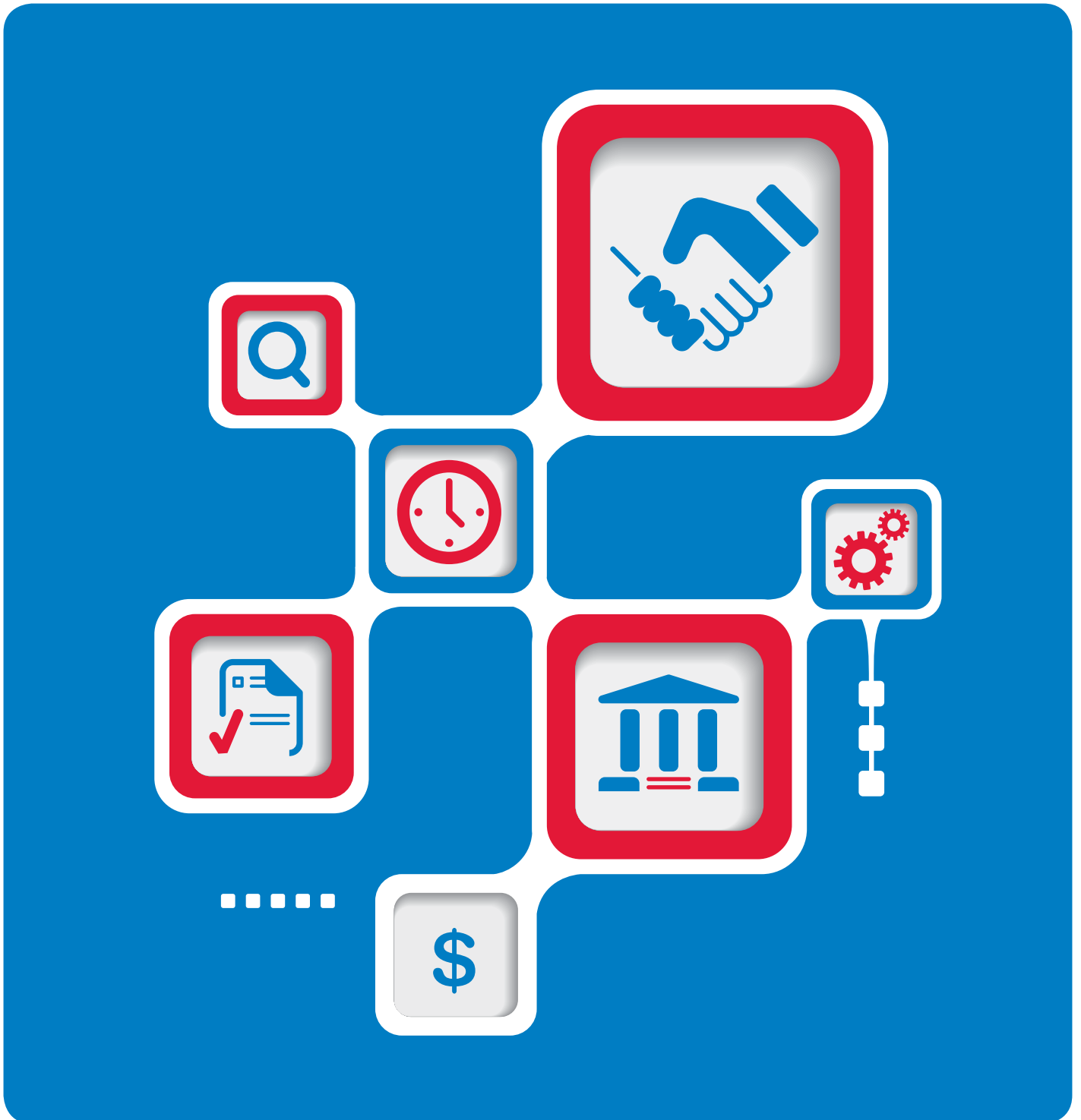


Victorian Local Government

# Best Practice Procurement Guidelines

2013



**Local Government Victoria**

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This paper is intended for consultation purposes and does not represent final policy or commitment to a particular course of action or provision of advice.

Victorian Local Government

**Best Practice  
Procurement Guidelines**

**2013**



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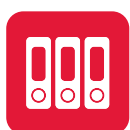
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# Introduction

# 1. Introduction

The **Victorian Local Government Best Practice Procurement Guidelines** (the guidelines) provide a set of principles and practices that represent the most efficient and prudent course of action for developing and maintaining best practice local government procurement processes, in order to:

- 1. achieve value for money and continuous improvement in the provision of services for the community**
- 2. ensure resources are used efficiently and effectively to improve the overall quality of life of people in the local community**
- 3. achieve compliance with relevant legislative requirements**
- 4. achieve high standards of fairness, openness, probity, transparency, risk management and accountability**
- 5. minimise the cost of bidding for potential suppliers.**

These outcomes can only be achieved through a properly planned process, as procurement operates in an environment which is becoming increasingly complex.

These guidelines are intended for use by both specialists in the field of local government procurement and by staff who are engaged in routine procurement activities. Some users will be familiar with the principles and practices contained in these guidelines while others will require training and development. Councils should direct staff in the use of these guidelines according to their role and provide knowledge and skills accordingly.

The guidelines are available in Microsoft Word format to allow councils to develop material tailored to specific staff or for training purposes.

These guidelines largely cover matters raised in submissions from the local government sector on the *Victorian Local Government Best Practice Procurement Guideline 2008*, and feedback received on the revised draft guidelines in October 2012.

The first six sections of these guidelines address the foundations of procurement in Victorian local government and focus on the legislative components. The remaining sections deal with the procurement cycle – planning, implementation, management and performance evaluation, and reporting on the procurement.

Although parts of these guidelines address the mandatory requirements of the procurement process, other parts need to be considered in the light of the unique characteristics of each council. The latter sections of the guidelines are not intended to form a ‘one size fits all’ approach. They must be adapted by each council.

All references to *the Act* are references to the *Local Government Act 1989*.

References to councils on procurement matters are to be taken to be references to municipal councils and to regional libraries which have been established under section 196 of the Act. However, it should be noted that section 1 of the Act (Preamble), section 3A and 3C of the Act (Local government charter and objectives), section 186A of the Act (Procurement Policy) and section 208A to 208J of the Act (Best Value Principles) do not apply to regional libraries. The provisions which apply to regional libraries apply to them as if they were municipal councils.

Within these guidelines there are references to sources of related information. Where appropriate, hyperlinks have been included. Footnotes are used generally to reference legislative provisions and other relevant sources.

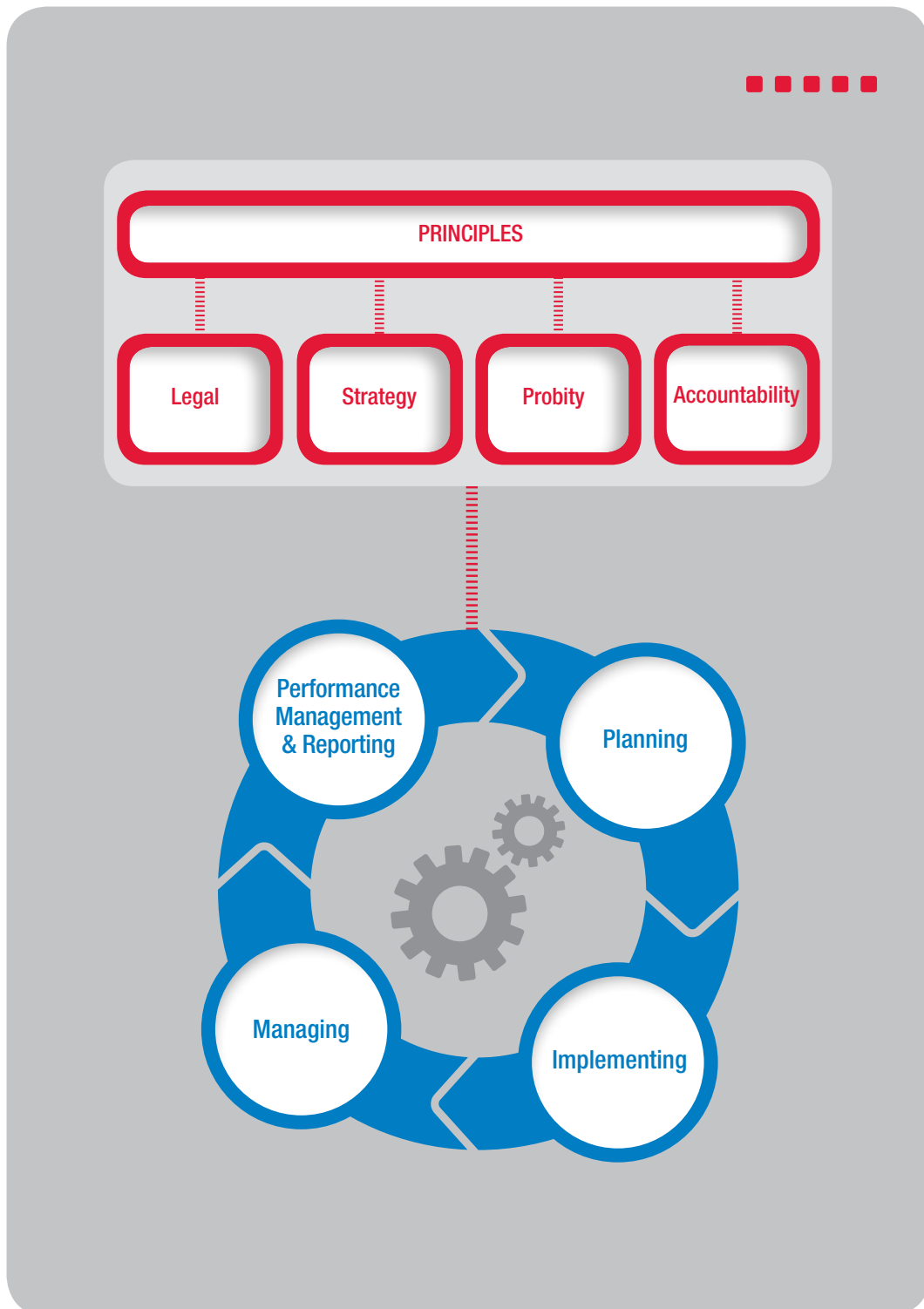
These guidelines replace the *Local Government Victoria Local Government Procurement Best Practice Guideline, August 2008* and the *Victorian Local Government Code of Tendering* which was developed in 1996 and had a focus on compulsory competitive tendering.

Councils should expect the Victorian Auditor-General's Office and the Victorian Ombudsman may assess their practices and report against these guidelines.

The legislative provisions referred to in these guidelines are binding on councils. Similarly councils should follow the findings of applicable legal cases and opinions cited in so far as they apply to a council's circumstances. Otherwise these are not Ministerial Guidelines and are not binding on councils. They provide guidance to Victorian councils, but do not represent legal advice.

## Guideline structure

These guidelines are structured as follows:

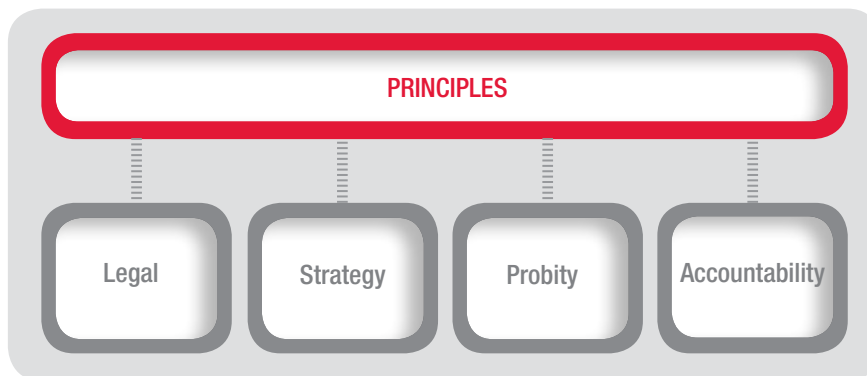






Principles





## 2. Principles

### 2.1. General principles

The procurement activities of councils should be governed by a set of general principles. These are founded on the legislative requirements placed on councils and on councils obtaining optimum outcomes for their communities through their procurement processes.

In this context, councils are bound by their statutory objectives to *'ensure that resources are used efficiently and effectively and services are provided in accordance with Best Value principles to best meet the needs of the local community and to improve the overall quality of life of people in the local community'*<sup>1</sup>.

Optimum outcomes are achieved by applying several fundamental best practice principles.

### 2.2. Best practice principles in procurement

The fundamental best practice principles that should be applied to every procurement, irrespective of the value and complexity of that procurement, are:

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

#### Value for money

Obtaining value for money does not mean a council is obliged to accept the lowest price. Section 186(4) of the Act specifically provides the council does not have to accept the lowest tender.

The concept of 'value for money' involves taking into account both costs and non-cost factors including:

- advancing the council's priorities
- fitness for purpose
- quality
- service and support
- whole-of-life costs and transaction costs associated with acquiring, using, holding, maintaining and disposing of goods, services or works.

<sup>1</sup> Section 3C(2)(b) and (c) of the *Local Government Act 1989*

The Victorian Auditor-General's Office defines value for money as the optimum combination of quality, quantity, risk, timeliness and cost on a whole-of-contract and whole-of-asset-life basis.<sup>2</sup>

### **Open and fair competition**

All prospective suppliers/vendors must be treated (and be seen to be treated) fairly in an open and transparent manner with the same access to information about the procurement to enable them to submit prices/quotations/tenders on the same basis. Councils must adequately test the market in a consistent manner without any bias, or perception of bias, so that potential suppliers and the public have confidence in the outcome.

### **Accountability**

Council staff are responsible for the actions and decisions they take in relation to procurement and for the resulting outcomes. Staff are answerable for such activities through established lines of accountability and delegation, and ultimately to the Chief Executive Officer (CEO). Staff must also ensure they provide adequate and reliable advice to the elected council to allow it to make sound decisions on procurement matters.

Section 6 of these guidelines specifically deals with accountability.

### **Risk management**

All procurement carries some level of risk. It is important for councils to recognise this risk and to develop appropriate strategies to deal with it.

Section 8.9 of these guidelines specifically deals with managing risk.

### **Probity and Transparency**

In all commercial dealings, the highest standards of honesty must be observed. Councils must conduct their business in a fair, honest and open manner, demonstrating the highest levels of integrity consistent with the public interest.

Section 5 of these guidelines specifically deals with probity.

## **2.3 Role of Best Value principles in procurement<sup>3</sup>**

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In addition to the fundamental best practice principles that should be applied to every procurement, as listed in Section 1 of these guidelines, councils must also apply the Best Value principles to their procurement functions.

Best Value principles require, among other matters, that:

- all services provided by council must meet the **quality and costs standards** required by the Act, and
- a council must achieve **continuous improvement** in the provision of services for its community.<sup>4</sup>

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<sup>2</sup> Victorian Auditor-General's Office *Public Sector Procurement: Turning Principles into Practice, October 2007*. [http://download.audit.vic.gov.au/files/Procurement\\_BPG.pdf](http://download.audit.vic.gov.au/files/Procurement_BPG.pdf)

<sup>3</sup> Reference should be made to *A guide to achieving a whole of organisation approach to Best Value* which was issued jointly by LGPro, the Best Value Commission, and LGV during 2006 and can be found at: [http://www.dpcd.vic.gov.au/\\_\\_data/assets/pdf\\_file/0016/53080/Best-Value-August-2006.pdf](http://www.dpcd.vic.gov.au/__data/assets/pdf_file/0016/53080/Best-Value-August-2006.pdf)

<sup>4</sup> Section 208B (a) and (d) of the *Local Government Act 1989*

Each council must be able to demonstrate and report to their community that it effectively applies Best Value principles.<sup>5</sup>

Councils need to ensure continuous improvement is applied in how they carry out their functions, having regard to efficient and effective outcomes. Best value recognises that good procurement practice is essential for local government to obtain real improvements to service cost and quality.

The Act sets out a number of factors which councils may take into account when applying the Best Value principles:

- the need to review services against the best on offer in both the public and private sectors
- an assessment of value for money in service delivery
- community expectations and values
- the balance of affordability and accessibility of services to the community
- opportunities for local employment growth or retention
- the value of potential partnerships with other councils and State and Federal governments
- potential environmental advantages for the municipality.<sup>6</sup>

From a best practice perspective a council should take these factors into account when developing the principles and objectives within its procurement policy.

## 2.4 Role of sustainability in procurement

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Sustainable procurement can be defined as ‘... a process whereby organisations meet their needs for goods, works and utilities in a way that achieves value for money on a whole life basis in terms of generating benefits not only to the organisation, but also to society and the economy, whilst minimising damage to the environment.’<sup>7</sup>

Use of sustainable procurement practices helps councils meet their needs for goods, services, and works, not solely on the basis of the immediately fundamental principles set out in **Section 2.2 Best practice principles in procurement**, but more widely by maximising long-term net benefits for their communities. These wider benefits are directly compatible with the primary objective of a council to endeavour to achieve the best outcomes for the local community **having regard to the long-term and cumulative effects of decisions.**<sup>8</sup>

Councils that embrace sustainable procurement incorporate extrinsic cost considerations into decisions alongside the conventional procurement criteria of price and quality, although in practice the sustainable impacts of a potential supplier’s approach are often assessed as a form of quality consideration. These considerations are typically divided into environmental, economic and social (also known as the **‘triple bottom line’**).<sup>9</sup>

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<sup>5</sup> Section 208B(f) of the *Local Government Act 1989*

<sup>6</sup> Section 208C of the *Local Government Act 1989*

<sup>7</sup> United Kingdom Government commissioned *Procuring the Future*, Sustainable Procurement Task Force, 2006

<sup>8</sup> Section 3C of the *Local Government Act 1989*

<sup>9</sup> In some cases a fourth consideration – cultural – is added to this list to form a ‘quadruple’ bottom line.

Social procurement forms an adjunct to sustainable procurement.

The legal framework for social procurement, especially in relation to trade practices legislation is considered in detail in the *Social Procurement: a Guide for Victorian Local Government*, October 2010, which can be found on the Local Government Victoria website.

Examples of sustainable procurement practices include, but are not limited to:

- strategic use of local suppliers to encourage economic development
- minimising council's environmental footprint by purchasing goods and services with less harmful impacts on the environment
- generating local employment amongst disadvantaged residents and promoting social inclusion.

It is important when undertaking sustainable procurement that a council properly articulates the benefits to the community, including financial benefits.

Councils adopting sustainable procurement practices may consider adopting the principles set out in the **Australian and New Zealand Government Framework for Sustainable Procurement (Framework)**.<sup>10</sup>

This Framework sets national principles for implementing sustainable public procurement to minimise environmental impacts, benefit society and reduce costs. It also encourages collaboration between governments to initiate consistent programs that promote the principles of sustainable procurement.

These principles can be used by councils to develop sustainable procurement strategies, policies, guidance material, training and tools. The four principles of the Framework commit organisations to:

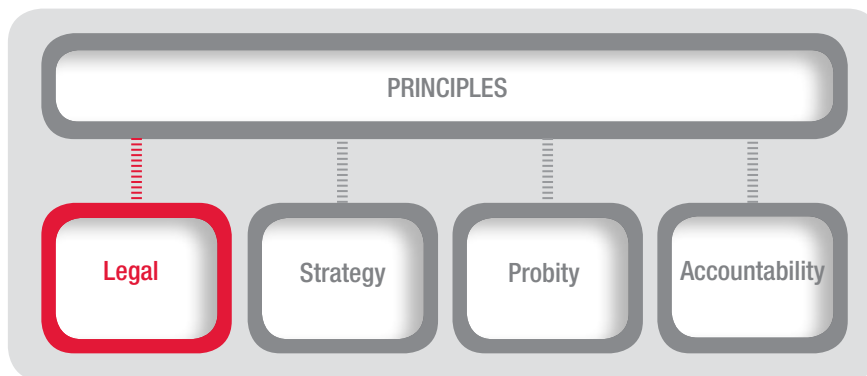
1. adopt strategies to avoid unnecessary consumption and manage demand
2. in the context of whole-of-life value for money, select products and services which have lower environmental impacts across their life cycle compared to competing products and services
3. foster a viable (Australian and New Zealand) market for sustainable products and services by supporting businesses and industry groups that demonstrate innovation in sustainability
4. support suppliers to government who are socially responsible and adopt ethical practices.

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<sup>10</sup> The Australian Procurement and Construction Ministerial Council (September 2007)  
<http://www.apcc.gov.au/LinkClick.aspx?fileticket=%2f1acffg18eQ%3d&tabid=151&mid=497>



**Section 186 of the Local Government Act  
- Legal framework**



## 3. Section 186 of the Local Government Act - Legal framework

### 3.1. General principles

The intent of the legislation applying to procurement in Victorian local government is to ensure that councils and their communities achieve value for money through open and fair competition and in the context of high standards of probity, transparency, accountability and managed risks. This requires that councils take steps to ensure that goods, services and works are procured at a competitive rate and in a transparent manner. It is important that councils continually test intended procurements against this primary standard.

Legislation requires councils to undertake a competitive process to seek value for money when certain thresholds of expenditure are reached. Exemptions apply in particular circumstances. There is also a transparency requirement in regard to the development and publishing of councils' procurement policy.

These aspects are all essential to any best practice strategy and to statutory compliance.

### 3.2. Requirement for public tendering

#### 3.2.1. Thresholds

Section 186 of the Act requires councils to undertake a competitive process to test the market by giving public notice before entering into a contract when the value of the contract is equal to or greater than:

- \$150,000 (including GST) for contracts for the purchase of goods or services; or
- \$200,000 (including GST) for contracts for the carrying out of works.<sup>11 12</sup> (“the thresholds”)

These thresholds have been set in alignment with the thresholds that apply to State Government and are reviewed from time to time.<sup>13</sup>

<sup>11</sup> The requirement for State Government to obtain tenders for works exceeding \$200,000 is contained in Ministerial Direction No. 1: Tendering Provisions for Public Construction issued by the Minister for Planning under the *Project Development and Construction Management Act 1994*.

<sup>12</sup> Section 186(1) of the *Local Government Act 1989*. Amounts were fixed in an Order in Council dated 5 August 2008 in alignment with State Government threshold levels.

<sup>13</sup> At the time of writing, Local Government Victoria is reviewing an increase of the goods and services threshold to \$200,000 to align with that of works. The sector will be notified in due course.

The Act must be interpreted having regard to the fact that:

- it provides a regulatory framework, aimed at guiding the activities of councils, ensuring that resources are used efficiently and effectively and services are provided in accordance with Best Value principles and ensure transparency and accountability.
- the Preamble to the Act provides, among other things, that it is essential that there is a legislative framework that provides for councils to be accountable to their local communities in the performance of functions and the exercise of powers and *the use of resources*<sup>14</sup>
- the Local Government Charter contained in the Act includes the following objectives:
  - 3C(2) In seeking to achieve its primary objective (to endeavour to achieve the best outcomes for the local community having regard to the long term and cumulative effects of decisions<sup>15</sup>), a council must have regard to the following facilitating objectives:
    - (b) *to ensure that resources are used efficiently and effectively* and services are provided in accordance with the Best Value principles to best meet the needs of the local community ...
    - (g) *to ensure transparency and accountability* in council decision-making<sup>16</sup>
- it provides that it is the intention of Parliament that its provisions be interpreted so as to give effect to *the Preamble* and to the *Local Government Charter*<sup>17</sup>
- it provides that a council must do all things necessary to ensure the efficiency and economy of operations and the avoidance of waste and extravagance.<sup>18</sup>

Council procurement processes must comply with the foregoing provisions irrespective of the value of the procurement. In short, in procurement matters<sup>19</sup> a council must firstly ensure:

- the efficient and effective use of resources
- transparency and accountability.

While section 186 of the Act is intended to give effect to these efficiency objects, the section will only apply to contracts falling under it. Section 186 of the Act clearly intends to capture as broad a cross-section of contracts as possible. The wording is intended so as to encompass, subject to the thresholds, the full range of contracts for goods, services and the carrying out of works entered into by councils.<sup>20</sup> However, contracts falling outside the terms of section 186 of the Act will still need to be entered into cognisant of the efficiency and other objectives noted above. These guidelines are designed to address section 186 of the Act and these other objectives.

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<sup>14</sup> Section 1(5) of the *Local Government Act 1989*

<sup>15</sup> Section 3(1) of the *Local Government Act 1989*

<sup>16</sup> Section 3C (2)(b) and (g) of the *Local Government Act 1989*

<sup>17</sup> Section 1A(1) of the *Local Government Act 1989*

<sup>18</sup> Section 140 (2)(f) of the *Local Government Act 1989*

<sup>19</sup> This would include a procurement entered into pursuant to Section 186(5)(a) of the Act because of an emergency.

<sup>20</sup> This is the view of the Victorian Government Solicitor's Office.

## Aggregation

In order to be efficient, effective and achieve value for money councils must practice aggregation.

This was well expressed in the Victorian Auditor-General's Office report on *Tendering and Contracting in Local Government*, February 2010, at page xiii, where it reported that:

*"...where significant amounts are spent in aggregate on one supplier, or for one service, over time ...it is possible to achieve greater savings by leveraging this aggregate spend, rather than treating each discrete arrangement as a separate procurement exercise, whether undertaken competitively or not."*

## Length of contracts

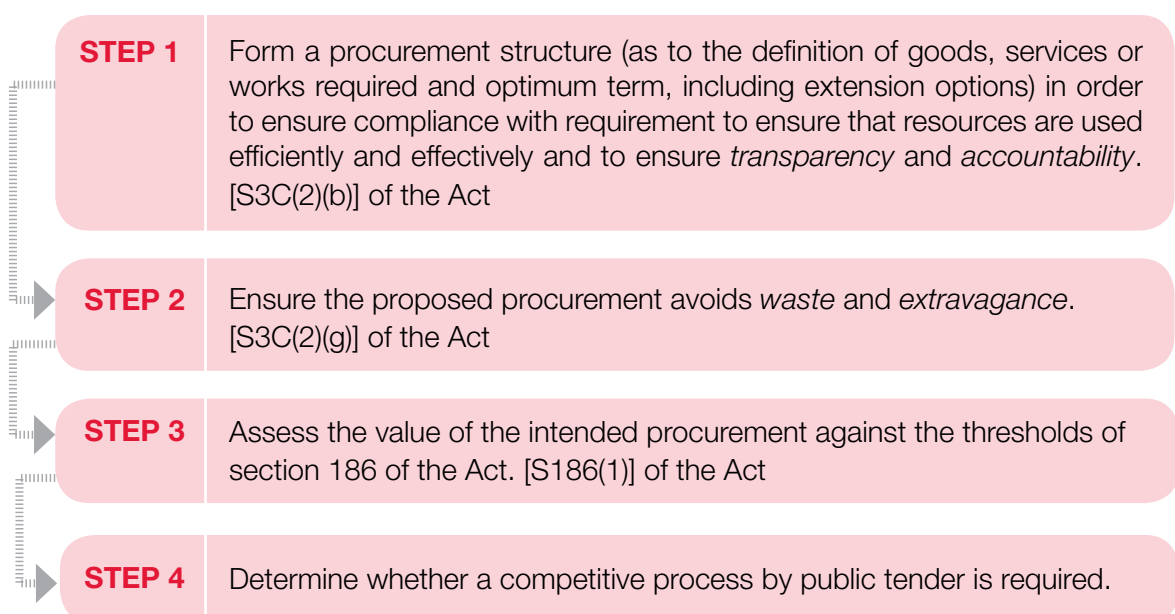
There is no specific time limit applicable to the length of a contract which is subject to the thresholds applying under section 186 of the Act. A council should firstly determine the optimum period for the contract on the basis of value for money and the efficiency and effectiveness of the procurement and then assess the value of the contract.

A council should then determine whether section 186(1) of the Act applies to the resulting contract.

The primary objective in any procurement process is to get value for money on a whole-of-life (or life-cycle) basis. The optimum length of a contract period in order to secure value for money can vary considerably depending on a range of factors, including:

- the extent of competition on the supply side – council may wish to approach the market more regularly if pricing is competitive, and vice versa
- ensuring the contract term is sufficient to make the cost of the tendering process worthwhile
- the cost of equipment which the contractor must amortise over the term of the contract in order to submit an economic price.

Therefore, the process necessary to comply with the legislation should be considered as follows:





### **Avoiding inefficient or ineffective contract structures**

If it is not an efficient or effective action to combine two or more services or works to form one contract, due for example to impracticalities, then a council should not create an artificial contract which does not promote value for money.

### **Measures which intentionally avoid public tendering**

Measures which intentionally seek to avoid the requirement to give public notice – for example, contract splitting, placing multiple orders, seeking multiple quotations with a single supplier or engaging in effect a single supplier under different guises – will breach the requirement to call public tenders where threshold values would otherwise be reached. Councils must act with good faith in this regard.

### **Appointment of a panel of tenderers**

One of the valid outcomes of a public tender process is the appointment of a panel of tenderers to promote security of supply. This is most likely to be the case where a council requires a range of services to be performed. The subsequent use of quotes on a job-by-job basis further promotes competition and value for money.

Typical examples include the appointment of a range of trade services to undertake maintenance works or a range of contractors prepared to undertake projects such as refurbishment of buildings or facilities (for example, kindergartens, sports pavilions or public toilets).

### **No tenders received**

Reference should be made to **Section 9.4 No tenders received** for guidance on circumstances where a council does not receive any tenders or rejects the tender(s) received on the basis they did not meet council's specifications outlined in the tender document, and/or did not provide value for money to council.

### **ILLUSTRATION**



In his report on *Tendering and Contracting in Local Government, February 2010*, the Victorian Auditor-General's Office found:

One council bought three vehicles on the same day from the same supplier but as separate contracts. The council approached three suppliers and asked them to price each of the three vehicles individually rather than submit a quote for the potential purchase of two or more as a means of encouraging better value. This is poor practice.

