Any unsolicited proposals should be referred to the Director General of the Department of Premier and Cabinet in the first instance. The Director General will liaise with relevant agencies on the best manner for dealing with the proposal.

Detailed written records of negotiations must be maintained.

2.4 Request for Tender documents

Documenting the agency's requirements fully and clearly in the RFT is essential to ensure the tendering process achieves and demonstrates the best results.

Errors or uncertainties in RFT documents can mislead tenderers and cause problems in evaluation. Once a contract is awarded these errors and uncertainties may result in contractor claims, time delays, disputes and incorrect work, products or services being provided.

The quality of RFT documents can be improved by:

- use of plain and direct language;
- use and definition of common terms, symbols, abbreviations and acronyms;
- use of a logical document structure.

- use of standard form contracts provided by government, e.g. those provided by the Department of Finance and Services.

2.4.1 Components

RFT documents typically include the following discrete components, usually based on agency standard form components:

- **conditions of tendering**
- **tender form** and/or **pricing schedule(s)** giving the basis for the tender price or prices/rates (specific to the RFT but using common form components);
- **responsible schedules of information** to be completed by the tenderers (lodged both with the tender and post tender) using specific and common form components;
- **standard or general conditions of contract**, possibly including a proposed **deed of agreement** (i.e. common to all such contracts);
- **special conditions of contract**, specific to the proposed contract but using common form components;
- **technical specification** describing the products, property, or other assets required, and/or the nature of the works or services to be undertaken (specific to the contract, but using components common to similar contracts);
- **drawings** or other **special documents** or **samples** - where applicable.

When preparing RFT documents agencies must ensure they include a clear and unambiguous description of the proposed procurement process, including the:

- proposed contract conditions, as described above;
- works, assets and services to be delivered through the contract;
- information to be lodged in the tender;
- tendering process, including the basis for evaluating tenders;
- decisions that will flow from the tendering process;
- a requirement for full compliance with the [NSW Government Code of Practice for Procurement](#) during the tendering process.

2.4.2 Conditions of tendering details

The RFT documents should, in describing the tender process requirements in the conditions of tendering:

- nominate a person and their contact details who will deal with enquiries from tenderers and provide any additional information required;

- explain where, when and how tenders must be lodged (for example by physical delivery, facsimile or electronic tendering; and the use of ‘two-envelope’ arrangements separating price and non-price information, phased lodgement, or other special requirements);
- indicate any supporting information required from tenderers, and how and when it must be submitted;
- state the evaluation criteria, and in most cases the broad weightings, on which the assessment of the tenders will be based;
- allow, where applicable, for further information to be requested after close of tenders (normally only sought from tenderers in contention) to assist the evaluation process (such as evidence of licences, accreditation status, information for the financial assessment of tenderers and their legal entity) and how and when such information should be submitted;
- indicate what information will be made public during and after the tendering process and that information on service provider performance may be exchanged between agencies and others;
- draw attention to any special conditions or obligations under the proposed contract which may depart from the agency’s normal practice;
- where appropriate, encourage tenderers to offer alternative tenders, and also clearly state the basis upon which they are to be submitted and considered;
- include mandatory tender process requirements only where they are essential for the evaluation of the tenders (these should be kept to a minimum as non-compliance will lead to disqualification of the tender);
- if the nature of the procurement is such that a Best and Final Offer could be sought, the agency must indicate in the RFT that it can, at its sole discretion, request short-listed tenderers to submit a best and final offer at any time during the evaluation process.

RFT documents should not preclude negotiations with tenderers. These negotiations may be for the purpose of clarifying a tenderer’s offer, or in the case of negotiations with a preferred tenderer, may be for the purpose of improving affordability or value for money for Government.

2.4.3 Specification

Technical or other specialist product specification in the RFT documents can be of three main types:

- functional specifications set the proposed function to be fulfilled by the product or other deliverables required (for example, provision of a sewage treatment works that treats the specified input), or service to be provided (for example, the provision of event management services or the design of a product for a specified function);
- performance specifications set the performance standards to be met by the product or other deliverable, for example the reliability of a patient

monitoring system, the strength and durability of concrete to be supplied or service quality or other performance attributes;

- detailed specifications define the product's detailed technical and physical characteristics, including physical dimensions, detail design such as reinforcement details, plant power input and output, controls and instruments, materials to be used, and the like.

The use of functional and performance specifications should be considered, rather than specifying design or descriptive characteristics.

The technical or specialist product or service specification should:

- state the requirement clearly, concisely, logically, and unambiguously;
- contain enough information for tenderers to decide on and cost their tender proposals;
- permit the offered procurement solutions to be evaluated against defined technical criteria by examination, trial, test, or documentation.

Technical specifications should not preclude the adoption of relevant international standards, where such standards exist and are suitable. An exception to this requirement is where the use of an international standard would not meet the agency's procurement program requirements or would impose greater burdens on the user of the product or service than the use of the relevant national standard.

An agency must not use technical specifications that require or refer to a particular trade name, patent, copyright, proprietary design, origin, producer, or supplier, unless there is no other sufficient way of describing the procurement requirements and provided that words such as "or equivalent" qualifying the item are included in the RFT documentation.

2.4.4 Other matters during documentation

Industry forums or briefings

There may be circumstances where it is advantageous to release information about the forthcoming tender opportunity prior to the issue of RFT documents, even at a very early stage in the planning.

Care should be taken to ensure that this information is not prejudicial to the forthcoming RFT, and cannot be mistaken by the public for the actual RFT. Such information may be issued directly to industry organisations or their representatives, or advertised in a printed publication or as a notice on the tenders NSW website <https://tenders.nsw.gov.au/> . It must be made clear when such information is released that it is not the RFT, and that tenders are not being sought at that stage.