The contract values of the vehicles were \$64,259, \$73,996 and \$71,259 totalling \$209,951, which exceeds public tender thresholds.

## ILLUSTRATIONS



1. A council proposes to enter into a contract for a supply of quarry products with an initial contract period of three years and an option for an additional two years. The projected value of the contract for the full five-year period must be considered against the dollar thresholds prescribed under section 186 of the Act (and any adjustments made by Order in Council).
2. A council proposes purchasing fuel using a fuel card. The council must consider the total value of the expenditure under a proposed contract with the fuel provider. The issuing of individual purchase orders or use of debit/credit/company cards does not avoid the requirements of section 186 of the Act.
3. A council proposes calling tenders for grass cutting and divides the area of the municipality into three zones (to reduce the risk of a single contractor failing to deliver). The council anticipates the total value of contracts for all zones will exceed the threshold amounts (although prices for individual zones may not) and that, notwithstanding the risk aspect, one contractor may be successful in being awarded all contracts. In these circumstances a public tender process is advisable or council risks having to recommence the procurement process with a public tender if it wishes to award a contract to one contractor for all three zones.
4. A council calls public tenders for construction of a sporting pavilion, the value of which exceeds the threshold amount. The lodged tenders all exceed the council budget and council decides to complete the project using its own resources. Council has complied with section 186(1) of the Act. The council is, separately, obliged to ensure that it obtains value for money in a transparent and accountable manner.
5. A council is spending \$70,000 on stationery items each year. Council determines that the optimum period for obtaining value for money is three years (based on factors including the cost of the tender process). The indicative value of the contract is \$210,000 and it is therefore subject to the requirement under section 186 of the Act to seek tender proposals through a public process.
6. A council buys trucks using a third party agent – one at a time, in separate contracts, over a short period and each at a value below the threshold. The council is spending \$500,000 each year on trucks in these separate purchases. As the contracts are separate, section 186 of the Act is not enlivened. The council must, however, separately be able to demonstrate that this method of procurement is achieving value for money in a manner which is transparent and accountable.

### Use of a public notice for procurements below the threshold

A council may undertake a public tender where the value of goods, services or works **does not** reach the threshold sums. These may be situations where a public tender is preferred or prudent, managing risk considerations are paramount, or there is a desire for greater transparency of the procurement. Section 186 does not preclude councils conducting tenders under the threshold amounts.

### 3.2.2 Assessing the value of a contract

The value of all contracts for the purposes of compliance with section 186 of the Act includes:

- costs for the full term of the contract, including any options for either party to extend the contract
- applicable goods and services tax (GST)
- anticipated contingency allowances or variations
- all other known, anticipated and reasonably foreseeable costs.

In certain circumstances, for example, where the contract price is nominal, it will be the market value of the goods, services or works, which must be considered for the purpose of section 186 of the Act.<sup>21</sup> That is, it is the **value** of the contract rather than its **price** which applies.

In determining the value of a proposed contract, due diligence<sup>22</sup> should be exercised to ensure that realistic assessments are made of all factors which may impact on the value of the contract. This assessment should take into account all aspects of the proposed contract which are reasonably foreseeable. This has particular application to those procurements which involve schedules of rates or unit prices requiring projections of usage rates and volumes in order to derive the total value of the proposed contract.

The assessment of a contract's likely value must be made before entering into a contract. Councils therefore need to have in place a means of aggregating their expenditure on goods, services and works well in advance of the procurement. Best practice is served if a council uses standard products and services codes, such as the UNSPSC (United Nations Standard Products and Service Code)<sup>23</sup> or a code of its own design, **within budgeting processes** in order to assess future intended procurement aggregates.

Councils should use their budgeting process, supported by a committal accounting system, to report by supplier identity in order to avoid commitments which would otherwise be aggregated to in excess of the thresholds for any one supplier.

#### ILLUSTRATION



#### One council's procurement policy provides that:

Should a director consider that the nature of the requirement and the characteristics of the market are such that the public tender process would lead to a better result for the council, public tenders may be called for purchase of goods, services and building and construction for which the estimated expenditure is below the thresholds.

<sup>21</sup> An example of such a situation is where a subsidiary owned by council is supplying the goods or undertaking the service or works for a nominal payment.

<sup>22</sup> Due diligence is the standard of care which a reasonable person should take.

<sup>23</sup> The UNSPSC system can be implemented using the detail of the codes at different levels. Most councils will not require the full number of levels of detail offered by the UNSPSC code structure.

The objective is to identify the opportunity to aggregate spends before they are committed. Where a council only monitors expenditure in hindsight it risks exceeding the thresholds.

Best practice would decree that if doubt exists as to the likely value of an intended contract then a public tender process should be undertaken. This has the advantage of increasing the prospect that the goods or services are purchased or obtained at a competitive rate and in a transparent manner.

### 3.2.3. Goods, services and works<sup>24</sup>

The threshold amounts applicable under section 186 of the Act distinguish between the purchase of goods and services (\$150,000) and contracts for the carrying out of works (\$200,000).

The terms *goods*, *services* and *the carrying out of works* are not defined in the legislation, therefore, they take on their ordinary meaning and in the context of these guidelines the terms should be considered to mean:

- **Goods:** movable personal property, especially merchandise used in trade or commerce and requiring carriage from one place to another. The word ‘goods’ is very general and of quite indefinite import<sup>25</sup>
- **Services:** the act of helping or doing work for another... work done in this way... assistance or benefit given to someone... the provision of what is necessary for the installation and maintenance of a machine etc. or operation....<sup>26</sup>
- **Carrying out of works:** the operations of building or repair (roadworks).<sup>27</sup>

The thresholds do not apply to services which a council elects to conduct using employed staff as these are not contracts for goods, services or works and are not subject to section 186 of the Act. The method for the delivery of all services and carrying out of works is reserved to the council and the public tendering process only applies to those circumstances where external resources are sought and the thresholds are reached.

Whilst other legislation contains definitions of goods, services and works these other definitions will not bear any relevance to the interpretation of the same term in a different Act of Parliament, unless otherwise provided.

#### ILLUSTRATION



Multiple council departments are using the same consultant for the same type of service without each other's knowledge. There is a risk of exceeding the thresholds of section 186 of the Act if the council does not monitor its expenditure at the budget phase or as commitments are incurred.

<sup>24</sup> In the event that the change to the threshold which is under review (see earlier) proceeds then the distinction between goods and services and works will cease to be relevant for the purpose of compliance with Section 186 of the *Local Government Act 1989*.

<sup>25</sup> Butterworth's Concise Australian Legal Dictionary (2004, 3rd Ed) 191.

<sup>26</sup> Australian Concise Oxford Dictionary (2004, 4th Ed) 1299

<sup>27</sup> Australian Concise Oxford Dictionary (2004, 4th Ed) 1652

### 3.2.4. Public notice

The public notice which councils are required to give when calling tenders or expressions of interest for procurement, where the value reaches the threshold, must be in the prescribed form and contain any prescribed details.<sup>28</sup> To date there have been no details prescribed (in regulation) and therefore only the provisions of the Act apply.

The requirement under the Act to give public notice has two elements. The notice must:

- give the purpose of the contract
- invite tenders (or expressions of interest) from persons wishing to undertake the contract.

Public notice is defined as a notice published in a newspaper generally circulating in the municipal district of the council chosen by the council for that purpose.<sup>29</sup>

A council must also ensure that any public notice required to be given by the council is published on its website.<sup>30</sup> However, if a council fails to comply with this requirement it does not invalidate the public notice.<sup>31</sup>

Given the requirement for a public notice to be published in a newspaper, councils are not able to solely use electronic tender systems which rely on online publication of the public notice. In a best practice context the public notice process should be aimed at obtaining a competitive price in a transparent manner. Notices that are placed solely online risk missing potential suppliers, especially small local businesses, which may not access online sites.

One means of achieving the public notice requirements is to place a brief 'pointer-style' public notice (that complies with the requirement to give the purpose of the contract and invite tenders) and include a web address which links to a more detailed online public notice. If this web address is the council's website then the requirement to publish the notice on council's website will also be satisfied.

Where there are publications or forums which target particular markets it may be desirable to also access these, at the council's discretion, with additional notices whether in hardcopy or electronic form. Further, the advertising for bid proposals does not have to be restricted to procurements which reach the threshold.

Obtaining a competitive price and transparency would be best served by ensuring that the period of public notice is reasonable and sufficient to enable bidders to adequately respond. This period will vary according to the nature of the contract and the length of time it will take tenderers to prepare adequate proposals.

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<sup>28</sup> Section 186 (3) of the *Local Government Act 1989*

<sup>29</sup> Section 3 of the *Local Government Act 1989*

<sup>30</sup> Section 82A (2)(a) of the *Local Government Act 1989*

<sup>31</sup> Section 82A (3) of the *Local Government Act 1989*

### 3.3. Breaches of requirement to give public notice

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A breach of section 186(1) of the Act's requirement to undertake a competitive process to test the market before entering into contracts occurs, for example, when:

- a contract with a value equal to the thresholds or more is entered into willingly without first conducting a public tender
- a public tender is called for but the contract subsequently entered into is materially different<sup>32</sup> from the tender specifications
- an existing contract with a value equal to, or more than, the thresholds is extended where there is no provision in the contract for an extension and without first undertaking a tender process or expression of interest
- a contract with a value equal to, or more than, the thresholds is entered into without first going to a public tender despite the refusal of the Minister to approve it as an arrangement under section 186(5)(c) of the Act or without the other exemptions under section 186(5) of the Act applying.

It is essential that councils have in place systems and processes to avoid such breaches.

### 3.4. Effect of non-compliance

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There is no Victorian case law dealing directly with a breach of section 186 of the Act, although there is a relatively recent case that considers the equivalent provision in New South Wales.

In *Tonkin v Cooma-Monaro Shire Council [2006] NSWCA 50 (7 April 2006)* (Tonkin's case), the council engaged a contractor to undertake works but failed to undertake a tender process required by the relevant legislation. The works were for the control of noxious weeds. The council had served notices on the landholder to deal with these weeds which the landholder had not acted on and the council sought to recover the costs of the works from the landholder. The landholder did not dispute that the works had been completed for a reasonable amount. The landholder, however, attempted to argue that the failure to conduct a tender rendered the contract unenforceable and, thus, precluded the council from recovering the contract monies from the landholder.

The New South Wales Court of Appeal (Court of Appeal) noted that a number of contract law cases had established that when a contract is the result of an unlawful process (for example, a failure to undertake a competitive tender process), the contract may not always be illegal or unenforceable.

The intent of Parliament is paramount in determining whether a contract is invalid.

The Court of Appeal found in Tonkin's case that Parliament could not be inferred to have intended that a breach of the analogous provision to section 186(1) would result in a contract being void and unenforceable simply because a tender process had not been conducted. It noted that the fact that the other contracting party was 'innocent' and unaware of the council's non-compliance is also of relevance as to whether such a contract is enforceable. It is not clear whether the same result would follow if the other contracting party knew of the legislative breach.

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<sup>32</sup> One test of whether a contract is 'materially different' is to compare the final position with what was originally provided for, and make a judgement in both quantitative and qualitative terms as to whether these positions are essentially the same. As a rule of thumb, if the result of the comparison is greater than a 20% difference in price it is indicative of a material difference. A material difference is, however, capable of arising even when the price differential is 20% or less.

The Court of Appeal in Tonkin's case also found that, where valuable work is done under a purported contract which is invalid for technical reasons (such as not being undertaken as required by the Act), the contractor may be able to, nevertheless, maintain a claim for the fair value of work actually done under the general law principle of 'quantum meruit' (what one has earned).

Tonkin's case confirms that a council which contravenes a legislative provision regarding tendering will not necessarily have its contract set aside by the courts and will not necessarily be precluded from recovering its costs from a third party in relation to such a contract.<sup>33</sup>

If a contract were found to be void this may have significant financial and public image consequences for a council. Councils should consider the need to seek legal advice in these circumstances, particularly where the value of the likely non-compliance is significant.

Further, council staff may find themselves subject to the imposition of a surcharge pursuant to section 240A of the Act, particularly where they have incurred expenditure in breach of the Act.

### 3.5. Reporting of non-compliance

A council must make available for public inspection a list of contracts with a value equal to, or greater than, the threshold that were entered into during the financial year without first engaging in a competitive process and which were not exempt from the requirement to enter such a process.<sup>34</sup> This requirement is a disclosure by the councils of all contracts that had been entered into in breach of section 186 of the Act during the financial year.

A contract should appear on this list in the financial year in which it is entered into in breach of the Act.

Further, a council is required to disclose in its annual report<sup>35</sup> and publish on its website<sup>36</sup> certain prescribed documents including a list of the documents which council is required to disclose (one of those documents is a list of these non-complying contracts), together with the location where these documents can be inspected or where copies can be obtained.<sup>37</sup>

#### ILLUSTRATION



In his report on investigations into the Port Phillip City Council, August 2009 the Victorian Ombudsman found payments made to one contractor exceeded \$620,000 over two years without a public tender process and that this breached section 186 of the Act. This breach should have been reported pursuant to Regulation 11(g) of the Local Government (General) Regulations 2004.

<sup>33</sup> If a contract were found to be void the contractor may be able to recover costs from the council incurred by relying on the void contract on the basis that the council engaged in misleading or deceptive conduct (in breach of section 18 of the *Competition and Consumer Act 2010* (Cth)) or that the council was negligent in failing to comply with statutory obligations and leading the contractor to believe it had the power to enter into the contract. In this scenario, it is not clear that the council could recover these costs from a third party. Tonkin's case suggests that it would be unlikely that a contract entered into in breach of section 186 of the *Local Government Act 1989* would be found to be void.

<sup>34</sup> Regulation 11(q) of the *Local Government (General) Regulations 2004*

<sup>35</sup> Regulation 11(g) of the *Local Government (General) Regulations 2004*

<sup>36</sup> Section 82A (2)(c) of the *Local Government Act 1989*

<sup>37</sup> See Local Government Victoria circular No 13/2006 *Local Government Procurement – Public Disclosure Requirements*.

## 3.6. Specific matters related to thresholds

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### 3.6.1. Use of agents<sup>38</sup>

It is common practice for councils to use the services of a third party agent (also variously called buying groups, **buying companies, aggregators and local government group purchasing schemes**).

Councils can use third party agencies for procurements valued at below the threshold amounts set out in the Act. Councils are, nevertheless, required to ensure *that resources are used efficiently and effectively* and to ensure *transparency and accountability*. Once the threshold amounts are reached, councils are required to adhere to section 186 of the Act.

#### 3.6.1.1. Common law aspects

The use of third party agents takes its power from the common law ability of a council to appoint agents to act for it (see **Section 3.7.2 Agency arrangements**).

A council is a body corporate with perpetual succession<sup>39</sup> and it is an accepted common law principle that a body corporate may act through an agent. Therefore a council can act through an agent in procurement. **However, a council must retain control of the exercise, its statutory powers and duties.**

#### 3.6.1.2. The Act

In engaging an agent to undertake procurement, councils must exercise the duties specified in section 140 (Accounts and Records) of the Act.

These include the duty to do all things necessary to:

- ensure that all money expended by the council is correctly expended and properly authorised
- ensure that all liabilities incurred by the council are properly authorised
- ensure efficiency and economy of operations and the avoidance of waste and extravagance
- develop and maintain adequate internal control systems.<sup>40</sup>

Above all, a council must implement principles of sound financial management.<sup>41</sup>

#### 3.6.1.3. Action required of councils

In using the services of a third party agent, a council is required to take the following actions in order to comply with its statutory duties and powers:<sup>42</sup>

1. make an initial decision to purchase goods, services or works, including reviewing and settling contract specifications, conditions of contract and other contract documentation before public tenders are called

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<sup>38</sup> The provisions of this section are consistent with Local Government Victoria Circular No. 06/2006 - *Local Government Procurement and Capacity to Appoint Agents* issued on 23 March 2006.

<sup>39</sup> Section 5(2) of the *Local Government Act 1989* (Councils) and 196(4) of the *Local Government Act 1989* (Regional Libraries).

<sup>40</sup> Section 140 (2)(c),(e),(f) and (g) of the *Local Government Act 1989*

<sup>41</sup> Section 136 (1) of the *Local Government Act 1989*

<sup>42</sup> These requirements follow the advice of the Victorian Government Solicitor's Office which cites the decision in *Morrison V Shire of Morwell* (1948 VLR 73), page 79, which held that *'for the purposes of carrying out the duties the councils may employ agents, but, if it does so, it must retain control of the exercise of its statutory duties and powers.*



2. ensure that probity is in place for the procurement, including obtaining and reviewing the documented probity policies, processes and procedures of the agent
3. make the decision to appoint an agent
4. make a decision to either accept one of the tenders or reject all tenders as allowed under the Act, including reviewing all the tenders received and the tender evaluation and selecting one of the tenders or a panel of tenderers subject to obtaining value for money and not simply a panel of convenient tenderers<sup>43</sup>
5. exercise discretion in accepting one of the tenders and not merely rely on the work undertaken by an agent.<sup>44</sup>

Where a proposed procurement reaches the thresholds a council cannot access a third party conducted contract if it has not been party to the process and resultant tender from the outset.

There is an important distinction between contracts which are conducted by agents on behalf of a council(s) and a contract such as those on the Construction Supplier Register (CSR) contracts, State Purchase Contracts (SPC) and Whole of Victorian Government Contracts (WoVGs) which are available to councils on account of a Ministerial Approved Arrangement.



Where a council uses an agent the council must ensure that the agent complies with the same requirements that council itself must meet. The agent is only acting on council's behalf. A contract such as those on the SPC's, CSR and WoVGs is not conducted by a third party on behalf of council. Rather, it is an arrangement which has met the criteria for a Ministerial Approved Arrangement (see section 2.7.3 Ministerial Approved Arrangements).

Above all, a council must determine that the tender represents 'value for money' to their community through undertaking their own analysis of the benefits of the contract on offer.

Where a council appoints an agent to conduct a public tender process the council remains wholly responsible for the probity of the proposed procurement. It must ensure that it has the necessary processes and checks and balances in place so that it will be in a position to be satisfied as to the integrity of the procurement. The use of third party agents must be rigorous and not constitute an exercise of convenience simply to fulfil the requirement of the Act to call public tenders.

<sup>43</sup> The test a council must apply is to assure itself that it has sufficient information to make an informed decision.

<sup>44</sup> Reference should be made to Local Government Victoria Circular 6/2006 *Local Government Procurement and Capacity to Appoint Agents* issued on 23 March 2006.

### 3.6.2. Sole supplier

Situations arise where there may only be a single supplier of a good or service who is capable of carrying out work. Often, however, the ability to tap a competitive market will vary between councils especially in regional areas. The only transparent means of demonstrating that multiple suppliers do not exist is to place the required public notice (see **Section 3.2.4 Public notice** in these guidelines for an economic approach of achieving this). If that action demonstrates that there is only one supplier then a council is free to enter into a contract with that supplier (mindful of its obligation to obtain value for money).

If council can demonstrate that there is not a competitive market for a given procurement then it can also apply for a Ministerial Approved Arrangement (see **Section 3.7.3 Ministerial Approved Arrangements**).

### 3.6.3. Insurance

In other legislative contexts, a contract of insurance may not amount to a contract for a good or service. These terms must, however, for the purposes of this Act, be interpreted in line with the Act's stated objectives of accountability and transparency and in line with the Best Value principles. In view of this and the broad language used in section 186 of the Act, contracts for insurance will fall within the scope of section 186 of the Act.

Where the value of a contract (that is, the premium over the life of the contract) for insurance cover is estimated to reach the threshold amount (inclusive of GST), councils must undertake a public tender.

There are, however, some exceptions to this requirement:

- the public liability and professional liability insurances taken out by a council which becomes a member of, or participates in, a scheme approved by the Minister for the purposes of section 76A of the Act
- statutory compulsory monopoly insurance schemes such as motor vehicle compulsory third party and WorkCover insurances.<sup>45</sup>

Where insurance cover is procured through an insurance broker, a council is in fact entering into two separate contracts:

1. the contract with the insurance broker, the value of which is represented by the brokerage fee
2. the contract with the insurance underwriter, the value of which is represented by the insurance premium and all associated statutory charges.

As both the above contracts are contracts for services, both are subject to section 186 of the Act, if the value of either contract reaches the thresholds.

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<sup>45</sup> Refer to Local Government Victoria Circular No 04/2010 - *Contracts for Insurance and Compliance with Section 186*.

### 3.6.4. Leases and licences

Section 186 of the Act does not generally apply to leases, although there are exceptions.

A **finance lease** is generally one where the lessor effectively transfers to the lessee substantially all the risks and benefits incidental to the lease, but where legal ownership of the goods may, or may not, be transferred **to the lessee**. Section 186 of the Act is likely to apply in the case of finance leases only where, under the terms of the lease, the council will acquire the goods under lease (and hence there is contract for goods; a lease not otherwise being a contract for services) and, of course, the lease is over the threshold amounts.

Notwithstanding the general non-application of section 186 of the Act to finance leases, council must consider legislative requirements to ensure **value for money** and transparency and accountability.

Under an **operating lease** the lessor leases the asset, generally a vehicle or plant and equipment, to the lessee generally for a fixed monthly amount, and also assumes the residual value risk of the vehicle. The asset under an operating lease does not vest in the council and therefore section 186 of the Act does not apply. In this context section 186 is generally concerned with the purchase of goods and services and entering an operating lease is not a purchase of a good or service.

As with finance leases a council should consider undertaking a competitive process, in the context of the overriding requirement for council to ensure value for money, transparency and accountability.

**Software licences** are contracts for services. By making available a product to a council, the owner of the software licence is providing a service. Often this service would also extend to troubleshooting problems on behalf of the licensee, providing software updates and otherwise assisting the licensee to utilise the software. The fact that a software licence may amount to a limited grant of rights does not change the fact that its provision will amount to a service. Section 186 of the Act therefore applies.

Where council establishes electronic systems and is subsequently (after the initial contract period) renewing software licences (or upgrading systems), and the cost reaches the section 186 thresholds, it is open to it to seek a Ministerial Approved Arrangement to a public tender process (see **Section 3.7.3 Ministerial Approved Arrangements**) where there is only one supplier of the software.

A **property lease** or a **licence to occupy** where the council is the lessee is not viewed as the purchase of a service as the licence fee being paid to the council is in return for the right to use and manage the subject property. It is therefore not subject to section 186 of the Act. Councils will note that separate legislative provision requires that certain property leases by council are subject to public notices.<sup>46</sup>

### 3.6.5. Loans

Loans are considered to be contracts of loan and not contracts for goods, services or the carrying out of works. They are therefore not subject to section 186 of the Act.

Notwithstanding, councils should consider both the mandatory value for money and transparency and accountability requirements<sup>47</sup> when raising loan funds. Placing a public notice is one means of achieving these requirements. Some councils have achieved significant savings by promoting competition between lenders.

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<sup>46</sup> Section 190 of the *Local Government Act 1989*

<sup>47</sup> Section 3C (2)(g) of the *Local Government Act 1989*

Further, councils should be aware of the requirements associated with the power to borrow under sections 144-150 of the Act.

### 3.6.6. Purchase of land

*Contracts for the purchase of land do not attract the requirements of section 186. 'Goods' means movable personal property, especially merchandise used in trade or commerce and requiring carriage from one place to another (see Section 3.2.3 Goods, services and works). Land is not a good and not subject to section 186 of the Act.*

### 3.6.7. Contracts for sale of goods by council

Contracts for the **sale** of goods by the council (for example, recyclables under waste contracts) are not contracts for the **purchase** of goods or services or for the carrying out of works by the council. Sale of goods by council is therefore not subject to section 186 of the Act. Councils should, of course, in entering contracts for sale of goods, be mindful that they are still required to avoid waste<sup>48</sup> and therefore should obtain proper value for goods sold.

### 3.6.8. Grants

Where council expenditure is funded from State or Federal Government grant monies the requirement to comply with section 186 of the Act remains unless there are grant conditions which provide alternative arrangements. This may arise where council's role in the funding arrangement is that of 'fund manager' and passes on funds from another level of government or other body.

### 3.6.9. Expenditure by special committee

Where a council provides funding to a special committee appointed under section 86 (not 186) of the Act for purchase of a good or service or undertaking of works, then expenditure by that committee is subject to section 186 of the Act. The actions of a committee appointed under section 86 are, in law, the actions of the council itself and subject to the same legislative requirements. Such special committees should comply with the council procurement regime.

### 3.6.10. Developer Contribution Plans

A council can waive a developer contribution pursuant to section 46P(2) of the *Planning and Environment Act 1987*<sup>49</sup> and require the developer to undertake works-in-kind in lieu of a cash contribution. Such an arrangement does not amount to a contract so it does not enliven section 186 of the Act, regardless of whether the threshold amounts are reached. However, were council to be minded to enter into a contract with the developer to undertake further works on council's behalf, these would be subject to compliance with section 186 of the Act.

### 3.6.11. Major policy decisions during an election period

Councils are prohibited from making certain prescribed decisions during an election period.<sup>50</sup> This includes a decision to enter into a contract the total value of which exceeds whichever is the greater of the threshold amounts or 1% of the council's revenue from rates in the preceding year.<sup>51</sup>

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<sup>48</sup> Section 140 (2)(f) of the *Local Government Act 1989*

<sup>49</sup> Section 46P(2) of the *Planning and Environment Act 1987* provides that "The relevant collecting agency (council) may accept the provision of land, works, services or facilities by the applicant in part or full satisfaction of the amount of levy payable"

<sup>50</sup> Section 93A of the *Local Government Act 1989*

<sup>51</sup> Election Caretaker Requirements – *Local Government Act 1989*: LGV Practice Note (August 2008)

A decision which does not follow this requirement is deemed to be invalid.<sup>52</sup> Councils are liable to pay compensation as a result of acting on a major policy decision made in contravention of the legislation. The decision also applies to special committees or persons acting under a delegation from council. These requirements also cover a regional library with which a council has an agreement.<sup>53</sup>

### 3.7. Exemptions to requirement for public tendering

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Under sub-section 186(1) of the Act, councils must expose all purchases of goods, services or works which reach the thresholds to public tender. However, the legislation allows for specific circumstances where a council may enter into a contract without first undertaking the public tender. These circumstances are:

- where the council has resolved that the contract must be entered into because of an **emergency**<sup>54</sup>
- where the contract is entered into **with a council acting as the agent** for a group of councils and the council has otherwise complied with this Act<sup>55</sup>
- where the contract is entered into in accordance **with arrangements approved by the Minister** for the purposes of this sub-section<sup>56</sup>
- the contract is **a type of contract that has been exempted** from this section by regulation.<sup>57</sup>

Novated contracts are also exempt subject to certain conditions.

Guidance on each of these exemptions follows.

#### 3.7.1. Emergencies

A council may enter into a contract, the value of which reaches the threshold amounts, for the provision of goods, services or works without first putting that contract to public tender if the council resolves that the contract must be entered into because of an emergency.<sup>58</sup>

Best practice would indicate that councils should set the scope, timeframe and value of works to be covered by a contract entered into because of an emergency and to report this publicly in the interests of transparency.<sup>59</sup>

Councils should consider delegating to the CEO<sup>60</sup> the power to declare that a contract must be entered into because of an emergency and thus avoid delays in responding to an emergency.

The Act does not define what constitutes an emergency situation. However, for the purposes of these guidelines the usual meaning of the term is used and an emergency should be taken to be a *sudden or unexpected occurrence requiring immediate action*.

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<sup>52</sup> Section 93A (4) of the *Local Government Act 1989*

<sup>53</sup> Section 196 (7)(b) of the *Local Government Act 1989*

<sup>54</sup> Section 186 (5)(a) of the *Local Government Act 1989*

<sup>55</sup> Section 186 (5)(b) of the *Local Government Act 1989*

<sup>56</sup> Section 186 (5)(c) of the *Local Government Act 1989*

<sup>57</sup> Section 186 (5)(d) of the *Local Government Act 1989*

<sup>58</sup> Section 186 (5)(a) of the *Local Government Act 1989*

<sup>59</sup> Victorian Auditor-Generals report on *Tendering and Contracting in Local Government, February 2010*.  
[http://download.audit.vic.gov.au/files/240210\\_Tendering\\_audit\\_summary.pdf](http://download.audit.vic.gov.au/files/240210_Tendering_audit_summary.pdf)

<sup>60</sup> In accordance with Section 98 of the *Local Government Act 1989*

As a matter of policy and principle, the use of this emergency provision, should be limited to situations where a real emergency has arisen. Situations where this might occur include:

- the occurrence of a natural disaster such as flooding, bushfire or epidemic which may require the immediate procurement of goods, services or works to provide relief
- the occurrence of an event such as flooding or fire at a council property which may require the immediate procurement of goods, services or works to ensure business continuity
- the unforeseen cessation of trading of a core service provider due to bankruptcy and a need to appoint a replacement service provider on the grounds of public safety
- any other situation which is liable to constitute a risk to life or property.

Faced with a potential emergency situation, it is preferable for council to take all reasonable steps/actions to avoid the use of the emergency provisions of the Act to enter into a contract. When a situation ceases to be unforeseen or no longer requires action to protect lives or property then the basis for use of this power also ceases.

In the context of achieving value for money and demonstrating transparency and accountability, contracts entered into under the emergency provisions must be limited in scope to that which is necessary to deal with the emergency. The period for any contract should only be sufficient to enable the councils to call for tenders for a new contract or replacement service provider. The emergency provisions cannot be relied upon for extended works and services after the need for an emergency response has passed. Best Value principles may also require councils to take steps to assess best options prior to an emergency occurring, particularly where the risks of such an emergency are cyclic.

The use of the emergency provisions may be open to challenge where a council's use of the power is inappropriate, for example, where no emergency actually existed, or where the council had taken into account irrelevant considerations or had acted for improper purposes in resolving that a contract must be entered into because of an emergency.

### 3.7.2. Agency arrangements<sup>61</sup>

The Act allows for councils to form groups for the procurement of goods, services or works **with one member of the group, acting as an agent for the other councils**, undertaking a single competitive process.<sup>62</sup> Each of the members of this group is able to enter into a contract with the preferred service provider identified through this competitive process. Alternatively, the members of the group may choose to enter into a contract with the council which conducted the public tender.

The practice of one council acting as an agent for a group of councils is not common.

The more common practice is for the services of a third party agent (also variously called buying groups, buying companies, aggregators and local government group purchasing schemes) to be used by councils (see **Section 3.6.1 Use of agents**).

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<sup>61</sup> Section 186 (5)(b) of the *Local Government Act 1989*

<sup>62</sup> Section 186 (5)(b) of the *Local Government Act 1989*

The ability to use agents does not prevent a group of councils jointly undertaking a procurement process without appointing an agent. However, each participating council must be involved in:

- the initial decision to undertake the procurement
- preparation of, and agreement to, the specifications
- ensuring probity for the procurement (see **Section 5 Probity in procurement**)
- deciding which tenders to accept or reject.

#### ILLUSTRATION



A tender process was conducted by the five (5) members of the Central Highlands Regional Procurement Excellence Network for bituminous road reseals.

Each council had two representatives involved in each phase of the contract. All parties confirmed a strategic procurement plan, procurement probity plan, a procurement conduct plan and a tender evaluation plan. All councils were involved in the development of contract documentation and specifications. They all evaluated tenders and selected the successful tenderer.

This project reflects the level of decision-making in each phase of a collaborative procurement which should be undertaken when groups of councils combine for procurement.

Details of this project can be found on Local Government Victoria's website: <http://www.dpcd.vic.gov.au/localgovernment>

### 3.7.3. Ministerial Approved Arrangements<sup>63</sup>

The Minister for Local Government has discretionary power to approve as an arrangement for the purposes of the Act, a contract which a council wishes to enter into without first exposing that contract to public tender (commonly known as Ministerial exemptions or Ministerial Approved Arrangements).

The Minister for Local Government will not act to restrict competition by exercising his or her powers to grant exemptions which will limit competition. Ministerial Approved Arrangements should only be sought in exceptional circumstances.

A council must demonstrate that it is not a viable option for it to undertake a public tender or expression of interest process. This can be demonstrated in one of three ways:

1. the contract is non-contestable and/or other providers cannot meet specialised requirements of the proposed contract
2. whilst the contract is contestable the contract proposed by a council clearly provides value for money and the council can demonstrate how this is achieved
3. there are current arrangements in place that restrict the council to engaging a certain provider and value for money can be demonstrated.

<sup>63</sup> Section 186 (5)(c) of the *Local Government Act 1989*

An application seeking a Ministerial Approved Arrangement must:

- set out the value of the proposed goods, services or works and describe in detail the nature of those goods, services or works and the overall project to which they relate
- demonstrate why a council considers a public tender or expression of interest process is not necessary. This must show that there is no competitive market and the contract is not contestable, or that there is no alternative for the council other than to contract with a specified contractor in the particular circumstances
- give an explanation as to why and how engaging a particular contractor will provide the council value for money, and provide other benefits to the council and the community
- provide the date on which the council intends to enter into the contract for which the application relates. If the matter is urgent, reasons for the urgency must be provided
- give details or a copy of the funding agreement and identify the relevant funding department/agency and their contact details if the project to which the goods, services or works relate is subject to a government grant
- give details of any benchmarking of the quality and estimated costs of the goods, services or works that can be relied upon, such as comparing against similar projects undertaken by the council or other councils
- provide an estimate of the cost of goods, services or works. Where this is an internal council estimate, further information needs to be provided which supports that this is an accurate estimate and will provide the council value for money (for example, other quotes obtained, quantity surveyor assessments or benchmarking against similar projects)
- include any other independent advice or reports obtained by council that are relevant, or support the application.<sup>64</sup>

There are considerable risks associated with a council pre-empting a decision of the Minister for Local Government by entering into a formal contract which is the subject of an application – as retrospective approvals are not granted.

Councils should allow sufficient time for due consideration of an application which may take up to two months. Council should plan accordingly and recognise that a complex application may take longer.

The types of arrangements impacting on a wide range of councils which have been granted as Ministerial Approved Arrangements include:

- public liability and professional liability insurances taken out by a council which becomes a member of or participates in a scheme approved by the Minister for Local Government for the purposes of section 76A of the Act
- situations where a regional waste management group constituted under section 50F of the *Environment Protection Act 1970* had already conducted a public tender for and on behalf of its member councils (considered on a case by case basis)
- the Construction Supplier Register (CSR) which is a pre-qualification scheme for building and construction industry contractors and consultants<sup>65</sup>
- a range of State Purchase Contracts (SPCs) and Whole of Victorian Government contracts (WoVGs)<sup>66</sup>

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<sup>64</sup> Local Government Victoria Circular No 41/2011 – *Applications under section 186 (5)(c) of the Local Government Act 1989 Exemptions from Public Tenders*

<sup>65</sup> The Minister's approval is granted conditional on councils adhering to certain rules relevant to local government and set out in Ministerial Direction No 1 '*Tendering Provisions for Public Construction*' and Ministerial Direction 2 '*Contractual Provisions for Public Construction*'



- where the council enters into a contract with the Victorian Electoral Commission for the provision of a number of election services relating to the council's general elections in October 2012, as well as any by-elections or count-backs during the following term of the council.

Details on accessing the Construction Supplier Register, State Purchase Contracts and Whole of Victorian Government contracts can be found on the Local Government Victoria website: <http://www.dpcd.vic.gov.au/localgovernment>.



#### 3.7.4. Prescribed exemptions

The legislation allows for contracts which have been prescribed (in a regulation)<sup>67</sup> to be exempted from complying with section 186(1) of the Act. At this time only contracts for legal services have been exempted.

A contract for debt recovery services may be taken to be a contract for services, as distinct from legal services. While some debt recovery contracts could also involve legal services, certainly the portion of the service related to the process aspect of debt recovery would constitute a contract for services.

The prescribed exemption for legal services does not prevent a council forming a panel of legal advisors by first placing a public notice. The process of engaging legal services must still meet the tests of achieving value for money and transparency and accountability.<sup>68</sup>

The Minister for Local Government will give consideration from time to time to prescribing other types of goods or services under this provision.

#### 3.7.5. Novated contracts

One final exemption from the requirement to give public notice relates to novated contracts.

A council is exempt from the requirements of section 186(1) of the Act where that council enters into a novated contract<sup>69</sup> providing:

- the initial contract was entered into in compliance with section 186 of the Act.
- the council has undertaken due diligence in respect to the new party to the contract.

<sup>66</sup> Access to the WoVGs are subject to the State Government 'Fair Payments Policy' (Refer to section 5.7)

<sup>67</sup> Part 4, Clause 10 *Local Government (General) Regulations 2004*

<sup>68</sup> Section 3C (2) of the *Local Government Act 1989*

<sup>69</sup> A novated contract is one where a party to an agreement is replaced with a new party. The new contract must be executed largely on the same terms and conditions as the existing contract.

### ILLUSTRATION



A council conducts a competitive tender process in accordance with section 186(1) of the Act. A contract is entered into with the successful bidder. On or after the contract becomes operational the successful bidder seeks to assign the contract to a third party to provide the goods/services. In accordance with the provisions of section 186(5A) of the Act council may novate the contract.

If the proposed novation occurs during the tender evaluation process or involves another tenderer, legal advice should be sought on the proposed novation.

## 3.8. Effective and substantial preference

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Whenever practicable, a council must give effective and substantial preference to contracts for the purchase of goods, machinery or material manufactured or produced in Australia and New Zealand.<sup>70</sup>

Councils can express the extent of the *effective and substantial preference* in their procurement policy. For example, a council may determine that a price preference of 5% be extended to goods, machinery or material manufactured or produced in Australia and New Zealand.

## 3.9. Trade practices compliance

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Trade Practice compliance is generally regarded as a specialist area. A council's procurement policies and practices must comply with the *Competition and Consumer Act 2010* and other fair trading legislation applicable to its operations.

The Competition and Consumer Act only applies where a council carries on a business either directly or by an incorporated company in which it has a controlling interest. Certain activities must be treated by councils as a business (for example, abattoirs). The test for other activities is whether, and to what extent, an activity is, or is likely to be, subject to competition by other providers.

Breaches of applicable provisions of the Competition and Consumer Act can involve criminal and civil penalties. A council and its staff can be liable for their respective involvement in breaches. Councils should have in place a compliance program.

A council's best practice program to comply with the Competition and Consumer Act must cover the aspects of:

- restrictive trade practices, including price fixing and exclusory provisions resulting in a division of territories
- market sharing, including allocation of customers, anti-competitive agreements, exclusive dealing and misuse of market power
- communication and promotion, including misleading or deceptive conduct, false claims and unsubstantiated predictions

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<sup>70</sup> Section 186 (6) of the *Local Government Act 1989*

- conscionable and fair business practices
- service, quality and safety.

The operating procedure for trade practice compliance should cover:

- appointment of a compliance officer
- conduct of risk assessments, using a risk assessment questionnaire or similar approach
- staff education and training
- complaint handling
- reporting.

A key element of implementing trade practice compliance lies in the provision of trade practice awareness training (supported by appropriate resources), adequate education material and operating procedures to facilitate compliance. Best practice is served when a review of trade practice compliance is linked with an annual service review process (or review of the council's procurement policy).

The education and training aspect of compliance is best conducted by providers specialising in this area. Councils operating services which compete with the private sector should implement a full compliance program. Councils which assess their trade practices risks to be low may be able to link trade practice education and training to the more general procurement training.

From the perspective of supplier compliance, in order to minimise the risk of collusive practices among tenderers, some councils require the completion of a statutory declaration as part of the tender proposal. This is considered best practice.

## 3.10. National competition policy

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Councils must ensure that when evaluating/analysing bids submitted by corporatised government entities, or other significant government businesses, that tenders must conform to the requirements of the State Government policy on competitive neutrality. The principle underlying competitive neutrality is that government businesses should not enjoy any net competitive advantage simply by virtue of their public sector ownership.

## 3.11. Procurement policy

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### 3.11.1. General principles

Section 186A of the Act requires all councils to prepare, approve and publish a procurement policy.

Publishing the council's procurement policy assists in informing suppliers about council's processes, increases confidence in the council's procurement activities and thereby improves the relationship between council and their current and prospective suppliers. Publication can minimise negative perceptions and complaints, enhancing transparency and accountability in local government business.

### 3.11.2. Legal aspects

The Act defines a procurement policy as the principles, processes and procedures that will apply to all purchases of goods, services and works by the council.<sup>71</sup> Given the breadth of this definition a *high level* policy which contained only the council's procurement principles would not comply with the legislation.

A copy of the current approved procurement policy must be available for inspection by the public:

1. at the council office
2. on the council website.<sup>72</sup>

The procurement policy must be reviewed at least once each financial year and may be amended as necessary. Best practice would be served if this review is consultative of stakeholders and is approved by a council's management group and agreed to prior to presentation to the elected council for approval.

The procurement policy must also contain matters, practices or procedures which are prescribed (in regulations).<sup>73</sup> As at January 2013 there are no prescribed matters, practices or procedures and therefore there are no further requirements of councils.

### 3.11.3. Policy content

The required components of a procurement policy are as follows:

**Principles:** the fundamental norms, rules, or values that represent what is desirable and of value to council and its community. Principles are more basic than policy, process or procedures, and should govern all three.

The principles outlined in these guidelines (see **Section 2.2 Best practice principles in procurement**) are defined as value for money, openness and fairness in dealing with all suppliers, accountability, risk management, probity and transparency, environmental objectives, support of local business and any social procurement objectives.

**Processes:** activities that use resources to transform inputs into outputs. A process therefore describes what is to be done. In these guidelines processes are activities such as the preparation of specifications and tender evaluations.

In procurement a process consists of:

- roles and responsibilities of the staff assigned to undertake the procurement
- appropriate resources to support individuals in doing their jobs.

**Procedures:** ways in which procurement tasks are accomplished. It can be a sequence of steps that include preparation, conduct and completion of a task. A procedure describes how a process is to be achieved.

The procedures will **explain how to undertake** administrative tasks, risk management processes, internal control frameworks and performance measurements.

Specifications, contracts and records are not procedures in themselves as they do not describe how to do anything, rather they describe the outputs resulting from carrying out procedures or tasks.

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<sup>71</sup> Section 186A (10) of the *Local Government Act 1989*

<sup>72</sup> Section 186A (8) of the *Local Government Act 1989*

<sup>73</sup> Section 186A (3) of the *Local Government Act 1989*

Common elements which should be found in councils' procurement policies include:

- council's strategic objective for procurement
- identification and control of associated risk, including the development of containment strategies to mitigate loss/liability and contingency planning to respond to risks that may emerge
- definition of the internal controls in place for procurement – integrated with each of the procurement functions
- adopted mechanisms for procuring goods, services, and works
- delegations of authority for the procurement of goods, services, and works
- probity, for example, the conduct of council business in an honest, proper, fair, and ethical manner
- provision of training for procurement staff and ongoing opportunities to update knowledge and skills
- council policy on social, environmental and economic procurement.

The preferable method of incorporating statements of procedure and process in the procurement policy is by reference to the relevant document. This allows flexibility and continual improvement of processes and procedures without the need to amend the policy for each change.

#### 3.11.4. Best practice policies

The procurement policy requirements apply to all purchases of goods, services or the carrying out of works – irrespective of the value of such purchases.

Council should develop policies which are particular to their own requirements.

Policies should be aligned to a council's overall vision and service objectives, and be consistent with council delegations and with the adopted Staff (and Councillor) Code of Conduct.<sup>74</sup>

Councils should also assess their procurement policy against the human rights specified in the Victorian Charter of Human Rights legislation provisions and confirm its compliance therewith. Within the context of human rights, some councils seek to promote objectives in regard to diversity and equity. The procurement of particular council services requires consideration of these factors, including human services, where a council may seek to require in contracts that contractors exercise the same standards as the council in areas of employment equality and the treatment of clients.

Policies may reflect local circumstances such as an objective to support local business or other economic development goals; to achieve particular social procurement objectives<sup>75</sup> or to achieve environmental objectives (see **Section 2.4 Role of sustainability in procurement**).

#### ILLUSTRATION



One council conducts its assessment and incorporates the following provision in all policies which it adopts:

**Charter of Human Rights**

This policy has been assessed against and complies with the Charter of Human Rights.

<sup>74</sup> Section 95 and 95AA of the *Local Government Act 1989*

<sup>75</sup> Social procurement involves using procurement processes and purchasing power to generate positive social outcomes in addition to the delivery of efficient goods, service and works. It is thus consistent with achieving Best Value. Reference should be made to *Social Procurement: A Guide for Victorian Local Government*, October 2010 and the Social Procurement Toolkit on the Local Government Victoria website.

## ILLUSTRATION



One council's approved policy provides that:

### **Sustainable Purchasing**

Council is committed to reducing its environmental impacts and operating in a socially and environmentally responsible manner. Council will encourage the design and use of products and services that have been produced to ethical standards, which have minimal impact on the environment and human health. This includes, but is not limited to:

- waste management
- recycling
- energy management
- emissions management
- water conservation
- green building design
- environmentally sustainable procurement.

One of the difficulties that councils face in applying policies which preference local purchasing relates to determining which suppliers or goods and services are 'local'. The usual test of 'local' is that of business location or employment opportunities. However, the issue of business ownership frequently arises where the economic benefit of the procurement does not remain in the local area.

A council needs to define in its policy its own definition of local in the context of its strategic plans for economic development.

Objectives which seek to minimise whole-of-life or life-cycle costs subject to quality requirements, and to also engage local businesses, are likely to be inconsistent when local businesses cannot offer minimum life-cycle costs. A council adopting objectives supporting local business should reconcile these and state clearly in their policy the extent to which they will favour local business against minimum life-cycle costs.

## ILLUSTRATIONS



### **1. One council-approved policy provides that:**

Council recognises it has a role in the economic development of the community and is committed to assisting local industry to do business with council. Local business in this context means suppliers based within (this municipality) and the immediate neighbouring municipalities

Council has mandated the requirement to obtain one quote from a local supplier, if available, for any purchase less than \$5,000 and at least one quote from a local supplier, where available, for purchases over \$5,000 but less than the tender threshold.

In addition, a minimum tender evaluation weighting of 10% will be assigned for local business where a weighting evaluation criteria is used.

### **2. The City of Ballarat conducts 'Tender Write' workshops.**

These sessions aim to assist business in writing tender bids. They provide an opportunity for local businesses to grow and to ensure "business owners are up to date and familiar with what local and state government are looking for in tender applications".

Importantly, the selection criteria which is included in council contract documentation and requests for quotations must include all factors which a council proposes to take into account when evaluating a proposal.

One of the local government sector peak bodies has developed a 'Model Procurement Policy', which can be found at the Municipal Association of Victoria website.<sup>76</sup>

Councils using this generic model should be sure to adapt it to their own circumstances and ensure the resultant policy complies with the relevant legislation and represents best practice for that council.

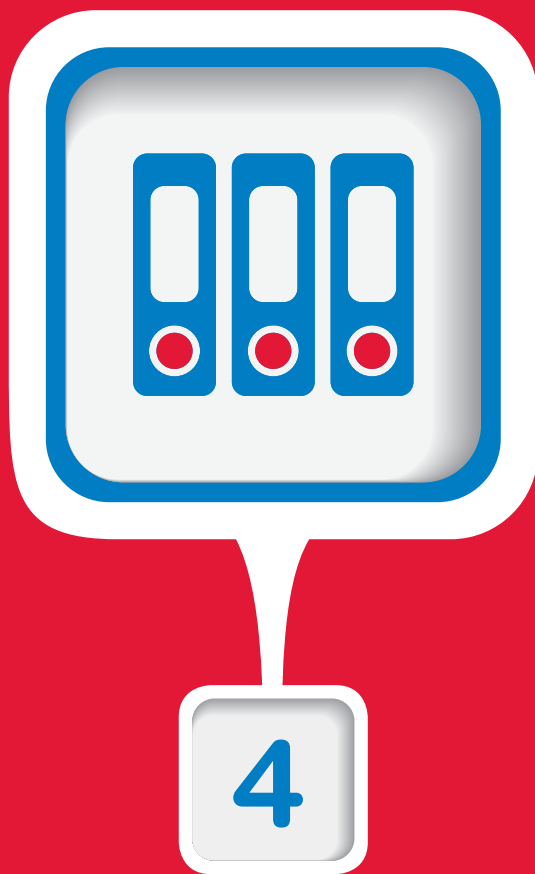
Particular attention should be given to ensuring the following aspects are adequately covered within a policy:

- structure is aligned with a council's usual policy format, subject to ensuring that it complies with the requirement to include the principles, processes and procedures that apply to all purchases of goods, services and works by the council
- structure follows a logical flow
- content is consistent with these guidelines
- policy correctly cites the relevant legislative provisions, particularly those pertaining to conflict of interest, where the applicable concepts and requirements differ from those applying to other levels of government
- policy provides adequate detail on the council probity procedures
- definitions of internal control procedures which are to be applied should be included.

Appendix A to these guidelines sets out a policy structure which would meet the requirement of section 186A of the Act.

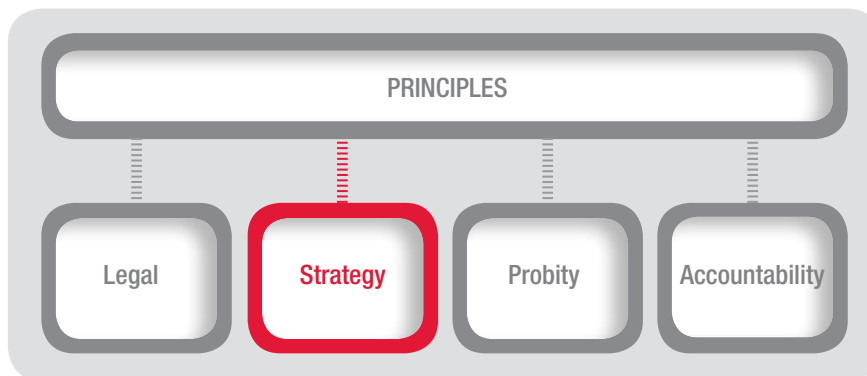
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<sup>76</sup> <http://www.mav.asn.au/policy-services/procurement/Pages/default.aspx>



Strategy





## 4. Strategy and organisation

### 4.1. General principles

The strategy and organisational structure adopted for each council procurement activity will be particular to its needs and resources. The important aspect of the strategy and structure is that consideration has been given to these structures and decisions made to optimise the efficient and effective use of resources and to ensure transparency and accountability.

The strategy should be documented in order to provide direction to all stakeholders.

### 4.2. Strategic procurement

Over time the role of the buying function has moved from a back-end purchasing activity focused primarily on reactive, transactional processing of requisitions, and on acquisition price for each procurement, to a strategic function.

However, the term 'strategic procurement'<sup>77</sup> is variously applied to several different concepts including:

- a coordinated approach by an organisation to influence supply markets to support the business objectives
- the purchase of high value, high risk, important and complex goods, services or works, often a multi-faceted project
- long-range plans for ensuring timely supply of goods and/or services that are critical to a firm's ability to meet its core business objectives
- the process used to take a project from its early planning phase through to completion.

Depending on which of these concepts is adopted there will be a number of outcomes from a process of strategic procurement. These outcomes may take the form of:

- a strategy document formalising the council approach to influencing supply markets, focused on core business objectives and/or organisational coordination
- a strategic procurement plan for the implementation of a significant (high value or high risk) procurement (or a planning-to-completion project based plan) as described in **Section 8.7 Strategic procurement plan**.

<sup>77</sup> The term 'strategic sourcing' is also used, generally interchangeably with 'strategic procurement'

The features of a strategic approach to procurement include:

- a centre-led organisational structure (see **Section 4.3 Organisational model/staffing structures**)
- an organisational commitment to a coordinated and cooperative approach – often involving a team for a significant procurement
- early involvement in the planning phase by the procurement function or team
- an understanding by procurement practitioners of product/service categories and the relative spend on each, together with the particular needs of the council functions which are being serviced
- the gathering of market intelligence and encouragement of new suppliers entering the market
- the use of performance-based specifications to encourage maximum innovation, where appropriate
- an openness with suppliers as a basis for conducting negotiations – with a focus not just on prices but on achieving other council objectives
- optimising the allocation of risk between the parties
- use of systems to monitor the progress of procurement and measure the outcomes.

The strategic elements adopted in any one procurement should be appropriate to its complexity.

The essence of strategic procurement is that it should be aligned with, and contribute to, council's long-term strategy. It should be consistent with the Council Plan and the Strategic Resources Plan, including the four year projection of revenue and expenditure in the standard statement of financial performance.<sup>78</sup>

Strategic procurement places an emphasis on:

- detailed analysis of a council's spending pattern
- ensuring procurement effort corresponds with risk and expected return
- optimising the procurement process to reflect market conditions
- including continuous improvement and value for money in contractual arrangements with suppliers.

This emphasis is best supported with:

- sound training and development of those undertaking procurement functions
- a focus on accountability to achieve value for money for all staff involved.

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<sup>78</sup> Section 126 of the *Local Government Act 1989*

### 4.3. Organisational model/staffing structures

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The Local Government Victoria Procurement Excellence Program identified three generalised organisational models for undertaking procurement. These were:

1. centralised: a single central group undertaking all procurement
2. decentralised: dispersed procurement undertaken within individual departments
3. centre-led: a blend of localised and centralised procurement models.

**Centralised model:** a centralised model, of whatever size, leverages council spending and drives standard policy, process and technology decisions as well as implementation from a central point. While offering greater spending leverage and operational efficiencies, centralised structures often result in higher incidences of unapproved spending and process circumvention. The centralised model may have higher staffing costs and be less flexible and responsive to operational needs.

**Decentralised model:** a decentralised model empowers departments with autonomy and control over supply, process and technology decisions, as well as procurement execution. This structure improves satisfaction at the departmental level but fails to leverage council spending. It is usually costly to operate and leads to inconsistent supply cost and performance across the council.

The Victorian Auditor-General's Office found the lack of central oversight in five councils that were audited resulted in inadequate and inconsistent practice, including insufficient monitoring of both expenditure levels and adherence to probity standards, and an insufficient review of effectiveness.<sup>79</sup>

**Centre-led structure:** a centre-led model allows procurement action to take place in the department whilst policy, strategy, technology, best practice and networking are led by a centralised unit.

In practice, there will be variations of these models within individual councils. For example, some councils will:

- require procurements above a specified amount to be managed centrally, and
- operate a centralised model for part of the organisation – say internal operations – and a decentralised model for other parts, such as works and parks.

Organisational size and resourcing levels will play a significant role in how structures are designed and implemented.

Although a centre-led model is favoured by most councils, each council should undertake an assessment to determine the structure most appropriate to its needs. Periodic review of the structure should be undertaken.

Position descriptions developed for the procurement function should align to each council's procurement objectives and be structured in accordance with the Victorian Local Authorities Award 2001. These statements should be endorsed at senior management level to ensure the roles they define are embraced by all stakeholders.

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<sup>79</sup> *Tendering and Contracting in Local Government, Victorian Auditor-General's Report*, February 2010. Page 17. [http://download.audit.vic.gov.au/files/240210\\_Tendering\\_full\\_report.pdf](http://download.audit.vic.gov.au/files/240210_Tendering_full_report.pdf)

## 4.4. Leadership

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As with many council programs, the success of the organisational model for procurement rests on the extent to which it is embraced and implemented by a council's senior management. Leadership of procurement means having an understanding of the objectives of the council's procurement policy and procedures, advocating for their implementation, instilling a culture of compliance and best practice from a risk management perspective, and leading by example.

## 4.5. Procurement steering group

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One option for councils is the formation of a procurement steering group. This is an excellent means of ensuring adequate focus on the procurement function and of achieving change within the organisational procurement culture.

A procurement steering group would be mandated to provide coordination, leadership and guidance for the procurement function.

The procurement steering group would include at least one director/senior manager and key stakeholders in the council's procurement operations.

## 4.6. Project teams

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Where a procurement is of sufficient scale, complexity or has significant inherent risks, consideration should be given to forming a project team to drive the procurement process (or the overall project where procurement forms part of a larger project). A well-planned project team is likely to improve decision-making, reduce risks and assist transparency. However, an assessment would need to be made as to whether the value of a project team would justify the cost of resourcing it and the likely additional time involved in decision-making.

## 4.7. Delegations

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One of the key mechanisms for ensuring the efficiency of the procurement process is the implementation of delegations. Delegations allow for efficient decision-making at the appropriate level of the council. Councils have legislative capacity to delegate most functions, powers and duties to the CEO or its staff under an instrument of delegation.<sup>80</sup> The CEO can also delegate to other council staff functions, powers and duties of his/her office under an instrument of delegation.<sup>81</sup>

Delegation relating to functions, power and duties should be distinguished from authorisations which would, for example, allow staff to approve procurements at values below certain thresholds. In the context of procurement, these authorisations relate to the administration of any act or regulations which relate to the functions and powers of the council. They might take the form of authorisations contained in a procurement policy approved by a council or in a separate written instrument authorising staff in specified positions to undertake procurement at stated levels of value.

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<sup>80</sup> Section 98 of the *Local Government Act 1989*, subject to specified exceptions. These delegations are often made on an exception basis.

<sup>81</sup> Section 98 (2) of the *Local Government Act 1989*

Delegations for sums that reach the threshold should be consistent with a council's approved procurement policy and should specify who (staff position, rather than a named staff member) has the delegated power to purchase and at what level of value those delegations apply.

All instruments of delegation should be properly made and documented. It is important when determining delegations that the delegation be granted with clear instructions on how it is to be exercised.

Delegations from council must be reviewed within 12 months after a council general election.

Staff who are holding delegations should be provided with training on the exercise of their delegations. Such training can form part of broader governance training.

Legal implications result from the appointment of a delegate of the council. The individual delegate is the council for the purpose of the delegated power, duty or function and a decision made under delegation is binding on the council. Comprehensive conflict of interest rules apply to a delegate of the council. (See **Section 5.8 identification and management of conflicts of interest.**)

A delegate must ensure that any matters they deal with comply with the principle of natural justice or procedural fairness. For example, a delegate must:

- be unbiased and act in good faith
- take into account relevant considerations and extenuating circumstances, and ignore irrelevant considerations.

Delegation is a two-way street. Therefore it is usually appropriate for the exercise of a delegation to be recorded and reported on a regular basis so the delegator can monitor the use of the delegated power.

A record should be kept of:

- what decision was made
- who made the decision
- when the decision was made.

Most procurement systems, whether manual or electronic, will be likely to satisfy these record keeping requirements without the need for further recording. A simple periodic report from an electronic system to the delegator (council or the CEO) can facilitate appropriate monitoring of the delegation. Manual systems will require greater effort to enable the delegator to monitor the exercise of the delegation.

The elected council can 'call in' a procurement matter which is the subject of a delegation to staff and reach its own decision on the matter (subject to compliance with matters such as consistency with selection criteria).

Delegations can only be made to council staff (or a special committee). A council cannot make delegations to non-council staff<sup>82</sup> (for example, to a consultant or embedded contractor<sup>83</sup>) to undertake responsibilities such as the evaluation of tenders, the selection of contractors, decisions regarding contract variations where budget funds are not specifically available or approval of invoices.

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<sup>82</sup> Reference should be made to the findings of the report on *Tendering and Contracting in Local Government*, Victorian Auditor-General's Report, February 2010. [http://download.audit.vic.gov.au/files/240210\\_Tendering\\_audit\\_summary.pdf](http://download.audit.vic.gov.au/files/240210_Tendering_audit_summary.pdf)

<sup>83</sup> 'Embedded contractor' is used here in the context of external contractors who are appointed to undertake office-based functions. For example, a contractor managing design and construction projects.