External involvement

Expert advisors are commonly engaged by agencies to help prepare RFT documents. Engaging expert advisors would generally make it necessary to preclude them from subsequent related tendering. If this will be the case, they should be informed of this risk prior to their engagement.

Pre-tender estimate

Before inviting tenders, agencies must prepare a pre-tender estimate to:

- ensure the estimated cost (or income) is compatible with the agency budget and available funding;
- use in the assessment of value for money.

The pre-tender estimate must be based on the proposed contract requirements, expert advice (where needed) and consideration of current market conditions.

For high risk construction projects or other construction projects greater than \$10M in value, a pre-tender estimate report for the first on-site or material supply contract must be forwarded to the agency's Treasury Analyst prior to inviting tenders. Refer to the document *Treasury Appraisal/Monitoring of Major Projects* at:

<http://www.nswprocurement.com.au/Government-Procurement-Frameworks/Construction/Framework.aspx>

Similarly for ICT projects, a pre-tender estimate report must be forwarded to the agency's Treasury Analyst for high risk projects and others over \$5M in value. Refer to Treasury Policy and Guideline Paper TPP06-10 [*Information and Communications Technology \(ICT\) Capital Investment Process*](#).

Electronic tendering

The NSW *Electronic Transactions Act 2000* provides for tendering without hard copy documents, using electronic means.

The Government has established an [*eTendering*](#) system that is available through <https://tenders.nsw.gov.au/> and allows agencies to:

- publish notices of a proposed RFT;
- notify registered providers and service providers of each relevant RFT initiated;
- advise of industry briefings;
- advertise RFT and invite tenders;
- issue RFT documents with a payment gateway when needed;
- issue addenda and tender period changes.

It also provides mechanisms for the receipt of tenders in electronic form, closing tenders, receiving late tenders, opening the tenders, the removal of tenders, publishing a listing of tenderers, and publishing contract award information.

Under Premier's Memorandum M2006-11 [NSW Procurement Reforms](#), all NSW Government agencies, other than State Owned Corporations, are required to make Requests for Tender documentation available and tenders able to be lodged through the NSW Government eTendering system <http://tenders.nsw.gov.au>

2.5 Tender Evaluation Plan

Tender evaluation should be managed using project management techniques, which include developing and implementing an appropriate plan.

A Tender Evaluation Plan (TEP) sets out how the evaluation is to be conducted. Ideally, the plan should be prepared before the issue of the RFT documents. Failing that, it must be completed before tenders are opened. It describes the specific evaluation criteria to be used and provides for probity, fairness and how value for money of the tendered offers will be assessed. It should be appropriate for the procurement, tendering method, process complexity and value of the proposed contract.

The TEP should align the evaluation criteria described in the conditions of tendering with the information sought from tenderers, and explain how each criterion will be assessed. It must be explicit about what will be done, how it will be done, when it will be done, and who is responsible for doing it.

A TEP may not be required for services or works which are very low in value and risk.

The TEP may cover the following management and technical elements –

Management elements:

- purpose and objectives of the procurement;
- evaluation and approval processes and responsibilities;
- management, organisation and resource requirements for the evaluation;
- confidentiality and probity management arrangements for the evaluation;
- risks - how and when they will be identified and controlled and how this will be integrated in the evaluation process;
- schedule of tasks, target completion dates and roles for the evaluation;
- audit and review arrangements for the evaluation process;
- identification of tenderers out of contention and the means for promptly informing those tenderers

Technical elements:

- information sources that will assist in the evaluation criteria;
- weighting of evaluation criteria for price and non-price components;
- a scoring and ranking system;
- a method for assessing the costs of departures, and qualifications, and any sensitivity analysis requirements;
- arrangements for checking tenderers' credentials and referees;
- arrangements for presentations and meetings with tenderers;
- methods for assessing best value for money using the above.

The TEP may also:

- note record keeping procedures and responsibilities;
- describe the conduct required by the evaluation team, including provisions for dealing with any conflict of interest or confidentiality issues;
- note security procedures, including document handling, storage and long term management;
- detail the reports that the evaluation team must make to reviewing and approving authorities;
- be co-ordinated with or include any probity plan;
- indicate when and how the Treasury reporting requirements prior to award of contract (post-tender review report) will be met for high risk construction projects and other construction projects with a value equal to or greater than \$50M (see *Treasury Appraisal/Monitoring of Major Projects* at <http://www.nswprocurement.com.au/Government-Procurement-Frameworks/Construction/Framework.aspx>). A threshold of \$10M applies for ICT projects. (Refer to Treasury Policy and Guideline Paper TPP06-10 *Information and Communications Technology (ICT) Capital Investment Process*).
- make provision for a Tender Evaluation Gateway Review if required by the agency. Refer to the gateway review details on the procurement website <http://www.nswprocurement.com.au/>.

When developing a TEP, agencies should be aware of the *Policy Statement on the Application of Competitive Neutrality* ([Treasury Paper TPP02-1](#) refers). Consideration should be given to the inclusion of a member of another agency in the tender evaluation process when an in-house bid is anticipated or received.

3. Tendering Process

3.1	Request for Tenders
3.2	Tender period
3.3	Enquiries and meetings
3.4	Amendments to RFT document
3.5	Submission, receipt, and opening of tenders

3.1 Request for Tenders

Prior to issue

Before the RFT documents are issued, approvals must be obtained for the documents, a current and up to date pre-tender estimate and to commence the tender process.

An updated pre-tender estimate must be prepared when there is a long duration from the preparation of the last pre-tender estimate. Changes in a pre-tender estimate could arise due to late changes in scope, greater definition of content requirements, and changes in market rates.

Approval to issue the RFT documents must only be given when there is a firm commitment, intention and capacity to proceed. This approval should include confirmation of the availability of the funds necessary for any contract and other activity that may arise from the tendering process.