However, a council can appoint contract staff as agents. This would, for example, allow council to appoint a contract staff member to: undertake the preparation of specifications and contract documentation; respond to tender queries; supervise another contract; approve minor variations where funds have been provided in the council's budget; certify satisfactory completion of works (to enable a delegated council officer to approve the payment of invoices); or prepare and issue correspondence including works instructions, all subject to the provisions of the contract.

Agency appointments in these circumstances should be in writing and should define any restrictions on the functions of the agency. Where council is using an agent they must retain control of the procurement exercise including statutory duties and powers (see also **Section 3.6.1 Use of agents**).

## 4.8. Training and skill development to build capacity

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Many of the shortcomings that arise from investigations<sup>84</sup> of procurement matters in councils are due to lack of knowledge and skills of staff or the deficient application of procurement practices.

Development of knowledge and skills about procurement is therefore critical to effective procurement and compliance of councils.

There are a number of learning pathways in procurement and contract management ranging from foundation learning, vocational education and training (VET) to higher education qualifications. By accessing the national network of registered training organisations (RTOs), councils can select the training best suited to the role requirements and career aspirations of their staff, especially where councils do not have in-house expertise in training.

Councils should consider use of the Australian Qualifications Framework (commonly known as the AQF) which is a unified system of national qualifications in schools, vocational education and training providers (TAFEs and private) and the higher education sector (mainly universities) to identify and define the knowledge and skill needs of their staff. The knowledge and skills gained by staff should be assessed and formalised.

There is a wide range of knowledge and skills needed to support effective procurement processes. These include:

- policy and procedure development and implementation
- policy and procedure awareness
- probity planning and implementation
- procurement planning
- risk management
- needs definition and specification preparation
- tender/bid evaluation
- negotiation
- contract management/project management
- performance monitoring and reporting.

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<sup>84</sup> These include investigations and reports by the Victorian Auditor-General's Office and Victorian Ombudsman.

Some training can be delivered in association with other council training. For example:

- training in conflict of interest and other aspects of probity could be delivered as part of council's governance training (which could also cover the staff code of conduct, council gifts and hospitality policy)
- risk management training for procurement could be combined with similar training at an organisational level
- generic training in negotiation skills could be appropriate for some staff
- policy development training could benefit from being combined with other strategic training activities
- induction training for new staff could provide core guidance on each of the council's key policies and practices.

Training could be effectively provided across a group of councils where resources for individual council training are limited.

Training and accreditation standards equally apply to elected councillors where they engage in procurement functions (see **Section 9.5 Tender evaluation panels**).

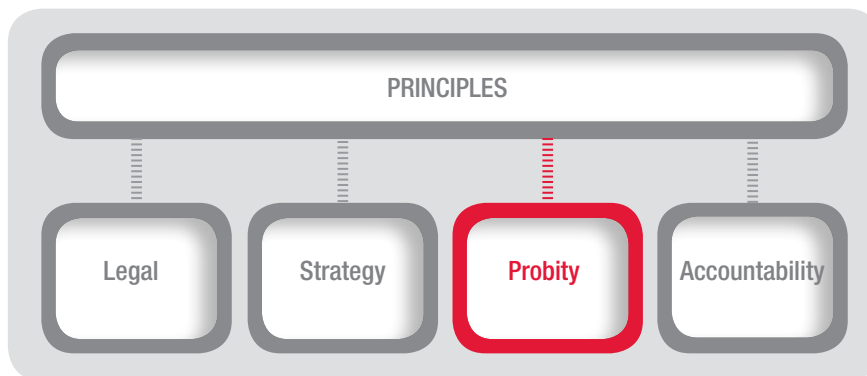






5

Probity



## 5. Probity

### 5.1. General principles

In the context of a procurement process probity is a defensible process which is able to withstand internal and external scrutiny – one which achieves both accountability and transparency, providing tenderers with fair and equitable treatment. Probity is about ensuring the procedural integrity of the procurement process.

When councils (or their agents) approach the market to procure goods, services or the carrying out of works, they have a responsibility to obtain value for money. This must be achieved by acting in an unbiased and ethical manner. The community expects business in the public sector to be conducted ethically, displaying honesty, integrity, diligence, fairness, trust and respect when dealing with others. The law imposes a standard of ‘good faith’<sup>85</sup> in contract matters, which can be discharged if parties to a contract act honestly and reasonably.

This section of the guidelines is concerned primarily with the behaviour of council staff and their agents and highlights associated ethical issues, ensuring the proper conduct of procurement services to:

- facilitate the achievement of value for money
- reduce the risk to council of being exposed to legal action and financial loss
- provide potential contractors with confidence about fair treatment, with consequential improvements in competition and performance
- guard against collusion and fraud.

### 5.2. Good governance

The foundation of sound probity lies within a council’s governance culture and practice. Good governance is essentially getting the governance processes right – in the best interest of the community.

It is a council’s responsibility to provide an environment that is conducive to good governance. Such an environment exists when a council:

- creates a vision for the council
- develops and fosters an organisational culture which is conducive to good governance
- establishes processes for defining and implementing clarity of roles

<sup>85</sup> See the Victorian Government Solicitor paper on Managing Good Faith Requirements in Government Contracts, July 2004 found at: <http://www.vgso.vic.gov.au/sites/default/files/publications/Managing%20Good%20Faith%20Requirements%20in%20Government%20Contracts.pdf>

- fosters an effective relationship between the councillors and the administration
- develops effective decision-making processes that reflect transparency and accountability
- establishes robust and transparent financial management
- establishes and maintains an effective approach to the identification, assessment, monitoring and management of risks
- sets up effective delegations
- creates systems that support council's accountability
- puts in place an active performance management system
- establishes internal structures that provide for independent review of processes and decision-making
- embeds consultation appropriate to the scope and potential impact of each process or decision.

A council with a good governance culture and sufficient standards and practices in place will succeed more easily in achieving probity in its procurement processes.

### 5.3. Probity fundamentals

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The key probity fundamentals for ensuring the achievement of the legislative requirements to ensure that resources are used efficiently and effectively and reflect transparency and accountability<sup>86</sup> can be identified as:

- compliance with the legal and policy framework applying to procurement decisions
- use of an appropriately competitive process
- fairness and impartiality
- consistency and transparency of process
- identification and management of conflicts of interest
- appropriate security and confidentiality arrangements.<sup>87</sup>

These principles apply equally to a third party agent appointed by a council, as do all the requirements of the best practice standards as outlined in **Section 2.2 Best Practice principles in procurement**.

### 5.4. Compliance with the legal and policy framework

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Compliance with the framework set out in **Section 186 of the Local Government Act - Legal framework** and the policy framework set out in **Section 3.11 Procurement policy** is central to the probity of the procurement process.

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<sup>86</sup> Section 3C (2)(b) and (g) of the *Local Government Act 1989*

<sup>87</sup> These key fundamentals are consistent with the Commonwealth Government's *Fairness and Transparency in Purchasing Decisions: Probity in Australian Government Procurement – Better Practice Guide (August 2007)*.  
[http://www.anao.gov.au/~media/Uploads/Documents/anao\\_probity\\_bpg.pdf](http://www.anao.gov.au/~media/Uploads/Documents/anao_probity_bpg.pdf)

## 5.5. Use of an appropriately competitive process

In most cases, probity is improved where a competitive process is used to test the market. This applies to all but lower value procurements where the cost of securing multiple prices may exceed any potential savings.

Dependent upon the legislative requirement and the value of the proposed procurement, a competitive process may consist of tenders, expressions of interest and quotations. Invitations for bids should be targeted so as to maximise the opportunity to obtain value for money.

In the interests of obtaining the broadest range of bids possible, consideration should also be given to providing information on the council's website about how businesses, especially small and medium enterprises, can access and win local government work.

### ILLUSTRATION

One council provides encouragement to local business on its website with the following introduction:

#### DOING BUSINESS WITH COUNCIL

We spend over \$150 million annually on goods, works and services.

We aim to:

- achieve value for money for ratepayers
- conduct activities in a fair and ethical manner
- support local business
- support skills and training of suppliers.



A council should be careful not to erect barriers to competitive processes. These may include fees for tender documents and/or tenderer pre-qualification. Any fees for a pre-qualification arrangement must be clearly identified within the tender documents allowing prospective tenderers to make provision for these costs within their tender bid.

ETendering solutions must ensure prospective bidders have ready access to tender documentation and clear instructions on how to submit a bid.

### ILLUSTRATION

Many councils provide advice on their website to prospective tenderers regarding e-tendering. These instructions provide clear steps for downloading tender documents, using electronic forums for questions and uploading responses. One example can be found on the Banyule City Council website:

<http://www.banyule.vic.gov.au>



A competitive process must be accompanied with safeguards as to supplier conduct. Each council should have in place documented supplier behaviour expectations.<sup>88</sup> It is important that a council directly controls interaction with its suppliers. Consideration should be given to aspects such as:

- meetings with suppliers to be by appointment only
- meetings with suppliers to be attended by more than one council officer
- suppliers wanting to demonstrate a new product to be required to send details of that product to a generic email address accessible by more than one council officer.

## 5.6. Fairness and impartiality

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Potential suppliers often invest considerable time, effort and resources in preparing and submitting offers to councils. In return they are entitled to expect fair treatment at every stage of the procurement process.

Potential suppliers should all be provided with the same information. Procedures should be put in place to ensure that each bid is given fair and equal consideration.

The risk associated with processes that are not fair and impartial is that they may limit the number of bidders in the future and jeopardise a council's opportunity to obtain competitive prices and hence value for money (see also **Section 9.9 Tender evaluations**).

Equal access to information in the same form, and at the same time, for all potential suppliers is essential to fairness and likely to be in the long- term interest of the council. Procedures for controlling and monitoring the flow of information should be established before a tender process commences.

A further aspect of fairness relates to the fair payment of suppliers. Councils should consider including an appropriate fair payment clause in its contracts. Clauses could provide for:

- payment of debts within 30 days
- penalty interest for late payments
- requirement for the supplier to give notice of late payment in order to receive penalty interest
- suspension of the 30 day payment period in the event of a dispute.

When using Victorian State Government contracts it is a condition of use that a council apply the 'fair payment policy'.<sup>89</sup>

## 5.7. Consistency and transparency of process

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The essence of a consistent and transparent bid consideration process is that it builds the confidence of potential suppliers in the council.

All prospective supplier bids need to be evaluated in a systematic manner against clearly predetermined and disclosed evaluation criteria.

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<sup>88</sup> In its October 2012 report, the Independent Commission Against Corruption (ICAC) in New South Wales proposed in Recommendation 1 that councils communicate to suppliers a clear set of supplier behaviour expectations and the associated consequences for non-compliance.

<sup>89</sup> Details can be found at: <http://www.dbi.vic.gov.au/corporate-governance/fair-payments-for-small-business>

Where tenders or quotations are sought documentation should include the selection criteria. Where criteria are weighted the weighting should be decided and documented before the closing time/date for receipt of quotations and tenders. Weightings need not be disclosed to the bidder<sup>90</sup> although this action may build confidence in the council and the process. Council should be alert to tenders or quotations where bidders bias their bids according to any disclosed weighting.

Importantly, selection criteria must include all factors which a council proposes to take into account when evaluating a proposal. Hence, if social procurement or local buying objectives and similar initiatives are to be considered, then they must form part of the disclosed evaluation criteria.

Where certain tender requirements are mandatory these must be identified. These generally relate to risk management factors including insurance, financial viability and occupational health and safety. They are generally assessed in terms of pass or fail and are the first criteria to be assessed.

Transparency also has implications for accessing council information on procurement policies. Councils are required to publicly disclose their procurement policy (see **Section 3.11 Procurement policy**).

Best practice is served when councils also make their contract register publicly available, minimising information which is withheld from the public and thereby increasing the confidence of the public and potential tenderers in the integrity of the tender process. A contract register should contain the following information about contracts that have been awarded:

- the contract number
- title of the contract
- type of contract (for example, works or goods)
- name of the successful contractor (and ABN)
- total value of the awarded contract
- length of the contract.

The register should be available online. Examples of this type of disclosure can be found on the City of Port Phillip's website.

This type of disclosure is becoming accepted practice with governments across Australia. The underlying principle is that the public have a right to access government information.

Only trade secrets and genuinely confidential business information which would expose the contractor to unreasonable disadvantage should not be disclosed.

Contract documentation should specify that certain information will be publicly available. Consent to make available such information should be made binding on prospective bidders. Bidders should further be advised that disclosure may occur under the *Freedom of Information Act 1982* or as required by the Victorian Auditor-General's Office or the Victorian Ombudsman.

There are two further aspects to transparency and maintaining a good relationship with bidders:

- providing feedback to bidders who lodge unsuccessful proposals, and
- effectively handling grievances from bidders.

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<sup>90</sup> Ipex ITG Pty Ltd (in liq) v State of Victoria (2010) VSC 480

By keeping lines of communication open and unbiased, council should be able to develop and maintain a good relationship with tenderers and suppliers, thereby reducing the likelihood of complaints.

### **5.7.1. Feedback**

It is good practice for council to provide feedback to tenderers as a matter of routine. Council should promptly inform bidders of the decisions on the award of a contract or the bidder's elimination from expression of interest selection.

An investment in providing feedback can pre-empt expressions of concern by bidders and may save councils from protracted exchanges with aggrieved bidders. A single dispute can engage more resources than a routine feedback process. It is simply best practice.

The process for providing feedback should be built into the council's procurement procedures. Feedback is integral to an accountable and transparent procurement process and supports the goal of a fair, open and ethical relationship with suppliers.

By providing well-structured feedback and debriefing to tenderers who lodge unsuccessful proposals, councils can educate the market on their procurement process and expectations. This, in turn, may help improve the standard of proposals in the future.

### **5.7.2. Grievances**

It is best practice to:

- set up fair, equitable and non-discriminatory complaints handling procedures that are well understood by all parties involved in a procurement process
- effectively handle any complaints received in relation to a procurement process.

A complaint or grievance is a negative expression generally of resentment or faultfinding and is distinct from an enquiry or request for information.

Where a complaint is received, open communication will assist in resolving complaints to the satisfaction of the tenderer or supplier.

A council should consider appointing staff who are independent of a matter to investigate complaints. Grievance handling should be integrated into any corporate 'public request/complaint' type systems operated by a council.

Detailed guidance on providing feedback and managing grievances can be found at <http://finance.gov.au/archive/archive-of-publications/good-procurement-practice/06-feedback-and-complaints.html>

### ILLUSTRATION



One council has the following entry on its website:

#### PROBITY AND FAIRNESS

Council is committed to fairness in all its dealings with contractors and suppliers.

It is possible that people involved in contracting processes may become aware of or have information indicating corrupt, fraudulent or unfair activity in relation to tendering or contract processes. In these circumstances please contact council's internal audit unit. This unit is an independent department not involved at operational level with tendering or contracts. Phone XXXXXX and ask to speak to an internal auditor (in a small council this might be the CEO).

## 5.8. Identification and management of conflicts of interest<sup>91</sup>

Conflict of interest has particular implications for council staff, councillors, members of special committees and contractors/consultants. The prescriptive nature of legislation covering conflict of interest in Victorian local government requires careful consideration. The importance of this aspect of procurement cannot be over-emphasised, as significant penalties and consequences may follow a breach.

In simple terms, the law provides that a staff member holding a delegation(s)<sup>92</sup> or advising council or a special committee, or a meeting of council or a special committee<sup>93</sup>, has a conflict of interest which they must disclose in writing when they have a direct or indirect interest of the type specified in the legislation.

Separately, the Act provides that council staff must in the course of their employment:

- a) act impartially
- b) act with integrity including avoiding conflicts of interest.<sup>94</sup>

### 5.8.1. Identifying a conflict of interest

There are two steps in the process of identifying a conflict of interest.

First, there must be a relevant direct or indirect interest. Often this is a financial interest, but it can also be another sort of interest, such as a special advantage to a family member or a responsibility to another organisation.

Second, the interest must intersect or overlap with a person's official duty. This may involve a decision to be made by a council officer who has been delegated a council power or one who is advising council, including preparation of a report on tender evaluation.

<sup>91</sup> All persons engaged in procurement activities should have a knowledge and understanding of section 77A to 80C of the *Local Government Act 1989* on conflict of interest.

<sup>92</sup> Section 80B of the *Local Government Act 1989*

<sup>93</sup> Section 80C of the *Local Government Act 1989*

<sup>94</sup> Section 95 (1)(b) of the *Local Government Act 1989*



### 5.8.2. Staff members holding a delegation

In a procurement matter where a staff member holds a delegation in relation to procurement and has a conflict of interest, **that member must not exercise their delegation** and must disclose the interest. Regardless of whether delegation is from the council or CEO under a deed of delegation, the procurement matter should be dealt with by another qualified staff member.

### 5.8.3. Staff members advising council or a special committee

Where a staff member provides advice or service to the council or a special committee (or provides advice to a meeting of council or a special committee) and has a conflict of interest in the matter, they **must disclose that conflict**. This could include any member of a tender/quotation evaluation panel. It would also include preparing a report on a procurement matter (for example, recommending acceptance of a tender).

Staff are considered to be providing advice to a meeting of council when they:

- sign a report
- prepare part of a report (even when someone else's name appears on the report)
- provide information for inclusion in a report.

Staff who present verbal advice to a meeting of council or a special committee are held to have a conflict of interest which they must disclose. They must also declare any conflict of interest to the meeting when they make a presentation to council or a special committee.

If a tender evaluation report (or any other advice) is to be considered by the council (or a special committee) and the staff member in the circumstance identified above has a personal or private interest of the type specified in the legislation, then that staff member has a conflict of interest which must be disclosed to the CEO as required by the Act.<sup>95</sup>

Although the Act only requires conflicts of interest to be disclosed in defined circumstances, it is good practice to make an interest known to other members of an evaluation panel in any situation where there might be a perception of unduly influencing an outcome.

### 5.8.4. Secondary employment arrangements

Staff who have approved arrangements for undertaking, or are engaged in, secondary employment must have particular regard to the associated exposure to conflicting interests.<sup>96</sup>

### 5.8.5. Contractors and consultants providing advice

Contractors, including consultants, engaged under a contract to provide advice or service to a council or special committee (or to a meeting of the council or a special committee) – for example, as part of the procurement process – are subject to the same rules as staff and must disclose any direct or indirect interest they have in a matter.

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<sup>95</sup> Section 80B (2)(c) of the *Local Government Act*

<sup>96</sup> The 2008 report by the Victorian Ombudsman on *Conflict of Interest in Local Government* recommended that councils develop specific policies or rules on gifts and hospitality; seeking consent for outside (secondary) employment and outside activities that could reasonably relate to an employee's council duties; and policies to ensure staff do not use information other than for the purposes for which it was provided and to prevent tenderers from acquiring an information advantage by hiring council staff. [http://www.ombudsman.vic.gov.au/resources/documents/Conflict of interest in local government March\\_2008.pdf](http://www.ombudsman.vic.gov.au/resources/documents/Conflict%20of%20interest%20in%20local%20government%20March_2008.pdf)

Staff engaging contractors should ensure that contractors are aware of the conflict of interest legislative requirements. Best practice suggests this should be formalised as part of the process of engaging contractors and consultants who will be giving advice. A specification for consulting and similar services should clarify that the conflict of interest provisions of the Act apply when service or advice is provided to council or a special committee.

A contractor or consultant who has a conflict of interest in a matter, to which the advice or report relates, must disclose the type of interest when providing the advice/report and before the advice/report is considered by a meeting of council or a special committee.

### 5.8.6. Acceptance of gifts and hospitality

Caution is also required with regard to gifts and hospitality. Staff need to exercise care in regard to:

- avoiding a breach of section 78C of the Act resulting from a conflict of interest due to receipt of an applicable gift (see **Section 6.2.2 Gifts and hospitality**)
- being familiar with and applying council policy on these matters (see **Section 6.2 Policies to facilitate accountability**)
- being particularly alert to the consequences of accepting a gift from a potential supplier which may be a crime in itself.<sup>97</sup>

### 5.8.7. Codes of conduct

Whilst the Act confines conflicts of interest in respect to staff members to those holding a delegation(s) or advising council or a special committee, many councils use broader definitions of conflict of interest within their Staff Code of Conduct.

Staff involved in procurement processes at a council with a broad definition of conflict of interest would be obliged to disclose a conflict of interest which arises between public duty and private/personal interest in order to comply with the Staff Code of Conduct. This may be broader than the requirements of the Act.

Similarly councillors involved in procurement matters are bound by the General Councillor Conduct Principles which require a councillor to avoid conflicts between his or her public duties as a councillor and his or her personal interests and obligations.<sup>98</sup> There are provisions for a hearing by a Councillor Conduct Panel in respect to alleged breaches of those principles. (However, see **Section 9.5 Tender evaluation panels.**)

Councillors are also subject to the Councillor Code of Conduct.<sup>99</sup> Sometimes these will provide for perceived as well as actual conflicts of interest and interests outside the legislation to be identified and declared.

#### ILLUSTRATION



One council's Staff Code of Conduct provides:

*A 'conflict of interest' is a situation where a conflict arises between public duty and private/personal interest. It refers to circumstances where a staff member could be influenced, or could be reasonably perceived to influence or be influenced, by a private or personal interest when performing the official functions/duties of their role.*

<sup>97</sup> Section 179 of the *Crimes Act 1958*. If a gift is given in exchange for favourable consideration it may constitute a 'secret commission' under section 176 of the *Crimes Act 1958*, which is a criminal offence.

<sup>98</sup> Section 76BA(a) of the *Local Government Act 1989*

<sup>99</sup> A Guide to Councillor Conduct Arrangements can be found at [http://www.dpcd.vic.gov.au/\\_\\_data/assets/pdf\\_file/0011/38198/2009\\_Guide\\_to\\_Councillor\\_Conduct\\_Arrangements.pdf](http://www.dpcd.vic.gov.au/__data/assets/pdf_file/0011/38198/2009_Guide_to_Councillor_Conduct_Arrangements.pdf)

Codes of conduct should include provision for standards of behaviour in relationships between suppliers and council staff (see **Section 5.7 Consistency and transparency of process**).

### 5.8.8. Evaluation panels

Best practice is served when all participants proposed to be appointed to a tender evaluation panel (however formed) are required to complete a declaration stating they do not have any conflict of interest prior to commencing any activity in regard to a proposed procurement.

#### ILLUSTRATION



A council's conflict of interest declaration for tender evaluation purposes may take the following form:

#### To Chief Executive Officer

Re: Contract No.

I declare that I DO NOT have a conflict of interest in the evaluation of tenders pursuant to section 79 / 80B / 80C# of the Local Government Act 1989.

I further declare that, if I become aware that I have a conflict of interest during the evaluation of tenders, I will immediately disclose my conflict of interest in accordance with the relevant legislative provision.

I also declare that I have no financial interest in or association with any tenderer or other person named in any tender submission as providing goods or services to a tenderer. I further declare that, if I become aware of any such interest or association during the evaluation of tenders, I will immediately bring such interest or association to the attention of council's Chief Executive Officer.

Name: \_\_\_\_\_

Signature: \_\_\_\_\_

Date: \_\_\_\_\_

# Delete as appropriate.

This declaration is distinct from obligations which staff, councillors and contractors have to disclose conflicts of interest under sections 77A to 80C of the Act.

It is beyond the scope of these guidelines to include detailed guidance on all aspects of conflict of interest. However, all persons involved in procurement should familiarise themselves with the legislative provisions in relation to conflict of interest. They should also consult the various guides on conflict of interest published by Local Government Victoria.<sup>100</sup> Further, each council should conduct specific training on the implications of conflict of interest provisions for all staff engaged in procurement (see **Section 5.13 Training in probity**).

<sup>100</sup> In particular and *Conflict of Interest: A Guide for Council Staff October 2011* which can be found on the Local Government Victoria website.

## 5.9. Appropriate security and confidentiality arrangements

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Procedures adopted for receiving and managing tender and supplier information should ensure the security and confidentiality of all information including intellectual property and proprietary information of the tenderers as well as the integrity of the procurement process. The test of security is that tender documentation must not be disseminated beyond members of the panel.

Appropriate security and confidentiality measures commence with preparation of the tender documentation. The documentation should remain confidential until released to the marketplace in order to maintain fair competition.

From that point forward in the procurement process discussions and documentation should remain secure and confidential, particularly through the council/committee agenda preparation phase, at least until a decision on a tender is made public, including:

- minutes of all meetings
- tender distribution lists
- tender briefing attendance forms<sup>101</sup>
- selection panel appointment (and acceptances)
- conflict of interest declarations
- confidentiality deeds/declarations
- selection criteria weightings
- submitted tenders including attachments and any supplementary information
- tender evaluation discussions and assessments, including all scoring
- questions to tenderers and the answers
- referee questions and answers
- tenderers shortlists
- preferred tenderer negotiations
- tender evaluation report (at least until released under council resolution or policy).

In many cases council will hold these documents in electronic form and appropriate electronic security access should be put in place.

Each member of a tender evaluation panel should also complete a deed of confidentiality. One suitable version of a confidentiality agreement can be found on the Victorian Government Purchasing Board's website <http://vgpb.vic.gov.au/>

Where a council is providing bidders with confidential information as part of the request for tender and/or expression of interest, the bidder should equally be bound to confidentiality. Contract documentation should provide that information used in the development of the bid by the tenderer, in whatever form provided by the council or converted by the bidder, must (at the council's request) be returned to council following advice of the outcome of the tender/quotation process.

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<sup>101</sup> Individual registration forms for each potential bidder representative attending briefings will ensure that the identity of competing bidders is not identified to one another.

## ILLUSTRATION



A confidentiality agreement executed by the authorised representative of the tenderer could take the following form:

### **CONFIDENTIALITY AGREEMENT**

Contract Number: XXXXXXXXXXXXX

#### **Tender Bidder Confidentiality**

I hereby undertake to agree to:

1. maintain the confidentiality of the information to which I will have access and take reasonable precautions to prevent its unauthorised dissemination or use.
2. not use any confidential information for purposes other than those necessary to perform my function and shall not allow any other person access to the confidential information.
3. accept that this confidentiality agreement is binding.
4. treat as secret and confidential all confidential information to which I have access or which is disclosed to me.
5. not copy or reproduce the confidential information (in whole or in part) without the approval of the XXXXX city/shire council and will take all necessary precautions to prevent unauthorised access to or copying of the confidential information by any other person.
6. upon request, return any information supplied to myself.

nothing in this agreement precludes me from disclosing any confidential information:

- if required under a binding order of a government agency or procedure for discovery proceedings.
- if required under any law or administrative guidelines, directive, request or policy having the force of law.
- which is in the public domain.
- with the prior written consent of the council's CEO.

Name: \_\_\_\_\_

Signature: \_\_\_\_\_

Information which is confidential pursuant to section 77 of the Act must not be released by councillors (or members of a special committee). Confidential information for these purposes is information made confidential when:

- the CEO has designated the information confidential for a period of 50 days
- the information is provided to a meeting that is closed to the public, or
- the council has designated the information 'confidential'.

## 5.10. In-house teams and embedded contractors

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Councils must exercise particular diligence with confidentiality and security of information where:

- they operate in-house teams that compete with external contractors
- contractors are engaged under a contract which involves performing office-based work that has proximity or potential access to otherwise confidential information.

Councils must ensure that in-house teams do not have access to any tender information which would advantage them over external bidders.

Corresponding attention needs to be given to ensuring that in-house teams, as council staff, are adequately skilled in identifying and disclosing conflicts of interest and other probity matters (see **Section 5.13 Training in probity**).

## 5.11. Reviewing probity standards

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When applying probity standards councils should consider the summary framework used by the Victorian Auditor-General to review the setting and application of probity standards.<sup>102</sup> These standards are:

- adequacy of policies
  - > policies identify acceptable probity standards
  - > policies provide sufficient guidance on applying probity standards
- application
  - > tender bids treated equally
  - > adequate controls for the management and security of tender documentation
  - > conflicts of interest (and confidentiality) adequately managed during tendering
  - > tender evaluation reports contain sufficient detail to support recommendations to award tenders
- oversight and training
  - > council staff trained in probity standards
  - > adequate arrangements to monitor adherence to probity standards.

When a council undertakes an annual review of its procurement policy it should also consider other aspects of the procurement process by applying the foregoing tests of probity standards. Ideally a council should develop a comprehensive checklist which it applies at the time of each review.

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<sup>102</sup> *Tendering and Contracting in Local Government, Victorian Auditor-General's Report, February 2010, Page 7.* [http://download.audit.vic.gov.au/files/240210\\_Tendering\\_audit\\_summary.pdf](http://download.audit.vic.gov.au/files/240210_Tendering_audit_summary.pdf)

## 5.12. Probity plans, probity auditors (and/or advisors) and reports

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### Probity plans

A probity plan is a document that sets out the steps to be taken and the processes to be implemented to ensure a tender is conducted fairly and ethically.

Formal probity plans (and procurement conduct plans) should be developed and implemented in one of two circumstances:

1. where the value of a proposed contract exceeds a specific value over its life determined by council
2. where a proposed contract is in the council's view particularly complex, of a high risk or controversial nature, and requiring a high level of public confidence.

The benchmark value at which a proposed contract should be subject to a probity plan is \$10 million.<sup>103</sup> Although this is a matter for individual councils, a judgement must be made between the direct cost of developing and implementing a formal probity plan and the potentially considerable cost (both financial and to public confidence) of resolving problems that may arise from not adopting a probity plan approach. Ultimately, a policy position on this decision should form part of a council's procurement policy.

A probity plan should cover the following matters:

1. identification of the contract
2. objectives of the probity processes
3. statement on the proposed application of probity principles
4. roles and responsibilities of each participant in the evaluation process and probity auditing
5. specification of what probity auditing will occur
6. probity tasks, documents and timelines
7. measures for ensuring confidentiality and security
8. communication protocol with bidders (to ensure that no one bid obtains an unfair advantage over others)
9. record keeping requirements.

### Probity auditor or advisor<sup>104</sup>

A probity plan generally involves the appointment of a probity auditor or advisor.

A probity advisor is involved in providing advice on probity issues which may arise, together with advice on strategies to overcome potential problems.

A probity auditor's role is more generally confined to reviewing all processes and documentation throughout the tender process and reporting to council or the CEO after the end of the process.

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<sup>103</sup> The \$10 million threshold for development of a probity plan is consistent with the State Department of Treasury and Finance, *Good Practice Guidelines on Conduct of Commercial Engagements*, July 2011 <http://vgpb.vic.gov.au/CA2575BA0001417C/pages/procurement-practitioners-stage-1---planning-step-3---develop-the-procurement-strategy-vgpb-conduct-of-commercial-engagements-policy>

<sup>104</sup> Details on roles can be found in the Commonwealth Government's *Fairness and Transparency in Purchasing Decisions: Probity in Australian Government Procurement – Better Practice Guide* (August 2007) Page 15. [http://www.anao.gov.au/~media/Uploads/Documents/anao\\_probity\\_bpg.pdf](http://www.anao.gov.au/~media/Uploads/Documents/anao_probity_bpg.pdf)

Where a probity auditor or advisor is appointed this must occur before the tender specifications and documentation are completed. Care is required in selecting a probity auditor or advisor to ensure they are independent and retain the necessary skills.<sup>105</sup>

The probity auditor or advisor takes no part in the decision-making process of the tender evaluation panel but will assist the panel on probity matters.

### **Probity report**

A probity auditor's report of the audit at its conclusion should incorporate the following contents:

1. definition of the scope of the audit
2. statement that the probity auditor has been able to fulfil their project brief in order to express an opinion on the tender process
3. brief description of the probity framework (for example, plans, policies, guidelines etc.) against which the review has been conducted
4. statement about whether or not the audit was conducted according to the probity framework
5. list of any qualifications or limitations on the probity auditor's opinion on the process
6. findings in the form of an expression of opinion about whether – in all material respects and based on the probity framework – the process was undertaken according to the legislation and council procurement policy.

In the case of tenders where the complexity, risk or value are high, consideration should be given to ensuring the role of probity auditor is separated from the role of a probity advisor.<sup>106</sup>

The role of each of these appointments is well described in *The Victorian Government Purchasing Board's Good Practice Guidelines: Conduct of Commercial Engagements*.<sup>107</sup>

## **5.13. Training in probity**

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One of the key measures a council should adopt in order to achieve a strong application of probity standards in procurement is in skilling staff involved in procurement to identify conflicts of interest and apply probity principles.

All staff involved in procurement should be skilled in probity fundamentals and their application. Chairpersons of evaluation panels should also be skilled in the development and implementation of probity plans and the engagement of probity auditors/advisors.

Such skills training should be competency-based and include a formal assessment of skills gained and accredited. Only accredited persons should chair tender evaluation panels.

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<sup>105</sup> Failure to ensure the independence of a probity auditor was considered in the Victorian Auditor-General's Office report on the *New Ticketing System Tender*. [http://www.audit.vic.gov.au/reports\\_and\\_publications/latest\\_reports/2007/20071031\\_ticketing\\_system.aspx](http://www.audit.vic.gov.au/reports_and_publications/latest_reports/2007/20071031_ticketing_system.aspx)

<sup>106</sup> The need for separate roles should be considered in light of the findings of the Victorian Auditor-General's Office in its report on the *New Ticketing System Tender*, especially recommendation 3.4. [http://www.audit.vic.gov.au/reports\\_publications/reports\\_by\\_year/2007/20071031\\_ticketing\\_system.aspx](http://www.audit.vic.gov.au/reports_publications/reports_by_year/2007/20071031_ticketing_system.aspx)

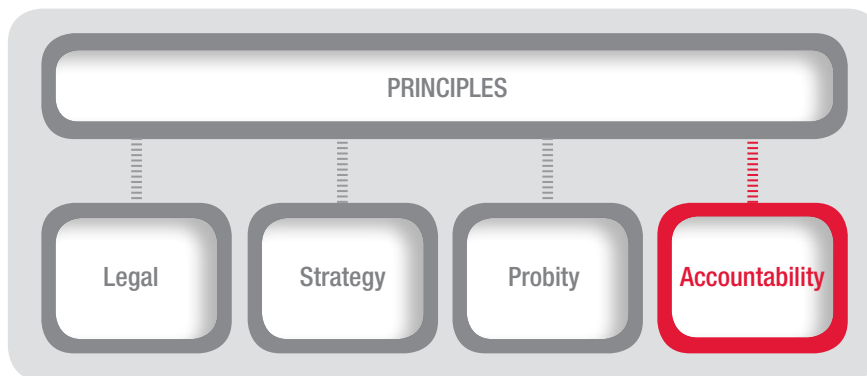
<sup>107</sup> <http://www.vgpb.vic.gov.au/CA2575BA0001417C/pages/procurement-practitioners-stage-1---planning-step-3---develop-the-procurement-strategy-vgpb-conduct-of-commercial-engagements-policy>







Accountability



## 6. Accountability

### 6.1. General principles

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Accountability in this section of the guidelines means that staff are responsible for the actions and decisions they take in relation to procurement and for the resulting outcomes. Staff are answerable for such activities through the established lines of accountability ultimately to the CEO.

The test of accountability is that an independent third party must be able to see clearly that a process has been followed and that the process is fair and reasonable. Every step of the process must be properly documented. Record keeping is also paramount. There must be a sufficient audit trail to account for all procurement decisions.

Accountability in this section covers all aspects of the initiation, approval, processing and review of procurement transactions and the holding of persons responsible for the validity, correctness and appropriateness of their actions. Accountability must be based on a strong policy framework which sets the parameters for the integrity of the system.

A council needs to have in place a number of instruments, processes and policies to ensure accountability. These should cover:

- processes to allow staff to identify and disclose conflicts of interest
- council Staff Code of Conduct (and a Councillor Code of Conduct)
- policies and procedures on fraud, gifts and hospitality and purchasing cards
- sound regime of internal controls
- effective internal audit functions
- systems for providing feedback and managing grievances on procurement matters.

Matters relating to conflict of interest and Staff Codes of Conduct are covered elsewhere in this guidance (see **Section 5.8.7 Codes of conduct**).

Matters relating to feedback and managing grievances are also covered elsewhere in this guidance (see **Section 5.7 Consistency and transparency of process**).

## 6.2. Policies to facilitate accountability

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There are at least three key policies which council should have in place to support accountability in procurement, including:

- fraud (sometimes called 'fraud and corruption control' or similar titles)
- gifts and hospitality
- use of purchasing cards.

### 6.2.1. Fraud policy

A council should develop and implement a fraud policy which creates a holistic framework to prevent the risk of fraud and strengthen organisational integrity.

Fraud is the crime of obtaining a financial benefit by deception which involves some form of material loss to the entity defrauded.<sup>108</sup>

A fraud policy should address the three conditions which are generally present when fraud occurs:

- incentive or pressure that provides a reason to commit fraud
- opportunity for fraud to be perpetrated (for example, the absence of controls, ineffective controls, or the ability of management to override controls)
- an attitude that enables individuals to rationalise the fraud.

A fraud policy should cover the following aspects:

- prevention
- deterrence
- detection
- investigation.

Councils are required to have in place whistleblower policies and processes in order to facilitate disclosures of improper conduct by councillors and council officers. A council should not tolerate improper conduct or the taking of reprisals against those who come forward to disclose such conduct.

Staff should feel confident to report matters where they have concern as to improper conduct that constitutes one of the following:

- corrupt conduct
- a substantial mismanagement of public resources
- a substantial risk to public health or safety
- a substantial risk to the environment.

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<sup>108</sup> In October 2012 the Independent Commission Against Corruption (ICAC) in New South Wales reported on investigations which found that staff had facilitated substantial payments of false invoices generated by suppliers in return for corrupt payments to staff. The financial loss to one council was estimated at almost \$1 million and led to imprisonments.  
<http://www.icac.nsw.gov.au/investigations/past-investigations/investigationdetail/185>

### 6.2.2. Gifts and hospitality

The Act requires that council staff in the course of their employment act impartially, including avoiding conflicts of interest. It further provides that staff who receive an applicable gift may have an indirect interest and therefore a conflict of interest.<sup>109</sup> (see also **Section 5.8 Identification and management of conflicts of interest**).

Particular care should be taken with gifts offered by suppliers and potential suppliers, including gifts to family members and unusual or exceptional invitations from any party with an interest in the tender.<sup>110</sup>

Council should have in place a policy which spells out its requirements with regard to gifts and hospitality (many councils have separate policies applicable to staff and to councillors). A program should be in place to communicate expected behaviour to staff in a way they can easily grasp.

A gift and hospitality policy should cover matters of:

- soliciting of gifts or hospitality for private purposes
- acceptance of a gift or hospitality
- gifts of token value
- ownership of gifts where accepted
- disciplinary consequences of policy breaches.

### 6.2.3. Purchasing cards

Usage of a corporate purchasing card is an effective way to acquire goods and services where it is not economical or practicable to issue purchase orders. Councils using this method of purchase should have in place a policy and procurement process which covers;

- identification of staff who are authorised to use cards (consistent with formal council delegations)
- expense thresholds for card use, including ATM withdrawals
- restrictions on use and on personal gain
- use agreement statements for card holders
- review and verification of card purchases
- audit trail for purchases by card
- security of cards
- sanctions for misuse or fraudulent use of cards.

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<sup>109</sup> *applicable gift* means one or more gifts with a total value of, or more than, the gift disclosure threshold (currently \$500 or greater), received from a person or persons specified in subsection 78C(2) of the Act in the 5 years preceding the decision or the exercise of the power, duty or function.

<sup>110</sup> In October 2012 the Independent Commission Against Corruption (ICAC) in New South Wales reported on investigations into allegations that employees of 110 state and local council authorities accepted a wide range of sometime substantial gifts from companies in return for placing orders and continuing business relationships with these companies.  
<http://www.icac.nsw.gov.au/investigations/past-investigations/investigationdetail/185>

## 6.3. Sound internal controls

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Councils have a duty to develop and maintain adequate internal control systems.<sup>111</sup>

Internal controls are the systems put in place to ensure sound financial management and effective and efficient service delivery. They comprise systematic measures (such as reviews, checks and balances, methods and procedures) set up by a council to:

- conduct operations in an orderly and efficient manner
- safeguard assets and resources
- deter and detect errors, fraud and theft
- ensure accuracy and completeness of accounting data
- produce reliable and timely financial and management information
- ensure adherence to other policies and plans.

The foundations of a sound internal control platform are found in areas including:

- organisation structure
- procurement policy
- financial management policies such as those on fraud prevention.

The key internal control activities which have application to procurement are set out below.

### 6.3.1. Segregation and rotation of duties

This requires that different staff be assigned responsibility for different elements of related activities, particularly those involving authorisation, custody or record keeping.


Best practice is to have different people for each of:

- drafting and approving tender specifications
- raising and approving purchase orders
- receipting goods
- approving related invoices
- reviewing and reconciling financial records
- performing inventory counts.

Controls should also ensure that staff rotate duties in positions more susceptible to fraud and that staff undertake regular periods of annual leave.

All staff undertaking approval, review and checking processes must familiarise themselves with the matters which they are considering and make an informed assessment.

With proper segregation, no single person has complete control over all buying activities.



The importance of the segregation and rotation of duties is nowhere better illustrated than in the October 2012 report of the Independent Commission Against Corruption (ICAC) in New South Wales where a breakdown in sound internal control led to substantial fraud.

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<sup>111</sup> Section 140 (2)(g) of the *Local Government Act 1989*

### **6.3.2. Accountability and authorisation**

Transactions and activities should be conducted in accordance with a council's procurement and other financial policies.

Best practice examples include:

- all procurements comply with approved procurement policy
- procurements are authorised by the correct staff members with the relevant delegated threshold powers
- contract variations are approved within applicable limits and by the authorised staff member
- signature and password authorisations are updated routinely
- invoices are paid in a timely manner.

### **6.3.3. Adequate documentation and controls**

Providing evidence to substantiate the validity of transactions and ensure that a clearly documented audit trail exists for procurement activities is necessary.

Best practice includes:

- maintaining copies of all tendering evaluation records
- adequate substantiation for contract payments, especially variations
- reviewing supplier invoices for accuracy (comparing charges to purchase orders)
- verifying that the goods and services purchased have been received
- performing monthly reconciliations of operating ledgers to ensure accuracy and timeliness of expenses.

### **6.3.4. Physical controls**

Ensuring control over assets and records in order to protect the assets.

Best practice examples include:

- securing goods received in a restricted area
- restricting inventory access to appropriate staff
- locking away goods and materials, and providing a key or combination to as few people as possible
- movement of goods in and out of storage recorded in an integrated inventory management system.

### **6.3.5. Independent checks**

Council should have in place a routine program for monitoring performance through random internal checks and an internal audit program. The checks should be conducted by persons knowledgeable in the function but independent of their operation.

## 6.4. Internal audit

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A key means of assuring a council that internal controls are in place (see **Section 6.3 Sound internal controls**) is the use of an internal audit to provide assurance of adequate controls and to mitigate the risks inherent in the council's procurement processes.

The great majority of councils contract-in the required resources for internal audit compliance functions whilst a few have an in-house internal audit function as part of their governance structure. The type of assurance function needs to be geared to the legal and regulatory risks of the council.

Internal audits should be viewed as an opportunity to value-add to the procurement function. A well-constructed internal audit process can value-add by:

1. cutting revenue leakages, reducing costs, increasing efficiencies and minimising the diminution of asset losses
2. promoting acceptance of, and reinforcing value adding, to works and services
3. raising the level of assurance (confidence) in governance across a council
4. better informing decision-making through improved financial reporting.

In light of the October 2012 report of the Independent Commission Against Corruption (ICAC) in New South Wales councils should consider the risks presented by:

- relational selling and gift giving
- procurement processes
- inventory management.

Where they consider the council at risk, they should add these matters to their internal audit program.

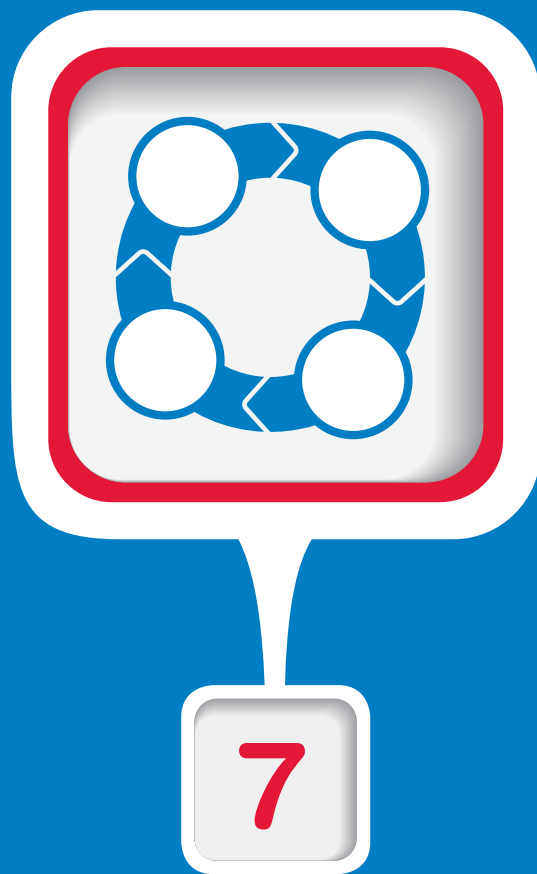
Councils are also required to have audit committees whose role is to oversee corporate governance including financial and performance reporting, risk management, internal and external audit and internal control.<sup>112</sup>

Councils should include in the charter of audit committees provision to ensure that the risk management framework and reporting mechanisms give adequate coverage of procurement processes and risks as well as the council procurement policy.

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<sup>112</sup> Section 139 of the *Local Government Act 1989*



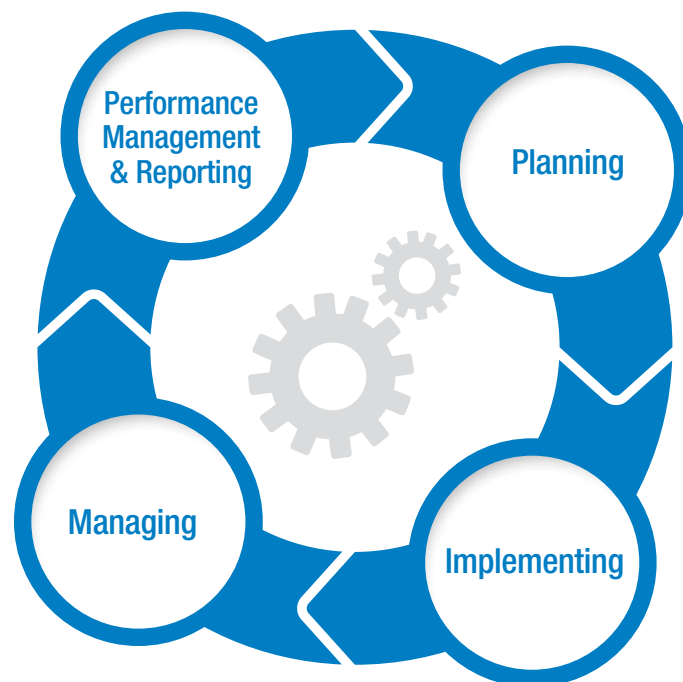


The procurement cycle

## 7. The procurement cycle

The following sections of the guidelines contain guidance on the planning, implementation, management, monitoring and reporting of the procurement function.

The following diagram summarises the process cycle for the procurement of goods and services and the carrying out of works used in these guidelines.<sup>113</sup>



One of the keys to a successful procurement outcome is to prepare a timetable of steps in the process and to adhere to that timetable.

The goal is to ensure that procurement decisions are made in a timely manner and provide certainty to all stakeholders including potential suppliers. Timely decision-making will also avoid increased costs associated with delays, both to the council and to potential suppliers.

**Procurement manual:** Councils should support their procurement cycle with a cohesive set of checklists, templates and proformas in the form of a procurement manual. The preferable location for this manual is online for ease of access and maintenance rather than a lengthy hardcopy document. A key aspect of this material is its structure. Given the volume of material that supports procurement, it should be structured in a logical manner to ensure it is useful and accessible.

<sup>113</sup> This model draws on the Victorian Auditors General's Office *Public Sector Procurement: Turning Principles into Practice* October 2007, although it does not follow that model entirely. This is not the only model which could be used to reflect the procurement process.

## 7.1. Role of eProcurement

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In the context of achieving continual improvement in the procurement cycle many councils have improved their efficiency and effectiveness through the implementation of varying aspects of eProcurement. In these guidelines eProcurement is defined as the automation of the procurement process through the use of technology.<sup>114</sup>

EProcurement can take many forms, from the simple automation of purchase orders through to the online pre-qualification of tenderers, electronic issue and receipt of tenders (eTendering), electronic tender evaluation and use of electronic contract management systems. It is beyond the scope of these guidelines to address the selection and implementation of information and communication technology systems (ICT) for procurement purposes. However, councils will be aware of the need for careful planning and take-up of electronic systems.

The benefits of using eProcurement solutions include:

- considerable cash savings negotiable with key suppliers
- process savings and improvements
- improved customer service
- speed and simplicity of ordering
- accurate management information and a transparent audit trail
- efficiencies on the supply side, reducing suppliers' process costs and, ultimately, prices charged to the council
- internal process efficiencies, freeing up staff time to concentrate on alternative value-adding activities.

The greatest value from eProcurement is derived when it is interfaced, or preferably integrated, with council's other systems to the optimum extent – subject to cost.

Perhaps the most critical aspects of the introduction of all forms of eProcurement are the need for investment in skills development, culture change and the provision of user support.

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<sup>114</sup> In some contexts, eProcurement is used in the narrower sense of procurement activities carried out on the internet. In other contexts it largely means online shopping.



Planning



## 8. Planning

### 8.1. Planning objectives

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The objectives of the planning phase of the procurement cycle are to:

1. ensure the goods, services or works being procured meet the council's needs
2. ensure both the legislative requirements and council procurement policies are followed and a successful value for money outcome is achieved
3. manage the risks associated with the procurement.

The approach to each of these objectives, and the steps necessary to implement them, will depend on the scale of the procurement. Most of the guidance which follows applies to significant procurements in terms of value, complexity or risk.

This section of the guidelines covers activities from the decision to undertake procurement through to the close of tenders.

Factors that influence procurement planning include:

- the nature of the goods, services or works being procured – for example, capital projects requiring a design response may include a protracted period during which potential suppliers are required to move through a staged procurement process
- the complexity of the procurement – for example, where multiple parties are involved in negotiating aspects, such as financing and risk-sharing arrangements
- whether the need for the goods, services or works being procured is critical to service delivery by council – for example, waste management services
- whether there are time constraints on the delivery of the goods, services or works which mean the procurement needs to take place quickly
- the level of risk associated with the procurement – for example, a project that presents a high risk to the public requires more detailed documentation than procurement of general stationery items
- the cost of subsequent purchases that may rely on the successful outcome of the current procurement exercise – for example, a council may engage an architect to design a childcare centre and specify the functionality requirements. Tenders may later be called separately for construction of the facility
- the maturity or size of the market – for example, the market for a particular expert service may be small and specialised, thereby limiting the number of potential suppliers.

A council will need to take these factors into account when tailoring its approach to planning procurement.

## 8.2. Resourcing the procurement process

Consideration also needs to be given to ensuring that adequate resources, including adequate knowledge and skills, are available to ensure a successful and compliant procurement outcome.

Reference should be made to **Section 4.6 Project teams** for guidance on the use and role of project teams.

## 8.3. Authority and funding to procure

One primary prerequisite for every procurement is to ensure that adequate authority is in place. Before proceeding to procure any goods, services or works the relevant staff should confirm they have the authorisation, delegation or council direction necessary to undertake the procurement.

Procurements which reach the thresholds of section 186 of the Act should be covered by appropriate delegations granted pursuant to section 98 of the Act (see **Section 4.7 Delegations**).

Procurements at values below the threshold should be subject to authorisations of staff and include any conditions on those authorities, such as the number of prices or quotations required.

A typical procurement policy from one council records the authority and conditions to procure at levels below the thresholds in a format similar to the following:

Up to \$3,000 #	> \$3,000 up to \$15,000 #	> \$15,000 up to \$75,000 #	> \$75,000 up to \$149,999.99 #
<b>Acceptance of quotations</b>			
By the coordinator	By the team leader	By the departmental manager	By the director
<b>Quotations required</b>			
Obtain at least one (1) verbal or written quotation  A written quote is preferable for verification purposes	Obtain at least one (1) written quotation	The standard practice is for staff to seek and receive at least three (3) written quotations.  If less than three quotations are to be sought or were received, then the purchase is not to proceed unless the reasons for proceeding with the purchase are approved by the Director and placed on the relevant information management file.	

# All \$ sums include GST

Councils should develop their own rules for quotation requirements.

The level of authority granted to staff and the conditions will vary between councils.

Authorisations should also cover the approval of contract variations and should consider setting maximum values of variation as a percentage of the total value of the contract before the need for approval is escalated to a senior level.

Verification should be made of the assessed value of each procurement against the council's budget, a funding resolution of the council and/or the council's financial system to ensure adequate funds are available to meet the liability created by a procurement decision.

The following sections provide guidance on probity plans, strategic procurement plans, procurement conduct plans and risk management plans. A council may wish to develop its own format for an overall procurement plan. Attention should be paid to the adequacy of the content.

## 8.4. Consider possible need for a probity plan

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Another prerequisite for a major procurement is to determine whether a probity plan should be prepared. The criteria to be applied for this decision are set out in **Section 5.3 Probity fundamentals**.

## 8.5. Identifying what needs to be procured

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Prior to preparing a specification of needs it is essential to identify the need in the context of the proposed procurement's contribution to the council's objectives.

In the context of the legislative requirement to avoid waste and extravagance in council spending, there is also an element of justification in assessing need.<sup>115</sup>

The process of identifying need for significant value procurements involves:

- confirming the origins of the business need which can derive from circumstances such as a council decision based on the council plan, council budgets or simply the need to continue to provide existing services. Consultation with stakeholders to identify and substantiate the need is important at this stage
- identifying the goods, services or works to be procured
- analysing the supply market to determine if the goods, services and works proposed to be procured are available – to gain a thorough understanding of the range or scope and pricing/costs of goods, services or works that may meet the business need, and to identify a range of viable procurement options (see **Section 8.6 Analysing the supply market**)
- preparing a realistic, evidence-based assessment of the costs, benefits and risks associated with each procurement option. A business case should clearly identify any assumptions made and provide clear evidence of the basis for these assumptions.

The effort devoted to the process of identifying need, and particularly the extent of any business case, will depend on the complexity, value and risk of the procurement.

A significant project will generally call for a full business case.<sup>116</sup>

Alternatively, completion of a strategic procurement plan will address most of the business case requirements.

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115 Section 140 (2)(f) of the *Local Government Act 1989*

116 Guidance on developing a business case can be found in the *Good Practice Guidelines Developing a State Purchase Contract Business Case* produced by the Strategic Sourcing, Government Services Group, Department of Treasury and Finance (July 2011) [http://www.vgpb.vic.gov.au/CA2575BA0001417C/pages/procurement-practitioners-stage-1---planning-step-3---develop-the-procurement-strategy-state-purchase-contracts-\(spc\)-policy](http://www.vgpb.vic.gov.au/CA2575BA0001417C/pages/procurement-practitioners-stage-1---planning-step-3---develop-the-procurement-strategy-state-purchase-contracts-(spc)-policy)

## 8.6. Analysing the supply market

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The process of determining if the goods, services or works are available in the marketplace will arise with new or atypical, rather than routine, procurements, although procurement staff will generally also monitor the supply market for routine procurements.

Supply market analysis can also provide an understanding of the range and pricing of the required goods or services and assist in identifying the range of alternative procurement options.

Analysis will allow a council to develop an understanding of the range of suppliers in the market, the factors driving supply conditions and how they may affect the procurement. This is important for developing requirements/specification and in determining the strategy to encourage optimal market participation and thereby achieve value for money.

## 8.7. Strategic procurement plan

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It is advisable for more high risk, complex or larger scale procurements to develop a strategic procurement plan. Generally a strategic procurement plan will cover:

- scope of the requirement
- estimated value/financial considerations
- strategic analysis – business case including key objectives, business needs, critical success factors, current/ proposed spend (volume/trends) and demand profile
- policy matters affecting the procurement (for example, opportunities for participation by local businesses, environmental impacts, etc.)
- market analysis
- user/stakeholder expectations
- evaluation criteria and methodology
- procurement methodology/options (for example, pre-invitation proposals, public market approach and information briefings)
- procurement timeframe
- tender management
- risk management and mitigation issues
- reporting and monitoring arrangements
- transitional issues (in/out)
- asset management and disposal arrangements.

A strategic procurement plan template, which can be adapted by a council for its use, can be found at the Local Government Victoria website.<sup>117</sup>

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<sup>117</sup> <http://www.dpcd.vic.gov.au/localgovernment>



## 8.8. Procurement conduct plan

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One further tool which assists with higher value, more complex and higher risk projects is a procurement conduct plan. A benchmark value for developing a procurement conduct plan is \$5 million or greater. The procurement conduct plan acts as a checklist, assists in monitoring progress, and outlines processes and behaviours of a council.

A procurement conduct plan will typically cover the following matters:

- objectives of the procurement
- timelines for the procurement
- composition of the procurement team (whatever called)
- responsibilities of the procurement team and (if different) the evaluation team
- competition mechanism (for example, public notice)
- procurement process (for example, request for tender)
- measures to ensure consistency and transparency
- measures to ensure security and confidentiality
- use of probity practitioners and the probity task
- confidentiality procedures
- arrangements for briefing of relevant staff
- notification of tenderers
- supplier selection report
- notification of unsuccessful tenderers
- transition arrangements
- record keeping
- procurement conduct plan approvals.

The Local Government Victoria website has a format for procurement conduct plans which can be easily adapted to any council procurement.<sup>118</sup>

## 8.9. Managing risk

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All procurements embody a degree of risk that can never be completely eliminated. However, risks can be identified and many can be mitigated. The risks faced in procurement can range from the failure of a supplier to deliver a minor requisition through to the breakdown or delay of a major project. The management of risks requires containment strategies to mitigate risk and contingency planning to respond to risks that may emerge.

A council must also be aware of its statutory obligation to manage its financial risks by prudently having regard to economic circumstances.<sup>119</sup> Where a council is embarking on a project pursuant to its entrepreneurial powers it needs to also be mindful of the requirement for a formal risk assessment which complies with the legislation.<sup>120</sup>

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118 <http://dpcd.vic.gov.au/localgovernment>

119 Section 136 of the *Local Government Act 1989*

120 Section 193 (5A) of the *Local Government Act 1989*

All risk management considerations and actions should be consistent with the council's risk management policy. This policy should, in turn, be consistent with AS/NZS ISO 31000:2009 Risk Management – Principles and Guidelines (which supersedes AS/NZS 4360:2004) and provides a generic framework for establishing the context, identifying, analysing, evaluating, treating, monitoring and communicating risk.

High value procurements, and those of lesser value but of a complex nature, should be subject to preparation of a risk management plan. A risk management plan considers risks at all stages of the procurement cycle. The council procurement policy should set the trigger point at which a risk management plan is required.