In the case of the first on-site or material supply contract of a construction project valued over \$10m, a pre-tender estimate report must be provided to Treasury prior to tender invitation. Where the pre-tender project estimate exceeds the estimates previously provided to Treasury, the agency must provide the sources of, and reasons for the variation.

For ICT projects, a similar report must be forwarded to Treasury for projects over \$5M in value.

Advertisements or invitations

Premier's Memorandum 2011-16 *NSW Government Tenders advertised on <https://tenders.nsw.gov.au>* only states that, from 11 October 2011, the NSW Government will cease press advertising of government tenders, including composite, display and lineage advertisements. To advertise tenders on <https://tenders.nsw.gov.au> agencies use the NSW eTendering solution managed by the Department of Finance and Services.

Advertisements or invitations for open RFT's must give all qualified tenderers an equal opportunity to respond.

Premier's Memorandum M2007-1 [Public Disclosure of Information arising from NSW Government Tenders and Contracts](#), states that all open tenders, EOIs or other such public calls which may result in a contract with the private sector must be posted on the government website <https://tenders.nsw.gov.au/> operated by the Department of Finance and Services, in addition to any other location agencies choose to use.

Premier's Memorandum M2006-11 [NSW Procurement Reforms](#), requires all NSW Government agencies, other than State Owned Corporations, to make Requests for Tender documents available and tenders able to be lodged through the Government eTendering system (<https://tenders.nsw.gov.au>). All subsequent addenda issued are to be published in the same manner as the original RFT. All suppliers that have downloaded a copy of the original RFT must be notified of the addenda.

Advertisements or invitations must include a brief description of the scope and requirements for the tender.

Reference should be made to:

- any mandatory requirements of the tendering process e.g. meetings or site visits;
- when tenders close;
- where, when and how RFT documents can be obtained and details of the contact person;
- details of how, where and when tenders may be lodged (e.g. lodgement in a physical tender box, by facsimile machine or through electronic tendering);
- the price of purchasing the RFT documents, where applicable, and payment details;
- disclosure of any agency in-house tenderers invited;
- any specific resources required to prepare and lodge a tender (e.g. software);
- prominent notification to comply with the [NSW Government Code of Practice for Procurement](#)

If projects are funded, or partly funded, by the Commonwealth, the funding agreement may require the application of the [National Code of Practice for the Construction Industry and the Australian Government's Implementation Guidelines for the Code](#). The Implementation Guidelines contain the thresholds above which the Code and Guidelines apply. Where applicable, the following must be included in tender advertisements: "The National Code of Practice for the Construction Industry and the Australian Government Implementation Guidelines for the National Code of Practice for the Construction Industry August 2009, apply to this project."

Other considerations

The RFT documents and their distribution, and other supporting material, must be controlled. A record of who has collected RFT documents must be kept at a single location so that addenda and other notifications can be issued to all prospective tenderers.

Agencies are encouraged to advertise advance notice of their procurement plans as early as possible in each financial year.

3.2 Tender period

To ensure effective competition, agencies must allow a sufficient tender period between the date the RFT documents are first made available to all tenderers and the closing date of the tenders.

This period must be sufficient for tenderers to obtain RFT documents, acquaint themselves and any potential service providers with the requirements, make any site visits, view samples, and undertake any other activities necessary to allow a tender to be prepared and lodged. The period should allow for any likely lost time arising from public holidays and seasonal industry shutdowns.

Once the RFT documents are issued, any change to the tender period that arises to allow for changes advised in an addendum, or for any other reason, must be communicated promptly to all tenderers to allow them sufficient time to prepare and lodge a tender.

A normal tender period for an open RFT is no less than 30 calendar days. However, for open tenders this may be reduced to 25 calendar days where the agency advertises the RFT by electronic means and provides, to the extent practical, the RFT documentation by an electronic medium.

Under specific circumstances the tender period for an RFT may be reduced to no less than 10 days. The circumstances include:

- where the agency is procuring commercially readily available goods, commodities or services;
- where there is a need or urgency substantiated by the agency;

- where the agency published a separate notice, including a notice of planned procurement at least 30 days and not more than 12 months in advance, and the separate notice contains a description of the procurement, the time limit for lodging tenders or, where appropriate, applications for participation in a procurement, and the address from which documents relating to the procurement can be obtained;
- the publication of the notices for procurement of a recurring nature, a second or subsequent time.

3.3 Enquiries and meetings

Contact person

The agency must nominate a single contact person who understands the tendering process and contract requirements to respond to all enquiries from tenderers. All such enquiries should be recorded, noting the time and date, the subject matter and any responses provided.

Where other people are nominated for specific aspects of the tendering process, for example; technical experts, legal advisors, real estate agents, their role must be clearly defined, and all enquiries to them from tenderers and all responses from them must be through the single contact person.

Information

Any information or advice given to a tenderer that clarifies an ambiguity in any aspect of the tendering process or contract requirements must also be communicated promptly in writing to all other prospective tenderers. This does not apply to simple clarifications on which there is no ambiguity. It also does not apply to information that is not of a clarification nature but is clearly additional information sought by a tenderer and linked to its confidential tender proposal. Such information should not be passed on to other tenderers unless they have a similar request.

Meetings

Attendance at pre-tender meetings involving inspections, demonstrations or briefings, may be made mandatory or optional for tenderers depending on the nature of the meetings. A tenderer's non-attendance at mandatory meetings will result in its tender not being eligible for consideration, unless the conditions of tendering allow for non-attendance under certain circumstances that are accepted by the agency. Meetings should therefore only be mandatory if they are considered essential to assist tenderers' understanding of the tendering process and contract requirements.

Meetings must be carefully planned and managed to ensure no tenderer is given advantage over any other tenderer because of the meeting.

A record of matters discussed at the meetings must be made. For major meetings this may include a video recording.

3.4 Amendments to RFT documents

Where it becomes necessary to amend RFT documents (including any process conditions or arrangements) it must be done in a way that does not unfairly disadvantage or benefit tenderers.

The amendments must be advised in a notice, usually called an addendum, issued to all tenderers. This must occur in sufficient time to allow tenderers to fully consider the addendum, modify their tender accordingly and lodge it before tenders close.

A record must be made of all those who obtain the amended RFT documents so that they are all informed of the issue of an addendum.

Each addendum must state clearly that it is to be incorporated in the RFT documents and allowed for in the tender. Tenderers must confirm in writing, no later than close of tenders, that they have received all such addenda and that allowance has been made for each addendum in their tenders.

Consideration should be given to whether the tender period should be changed to allow for the changes involved whenever an addendum is issued.

3.5 Submission, receipt and opening of tenders

All competitive tenders must close and be lodged in an agency tender box, or a tender box approved for use by the agency, details of which must be included in the RFT documents.

Tender boxes, whether physical, facsimile equipment or electronic and subsequent tender handling processes must be secure and ensure that confidentiality is protected before and after close of tenders.

Agencies must have an appropriate documented tender opening process. This process shall include a Tender Opening Committee (TOC) of a minimum of two persons. The Committee shall be present to open any tender box, and remove and record the tenders received. These persons must sign a confidentiality and conflict of interest agreement.

They must record the receipt of each tender, including the date of opening, the apparent legal entity of the tenderer and, where appropriate, prices. Preferably, the TOC must mark any non-electronic tenders with an official stamp and sign the stamp. The TOC must also ensure that the record is signed before tenders are released for evaluation.

The electronic submission of tenders must be in accordance with the *NSW Electronic Transactions Act 2000*. Confidentiality must be no less than that required for tenders that are not in electronic format and the integrity of tender data must be protected after receipt. Refer to <https://tenders.nsw.gov.au/> for processes that are in place for use by agencies.

A tender received after the tender closing time is a late tender. Late tenders must be identified and the circumstances involved recorded.

Premier's Memorandum M2007-1 *Public Disclosure of Information arising from NSW Government Tenders and Contracts* requires the names and addresses of all entities which submit responses to public calls to be disclosed on <https://tenders.nsw.gov.au/> within seven days of closure of the call.

4 Tender Evaluation

4.1	Evaluation objective
4.2	Evaluation methodology
4.3	Probity requirements
4.4	Outline of the evaluation process
4.5	Eligibility of tenderers
4.6	Qualifications, non-conformities and departures
4.7	Late tenders
4.8	Clarification of a tenderer's information
4.9	Tender negotiation
4.10	Recommendation, review and approval

4.1 Evaluation objective

The principal objective of all tender evaluations is to identify the tender(s) offering the best value for money whilst achieving process probity and fairness and the other objectives outlined below. The process must be adequately documented to ensure all these objectives are demonstrably achieved.

Subject to achieving these objectives, the agency is not bound to accept the lowest (or highest) priced tender, and may pass over, or not consider further, any tender not in contention or that is not acceptable.

Tender evaluation must comply with the following principles:

Accountability and transparency – the process will be open, clear, and defensible.

Fairness – equal opportunities are provided for all tenderers in the process.

Impartiality – the process treats all tenderers the same way and without bias.

Objectivity – subjective judgement and opinion not based on objective evidence is minimised in decisions.

Repeatability – repeated evaluation of the same tender against the same criteria by the same evaluation team will yield the same decisions.

Reproducibility – evaluation of the same tender against the same criteria by a different evaluation team will yield the same decisions.

Reasonableness – decisions are based on the information reasonably known by the evaluation team and are supported by rational and logical argument.

Thoroughness – decisions are based on competent and comprehensive analysis of all relevant information.

4.2 Evaluation methodology

There are a number of approaches that can be used to identify the tender offering the best value for money.

The particular evaluation methodology used and effort involved should be consistent with the nature of the procurement and the tender process.

Choosing the best value for money tender must take account of:

- whether the tender is subject to qualifications or fully meets the requirements of the RFT documents;
- relative agency costs additional to the tender price such as life-cycle and operational costs;
- any extra value offered such as better quality, better capacity, better management, early delivery or earlier completion.

Evaluation commonly involves selecting the tender with the highest tender evaluation score or ranking, taking into account all relevant criteria. The scoring method must ensure the extra value indicated by a higher score is worth any extra cost by using appropriate weightings that strike an appropriate balance between non-price value and price.

Where alternative tenders are not precluded, they are equally considered in determining which tenders are in contention.

The tender evaluation must proceed as defined in the Tender Evaluation Plan, unless exceptional circumstances apply and any changes receive appropriate authorisation.

If a tenderer fails to comply with the mandatory or essential requirements, such as key aspects of the [NSW Government Code of Practice for Procurement](#), this failure would result in its tender being passed over.

4.3 Probity requirements

Specific considerations relating to probity during tender evaluation include:

- Confidentiality and security of tender information, and evaluation documentation and/or software;
- Involvement of a representative of another agency in the evaluation process if there is an in-house bid;
- Identification and resolution of conflicts of interests;

- A consistent approach for communicating with tenderers.

These issues will generally be part of the TEP and agency procedures. When the risks and nature of the tendering process justify, specialist advice on probity may be obtained using a probity auditor or advisory service, before or as part of the tender evaluation process. Refer to the Independent Commission Against Corruption publication [Probity and probity advising – Guidelines for managing public sector projects](#) .

4.4 Outline of the evaluation process

Evaluation usually involves the following stages:

Stage 1: Initial Examination and Assessment

All tenders must initially be examined to:

- confirm the legal entity of each tenderer;
- decide whether a late tender should be considered further in the evaluation;
- identify any in-house bids and ensure they are handled with the confidentiality and the competitive neutrality required;
- identify non-conformances with the RFT requirements which can be rectified by the tenderer by providing omitted information or clarification;
- identify non-conformances with the RFT requirements which are substantial or incapable of rectification and, therefore, justify not considering the tender further;
- identify any indications of errors or discrepancies in the RFT documents or in the tenders, which may need to be corrected or taken into account in the evaluation and any contract.