A risk management plan for a procurement project would address the following aspects:

- **Establish the context**  
The goals, objectives, strategies, scope and parameters of the procurement activity.
- **Identify risks**  
The identification of what, why and how things can arise in the procurement, providing a basis for further analysis.
- **Analyse risks**  
The existing controls will be determined and the risks in the procurement will be analysed in terms of consequence and likelihood in the context of those controls. The analysis will consider the range of potential consequences and how likely those consequences are to occur. Consequence and likelihood may be combined to produce an estimated level of risk.
- **Evaluate risks**  
The estimated levels of risk to the procurement will be compared against pre-established criteria. This will enable risks to be ranked so as to identify management priorities. If the levels of risk established are low, then risks may fall into an acceptable category and treatment may not be required.
- **Treat risks**  
Medium and low priority risks may be accepted and monitored. For other risks to the procurement, a specific action plan will be developed and implemented in accordance with the available funding.
- **Monitor and review**  
Performance of the risk management system will be monitored and reviewed to take account of any changes which might affect it.
- **Communicate and consult**  
Communication and consultation with internal and external stakeholders will occur as appropriate at each stage of the risk management process and concerning the procurement process as a whole.

One significant mechanism for addressing risk is contingency planning.<sup>121</sup> Many councils have in place contingency plans for their major and/or critical services or functions (for example, loss of telecommunications, loss of power etc.). These contingency plans together with a council risk register not only identify potential risks but also set out plans for addressing the occurrence of major incidents.

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<sup>121</sup> Guidance on contingency plans can be found on the Australian National Audit Office website: [http://www.anao.gov.au/uploads/documents/Business\\_Continuity\\_Management\\_.pdf](http://www.anao.gov.au/uploads/documents/Business_Continuity_Management_.pdf)

Conversely the role of the procurement function when a contingency plan is activated is critical; needing to respond to the urgent need for goods, service and works.

A council should also incorporate the relevant and current risk management standards in the specifications it develops for various goods, services and works.

A council must consider the balance between apportioning risk to a contractor(s) and the cost. If all risks on all procurements are assigned to contractors then it is likely that a premium will be paid by the council. Council should determine what risk it is prepared to accept in a contract and ensure this is reflected in the price it pays.

## 8.10. Preparation of a specification

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The specification of need can take the form of a simple definition on a purchase order through to a complex specification for a multifaceted project. The principle which should be applied for any such definition is that it focuses on outputs, solutions or outcomes rather than detailing inputs and process.

Specifications must be written clearly and unambiguously so that prospective suppliers can offer to provide the goods, services, or works required by the council and accurately determine their costs, and so that councils can avoid claims for variations.

There is no one standard format for a specification although there are several components which should appear in all. These include:

- objectives of the contract
- scope (where the service/work begins and ends)
- location for services or works
- statement of requirements
  - > outputs
  - > performance measures
  - > targets (i.e. volumes and timings)
  - > management of the contract
  - > quality requirements.

When procuring goods, services and undertaking works of a highly technical nature or which utilise specialist products, it is advisable to use industry standard specifications, including the Australian Standards, where these are available (and subject to licensing) or the services of a specialist to develop tender specifications. An example of frequently used industry standard technical specifications are those for roadworks made available by VicRoads for use by councils.<sup>122</sup>

When developing specifications for outsourcing service delivery, councils should:

- consider the requirements of service users and other stakeholders. It is likely to be prudent to seek the views of the existing providers of the service and others providing similar services
- encourage innovative or cooperative approaches to delivering services and works
- ensure clarity as to the goods, service or works required.

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122 Councils should note that as a condition of use they cannot make a charge for VicRoads documentation.

Guidance for preparing specifications, which can be of assistance where standards are not available, can be found at the Victorian Government Purchasing Board website.<sup>123</sup>

**Intellectual property:** Care should be taken where intellectual property is concerned in the definition of procurement requirements. Intellectual property includes things such as any expression of ideas, designs, images, original writing and unique signs which have been specially created. The owner has exclusive rights and may be able to charge a fee if anyone uses the intellectual property they have created.

Contravention of property rights could be direct or even indirect – for example, linking to a website which carries images or words, or even sending writing, pictures or materials in a quote.

A council should respect intellectual property in all tender matters. A contract should not involve the use of another’s intellectual property unless permission has been obtained and any fees paid.

If intellectual property is being created as part of a council contract there should be clear documentation to establish the ownership of such property arising from the contract.

## 8.11. Determine the procurement vehicle

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Councils have open to them a range of options for fulfilling their procurement needs. Choosing between these options will initially be determined by the value of the procurement relative to the legislative threshold.

**Where the value of a procurement does not reach the thresholds** the procurement can be achieved through:

- obtaining prices
- quotations (including by issuing requests for quotation)
- use of an applicable State contract
- a third party agent.

A council should be aware of the cost of each procurement transaction to ensure that it does not outweigh the savings from the competitive pricing process. The use of purchase cards is one means of containing these costs (see **Section 6.2 Policies to facilitate accountability**).

**Where the value of a procurement reaches the thresholds** a council has open to it a range of options, including:

- request for tender (RFT)
- expression of interest (EOI) as a preliminary step to calling tenders
- a State contract where these are accessible under a Ministerial Approved Arrangement<sup>124</sup> (see **Section 3.7.3 Ministerial Approved Arrangements**)
- a third party agent tender (purchasing schemes) where a council is eligible (see **Section 3.6.1 Use of agents**).

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<sup>123</sup> [http://www.procurement.vic.gov.au/CA2575BA0001417C/pages/procurement-practitioners-stage-2---bid-process-and-contract-award-step-4---preparation-of-bid-documents-\(rfqs--rfts\)](http://www.procurement.vic.gov.au/CA2575BA0001417C/pages/procurement-practitioners-stage-2---bid-process-and-contract-award-step-4---preparation-of-bid-documents-(rfqs--rfts))

<sup>124</sup> See Local Government Victoria Circular No. 40/2009 - *Local Government Access to State Purchase Contracts & Whole of Government*, issued 21 October, 2009 and Local Government Victoria Circular 26/2011 - *Local Government Access to the Construction Supplier Register*, issued 25 August, 2011.

The choice of one of these options will depend on a number of factors, including

- value for money
- risk
- availability of goods, services or works under a State Purchase Contract or Whole of Victorian Government Contract or under a third party agent contract
- council's objectives/ preferences.

As systems develop councils are likely to make increasing use of online procurement systems such as electronic auctions (eAuctions, reverse auctions, etc) where the roles of buyers and sellers in a typical auction are reversed and the sellers compete to obtain business.

#### **8.11.1. Request for tender**

Request for tender is the primary vehicle for seeking competitive bids from prospective suppliers where tender threshold values are reached.

Where a decision is made that a formal tender or expression of interest process is to be undertaken then a council needs to ensure it has in place the necessary documentation in addition to the specifications.

The composition of the documentation will vary between councils but there are a number of primary components:

- introduction/overview
- invitation to tender (some councils use this as a way to market their needs to potential tenderers)
- conditions of tendering (the rules for tendering, including evaluation criteria)
- form of tender and pricing schedules or tables
- proposed contract
- tender response proformas (including schedules)
- conditions of contract (and sometimes special conditions)
- specification for the goods, services or work sought which may or may not include drawings and technical definitions of need.

Tender documentation is most important. Poor, faulty, or inadequate documents will increase the risk to the success of the procurement and discourage bidders.

#### **8.11.2. Expression of interest**

An expression of interest is a two-step process. An expression of interest process does not replace the need to call tenders. It simply precedes the calling of tenders and generally seeks to constrain the number, and focus the quality and detail, of tenders received. An expression of interest process is generally structured with the following components:

- overview of requirements
- invitation to submit an expression of interest
- criteria for evaluating expressions of interest
- form of expression of interest submissions (respondents form).

An expression of interest should be used in circumstances such as where:

- there is likely to be many tenderers, tendering will be costly or the procurement is complex and council does not wish to impose the costs of preparing full tenders on a large number of potential tenderers
- there is uncertainty as to the interest of suppliers or vendors or their capacity to offer the potential products or services or to undertake the proposed works.

Tenders and expressions of interest should not be used to compensate for a lack of understanding as to a council's needs (see **Section 8.11.3 Requests for information**).

### 8.11.3. Requests for information

If a council is uncertain as to what goods and services it requires it should undertake a simple request for information. A request for information may be undertaken for reasons which include establishing:

1. available technologies, products or services in the marketplace that meet council needs
2. whether proposed terms and conditions or deliverable expectations are acceptable in the marketplace
3. whether proposed budgets are adequate to meet non-standard procurement needs – inadequate budgets should not become apparent when tenders are opened.

In short, a council should use a request for information rather than a request for tender or expression of interest in order to improve its understanding of its own needs, availability and likely costs.

## 8.12. Assessing the value of the procurement

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Once the procurement needs have been defined, the value of the proposed procurement should be assessed. **Section 3.2.2 Assessing the value of a contract** sets out guidance for determining the value of a contract and emphasises the importance of due diligence in this process.

## 8.13. Tender response schedules

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The key components of the tender documentation are the schedules which are prepared to enable the bidder to respond to the tender and to provide council with the information it requires in a preferred form. This information will be used as the basis for evaluating tenders.

A list of schedules would cover, but is not limited to:

1. tenderer's legal structure
2. statement of conformance
3. collusive tendering – statutory declaration
4. conflict of interest declaration
5. compliance with the Victorian Government Code of Practice for the Building and Construction Industry (where applicable)
6. receipt of addenda
7. occupational health and safety

8. WorkCover, public liability, professional development, product liability and motor vehicle insurances
9. industrial relations history
10. quality system
11. financial assessment
12. resources to be employed in the performance of the contract
13. register of subcontractors and suppliers
14. past and current contract commitments
15. business references
16. other information.

The schedules included in any one contract will vary. For example, where a contract is solely for goods then the 'schedule for resources to be employed in the performance of the contract' will not be required.

The content of some schedules will also vary according to the type of procurement. For example, an insurance requirement for professional indemnity and motor vehicle insurance does not apply to all contracts.

## 8.14. Assembling and checking of contract documentation

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Once all tender documentation is prepared it should be assembled (in hardcopy or online) in a sequence that facilitates bidders' responses.

A council should conduct a thorough review of all tender documentation before issuing it to the marketplace. Issued documents should be fit-for-purpose. The goal should be to avoid the need to issue addenda to the tender documentation for missing or erroneous matters which reflects poorly on the council and discourages bidders. It is often valuable to have all the documentation independently checked within a council.

Councils should be alerted to the problem of 'boilerplate' documentation and forming contracts with a 'cut and paste' approach. Many contracts require individual approaches to different aspects of the contract documentation, especially where standard template documentation is used and data has to be populated to the template. It is vital to check that all documentation is fit-for-purpose.

## 8.15. Tender documents sign-off

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Tender documentation should be subject to approval at a senior level, preferably at least third tier, within each council. This sign-off should confirm that the tender documentation reflects council's needs and authorises the placement of a public notice to invite tenders.

## 8.16. Public notice

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Section 3.2.4 Public notice of these guidelines sets out guidance for public notices.

## 8.17. Prequalification of tenderers

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One means of reducing the cost of tendering to a council (and their suppliers) where there are high volumes of tenders and/or expressions of interest is to pre-qualify potential tenderers. Under a prequalification arrangement, potential tenders can satisfy the basic tender conformance and mandatory requirements on an annual or periodical basis. Savings are gained by a council from not having to repeatedly assess the compliance of tenderers in areas of occupational health and safety, insurance (for example, public liability, professional indemnity, worker compensation) quality management, environmental management etc.).

Similarly, savings can accrue to businesses in not having to demonstrate compliance for every tender to which they respond.

The pre-qualification process should cover the following types of criteria:

1. company profile, including the financial stability of the organisation
2. confirm the insurance policies and level of cover held
3. compliance with occupational health and safety requirements
4. financial capacity of the contractor to fulfil its obligations under a contract
5. management, quality and environmental management systems
6. company experience including past and current contracts.

Many councils use third party website providers to manage their tenderer registration and tender issue processes. Some are also using these providers for the lodgement of tenders.

The Department of Sustainability and Environment and the Department of Transport operate excellent examples of pre-qualification.<sup>125</sup>

A council should be careful to ensure that pre-qualification does not act as a barrier to new or smaller businesses. Barriers exist when additional and/or uneconomic costs are incurred by tenderers in complying with council requirements or where the requirements of pre-qualification are excessive. (See **Section 5.5 Use of an appropriately competitive process**)

Prohibitive or unrealistic requirements for insurance cover or risk management requirements are examples. At issue is the level of risk a council should accept for itself. Councils must balance their responsibility to achieve prudent risk management with the cost of doing so, which is reflected in tender prices.

## 8.18. Pre-tender briefing and site inspections

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A decision about whether to conduct a pre-tender briefing is a matter of judgement as to the value of such a gathering and the timing thereof. For complex, unusual or sensitive tenders the opportunity to attend briefings prior to tender can help promote an effective tender exercise. Pre-tender briefings can be either mandatory or optional. The advantage of an optional briefing is that it allows a council to assess which potential tenderers are serious about pursuing a tender. Mandatory briefings have a number of advantages, including:

- allowing council to reinforce its primary requirements and the essence of the contract
- permitting tenderers to clarify any uncertainties

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<sup>125</sup> <http://www.transport.vic.gov.au/services/csr/applying-for-pre-qualification>



- allowing potential tenderers to assess their capacity to fulfil the contract
- fostering relationships with tenderers.

Whilst a standard condition of tendering requires tenderers to familiarise themselves with the sites and circumstances of providing a service or works, sometimes a formal site inspection is valuable.

## 8.19. Issue of addenda

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Circumstances may arise where it is necessary to issue addenda for clarification or to provide information during the tender period which was not included in the original tender documentation. The goal when issuing addenda is to ensure that further addenda are not required.

Addenda must be issued consistently to all bidders who have received/downloaded or registered to receive tender documentation.

Consistency should be adopted in all communications with tenderers where matters are clarified or components explained. Tenderers should be provided with all questions and answers and have adequate time to respond in their proposal. A cut-off date for questions should be applied by a council and should be set to take account of the size and complexity of the tender proposal sought.

## 8.20. Lodgement and close of tenders

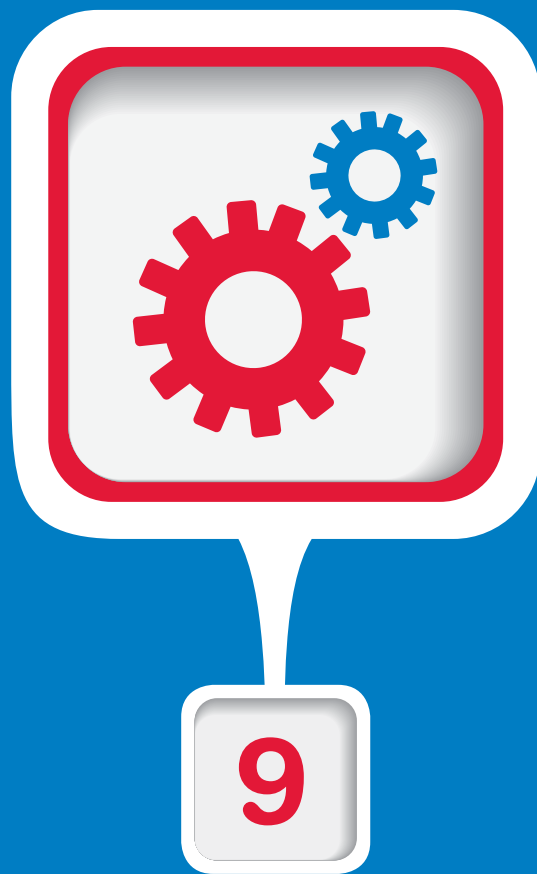
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There will be situations where an intended procurement may require the submission of hard copy materials and require a physical tender box.

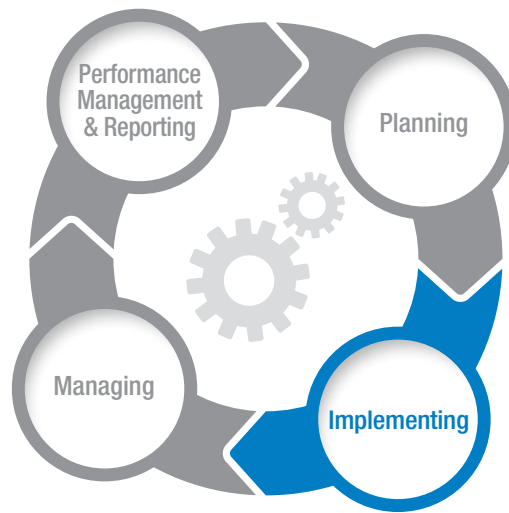
A council must be confident that the processes by which tenders are lodged in a tender box is secure and confidential. The process of receiving and recording tender submissions must be conducted in a manner that ensures the integrity of the tendering process

Tender lodgement instructions in the tender documentation must be clear to all prospective tenderers and tender receipt arrangements made as 'failsafe' as possible.





Implementing



## 9. Implementing

### 9.1. Implementation objectives

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The objectives of the implementation phase of the procurement cycle are to ensure that the:

1. selected bidder can deliver a value for money solution
2. selected bidder is capable of providing the goods or services being sought or the carrying out of works specified
3. procurement process is transparent, fair, robust, and that decisions are justified and adequately documented.

This section of the guidelines covers activities from the close of tenders through to the awarding of a contract.

As with the planning phase of the procurement cycle much of the content of this section applies to formal tenders although parts may be applied to requests for quotations, especially for high value procurements.

### 9.2. Opening and registration of quotations and tenders

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Council procedures for the opening and recording of tenders should be documented.

A council's tender opening process will vary depending on whether it operates an electronic lodgement system as well a physical tender box.

The opening and recording of tenders, including downloading electronic tenders, should be conducted by staff that are independent of the tender and preferably include a senior member of staff. The inclusion of a senior member of staff conveys to all participants that tender processes are a significant aspect of a council's procurement practice and demonstrates leadership in this regard.

The opening of tenders in a public forum increases the confidence of potential contractors in the transparency and fairness of council's tender processes. At a public tender opening council should only identify the tenderers who submitted. The prices submitted should not be divulged as 'raw' prices at this stage as it can be misleading given they are often not directly comparable.

Physical tenders should be received into a locked tender box. The tender box should be closed or removed at closing time. All tenders should be opened at the one time.

As each physical tender is opened it should be date stamped and the tenderer's details recorded on a manual or electronic register. Details recorded in the register should be sufficient to identify the tender including name and Australian Business Number (ABN) of each tenderer and the price(s) offered. The record of tenders received should be signed by those persons opening the tenders. This register is a key audit record.

An electronic tendering system will automatically record the time and date of the lodgement of each tender. Council should assure itself as to the security of such systems, especially where they are effectively controlled by a third party.

The documented protocols for securing tenders which are followed by a third party procurement agent should be held by council and be periodically tested by council as to the effectiveness of the security.

### 9.3. Late tenders

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As a general rule councils should not accept late tenders.<sup>126</sup> This rule is well founded in the principle of equity and fairness in the management of tender processes. A council can confidently rely on a tender condition which excludes late tenders from being opened.

The integrity of the tender process may be compromised if one or more tenderers are provided with extra time to submit tenders thus providing an unacceptable advantage in comparison to compliant tenders. Similarly, if tender submissions have been distributed to the evaluation panel members the possibility arises that the confidentiality of compliant tender submissions is compromised if late tenders are then accepted. The perception of other tenderers will also be unfavourable.

The condition that late tenders will not be accepted should be included in the request for tenders and expression of interest documentation.

Once tenders have closed late tenders should be kept unopened in a secure location pending a decision on acceptance. Late tenders which are rejected should be returned to the tenderer unopened with appropriate accompanying advice.

There may be, however, circumstances where a council wishes to accept tenders or expressions of interest which are not received by the closing time in exceptional circumstances and where the integrity of the tender process is not compromised. A late tender should only be accepted if it can be clearly documented that:

- there was a system failure/interruptions in case of the electronic tender system
- access was denied or hindered in relation to the physical tender box.

A council policy position on late tenders should be included in the council procurement policy. Any policy which accepts late tenders in exceptional circumstances must clarify who has authority to make the decision to accept a late tender and the grounds on which they will be accepted.

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<sup>126</sup> In the example in Appendix A: Procurement Policy the council concerned elected not to accept late tenders.

## 9.4. No tenders received

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In the event that a council undertakes a compliant public tender process and does not receive any tenders or rejects all tenders on the basis they did not meet council's specifications outlined in the tender document, it has two options:

1. recall tenders – either with or without amending the procurement requirements and the tender documents
2. seek an alternative means of delivering the service or works required under the tender without changing the requirements (including undertaking the service or works itself). If a council seeks to appoint another tenderer (under what is sometimes called a selective tender) who did not submit when tenders were originally called it must ensure:
  - the grounds for rejecting the tender(s) received are on the basis they did not meet council's specifications outlined in the tender document, and/or did not provide value for money to council, and
  - it is highly unlikely that another competitor would submit a tender if the council retendered for the goods, services and/or works, and
  - the terms on which council intends to engage the third party contractor are the same as the specifications in the original tender documents, and
  - engaging the third party contractor will provide value for money to council.

If a council amends the scope or intent of its requirements for goods, services or works so that it is materially different (see **Section 3.3 Breaches of requirement to give public notice**) this would constitute a new contract. Council should then call new public tenders (see **Section 9.15 Post-tender negotiations**).

## 9.5. Tender evaluation panels

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Tender evaluation panels should be formed in order to evaluate formal tenders and expressions of interest. All persons forming the evaluation panel should be involved in the actual assessment. The process should be robust and under no circumstances should tenders or expressions of interest be considered by a single person panel.

Evaluation panels must adhere faithfully to the tender conditions including applying the selection criteria set out therein.

There may also be circumstances where it is advantageous to form small panels to evaluate quotations. For example, where a series of quotations are sought for a range of trade services the assessment of these may benefit from a tender panel assessment.

A formal written appointment of the chairperson and each tender evaluation panel member should be made by the relevant director (or equivalent). This should also ensure the balance and independence of the panel. These appointments should include standard instructions on the role and responsibilities of tender panel members and/or the terms of reference for the tender evaluation panel.

The membership of a panel should be appropriate to the operational and technical aspects of the tender and preferably represent stakeholders as well as those staff who will be responsible for supervision of the ultimate tender. Where technical expertise is required, this may involve including one or more external persons on a panel. Contracts for waste are typical examples where external expertise in the assessment of tenders can be advantageous.

The inclusion of a panel member who is independent of the organisational area conducting the contract should be considered where it is central to, or will improve, the objectivity of the panel.

A tender evaluation panel should be formed before tenders are issued. Conflict of interest and confidentiality requirements should be satisfied at this time. The panel should review the tender documentation before it is issued and confirm it will achieve the objectives of the proposed contract.

As part of this review the panel must confirm the selection criteria will allow the meaningful assessment of the tenders. Preferably weightings should be assigned to each of the scored selection criteria (as distinct from the conformity and mandatory requirements – see below) and may be reflected in the tender documentation (also see **Section 5.7 Consistency and transparency of process**). If the assignment of weighting to selection criteria does not occur prior to the issue of tender or expression of interest documentation then it must be assigned before tenders close. This is an important probity issue and avoids the possibility of weightings being adjusted (consciously or unconsciously) to favour any tenderer after tenders close.

The number of persons on a panel is dependent on the value or risk of the tender. A benchmark size for a panel is three persons for tenders up to \$1 million in value and a larger panel for higher values.

In a best practice context evaluation panel members should undertake training, be assessed as to knowledge and skills, particularly in tender evaluation, and be accredited to be appointed to panels. The chairperson of a panel at least should be trained in probity matters (see **Section 4.8 Training and skill development to build capacity**).

A council's rules or terms of reference around the formation, composition and operation of evaluation panels should be documented. These should be distributed to panel members at the time they are appointed.

If councillors are involved in procurement processes/decisions they will have a need for particular care in identifying and disclosing conflicts of interest, in order to comply with the Act. The application of conflicts of interest provisions to councillors are broader than for staff. Any councillor involved in procurement should consult the relevant guide or take advice.

Councils should be aware of the recommendation of the Victorian Ombudsman in the report on an *Investigation into the disclosure of information by a councillor of the City of Casey*, March 2010.<sup>127</sup> The Ombudsman found that a councillor had improperly disclosed information to a supplier at the time an active quotation bid was under consideration.

The Ombudsman recommended to the State Parliament that the council “review its procurement processes and amend them where necessary to preclude councillors from membership of assessment panels”.

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<sup>127</sup> [http://www.ombudsman.vic.gov.au/resources/documents/Investigation\\_into\\_the\\_disclosure\\_of\\_information\\_by\\_a\\_councillor\\_of\\_the\\_City\\_of\\_Casey1.pdf](http://www.ombudsman.vic.gov.au/resources/documents/Investigation_into_the_disclosure_of_information_by_a_councillor_of_the_City_of_Casey1.pdf)

## 9.6. Evaluation of in-house tenders

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Where tender proposals from 'in-house' teams are to be evaluated then a council should:

- ensure the highest standards of probity in all matters associated with the tender (see **Section 5.10 In-house teams and embedded contractors**)
- appoint at least one panel member who is independent of the council
- apply the principles of Competitive Neutrality (see **Section 3.10 National competition policy**).

## 9.7. Role of tender evaluation panel members

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Persons who are appointed to tender evaluation panels should adhere to the following requirements:

1. act objectively and fairly throughout the tender evaluation process to ensure that all bidders are given an equal chance to succeed with their bid and that the integrity of the process is upheld<sup>128</sup>
2. hold information received as part of a bid in the strictest confidence and not release this information outside the tender evaluation panel
3. not divulge information on the deliberations and decisions of the tender evaluation panel at least until a formal recommendation has been approved by the appropriate officer or council and the successful bidder has been formally notified. A council may also resolve to designate information relating to the award of a tender as confidential pursuant to section 77 of the Act.

## 9.8. Role of the tender evaluation panel chairperson

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The role of the chairperson of a tender evaluation panel is to:

1. ensure that all members of the tender evaluation panel complete and lodge a conflict of interest declaration and confidentiality deeds, where required by council, prior to the commencement of the evaluation process
2. review the appointment of a probity advisor/auditor if one has been appointed (see **Section 5.12 Probity plans, probity auditors (and/or advisors) and reports**)
3. confirm the tender documentation has been properly prepared prior to its release to prospective bidders
4. ensure the evaluation process is conducted in a consistent, robust and fair manner
5. oversee the preparation of the tender evaluation report and ensure it is duly signed by each member of the tender evaluation panel
6. submit the recommendations of the tender evaluation panel to the appropriate officer or council
7. ensure an accurate record is kept of the tender evaluation panel's deliberations for audit purposes
8. if required, once approval has been provided, inform the successful and unsuccessful bidders of the outcome of the tender process.

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<sup>128</sup> See *Bycon Pty Ltd v Moira Shire Council* (1998) VSC 25 for evidence of the need to an approach free of bias.



## 9.9. Tender evaluations

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The process for evaluating both quotation and tender bids will depend on the size, complexity and associated risks of each procurement. This will range from a simple assessment of a number of quotations on a straightforward procurement through to a comprehensive evaluation involving pre-tender briefings, technical reports, a probity plan, probity advisor/auditors, detailed financial assessments, and possibly industrial relations negotiations.

A council must ensure that sufficient detail and analysis is undertaken and recorded during the tender evaluation in order to justify the awarding of tenders. The objective is to create an audit trail and a set of supporting documentation to justify the evaluation process and final decision.

The evaluation process should provide a fair comparison between the responses and be conducted in accordance with the approved evaluation methodology and criteria. The same evaluation method should be applied to each response. Bids must be evaluated in a systematic and consistent manner.

A council should be alert to the possible creation of a 'process contract'<sup>129</sup> wherein the mere request for tenders may also give rise to a legally binding agreement called by the courts a 'tender process contract'. This agreement governs the way in which the tender process is conducted. Courts have found that where a request for tender is issued and a conforming tender is received that a tender process contract will arise from it and will contain an implied term requiring it to 'deal fairly' with all the tenderers in assessing their bids and awarding the main contract. If a council deviates materially from its evaluation process set out in the tender documentation it may be challenged.

The failure to keep a tenderer fully advised of matters such as changes to tender requirements (for example during the tender process) may amount to a breach of section 18 of the (*Competition and Consumer Act 2010*) (Cth) for misleading or deceptive conduct (or conduct likely to mislead or deceive).

## 9.10. Requests for further information

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When tenders are initially assessed by the tender evaluation panel and deficiencies are identified in the information which has been submitted by the tenderer, the tender evaluation panel can request tenderers to submit the information which has been omitted if it is not material. However if the deficiencies are material it is open to the panel to decide that the tender is non-compliant. A consistent approach must be taken with all tenders.

An oversight or non-material omission (such as an unsigned schedule) can be resolved with a request for further information or rectification of the omission. Any material omission (such as an absence of pricing information) should, on probity grounds, be considered fatal to the tender bid.

All requests for and receipt of further information should be carefully controlled through a single point of contact.

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<sup>129</sup> See *Iplex ITG Pty Ltd (in liq) v State of Victoria* [2010] VSC 480 (29 October 2010) which case indicates a noticeable trend for the existence of process contracts to be found by courts and *Hughes Aircraft Systems International V Air Services Australia* (1997) 146 ALR 1. The risk of a 'process contract' being found increases with the complexity of the tender. Also called a 'Pre-Award Contract'.

Care should be exercised in seeking further information. If a contractor undertakes ‘works’ – for example detailed plans – it may be able to recover costs irrespective of whether it is awarded the contract.<sup>130</sup>

## 9.11. Tenderer interviews

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Evaluation panels may decide it is beneficial to interview tenderers, generally those which have been short-listed, in order to clarify parts of their tender submissions. The objective of such interviews is to address issues arising from each bid and/or to improve the panel’s understanding of the ability of the bidder to deliver on their bid. Interviews should be fully documented.

Interviews may also be designed to allow tenderers to make presentations to the panel where it is appropriate to the tender circumstances.

## 9.12. Selection criteria

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The tender selection criteria will have been determined as part of the preparation of the tender documentation.

There is no one correct system for setting selection criteria. A wide range of classifications are used for selection criteria.

In some circumstances bid evaluation tools may be useful to compare complex bids with different strengths and weaknesses enabling electronic evaluation of supplier responses to procurement requirements. Bid evaluation tools are integrated with sourcing packages such as an eTendering application.

Generally there are three selection criteria categories:

- **conformance requirements (also called submittal requirements)** – requirements to submit documentation and certification as part of the tender bid
- **mandatory requirements** – factors which test risk associated with each tenderer
- **scored selection criteria (which are scored and weighted)** – factors covering the resources of, and ability of, the tenderer to fulfil the contract, together with the tender price.

### 9.12.1. Conformance requirements

A tender response should include the information requested in the tender documentation. This may include:

- the schedules required to score the tender
- statements of conformance
- conflict of interest declaration
- compliance with the Victorian Government Code of Practice for the Building and Construction Industry (for building and construction tenders).

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<sup>130</sup> Sabemo Pty Ltd V North Sydney Municipal Council (1977) 2 NSWLR 880

### 9.12.2. Mandatory requirements

Mandatory requirements generally cover:

1. confirmation of insurance policies and level of cover held
2. compliance with occupational health and safety standards
3. provision of financial information.

They may also cover:

1. quality assurance: systems/accreditation to deliver quality
2. management systems: to deliver the contract
3. environmental sustainability: defined in terms of the impact of the proposed contract on the environment and/or in relation to supplier's environmental management practices.

Mandatory requirements are measured by the content of the response to council's tender (schedules). A tender response which does not meet any one of the conformance or mandatory requirements is generally deemed to be non-compliant.<sup>131</sup> Mandatory factors are thus measured in terms of pass or fail or compliant or non-compliant.

If council contemplates the possibility of awarding a contract to a non-conforming tender (such as one offering an innovative solution) then the tender documentation must make provision for non-conforming tenders to be received and ensure the selected non-conforming tender is not materially different<sup>132</sup> from the specification.

Mandatory criteria should be based on identifiable technical standards or quantifiable data.

Financial viability is often assessed with the assistance of an independent report from a third party that specialises in financial reporting on individuals and companies. These reports vary from simple confirmation of legal existence through to comprehensive analysis of financial statements of the tenderer. They should be obtained for high value and/or highly complex projects to ensure the tenderers have the capacity and stability to comply with the requirements of the contract. These reports should only be obtained where the tenderer has consented to assessing such information as part of the tender process.

### 9.12.3. Scored selection criteria

The objective of the scoring process against selection criteria is to obtain optimum value for money. Value for money does not necessarily mean selecting the lowest price. Using the Victorian Auditor-General's Office definition of value for money, it is the optimum combination of quality, quantity, risk, timeliness, on a whole-of-contract and whole-of-asset-life basis.<sup>133</sup>

Most assessed criteria fall into one of three categories:

- capacity
- capability
- price.

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<sup>131</sup> Reference should be made to the Auditor-General's report on East Gippsland Shire Council: Proposed sale of Lakes Entrance property, July 2005. [http://download.audit.vic.gov.au/files/EGSC\\_report.pdf](http://download.audit.vic.gov.au/files/EGSC_report.pdf)

<sup>132</sup> Refer to footnote at Section 3.3 Breaches of requirement to give public notice

<sup>133</sup> Victorian Auditor-General's Office *Public Sector Procurement: Turning Principles into Practice*, October 2007. [http://download.audit.vic.gov.au/files/Procurement\\_BPG.pdf](http://download.audit.vic.gov.au/files/Procurement_BPG.pdf)

**Capacity** measures resources which the bidder has available to it and can devote to undertake the tender. These may include labour (professional, trade or manual), material, plant and equipment, staff structure, availability of staff with expertise and support staff and subcontractors.

**Capacity** is measured by an assessment of the tenderer’s resources detailed in their tender proposal and possibly some testing of those proposals.

Capability measures the ability of the tenderer to complete the tender. This may include the knowledge and skills of the tenderer, past history of timely tender/project completion to the required quality, the tenderer’s systems for monitoring and managing projects, organisational systems and processes including ability to manage relations and resolve issues and disputes, the tenderers appreciation of the tender requirements, where applicable, systems of governance and the methodology (including innovation) the tenderer proposes to use to complete the tender requirements. If there are environmental aspects to the tender, then the tenderer’s system for managing these should be assessed.

Capability is measured by the tender proposal supported by reference checks of the principals of previous contracts undertaken by the tenderer.

**Price(s)** measures the price – either lump sum or unit rates – submitted by the tenderer. Price may factor into other considerations such as local procurement or the sustainability of goods and services where these form part of the selection criteria. Prices may be adjusted to reflect these factors in accordance with the tender conditions.

There are a number of formats for assessing prices. One common formula is:

$$\text{Price Score} = \frac{\text{Lowest Tender Price} \times 100}{\text{Tender Price}}$$

Where, ‘tender price’ is the price of the tender being evaluated.

#### ILLUSTRATION

If the above formula is applied to a simple comparison of tenders the following outcomes may be produced.



Tenderer	Tenders (in ascending order)	Normalised Prices
ABC Pty Ltd	\$1,282,000	100
DEF Pty Ltd	\$1,333,000	96.2
GHI Pty Ltd	\$1,925,000	66.6

Other formulas will produce a narrower or wider range of score outcomes.

#### 9.12.4. Whole-of-life costs

When assessing a significant procurement proposal, a council should consider the ‘whole-of-life’ cost of the goods, services or works it is procuring. A council must assess at what value of a procurement it is desirable to calculate the whole-of-life cost and use the result in scoring the tender price.

Sometimes, the acquisition cost of a procurement is only a proportion of the total cost of ownership. Much of the total cost lies in operating and maintaining the product over its life. This makes it important to base a procurement decision not only on the acquisition price but also on the costs of using the product.

When assessing the whole-of-life cost, a council entity should differentiate between one-off costs and recurring costs. One-off costs are ‘sunk’ once the acquisition is made, and are generally predictable. Recurring costs, on the other hand, continue to be incurred throughout the life of the procurement, and can increase with time if it is liable to wear and tear – resulting in increased maintenance costs.

Essentially, there are three types of costs, which together make up the total cost of a purchase. These are:

- initial purchase price
- purchase administration costs
- development and maintenance costs.

A more comprehensive breakdown however would cover:

- pre-acquisition costs
- acquisition costs
- changeover costs
- operating costs
- maintenance costs
- downtime costs
- end of life costs.

Within each of these costs there is another breakdown of costs which can be applied. For example, pre-acquisition costs might cover:

- investigation of the marketplace
- specification and design
- budget allocation
- preparation and issuing of invitation to tenders
- cost of tender evaluation
- cost of letting contract
- preparation for receipt of the procurement.

A comprehensive whole-of-life cost should be undertaken for major projects or where the cost structures of competing offers vary materially.

## 9.13. Weighting of selection criteria

Generally weighting of selection criteria should occur to reflect the relative importance of different criteria and in turn a council's objectives for each contract:

- weighting of selection criteria should be undertaken by the evaluation panel before tenders close
- weightings in each tender should reflect a council's objectives for the tender
- a logical approach is to assign proportions at a high level initially. For example, 30% might be assigned to capacity, 30% to capability and 40% to price. The proportions can then be broken down to individual criteria, although these would not normally be disclosed to bidders
- percentage-based weighting proportions make for easier calculations
- weightings need not be disclosed to the bidder although this action may build confidence in the tender process (see **Section 5.7 Consistency and transparency of process**).

Consistency of scoring against selection criteria between tender evaluation panel members is essential. A system of rating should be adopted to facilitate consistency.

Some councils use the following model of scoring:

Rating #	Assessment Against Criteria	Score
A	Very high standard with no reservations at all about acceptability	5
B	High standard but falls just short of A	4
C	Good standard	3
D	Generally of a good standard with some reservations.	2
E	Basic compliance only	1
F	Fails to meet the minimum requirements. (Bid rejected)	0

# The rating is a shorthand method of recording the assessment.

Council should adopt an appropriate scoring system and reference it in its procurement policy – however titled or structured.

## 9.14. Non-complying tenders

A council will sometimes receive tenders which offer one or more alternatives for delivery of the service or works where these are not sought in the tender documentation. These are considered to be non-conforming tenders. A council should always be open to innovative proposals as they may offer excellent opportunities for improvements to service delivery or works outcomes and are consistent with the legislative objectives for councils to achieve continual improvement.

Tender documentation where innovative solutions are sought should specifically invite non-conforming tenders which council can consider along with all other tenders.

## 9.15. Post-tender negotiations

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The goal of the tender evaluation process is to select the tender(s) which will best meet the council's objectives. This may mean that council needs to conduct negotiations with a tenderer in order to better meet/achieve its objectives.

The objective of post-tender negotiations is to obtain the optimal solution and commercial arrangements and not merely the lowest price. By the end of the negotiation/clarification process, council and the supplier must have the same expectations about the obligations of each party and how the contract will operate. All substantive issues must be agreed and the contract documentation amended to reflect the agreement.

If a council proposes, or seeks the option, to conduct negotiations then its tender documentation must specify that council reserves the right to negotiate with one or more preferred tenderers.

The conduct of negotiations should be consistent with a council probity plan and subject to that plan the negotiations should follow these steps:

- 1. preferred tenderer:** the tender evaluation panel should select a preferred tenderer or shortlist the tenderers that most closely meet the requirements of the contract and will best deliver council's objectives for the contract.

The shortlist has to be defensible, based on both weighted score and price. There has to be a clear break between the shortlist and other tenderers, such that given the weighted scores, even if the non-shortlisted tenderers were given an opportunity to participate in the best and final process, they would be unlikely to jump into the shortlist group from an overall value for money perspective. If they can bridge the gap they should be granted the opportunity to respond to the same negotiations as the preferred tender.

- 2. negotiating team:** the tender evaluation panel or, at the chairperson's discretion, some members of the panel should meet with the preferred tenders. Persons with expertise in negotiation may be included. No less than two persons representing council should participate in order to ensure the contents and intent of any discussion can be confirmed by a second person. Participants on behalf of council should have the necessary skill and experience in negotiation and non-panel members should be subject to the same conflict of interest declaration and deed of confidentiality requirements as panel evaluation members.
- 3. advice to preferred tenderer:** the preferred tenderer or shortlisted tenderers should be advised that they are the panel's preferred tenderer(s) but that this does not constitute an acceptance of the tender but rather an invitation to negotiate and/or that there are certain aspects of the tender which are unacceptable or deficient. The purpose of the negotiation is to achieve operational refinements or enhancements. This may include the price. However, care should be exercised that negotiations do not become an opportunity to trade-off one tenderer's prices against another tenderer's prices in order to obtain lower prices.

4. **maintenance of intent and scope:** negotiations which change the scope or intent of the contract creating a material difference (see **Section 3.3 Breaches of requirement to give public notice**) risk breaching section 186 of the Act. A tender which has been poorly scoped must not be 'downsized' in negotiation to meet, for example, a budget allowance. The resulting tender may be one to which smaller tenderers could have submitted proposals if they were aware of the realistic scope. The smaller contract may, in fact, be a new contract which should be subject to section 186 of the Act in its own right.<sup>134</sup> There is also a risk of breaching the *Competition and Consumer Act 2010* (Cwlth) in that the original request for tender may be found to be misleading or deceptive conduct.
5. **unacceptable aspects:** the unacceptable aspects of the bid should be detailed and the tenderer should be invited to consider those and advise in writing as to their willingness to address the inadequacies or deficiencies. Matters that could be negotiated include additional value adding options, specific contract management arrangements, accountable personnel for various contract stages or commitments, further intellectual property transfer opportunities, warranties etc. Post-tender negotiations can clarify matters and can be an effective risk management tool.
6. **meetings and records:** all meetings and other discussions should be recorded (and confirmed) in writing. Complete records of meetings should be maintained in order to form an audit trail and to demonstrate the integrity of the process has been maintained. A condition of meetings should be that they are to be treated as commercial-in-confidence by all parties.
7. **ethics and fairness:** post-tender negotiations must be ethical and meet the standards of procedural fairness.
8. **unsuccessful negotiations:** if negotiations are unsuccessful, the preferred tenderer or shortlisted tenderers should be advised.
9. **reporting:** the result of post-tender negotiations should be reported in the tender evaluation report.
10. **cost/benefit:** the cost of embarking on negotiations should be weighted against the value of the possible advantages to be gained at the outset.

Councils undertaking negotiations should consider the Independent Commission Against Corruption (NSW) publication *Direct Negotiations with Proponents – When, Why and How*.<sup>135</sup>

## 9.16. Best and final offer

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One option for a council to consider is to invite a best and final offer from each shortlisted tenderer. A best and final offer allows council to invite shortlisted tenderers to submit their best and last technical and priced offer on the basis of the tender requirements. It is particularly useful when two or more bids are difficult to separate following the evaluation.<sup>136</sup>

<sup>134</sup> Hunter Brothers V Brisbane City Council (1983) 52 LGRA 430

<sup>135</sup> <http://www.icac.nsw.gov.au/preventing-corruption/knowning-your-risks/procurement/4305>

<sup>136</sup> See the Victorian Government Purchasing Board *Good Practice Guideline, Strategic Procurement – General*, July 2011 [http://www.procurement.vic.gov.au/CA2575BA0001417C/WebObjD1132408GUIDELINEWEBCOPYStrategicProcurementGeneralGoodPracticeGuidelines/\\$File/D11%2032408%20GUIDELINE%20WEB%20COPY%20Strategic%20Procurement%20General%20Good%20Practice%20Guidelines.DOC](http://www.procurement.vic.gov.au/CA2575BA0001417C/WebObjD1132408GUIDELINEWEBCOPYStrategicProcurementGeneralGoodPracticeGuidelines/$File/D11%2032408%20GUIDELINE%20WEB%20COPY%20Strategic%20Procurement%20General%20Good%20Practice%20Guidelines.DOC)



The council must reserve the right to conduct negotiations with a preferred tenderer in its tender documentation and for shortlisted tenderers to be invited by council to submit a best and final offer.

A council should clarify that it may rely on the information submitted in the initial tender without inviting best and final offers and that tenderers must therefore submit their best and final offer in the first instance.

A best and final offer may replace the need for negotiations with bidders.

A council would write to each bidder citing the areas where their proposal was deficient and ask them to re-submit a proposal that improves those areas. The key is that the revised proposal can only change areas nominated by council.

A consideration with both post-tender negotiations and a best and final offer is that they increase the risk that a council will move away from the original contract specifications and thereby risk creating a contract which is 'materially different'<sup>137</sup> to that which was the subject of the public tender process.

## 9.17. Cancelling a procurement

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The decision to cancel a procurement without awarding a tender is a significant step which may have ramifications for the council's credibility and may discourage future participation in tenders by bidders.

However, if a council cannot achieve its objectives from the responses to a tender, or the tender process becomes compromised, then cancellation may be the better option.

## 9.18. Tender evaluation reports

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The key output of the tender evaluation process is the tender evaluation report.

A tender evaluation report should, as a minimum contain:

1. identification and brief description of the contract
2. background and scope of the contract
3. names of the tender evaluation panel
4. conflict of interest declaration outcomes and record of confidentiality agreements
5. procurement methods – request for tender or expression of interest
6. council's budgetary estimate of the cost of the tender and the date the estimate was prepared
7. date of public notice and tender closing
8. summary of bids received – bidder's name and price
9. conformance requirements
10. mandatory selection criteria and results, including financial viability and capacity of the tenderers (identify pre-qualified tenderers)
11. selection criteria, weightings and scoring (ranked)

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<sup>137</sup> Refer to the footnote in Section 3.3 *Breaches of requirement to give public notice*

12. risk associated with the preferred contractor
13. social implications
14. environmental implications
15. risk management implications
16. transition matters
17. recommended tenderer(s) and justification.

The report of the evaluation panel is made to the council or to the staff member holding the delegation to make a decision on awarding the contract. The report prepared for a council meeting will generally comprise a summary of the above detail.

### 9.19. Awarding of tenders

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Prior to the award of any tenders a full check of all pre-requisites should be conducted. A recommendation should then be put to the officer who has delegated authority to accept the tender or to the council.

It is open to the officer who has delegated authority, or to the council, not to accept the recommendation. However, in doing so, that party should be made aware of the potential ramifications of a 'process contract' breach (see **Section 9.9 Tender evaluations**).

Any decision which is inconsistent with the tender evaluation panel's recommendation should include the reasons for making an alternative decision. Such a decision must be compatible with the selection criteria published in council tender documentation.

### 9.20. Advice to tenderers and public announcements

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Both successful and unsuccessful tenderers should be advised of the outcome. Best practice is for the chairperson of the evaluation panel to speak with each unsuccessful tenderer and explain how they could improve their proposals in order to increase the prospect of being successful in future.

A direct personal approach to unsuccessful tenderers may well avoid subsequent grievances and more importantly may improve the quality of proposals received in response to future requests for tenders.

### 9.21. Completion of contract documentation

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The contract should be executed by each of the parties prior to works commencing. The contract documentation assembled for execution must represent the contract as intended. If there are changes as a result of negotiations these must be incorporated in the executed documentation. If these vary from the conditions of tender, amendments must be made to ensure consistency.

Some councils seek to accelerate the commencement of services or works by the issuing of a *letter of intent*. Letters of intent are problematic. They will only rarely be considered a binding contract and should therefore not be used to accelerate the commencement of works. It is preferable to prepare the contract documentation promptly, rather than use a letter of intent.

## 9.22. Execution of contracts

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The careful execution of the contract documentation is vital to the validity of the contract. It is useful, although not necessary, to have the contractor sign first. This provides some assurance to the council that execution of the documents will not be overlooked. The contract documentation should be bound and each page initialled by both parties.<sup>138</sup>

The signatories to a contract on behalf of council depend on the authorities that are in place. These will be found in council delegations.

Whilst council is not obliged to apply the council seal to any contracts, consideration should be given to applying the seal on major contracts or those where the absence is likely to raise concerns with the contractor. The rules for use of the seal are found in council's local law – often called the Meeting Procedure and Common Seal Local Law. Many of these local laws provide for a signature of:

- either the mayor or a councillor, **and**
- either the CEO or a senior officer.

The seal can only be applied on the authority of the council. Council can delegate the authority to decide when to apply the seal to a contract. Procurement practitioners responsible for overseeing the execution of contracts should be familiar with the relevant delegations and their council local law.

## 9.23. Tender performance security and retention monies

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Council should hold a security deposit for significant valued contracts. The basic principle is that council, as the contract principal, holds security for the purpose of ensuring the due and proper performance of the contract. The security deposit is released by the council to the contractor either once the work is complete or, if the contract provides and where the sum is substantial, at certain stages of the contract.

Councils should ensure any security is in the form of cash or an unconditional bank guarantee given by an approved financial institution.<sup>139</sup>

The contract should fix a date by which the deposit must be lodged. Many conditions of contract provide that it is a substantial breach of the contract for a contractor to fail to lodge the security.

Some building and construction contracts provide for retention monies where a specified percentage from progress payments is withheld until the amount of retention equals the total amount of security (sometimes deducted at the rate of 10% of each payment until a total of 5% of the value of the contract is reached). A council should consider the risks associated with allowing retention monies and whether a proportion of upfront security should be required in order to mitigate risks. Council should consider whether a potential contractor has sufficient cashflow to allow retention monies to be deducted from progress payment without causing financial duress (see **Section 5.6 Fairness and impartiality with regard to timely payments to the contractor**).

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<sup>138</sup> Initialling each page provides clarity as to which documentation forms part of the contract and thus reduces the risk of conflict over the provisions of the contract. Each council must balance the cost of this task against the costs of disputation if uncertainty (or fraud) arises.

<sup>139</sup> The Victorian Department of Treasury and Finance also provides guidance on the recommended prudential criteria and documentary requirements to be considered by a State public sector entity before accepting performance bonds – including insurance bonds. <http://www.dtf.vic.gov.au/CA25713E0002EF43/pages/performance-bonds-guide>.



Managing



# 10. Managing

## 10.1. Introduction

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The processes for managing a procurement will range from a simple process of ensuring that ordered goods are delivered through to the management of a complex contract. Individual contracts may also form part of larger projects and be subject to various prerequisites. For example, a building contract may be dependent on the purchase of land.

A critical aspect of the management phase of the procurement cycle is that by this stage the rules of the contract are largely fixed. If due diligence has not been applied to correctly establish the contract to obtain the desired outcomes in the planning and implementation phases, then changing the scope or intent of the contract at this point can prove difficult and expensive.

## 10.2. Objectives and scope

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The aim of the management phase of the procurement cycle is to ensure that goods and/or services are provided, or works are delivered in accordance with the contract. This involves ensuring that all parties to a contract meet their respective obligations under the contract.

The scope of this section of the guidelines commences after the contract has been awarded and finishes when all retention works are completed and the results of the contract are realised and/or assets are handed over. The content of these guidelines is not a variation of, or substitute for, the terms of a contract which take precedence.

The following guidance largely applies to formal contracts, as distinct from lower value, lower risk purchases. This guidance touches largely on operational aspects of contract management and generally does not deal with the very wide range of technical and legal matters which can arise with the interpretation and implementation of contracts.

## 10.3. Resourcing management of the procurement

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Relative to the size of the contract, adequate resourcing of contract management by council is essential to a contract's success – both in terms of adequate time commitment and the expertise of the council contract manager.

As with other aspects of the procurement cycle, a council should ensure the roles and responsibilities of the staff engaged in contract management are clearly documented.

Some of the expertise required includes:

- an understanding of the contract documentation – not only the specifications but also the conditions of contract and its meaning and practical application
- an ability to manage the relationship with the contractor and their representatives
- an appreciation and acceptance of the importance of ethical conduct in the management of contracts
- adequate project management skills (especially scheduling, prioritisation and time management)
- required level of delegation and authority.

These roles require either expertise or the appointee to be adequately supported by a person who does have such expertise. This has particular application to council staff that are only responsible for an occasional contract.

Some councils have implemented contract management software to assist in processing the wide range of issues which arise in contract management. Maximum benefit is derived by interfacing or integrating contract management software wherever possible with council's other software.

### **10.3.1. Superintendent and/or superintendent representative (or council representative or contract supervisor)**

Contracts should provide for the appointment of a superintendent<sup>140</sup> by the council. This is the contract manager. The superintendent is obliged to follow the provisions of the contract documents; must interpret and administer the contract in accordance with the documents; and must act ethically and with due consideration for their intent.

If the contract document does not nominate the superintendent then once an appointment is made the contractor should be advised. The superintendent's role is to manage the interaction between the contractor and the principal<sup>141</sup> (i.e. council).

The key roles of the superintendent under the contract should be set out in the conditions of contract. The superintendent is responsible for the day-to-day administration of the contract and key tasks including:

- issuing directions to the contractor
- negotiating disagreements
- monitoring, recording and reporting
- assessing claims made against the work undertaken and certifying payments.

Other roles of a superintendent include:

- assessing, referring and/or authorising contract variations
- determining the quality of materials and workmanship, including professional standards
- issuing notices and dealing with payment provisions
- ascertaining losses or expenses by the contractor due to directions
- assessing and determining any extensions of time applications

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<sup>140</sup> References to superintendent or superintendent's representative should be taken to refer to council representative or contract supervisor in the case of contracts for goods or services respectively.

<sup>141</sup> The principal is a generic term used in a contract to refer to the party to the contract that engages the contractor to perform work or provide goods or services.

- determining and formally notifying the date of practical completion
- determining completion and issuing the final certification.

In managing all these matters, a superintendent must be proactive in approaching and resolving all aspects of the contract.

Where councils have numerous contracts, the superintendent is often a senior person who does not have day-to-day involvement with the conduct of the contract. In such circumstances, it is common practice for the superintendent to appoint a superintendent's representative. The appointment of a superintendent's representative should be formalised in writing including any limitations on the authority of the appointment. These limitations may include restrictions on:

- engaging in arbitration, litigation or mediation
- approval of contract variations
- handover of a completed project
- issue of the final payment certificate to the contractor.

In these guidelines, the term superintendent should be taken to also cover the superintendent's representative.

## 10.4. Contract management prerequisites

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One of the first roles of the superintendent is to ensure all components of the contract are present to effectively oversee the contract. These will include:

- **contract documentation:** particularly the executed contract agreement, conditions of contract, specifications and letter of acceptance
- **insurance requirements:** ensuring a copy of required insurance certificates of currency are held, and maintained current, by council
- **bank guarantees:** to be secured from the contractor where they are provided for in the contract. These should be unconditional guarantees of the value stated in the contract
- **approvals:** are held for all planning matters, service authorities, etc.
- **other statutory approvals:** have been finalised – for example, approvals under Section 193(5A) of the Act for entrepreneurial activities
- **funding considerations:** such as grant approvals are secured and grant conditions are established
- **occupational Health and Safety (OHS):** documentation and systems have been reviewed and confirmed
- **risks:** have been assessed and any risk management plan which has been developed as part of the tender process has been reviewed to identify, monitor and manage all risks over the life of the project contract in order to achieve project objectives and a value for money outcome.

If the contract superintendent has not been involved in the planning and implementation phases of a contract then a formal transitioning should occur wherein the contract superintendent is fully briefed on the background of the contract and the expected outcomes.

## 10.5. Contract management manual

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Given the complexities of contract management, a council should support its contract staff with the development of a contract management manual.

Depending on the size and complexity of each council, a contract management manual will vary from a simple written guide to an online manual with a full set of checklists and proformas. Ideally this will, in turn, be integrated with any IT contract management system operated by the council.

As with a procurement manual, a key aspect of a contract manual is its structure. Given the amount of material that supports contract management, it is essential the manual is structured in a logical manner to maximise its accessibility and usefulness. While not exhaustive, the following list outlines what could be included in a contract management manual:

### **1. preparation of tender and/or conduct documents**

- a) development of appropriate tender
- b) expression of interest
- c) contract insurance requirements
- d) tender document approval

### **2. tender procedures**

- a) advertising
- b) issue of documents
- c) pre-tender meeting
- d) tender enquiries
- e) tender box (or electronic lodgement)
- f) tender opening procedures
- g) late tender

### **3. evaluation and acceptance of tenders**

- a) evaluation panel
- b) evaluation of tenders (or expressions of interest)
- c) financial assessment
- d) negotiation

### **4. finalising and executing the contract documents**

- a) awarding of contract
- b) security of documentation

### **5. administration of the contract**

- a) commencement of contract
- b) communication
- c) customer communication
- d) meetings
- e) issue resolution
- f) dispute resolution
- g) contract records



- h) variations to contracts
- i) performance monitoring, auditing and review
- j) payments
- k) contract extension
- l) default and cancellation
- m) contract completion.

A number of councils have excellent contract manuals.

## 10.6. Contractor relationships

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One of the key ingredients in successful contract management is the establishment of productive relationships between the council and contractors. This relationship is generally governed by the provisions of the contract. However, the contract should not be so rigid that it precludes flexible, constructive management or the natural maturing of the relationship between council and the contractor.

The basis of an effective working relationship with a contractor can be enhanced through the following actions:

1. establish an agreed understanding of the contract with the contractor
2. understand the background to the contract and any existing relationship with the contractor
3. establish the necessary systems for monitoring and reporting, protocols for communication and record keeping arrangements
4. ensure that any other stakeholders understand the rules of the working relationship.

The protocol for communication will include the frequency of meetings which may be defined in the contract documentation; meetings should be timed according to the needs of adequate supervision.

Formal meetings on contracts with longer terms should be conducted at predetermined points. These meetings should review key timelines, critical deliverables and performance reporting priorities.

The outcome of all dealings with the contractor should be committed to writing (or email) and held on file.

### 10.6.1. Negotiation

Most disagreements between a council and its contractors can be resolved through negotiation. The intent of negotiation during a contract is to reach a mutually acceptable solution where both sides consider they have gained the best possible result in the circumstances.

Successful negotiation will avert a formal dispute arising and is generally a preferable outcome in terms of both cost and progress of the contract. All negotiations should be conducted by two or more staff.

The outcome of any negotiated disagreement should be committed to writing and written acceptance by the contractor should be obtained.

### 10.6.2. Dispute resolution

At times a disagreement will not be resolved by negotiation and a dispute may arise. Consideration at this point should be given to seeking expert advice or assistance – dependent on the scale and ramifications of the disagreement.

The process for resolution of a dispute will generally be governed by the terms of the conditions of contract. All parties are bound by these. A council should follow these processes carefully.

### 10.6.3. Mediation

Where a dispute arises between a small or medium business and a council, the business may contact the Victorian Small Business Commissioner (VSBC) for assistance in resolving the dispute.

The VSBC provides a quick, low cost and confidential mediation service to resolve these disputes. Mediation avoids the uncertainty, cost and disruption traditionally associated with litigation. Terms of settlement reached at mediation by agreement between the parties is binding on both parties.

Mediation is a quick, less formal and less costly approach than arbitration. If mediation fails to resolve the dispute, arbitration may be undertaken.

### 10.6.4. Arbitration

The conditions of a contract will generally allow a dispute to be resolved by arbitration. The aim of arbitration is to obtain a final and enforceable result without substantial costs, delays and the formalities of litigation. Notwithstanding, it is still an adversarial process with the possibility that neither party will be satisfied with the outcome and it may be costly.

### 10.6.5. Litigation

Litigation is the act of pursuing a lawsuit or seeking redress through the courts. It can be expensive and time consuming and should only be undertaken when other avenues have failed. Litigation should be conducted through council's lawyers.

## 10.7. Occupational health and safety (OHS)

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Councils should have collected and assessed the OHS regime of a contractor when evaluating their tender. This should ensure that the contractor's OHS management system demonstrates compliance with all duties of an employer as specified in the *Occupational Health and Safety Act 2004*. A superintendent must equally ensure that council's own OHS responsibilities are met.

Councils undertaking to develop and manage buildings and civil construction projects should take particular note of the WorkSafe Victoria publication (*Health and Safety in Construction Procurement 2010*).<sup>142</sup>

It is beyond the scope of these guidelines to provide guidance on all aspects of OHS. Depending on the size and complexity of the contract, the superintendent should continually be alert to identifying, monitoring and regularly auditing OHS requirements. The advice of council's OHS officer should be sought where necessary.