If there are a substantial number of tenders then the first step before detailed evaluation would be to establish a short list for further consideration. This includes conducting a preliminary evaluation, as well as a preliminary price analysis, to make sure the short list does not include any tenders involving unacceptable risks or too high a price, or tenders clearly offering less value than those included.

Qualifications in all tenders need to be considered in this process to ensure no tenderer is excluded based on a qualification that could be removed if further analysed, or based on a qualification that identifies additional costs that apply equally to other tenders.

Stage 2: Detailed evaluation

During the detailed evaluation of tenders, each tender is considered in detail, evaluated and scored or otherwise ranked. Any comments and issues would be noted.

At this stage:

- the evaluation team must raise any questions with tenderers in contention or only the preferred tender, if possible, to clarify them and confirm the removal of unacceptable departures and qualifications allowing enough time for responses;
- presentations and demonstrations, where required, should be closely managed to make sure all the tenderers involved are treated equally using a common and detailed agenda and/or scenario with explicit time limits, ensuring the required content is communicated and producing a written record;
- reference checks, not necessarily limited to the tenderer's nominated references, should be obtained and considered;
- consideration of contractor and consultant performance information obtained from within the agency and other agencies may occur.

When the proposed contract requires work and services with significant risk in the event of financial incapacity, the preferred tenderer would need to show, as part of the evaluation process, it has the financial capacity to complete the work under the contract.

Contracts have been established with two service providers to enable NSW government agencies to obtain financial assessments of tenderers, particularly for construction or goods and services procurement. Refer to: <http://www.nswprocurement.com.au/Procurement-System-for-Construction/Service-provider-selection.aspx>.

Other independent capability assessments may be used when appropriate.

Value or cost calculations and analysis should allow for whole-of-life costs and may need to involve the development and use of comparative cost models.

In a multi-stage tender process, the names of short-listed tenderers are to be published on <https://tenders.nsw.gov.au/> within 7 days of them being advised of their short-listing (refer [Premier's Memorandum M2007-01](#)).

Stage 3: Completion

This stage draws together all the information identified in the evaluation process, completes the assessment of relative value for money, and finalises risk management activities. This is documented in a report recommending the best tender, or tenders, for acceptance, or for inclusion in future stages of the process.

4.5 Eligibility of tenderers

Ensure that a contract is only awarded to appropriate legal entities that have the financial resources, and capacity, to deliver the goods or complete the services or works under the contract.

Conditions of tendering in the RFT documents should require tenderers to state their Australian Business Number (ABN). Where the tenderer does not have an ABN and is not required to be registered for the Goods and Services Tax (GST), the tenderer must say so explicitly as a tender qualification. GST is normally required to be included in the tender price(s)/rates on the tender form and/or schedules.

An ABN uniquely identifies a business and enables the entity tendering to be determined. Payments to entities that do not have an ABN are required by taxation law to be reduced by a withholding amount.

Details of businesses with an ABN can be obtained from the Australian Business Register at <http://www.abr.business.gov.au/>

If an ABN is not provided in a tender, and no explicit statement is made that the tenderer is not registered for GST, the matter must be clarified with the tenderer.

Some entities do not have the legal capacity to enter into contracts. Tenders must only be considered from service providers that are able to form a valid contract.

Acceptable legal entities include: a sole trader; partnership; holding company; subsidiary company; registered (limited or proprietary limited) company; joint venture and trustee (under certain circumstances).

Entities not usually acceptable are: those only with business names or trading names without an acceptable legal entity or name; groups of companies (or consortia) without an acceptable legal entity; some trusts; unincorporated partnerships in some cases; or where the entity has a 'Provisional Liquidator' or a 'Receiver and Manager' appointed, or has gone into voluntary administration.

Tenderers must be identified by their correct legal entity name such as a registered company name. Trading or business names may be ambiguous if these are shown without the tenderer's correct legal name. The correct legal name of tenderers in contention should be confirmed with the tenderers or by reference to the Australian Business Register. The name of the entity must be confirmed before any recommendation is made to award a contract to that entity.

A business name is not a suitable identification, but a partnership or individual may use a name "trading as (the business name)". If there is a name such as "(business name) Enterprises" and nothing more, then further enquiries should be made about whether the business is a company, partnership or a sole trader. A company would have a registered name and an Australian Business Number (ABN). If acceptable, a partnership would be identified by the names and addresses of all the partners.

When the tenderer is an unknown partnership the tenderer should be asked to give a letter signed by each partner confirming that the tender is their tender.

Tenders must be authorised:

- if the tenderer is a registered company – by a person known to, or purporting to, be authorised to do so;
- if the tenderer is a partnership – by one or more of the partners “for the partnership”;
- if the tenderer is a sole trader (an individual) – by the tenderer personally;
- if the tenderers are acting “jointly and severally” or as a joint venture – by appropriate persons from each of the venture parties.

In the case of tenders submitted electronically the identity of the appropriate person, the person’s role with the tendering entity, and a statement that the person authorises the tender and the information contained in it, must be shown in the tender in accordance with Section 9 of the NSW [Electronic Transactions Act](#) 2000.

4.6 Qualifications, non-conformities and departures

Qualifications, non-conformities and departures included in a tender should be considered for their effect on all tenders. Even if not appearing to be in contention, a tenderer might have found a problem the other tenderers have not raised that needs resolution. The qualifications included in any tender may identify problems or document discrepancies that need to be resolved for all. This could justify price or other adjustments, or require clarifications from other tenderers. A small qualification missed or not properly clarified before accepting a tender may lead to problems that would have been avoided had the review correctly covered them.

It may be necessary to quantify the value of tender qualifications and departures in order to compare tenders.

4.7 Late tenders

The evaluator or evaluation team must give consideration to the inclusion or passing over of any late tender when commencing the evaluation process.

Late tenders should not be considered, except when the agency is satisfied that the integrity and competitiveness of the tendering process has not been compromised. The agency is not to penalise any tenderer whose tender is received after the time specified for receiving tenders if the delay is due solely to mishandling on the part of the agency.

Late tenders may be considered when verifiable circumstances are confirmed by the agency, such as:

- exceptional circumstances, such as the tender being the only tender or a natural disaster affecting all tenders equally, that ensure the integrity and competitiveness of the tendering process would not be compromised by considering the late tender;
- the tender left the control of the tenderer prior to close of tenders and confidentiality of the tender was maintained before it was opened;
- control of the confidentiality of tenders before the scheduling of tenders guarantees no enhancement to the late tender occurred using knowledge of the other tenders;
- there has been mishandling by the agency delaying lodgement, but no change to the late tender was possible after close of tenders;
- the RFT documents stipulate that lateness is not a bar to consideration.

Lateness may not be an inherent threat to probity or competition in some tender processes, and thus tenders may be accepted at other times. For example, some types of grant applications, single invited tenders, requests for information, EOI for pre-qualification, and the like.

4.8 Clarification of a tenderer's information

When it is necessary to clarify or confirm information in a tender by written request or discussions with tenderers, the following practices apply:

- do not divulge confidential tender information provided by one tenderer to any other tenderer;
- do not advise or imply the status of any tender, such as the tender being 'lowest tender', 'under special consideration', 'not under consideration' or 'rejected' to any tenderer;
- frame requests for clarification so they do not result in the tenderer gaining any advantage over other tenderers;
- do not accept amendments to an RFT requirement or the tender price or rates after the closing of tenders, unless this is justified in addressing a qualification in the tender or a change made by the agency;
- meetings should normally only be arranged with the preferred tenderer and should not normally be scheduled until all the matters requiring clarification have been identified, and a detailed written agenda can be provided to the tenderer.

For a meeting with a tenderer, the following practices should normally apply:

- prepare a detailed agenda for the meeting, and provide it to the tenderer in a reasonable time before the meeting;

- make it clear at the meeting what further advice and information is needed from the tenderer, and set a date for the written submission of the further advice and information;
- confirm all matters that will form part of a contract in writing with the tenderer;
- keep minutes of the meeting;
- resolve all matters at one meeting, where possible.

If tenderers raise matters at meetings outside those covered by the agenda, take care that the advice given and decisions taken conform to these *Guidelines* and maintain process fairness. If necessary, or in doubt, defer matters for further consideration and later advice and confirmation in writing.

The tenderer must confirm agreement to all adjusted terms in writing. Where appropriate, and with the tenderer's agreement, a schedule of agreed terms may be prepared and signed at the meeting. Otherwise, it may be convenient to give the tenderer a copy of the minutes documenting the agreed terms and ask them to confirm and return the endorsed minutes.

Any changes to the tender price or rates resulting from the withdrawal or modification of a tenderer's qualification and departures must be fully justified and explained in the tender evaluation report and recommendation.

4.9 Tender negotiation

Where there are no acceptable tenders, negotiations may be conducted with the tenderer submitting the least unacceptable tender, or the tender which conforms most closely to the requirements and provides best value for money (the 'best tender').

Where tenders are ranked by a systematic method, for example, by scoring tender prices and other evaluation criteria, the tender with the best ranking would normally be regarded as the best tender.

There are also instances when the agency may negotiate with an acceptable preferred tenderer to improve outcomes. Any negotiation process should be transparent, recorded and conducted in a manner that does not disadvantage other tenderers.

For some procurement, for example, privately financed projects, where the work or service outcomes are highly dependent on the proposals received from tenderers, it may always be necessary to negotiate the outcome after receipt of tenders. A preferred tenderer would be determined using the evaluation criteria, and the details, such as the work, deliverables, level of service and price, finalised through negotiation. This would be provided for in the RFT documents and the TEP.

4.10 Recommendation, review and approval

Recommendation

The evaluator, or evaluation team, must prepare a written report once the tender evaluation is completed and a preferred tenderer (or tenderers or the short-listed pre-qualified service providers) has been chosen. This report describes the evaluation and recommends the outcome of the tender process.

An evaluation report records the basis and reasons for the recommendation and is submitted to the agency's delegated approving authority for consideration. Reasons for the recommendation, and for passing over any better-priced tenders, must be clearly documented and supported. The report must include a complete account of the evaluation and must be able to withstand independent scrutiny. All members of the evaluation team must sign the report either in support or dissent of the recommendation.

Review

In more complex tender processes that involve unusual circumstances or lead to large contracts, or have risks that require expert attention, an independent expert or expert panel should review the report and process. This would be to check the probity and fairness of the process and the appropriateness of and rationale for the recommendation. The review may identify a need to reconsider and where necessary change the report. The reviewers may ask questions of the evaluation team and either suggest they reconsider matters in the report and the recommendation or support or concur with the recommendation.

Approval

The recommendation and any review concurrence would then be submitted to the approving authority.

For high risk construction projects or construction projects of value in excess of \$50 million, NSW Treasury must concur in the award of the project's major contract prior to the announcing of the tender result. Refer to the document *Treasury Appraisal/Monitoring of Major Projects* at:

<http://www.nswprocurement.com.au/Government-Procurement-Frameworks/Construction/Framework.aspx>

Similarly for ICT projects, a post-tender review report must be forwarded to the agency's Treasury Analyst for high risk projects and others over \$10M in value. Refer to Treasury Policy and Guideline Paper TPP06-10 [*Information and Communications Technology \(ICT\) Capital Investment Process*](#).

5 Outcome of Tendering

5.1	Announcing tender process results
5.2	Contract award
5.3	Debriefings
5.4	Tenderer complaints
5.5	Learnings from the tender process

5.1 Announcing tendering process results

Agencies must promptly advise unsuccessful tenderers in writing of the tender process outcome, and decisions such as short listing as they occur.

Agencies must also publish appropriate information on the outcome of the tender process. This would usually include advice where applicable that the tendering process has been suspended, or that re-tendering is proposed.

The names of successful multi-stage tenderers are to be published on <https://tenders.nsw.gov.au> within seven days of them being advised of their shortlisting (refer Premier's memorandum M2007-1 *Public Disclosure of Information arising from NSW Government Tenders and Contracts*).

Once a contract of \$150,000 or above is awarded, the information to be routinely disclosed is specified in Part 3, Division 5 of the [Government Information \(Public Access\) Act 2009](#) (GIPA). This disclosure is to be on <https://tenders.nsw.gov.au>.

Disclosure about privately funded public infrastructure contracts must also comply with the [Working with Government: Guidelines for Privately Financed Projects](#) (revised December 2006). See [Treasury Circular TC06/25](#)

Outcomes from the tendering process that do not involve a contract award may be disclosed. For instance, when no award is made or the tendering process involves no award of a contract the outcome of the process may be disclosed so that tenderers and the public are made aware.

Information in a tender that is intellectual property, proprietary, commercial-in-confidence, or otherwise identified as confidential should not be disclosed.

5.2 Contract award

Once the approving authority is satisfied with the recommendation provided and makes an award decision, a contract document must be prepared and the contract awarded or brought into existence.

Contracts may be awarded by issuing a notification of acceptance or letter of award. This notice must be consistent with the proposed contract details identified in the evaluation and recommendation report.

Alternatively, a specially prepared contract document – a formal instrument of agreement – could be used when the conditions of tendering require this kind of formal execution.

Where a formal instrument/deed of agreement is required, it must be executed in accordance with the *Conveyancing Act* and/or the *Corporations Law*, as applicable. Generally, the form of the instrument/deed is issued as part of the RFT documents, so that the tenderer is aware of the nature of the proposed contract.

The officer issuing the notification/letter of acceptance or letter of award must ensure that it is communicated to the contractor and seek satisfactory proof that the contractor has received it.

A notification of acceptance or letter of award should:

- be addressed to the entity that tendered, verified as able to enter a contract, and specify the date of the notification or letter, the date of contract commencement (if different), and other agreed terms to be included;
- be signed, or endorsed with any other identification in accordance with the [Electronic Transactions Act 2000](#);
- include a unique contract reference, contract title, and possibly the name of an initial contact officer for management of the contract;
- reference and identify the parts of the RFT documents, including any addenda, that form part of the contract documents;
- include a reference to, or a listing of, any post-tender correspondence between the agency and the tenderer and other documents that form part of the contract documents.

The approach used by agencies in forming a contract from the tendering process will be dependent on the procurement stream, policies of the agency, the legal and regulatory context and, if necessary, specific legal advice.

5.3 Debriefings

An unsuccessful tenderer shall, on request, be provided with the reasons for its tender not being selected. A record should be kept of the persons involved in the debriefing and the comments made.

If a supplier in a multi-stage process is not invited to participate in the second or subsequent stages of the process, the supplier shall on its request, be provided with a written explanation of the reasons for the decision.

Where an unsuccessful tenderer seeks information regarding the successful tender(s), this information should be limited to the information normally publicly disclosed.

5.4 Tenderer complaints

Tenderer complaints should initially be directed to the agency responsible for the tendering process, and agencies must have procedures in place for promptly and adequately investigating and responding to such complaints.

The [NSW Government Code of Practice for Procurement](#) identifies complaints handling procedures relating to complaints regarding *Code* breaches.

Tenderers and others may also direct complaints in writing to the Chairperson, State Contracts Control Board, Level 22 McKell Building, 2-24 Rawson Place, Sydney, NSW 2000.

5.5 Learnings from the tender process

Agencies should review the outcomes of each tendering process and ensure lessons learnt are disseminated and are considered for the improvement of future tender processes and related actions.

For assistance in evaluating any learning from tender processes refer to NSW Treasury's Total Asset Management document [TAM04-11 Sept 2004 - Post Implementation Review Guidelines](#).

6 Glossary of Terms

Agency	An entity of the public sector service as defined in the Public Sector Management (Goods and Services) Regulation 2000 NSW , but excludes State Owned Corporations within the meaning of the State Owned Corporations Act 1989 NSW ..
Alternative tenders	Alternative tenders are those that do not fully meet the conditions of tendering but purport to provide a better value for money solution. The alternative tender may be a solution (be it work, service, technology, etc) that is consistent with the scope of the outcome sought by the RFT but is not the solution anticipated in the RFT. For example, it may have a different life cycle cost or offer different benefits to users, but would have a certain price and be sufficiently detailed to be able to be assessed.
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.
Bid Shopping	<p>The practice of trading off one tenderer's prices against another's in order to obtain lower prices. This practice is prohibited by the NSW Government Code of Practice for Procurement.</p> <p>It involves divulging a tenderer's price or rates proposal or requiring a tenderer to divulge its price or rates to another tenderer before the award of a contract or subcontract in order to secure a lower price or rate.</p>

Conditions of Tendering	<p>The rules governing the content and submission of tenders and the conduct of the tendering process. The conditions of tendering are the generic rules that apply to most requirements such as tender lodgement details, conditions applying to the treatment of late tenders. Special conditions are specific to the RFT such as how RFT documents will be obtained. Tenders will be prepared, received and assessed/evaluated. Conditions of Tendering provide the basic framework upon which the tendering process is built.</p>
Collusive tendering	<p>Tendering can be considered collusive where it involves such practices as:</p> <p>Agreements between tenderers or their agents as to who should be the successful tenderer;</p> <p>Any exchange of information between tenderers or their agents prior to the submission of their tenders designed to reduce the tender process competitiveness that may disadvantage the party receiving the tenders;</p> <p>Agreements between tenderers to fix prices.</p>
Conflict of interest	<p>A situation occurring when an official's private interests may benefit from his or her public actions. Conflicts of interest, either at a personal or agency level, can arise where there is a reasonable expectation of direct or indirect benefit or loss for an individual employee (or agent of the agency) with a particular personal interest that could be influenced, or appear to be influenced, in favour of that interest, in the performance of their duties. The benefit or loss may be financial or non-financial.</p>

Contract	An agreement between two or more parties to do something that is legally enforceable. The agreement may be written, oral or inferred by conduct.
eProcurement	The use of electronic methods at any stage of the procurement process from identification of requirement through to completion of the contract. Electronic tendering is the undertaking of the tendering process stage by electronic methods.
eTendering	A NSW Government internet based electronic tendering system (developed and managed by the Department of Finance and Services on behalf of Government), that provides the facility to electronically 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.
Fair	Being unbiased, reasonable and even-handed. Being fair does not mean satisfying everyone or not reasonably pursuing one's legitimate interests. A fair decision may still adversely affect parties.
In-house bids	Tender from a NSW government business unit. The handling of in-house bids must comply with the application of competitive neutrality. Refer to the <i>Policy Statement on the Application of Competitive Neutrality (Treasury Paper TPP 02-1)</i> . (Treasury Paper TPP 02-1) .

Intellectual property	<p>Inventions, original designs, and practical applications of good ideas protected by law through copyright, patents, registered designs, circuit layout rights and trademarks.</p> <p>Also includes trade secrets, proprietary know-how and other confidential information protected against unlawful disclosure by law and through additional contractual obligations, such as confidentiality agreements, contracts and conditions of tendering.</p>
Late tender	A tender received after the required closing date and time.
Pre-tender estimate (PTE)	An estimate of the cost of, or an estimate of the income generated through a proposed contract prepared before the RFT documents are issued and updated as necessary before tenders close.
Probity	<p>Uprightness, honesty, proper and ethical conduct and propriety in dealings.</p> <p>There are a number of essential requirements to promote probity. Agencies should consider these essential requirements throughout all stages of the process. These requirements are:</p> <ul style="list-style-type: none"> • fairness and impartiality; • use of a competitive process; • consistency and fairness of process; • tender security and confidentiality; • identification and resolution of conflicts of interest.

Procurement	<p>Process involving all activities following the decision to acquire or dispose of goods, services, construction work, property or accommodation (including by lease).</p> <p>Includes acquiring consumables, capital equipment, real property, infrastructure, and professional services, facilities management services and construction.</p>
Process contract	<p>This is a contract arising in relation to the tendering process before acceptance of a tender by the party inviting tenders. Refer to the <i>Hughes Aircraft case – Hughes Aircraft Systems International v Airservices Australia</i> (1997) 146 ALR 1.</p>
Qualifications and departures [tender]	<p>Qualifications and departures means proposals in, or in connection with a tender which attempt to limit or change the effect of the contract or to perform the contract other than in accordance with the specified requirements</p>
Request for Tender (RFT)	<p>The issuing of an invitation, by advertisement or directly, to respond to tender requirements by lodging a tender. It covers all forms of tendering, including an invitation or request for quotations (RFQ) or proposals (RFP), offers, EOI, pre-registration for RFQ or RFP. Other terms commonly used include ‘call tenders’, ‘invite tenders’, ‘call for detailed proposals’.</p>
Request for Tender (RFT) documents	<p>The set of documents, prepared by the party seeking tenders and provided to tenderers, detailing the tender process, the requirements involved, and including the conditions of tendering, proposed contract conditions, and technical specification.</p>

Risk management	The systematic application of management policies, procedures and practices to the identifying, analysing, assessing, treating and controlling of risks, and monitoring the outcomes. Risk management is used to ensure that project objectives and goals are achieved. See the Total Asset Management Risk Management Guidelines (TAM 04-12) available from the NSW Treasury website.
Service provider	Includes a contractor, subcontractor, supplier and consultant that contracts to undertake a procurement activity.
State Contracts Control Board (SCCB)	A statutory board established under the Public Sector Employment and Management Act 2002 NSW . The board arranges the supply and disposal of all goods and services necessary for the operation of the NSW public sector service. In this role it assists Government in developing associated practices, and promoting the application of these practices by agencies.
Technical specification	A detailed description in the RFT documents setting forth the functional, performance, material and other specific technical requirements for a proposed building contract, engineering work, IT system, or good or service, or other work or product.
Tender	Includes a price, bid, offer, quotation, consultant proposal or expression of interest, or the like, lodged in response to an invitation or a Request for Tender.
Tender Closing Office	The office nominated in the RFT documents as the location where tenders are to be lodged.

Tender box	Location, physical or virtual, that receives tenders lodged by service providers, and maintains them secure and confidential until close of tenders, and commencement of the tender opening process.
Tenderer	Entity submitting a tender.
Tender Opening Committee	A quorum of people who convene to open and process tenders prior to evaluation in accordance with agency procedures.
Tender period	The period between the initial issue date or date of availability of the RFT documents and the closing date and time of tenders.
Value for money	<p>The benefits compared to the whole-of-life costs.</p> <p>Relative value for money may be determined between tenders by considering their benefits taking into account all factors relevant to the contract outcome such as:</p> <ul style="list-style-type: none"> • price with whole-of-life costs; • experience; • quality; • reliability; • timeliness; • delivery; • innovation; • product servicing; • fitness for purpose; • value adding components such as meeting the government's economic, social and environmental objectives where relevant.