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<sup>142</sup> WorkSafe Victoria – A Handbook for the Public Sector: Health and Safety in Construction Procurement, Edition No 1, October 2010.

## 10.8. Claims/variations and payments

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The conditions of contract generally provide rules for payments under a contract. There are several factors that impact on contract payments, including:

- contract lump sum or rates
- variations, including those due to latent conditions
- provisional sums
- rise and fall allowances
- liquidated damages
- extension of time and prolongation claims.

The *Building and Construction Security of Payments Act 2002* will also impact certain payments (see below).

### 10.8.1. Contract variation

The conditions of contract will generally prescribe the circumstances in which a variation might arise (for example an instruction by the superintendent for the contractor to undertake additional work – known as ‘scope variations’ or where the actions of the council leads to a claim for inefficiencies – known as ‘prolongation claims’). The method of calculating the value of variations should also be contained within the conditions of contract.

Contract documentation should be written in order to minimise the opportunity for conflict in determined variations. It should also ensure that council’s appointed superintendent can represent the interests of the council in matters of contract variations.

Councils need to exercise caution with contract variations where the:

1. variation works were not envisaged in the original contract (they are inconsistent with the scope of that contract)
2. value of the variation exceeds the threshold under section 186 of the Act
3. value of works which did not reach the threshold in the original contract (and was not subject to a public tender process) increases, and takes the total value over the threshold.

In these circumstances a council should assess whether it needs to undertake a further section 186 process or seek a Ministerial Approved Arrangement (see **Section 3.7.3 Ministerial Approved Arrangements**).

### 10.8.2. Extension of time and prolongation claims

Where a council grants an application by the contractor for an extension of time, a claim may well follow from the contractor for compensation for any additional costs involved in the extension. The assessment of prolongation claims may prove difficult and require expert advice.

### 10.8.3. Latent conditions

Latent conditions are physical conditions on the site or its surroundings, including artificial things but excluding the weather conditions at the site, which differ materially from the physical conditions that should reasonably have been anticipated by the contractor at the time of the tender. For example, latent conditions commonly include underground utilities such as telecommunications, electricity lines and sewerage systems and site conditions affected by contamination and water courses.

Where latent conditions are likely to arise, most contracts will provide for the contractor to be compensated provided it follows notification requirements within the contract.

It is the role of the superintendent to vet and test each claim for any variation.

#### **10.8.4. Provisional sums**

A provisional sum is a nominated amount of money, usually estimated by a quantity surveyor or engineer, where the exact scope and cost of specific work cannot be determined at the start of the contract. An example would be the excavation of rock on a building contract. Provisional sums are distinct from variations which are not known at the outset of the contract.

Provisional sums should only be provided for in contracts where it is not possible to determine the value of a component of works. They should not be used where it is possible to determine the value of the relevant component of works – either as a lump sum or as a rate.

Usually, a provisional sum included in a standard contract is not payable until a direction is given to the contractor to carry out that work or provide the item to which the provisional sum relates. Where the contractor carries out that work or provides that item, the price is determined by the superintendent. Any difference between the provisional sum stated in the contract and the amount determined by the superintendent is added to, or deducted from, the contract sum.

There are risks around provisional sums. If a council makes allowance for provisional sums in a contract it should ensure the rules around assessing the value of the work and payment for the provisional works are clearly set out in the conditions of contract.

#### **10.8.5. Contract breaches**

A breach of a contract is the failure by one of the parties to a contract to satisfactorily perform the service or action agreed to in the contract.

If a contract is breached there are several possible remedies. These include informal remedies such as replacing defective goods; damages as payments to compensate the innocent party; termination in situations where one party refuses to carry out an obligation under the contract; and specific performance where one party wants the other party to actually do what they undertook in the contract.

Councils are generally best advised to seek the least expensive and the less disruptive solution in case of contract breaches. Councils should always consider obtaining legal advice before acting in circumstances of a contract breach.

### 10.8.6. Liquidated damages

Liquidated damages are genuine covenanted (agreed) pre-estimates of damage where the contractor fails to perform or not remedy in a timely manner any non-compliance in the performance of the contract. They must be distinguished from penalties.

#### ILLUSTRATION



A typical contract which provides for liquidated damages is a waste service contract. An example of the type of provision in these contracts is:

Liquidated Damages may be deducted from the payment due to the contractor if the superintendent has reasonably determined that the contractor has failed to perform or not remedy in a timely manner any non-compliance in the performance of the contract.

The table below will be used to determine the times allowable to rectify the non-compliance and amount to be deducted if it is not rectified. The contractor accepts that the amount specified in the table as liquidated damages is a reasonable assessment of the cost to council of the non-compliance.

Item of non-compliance	Time to rectify	Liquidated damages to be deducted for each occurrence
Hard waste collection service		
Failure to collect waste from outside any tenement	24 hours	\$150
Failure to complete scheduled collections in any scheduled week	24 hours	\$150
Performing collections outside specified hours	N/A	\$500
Failure to keep collection vehicles in good order and in a sanitary condition	24 hours	\$200
Collection and delivery to a nominated disposal facility any waste not associated with the contract	Not applicable	\$2,000
Overloading of trucks above the tolerance allowed by VicRoads	Not applicable	\$500 per offence

Legal advice is generally beneficial to ensure that liquidated damages provisions in a contract are enforceable.

### 10.8.7. Building and Construction Security of Payments Act 2002

A council must be alert to the provisions of the (*Building and Construction Security of Payments Act 2002*) which helps to ensure that any person who carries out construction work or supplies related goods and services under a construction contract gets paid. The Building and Construction Security of Payments Act is designed to increase cashflow and provide a fast, cheap, non-legalistic way of resolving payment for work done or materials or services supplied. In summary it:

- covers both verbal and written construction agreements
- provides a statutory right to be paid for work done
- establishes default payment terms where contract is silent
- bans ‘pay when paid’ and ‘paid if paid’ clauses<sup>143</sup>
- establishes a process for the fast recovery of payments
- provides for the quick adjudication of payment disputes at a low cost to the parties.

### 10.8.8. Contract completion and asset handover

A contract is considered complete when all activity associated with the contract has been accomplished, all work is done and all accounts have been paid.

One of the more useful tools at the end of a contract – especially if an asset such as a building is being handed over – is a checklist of all tasks which need to occur at this point. These will include:

- checking that permits and approval conditions have been satisfied
- recording on asset registers
- confirmation of completion and that contract records are complete – including handover to any internal asset manager
- establishment of maintenance regime (including product warranties)
- acquitting any funding grants.

**Practical completion:** A term which applies to a construction project and describes the stage when:

- the work has been completed, all equipment installed, tested and found to be in running order
- the project is deemed safe and fit for occupation to the satisfaction of the superintendent
- the facility is fit-for-purpose, complies with service delivery performance requirements
- the facility commissioning has been undertaken
- operation and maintenance manuals, training and documentation have been provided.

A contractor will seek a certificate of practical completion once it believes works are complete and often a joint inspection will occur to establish (or otherwise) the contractor’s claim.

**Defects liability period:** The defects liability period is the period stated in the contract that provides for the rectification of minor defects and/or omissions or items that fail to perform suitably, that may be outstanding or occur after practical completion.

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<sup>143</sup> A ‘pay when paid’ clause provides that payment to the subcontractor will be made within a certain period of time after the contractor has been paid by the owner, rather than within a period of time after the subcontractor has performed its work. A ‘pay if paid’ clause establishes that payment by the owner to the contractor is a condition precedent to the contractor’s duty to pay its subcontractors and suppliers.

**Transitioning:** Some contracts will provide for the transitioning between different contractors. This occurs particularly in contracts for ongoing services. Where transitioning is required, the contract should provide for the existing contractor to participate in a transition process and require particular standards of cooperation with both the council and the new contractor.

Contractors may also be required to perform services for a short term after the contract term has expired. Care is needed to ensure that a new contract, subject to section 186 of the Act, is not created in this process.

## 10.9. End of contract term/contract options

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Before a contract term comes to an end a council will need to determine the future direction of the service. If the contract provides for options of additional terms council will need to elect (if the option is at council's discretion) whether to take up those options and extend the contract. There is likely to be a period of time specified in a contract before which council must notify the contractor of its intent.

If a council extends a contract it must do so in accordance with the provisions of the original contract. Parties to the contract must be of the view that the terms of the original contract provide sufficient certainty to ascertain the essential terms of the renewed agreement. However, if the terms are so uncertain, and any review conducted in accordance with the contract requires the parties to agree on all or any of the essential terms of the renewed contract, then they are putting in place a new contract and the council will be subject to compliance with section 186 of the Act. It matters not whether the new contract is different or identical to the existing contract following the renewal.

If a contract does not provide for additional terms then the contract cannot be extended. A contract that runs past the end of its term constitutes a new contract. Likewise if the thresholds set out under section 186 of the Act are reached the contract needs to be subject to a new public tender process.

## 10.10. Record keeping

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Thorough and sound record keeping/archiving at the end of a contract is important for a number of reasons, including to:

- substantiate the practices adopted during the procurement
- support any post-contract matters or disputes
- demonstrate OHS compliance and address any subsequent claims.

As with most aspects of records management, the structure and extent of records kept will depend on the value and complexity of the procurement. Procurement records, including contract management records, should be integrated with council's recording management system – whether hardcopy or electronic.

Records should be kept in accordance with the *Public Records Act 1973* Public Record Standard PROS 09/05 (Retention and Disposal Authority for Records of Local Government Functions).







Performance management and reporting



## 11. Performance management and reporting

Council should develop a systematic and well documented process for evaluating procurement outcomes in order to demonstrate that objectives are being achieved and provide a basis for the continual improvement of their procurement processes.

Procurement evaluation and reporting can provide a basis for effective control and stewardship of resources and demonstrates the value of the procurement function.

A key criterion for evaluating and reporting on the performance of a procurement is that it is simple and concise. There are a wide range of measures which can be used to measure aspects of performance. These typically include, but are not limited to:

- volume of orders/contracts
- on-time delivery/completion
- defect rates
- cost of raising order/processing contracts
- results of customer satisfaction questionnaires.

However, the recommended focus should be on an evaluation process which leads to the implementation of continual improvement to council's significant high value procurements.

There are three key procurement areas which should be evaluated:

- **contractor performance**
- **opportunities to improve processes**
- **incorporation of process improvement.**

## 11.1. Evaluate contractor performance

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In a best practice context the following evaluations of contractor performance should occur:

- **prior to final payment or contract payment:** when evaluating performance of the contractor, the contract manager should determine the extent to which the requirements were met, whether any problems arose, the level of satisfaction with the procurement outcome, and whether the performance standards were met. The extent of any evaluation should vary with the value of the procurement.
- **end of procurement review or contract management review:** as part of this evaluation the contract manager must determine if established processes were followed and must record reasons for non-compliance with processes – in order to determine the need to revise practices.

This review can be undertaken at the time the last payment is made and can be a simple online questionnaire for the contract manager. The questionnaire results should be reviewed and audited by the senior officer responsible for procurement.

It is also important to include a review of the currency of contract documentation at the end of the procurement to ensure that any problems that may have occurred are identified and, where appropriate, improvements can be made in future contractual arrangements.

- **audit trail:** the contract manager should use a checklist at the time of the last contract payment to review documents relating to the procurement and ensure there is a sufficient audit trail.

## 11.2. Evaluate opportunities to improve processes

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In a best practice context the following evaluation process improvements should occur:

- seek feedback from suppliers, users, contractors and consultants to determine their satisfaction with the procurement/contract management processes, and seek suggestions for improvement
- ensure that suggested improvements comply with legislation and policies.

## 11.3. Incorporate process improvements

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In a best practice context the following implementations of improved process evaluation should occur:

- review and update manuals, plans and policies as necessary
- train staff in revised processes
- use change-management strategies to implement processes.



Appendix A: Policy structure  
Appendix B: Glossary

## 12. Appendix A: Policy structure

The following structure encompasses the requirement for a procurement policy to comply with section 186A of the Act. Reference should be made to **Section 3.11 Procurement policy**.

This appendix contains examples of best practice.

A council should modify the sequence of this structure to meet any standard policy structures adopted by its council. The following content should be considered a minimum:

- Policy title (and number)
- Policy approval date and scheduled review date
- Policy objectives

### **A typical set of policy objectives may include the following:**



The objectives of this policy are to:

- establish a procurement framework for the XXX shire/city council to achieve value for money and continuous improvement in the provision of services for the community
- ensure that council resources are used efficiently and effectively to improve the overall quality of life of people in the local community
- achieve compliance with relevant legislative requirements
- achieve high standards of probity, transparency, accountability and risk management, and
- give preference to the procurement of environmentally sustainable goods, services and works.

A council should take care not to inadvertently constrain its capacity to broadly consider the potential benefits of a particular procurement (including achieving sustainable objectives) by prescribing commercial considerations only.

- Legislative compliance provisions

**This section may be a simple as:**



The key legislative requirements including:

- Section 186 of the Act (Power to enter into Contracts)
- Section 186A of the Act (Procurement Policy)
- Section 3C of the Act (Objectives of a Council)
- Sections 208C of the Act (Applying Best Value Principles)
- Sections 77A, 77B, 78, 78A to 78E, 79 79B to D, 80, 80A to C and 95 of the Act (Conflict of Interest)
- Section 98 of the Act (Delegations)
- Section 140 of the Act (Accounts and Records)
- The relevant provisions of the Competition and Consumer Act 2010

Council will adhere to all these provisions in all procurement matters consistent with the Victorian Local Government Best Practice Procurement Guidelines.

Council will develop and maintain a procurement manual which will detail the implementation of these legislative provisions.

- Scope and application

**A typical scope might say:**



This policy represents the principles, processes and procedures that will be applied to the purchase of all goods, services and works by council. The scope of this policy commences from when council has identified a need for procurement requirements. It continues through to the delivery of goods or completion of works or services.

This policy will apply to councillors, council staff and all persons undertaking procurement on council's behalf and they are accountable for complying with all relevant procurement legislative and policy requirements.

## Policy provisions

- Procurement principles

### Example:

**Council will apply the following fundamental best practice principles to every procurement, irrespective of the value and complexity of that procurement, including:**



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

**Council is also committed to reducing its environmental impacts. Council will encourage the design and use of products and services that have been produced to ethical standards, which have minimal impact on the environment and human health. This includes, but is not limited to:**

- waste management
- recycling
- energy management
- emissions management
- water conservation
- green building design
- environmentally sustainable procurement.

These principles are detailed in council's procurement manual.

- Organisational structure/model adopted for procurement

### Example:

It is council policy to operate a centre-led procurement structure wherein all strategy, policy, technology, best practice and networking in procurement matters will be led by council's centralised procurement unit/department.



Council's procurement coordinator is responsible for leading the operation of the procurement unit/department.

- Delegations and authorities

**This section should reference any:**



- Deed of Delegation from council to the CEO on procurement matters (including the power to determine that a contract must be entered into because of an emergency, being a sudden, unforeseen happening, for the immediate period of the emergency).
- Deed of Delegation by the CEO to staff on procurement matters.
- Authorisation to staff for procurement at sub-threshold levels and the conditions applying, for example, number of quotations required, compliance with council policy and its procurement manual, etc.

A typical procurement policy from one council records the authority and conditions to procure at levels below the thresholds in a format similar to the following:

Up to \$3,000 #	> \$3,000 up to \$15,000 #	> \$15,000 up to \$75,000 #	> \$75,000 up to \$149,999.99 #
<b>Acceptance of quotations</b>			
By the coordinator	By the team leader	By the departmental manager	By the director
<b>Quotations required</b>			
Obtain at least one verbal or written quotation  A written quote is preferable for verification purposes	Obtain at least one written quotation	The standard practice is for staff to seek and receive at least three written quotations.  If less than three quotations are to be sought or were received, then the purchase is not to proceed unless the reasons for proceeding with the purchase are approved by the director and placed on the relevant information management file.	

# All \$ sums include GST

Councils should develop their own rules for quotation requirements

- Procurement planning

**Example:**



A strategic procurement plan and a procurement conduct plan must be completed and approved for all procurements of a value of \$1 million or greater.



- Procurement manual

**Example:**

Council will develop and maintain an online procurement manual to provide guidance to council staff on all operational aspects of procurement. The manual will include all checklists and forms required in council's procurement process.



- Probity requirements

**Examples of contents might include:**

Councillors and members of staff (and all persons engaged in procurement on council's behalf) must exercise the highest standards of integrity in a manner able to withstand the closest possible scrutiny.

All members of staff have an overriding responsibility to act impartially and with integrity, avoiding conflicts of interest (Section 95 of the Act).

In procurement matters:

- Members of staff must disclose a direct or indirect interest (and the type of interest) before providing advice or reports (or any other matter) (Section 80C of the Act)
- Council officers delegated council powers or duties are prohibited from exercising those powers, duties or functions if they have conflicts of interest (Section 80B of the Act)
- A councillor must comply with the Primary Principle of Councillor Conduct and avoid conflicts between his or her public duties as a councillor and his or her personal interests and obligations. (Section 76BA LGA). Councillors (and members of audit committees) must disclose a conflict of interest (Section 79 of the Act)
- Councillors must also comply with the Councillor Code of Conduct
- Councillors must not improperly direct or improperly influence a member of council staff in the exercise of any power in the performance of any duty or function. (Section 76E of the Act)
- Members of staff must also comply with the Code of Conduct for Council Staff (Section 95AA of the Act)
- All staff engaged in the evaluation of quotations or tenders evaluation must adhere to this policy and complete and lodge a Conflict of Interest Declaration and a Deed of Confidentiality
- All councillors and staff must adhere to council's gifts and hospitality policy in matters of procurement.

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- Probity requirements (continued)

**Example:**

Councillors and staff members should make their interests known in any situation where it could be perceived that an interest might unduly influence them.



**Late tender:** It is council policy not to accept late tenders under any circumstances.

**Probity plan and probity audits:** A probity plan should be prepared and a probity advisor or auditor is to be appointed by the relevant council director to any tender evaluation panel where the value of the subject tender is assessed to reach \$10 million in value.

- Risk management / occupational health and safety

**Examples of contents might include:**

Council will manage all aspects of its procurement processes in accordance with its adopted risk management policy and in such a way that all risks, including occupational health and safety, are identified, analysed, evaluated, treated, monitored and communicated to the standard required by the law, in accordance with Australian Standards and council policy.



A procurement risk management plan must be completed and approved for all procurements of a value of \$1 million or greater.

- Internal control and internal audit

**Internal control**

Council will establish, document and maintain a framework of internal controls over procurement processes in order to ensure:



- a framework for supplier engagement is in place
- more than one person is involved in, and responsible for, each transaction
- transparency in the procurement process
- a clearly documented audit trail exists for procurement functions
- appropriate authorisations are obtained and documented
- systems are in place for appropriate monitoring and performance measurement.

All persons engaged in procurement processes must diligently apply all internal controls.

**Internal audit**

Council's internal audit committee charter will include provision for the committee to monitor and review this procurement policy and its implementation and the related internal controls.

- Methods of procurement

### Methods of purchasing



Council's standard methods of procurement shall encompass a:

- purchasing card
- purchase order following a quotation process from suppliers for goods or services that represent value for money under directed quotation thresholds
- contract following a public tender process
- contract established by a third party agent where council is eligible to participate
- State Purchase Contract or a Whole of Victorian Government Contract
- contract entered into under an arrangement approved by the Minister for Local Government.

A council director may determine to seek expressions of interest (Section 186(1) of the Act) where there is:

- likely to be many tenderers, tendering will be costly or the procurement is complex and council does not wish to impose the costs of preparing full tenders on all tenderers
- uncertainty as to the willingness and/or interest of parties or vendors to offer the potential products or services or to undertake the proposed works.

An expression of interest process can be undertaken where determined by the CEO or a director, and where council advertises publicly the:

- purpose and nature of the contract
- date by which it will invite tenders.

A request for information is to be used to determine whether the:

- available technologies, products or services available in the marketplace meet council needs
- proposed terms and conditions or deliverable expectations are acceptable in the marketplace
- proposed budgets are adequate to meet non-standard procurement needs – inadequate budgets should not become apparent when tenders are opened.

- Quotations and tenders

### Calling of tenders



#### A typical policy may contain the following:

Purchases of goods or services, to the value of \$150,000 or more, or for the carrying out of works, to the value of \$200,000 or more for the whole term of the contract will be undertaken by a public tender process, unless one of the nominated exemptions apply.

A public tender process may be used for values less than \$150,000 if this will service council interests and produce a better outcome in the context of this policy.

#### Council's tendering process will:

- comply with the procurement principles set out in this policy
- require a public notice inviting tenders to be placed in the council-chosen newspaper, otherwise seek the widest access to the marketplace
- not levy a charge for access to tender documentation
- provide common advice to all tenderers on all clarifications and amendments.

#### A tendering process may, at the discretion of the relevant director:

- utilise a pre-tender briefing
- engage an agent to act on council's behalf providing that council reserves to itself the final decision on whether to award the contract and that it meets the other requirements of the Act such as giving public notice.

#### Quotations:


- evaluation panels for quotations for goods, services or works for a value up to \$50,000 must comprise at least two persons including one member of staff
- evaluation panels for quotations for goods, services or works for a value over \$50,000 must comprise at least two persons including one member of (third tier) council's management team.

#### Tender evaluation:

- late tenders will not be accepted under any circumstances
- evaluations will be conducted in accordance with the methodology set out in council's procurement manual
- an evaluation panel will be established to evaluate each tender against the selection criteria and its composition will be determined by the respective director
- tender evaluation panels can include external personnel in order to ensure value for money.
- the evaluation process must be robust, systematic and unbiased

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- Quotations and tenders (continued)

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- a price preference of 10% can be applied to the purchase of recycled and environmentally preferable products – all other considerations being equal
  - once a preferred tenderer is selected negotiations can be conducted in order to obtain the optimal solution and commercial arrangements, providing they remain within the intent and scope of the tender. Such negotiations must be exhausted with one tenderer before beginning with another tenderer
  - tender evaluation panels will produce a written report of their evaluation using the appropriate prescribed template.

**Acceptance of tenders:**

The chairperson of the evaluation panel will:

- maintain detailed records of all commercial-in-confidence negotiations, if any occur
- obtain approval for public tenders up to \$500,000 from the CEO
- seek the approval of the council for public tenders up to \$500,000.

- Evaluating performance

**Example:**




Council will evaluate and report on the following aspects of procurement in order to continually improve its processes and outcomes:

- evaluate contractor performance
- evaluate opportunities to improve processes
- incorporate process improvements.

- Charter of Human Rights

**Example:**



Council will ensure that all of its procurement operations are fully consistent with prescribed rights and responsibilities and that they respect the 20 fundamental rights within the Victorian Charter of Human Rights and Responsibilities Act 2006.

- Definitions

This section may reference the glossary contained in the Victorian Local Government Best Practice Procurement Guidelines.



### **Processes and procedures**

The preferred method of incorporating statements of procedure and process in the policy is by reference to the relevant document. This allows flexibility as well as continual improvement of processes and procedures without the need to amend the policy for each change.

# Appendix B: Glossary

<b>Term</b>	<b>Definition</b>
<b>the Act</b>	<i>Local Government Act 1989 (as amended).</i>
<b>Addendum</b>	Additional information or corrections about a request for tender, provided to all registered potential respondents after the initial advertising date.
<b>Bid</b>	An offer by one party to enter into a legally binding contract with another party, often used interchangeably with quote, tender, response and offer. See also 'tender'.
<b>Bidder</b>	The party offering to enter into a legally binding contract with another party, often used interchangeably with respondent and tenderer.
<b>Commercial in confidence</b>	Information that, if released, may prejudice the business dealings of a party (for example, discounts, rebates, profits, methodologies and process information). It is information provided for a specific purpose that is not to be used for any other purpose than set out in the initial document.
<b>Competitive neutrality</b>	A policy which aims to ensure that, where a government business is competing with the private sector, adjustments are made to remove any net advantage (or disadvantage) the government business has because it is owned by government.
<b>Conflict of interest</b>	In Victorian local government the law provides that a staff member holding a delegation or advising council or a special committee has a conflict of interest which they must disclose in writing when they have a personal or private interest of the type specified in the legislation.
<b>Conflict of interest declaration</b>	A declaration signed by staff, councillors and consultants involved with a procurement process to indicate they do not have a conflict of interest.
<b>Conditions of contract</b>	The contractual terms that define the obligations and rights of the parties involved in the contract, and form the basis of the contract awarded to the successful tenderer.

<b>Conditions of tendering</b>	Rules governing the content and submission of tenders and the conduct of the tendering process.
<b>Confidentiality agreement</b>	A written legal document that is proof and record of the obligations agreed to between the parties; to protect the commercial interests of the council and/or the contractor. Often used interchangeably with the deed of confidentiality.
<b>Contract</b>	An agreement between two or more authorised persons on behalf of their organisations to perform or not perform a specific act/s that is enforceable in law. A contract may be verbal or written or inferred by conduct.
<b>Contract documents</b>	Documents construed together as an instrument of contract. They may include terms and conditions, specifications, drawings, tender responses, delivery schedules and payment schedules.
<b>Contract management</b>	The process that ensures both parties to a contract fully meet their respective obligations as efficiently and effectively as possible, in order to deliver the business and operational objectives required from the contract and in particular, to provide value for money.
<b>Contract manager</b>	The person nominated by the council to manage the day-to-day matters of the contract. See also superintendent.
<b>Contractor</b>	Respondent (person, firm, etc.) whose tender/quotation offer has been accepted by the council with or without modification.
<b>Contract variation</b>	An addition or alteration to the goods and/or services under a contract that is within the general scope of the original contract. A contract variation can be documented between the parties with a letter or a deed of variation.
<b>Council staff</b>	Includes full-time and part-time council staff, and temporary employees, contractors and consultants while engaged by the council.
<b>Deed of confidentiality</b>	See confidentiality agreement.
<b>Delegate</b>	A person authorised by the council or Chief Executive Officer to make general or specified decisions constrained only by the instrument of delegation. Specifically, delegates commit and incur expenditure. The delegate is responsible for actions arising from their use of such power.
<b>Delegation</b>	A power handed down by the council or Chief Executive Officer in an instrument to enable a delegate to act on council's behalf.



<b>Due diligence</b>	The process of reviewing and analysing in detail the capacity of a bidding organisation to meet future contract performance requirements. This may include a detailed assessment of the organisation's financial stability, legal risks, technical capacity and infrastructure.
<b>eProcurement</b>	EProcurement refers to the use of electronic methods at any stage of the procurement process from identification of a requirement through to any to contract management and possibly procured asset management. Electronic tendering is the undertaking of the tendering process stage by electronic methods.
<b>eTendering</b>	An internet-based electronic tendering system that provides the facility to electronically invite or advertise RFIs and RFTs, distribute ROIs and RFT documents, securely receive and open tenders, and provide various notices.
<b>Expression of interest (EOI)</b>	A response to an open approach to the market requesting submissions from bidders interested in participating in procurement. It is used to identify potential suppliers interested in, and capable of, delivering the required goods or services. Potential suppliers are asked to provide information on their capability to do the work. It is usually the first stage of a multi-stage tender process.
<b>Evaluation criteria</b>	The criteria used to evaluate the compliance and/or relative ranking of tender responses. All evaluation criteria must be clearly stated in the request documentation.
<b>General conditions of contract</b>	Contractual terms which define the obligations and rights of the parties involved in the contract, and form the basis of the contract awarded to the successful tenderer.
<b>Late tender</b>	A tender received after the specified closing time and date.
<b>Negotiation</b>	The bargaining process between two or more parties. Each party has its own viewpoints and objectives, but seeks to reach an overall satisfactory arrangement.
<b>Probity</b>	In the context of a procurement process probity is a defensible process which is able to withstand internal and external scrutiny – one which achieves both accountability and transparency, providing tenderers with fair and equitable treatment.
<b>Probity advisor</b>	A contractor with extensive experience and skills in procurement who may develop probity plans and other key documents and provide advice and training to staff on probity principles and guidelines.
<b>Probity auditor</b>	A contractor who provides the Chief Executive Officer with an independent and appropriate sign-off on probity requirements generally at the end of the procurement process.

<b>Preferred tenderer</b>	Tenderer who at the conclusion of the evaluation period has been selected to enter contract negotiations for the contract with the principal.
<b>Procurement</b>	Procurement is the whole process of acquisition of external goods, services and works. It can include planning, design, standards determination, specification writing, preparation of quotation and tender documentation, selection of suppliers, financing, contract administration, disposals, and other related functions. It also includes the organisational and governance frameworks that underpin the procurement function.
<b>Purchase order</b>	A form of contract, which is an official document used to authorise and record the purchase of goods or services by a buyer. It is the prime reference confirming the contractual situation between the buyer and supplier.
<b>Request for expressions of interest (EOI)</b>	An invitation for persons to submit an EOI for the provision of the goods, services or works generally set out in the overview of requirements contained in the document. This invitation is not an offer or a contract. It identifies potential suppliers interested in, and capable of, delivering the required goods or services. Potential suppliers are asked to provide information on their capability to do the work. It is usually the first stage of a multi-stage tender process. See also 'expression of interest'.
<b>Request for information (RFI)</b>	Formal request for information to gain a more detailed understanding of the supplier market and the range of solutions and technologies that may be available. It may be used to develop documentation for a future tender.
<b>Request for quotation (RFQ)</b>	A written process of inviting offers to supply goods and/or services involving simple documentation, a limited number of potential suppliers and generally of relatively lower values.
<b>Request for tender (RFT)</b>	A request for offer against a set of clearly defined and specified requirements. Tenderers are advised of all requirements involved, including the conditions of tendering and proposed contract conditions.
<b>Quotation/quote</b>	A document in the form of an offer to supply goods and/or services, usually in response to a request for quotation.
<b>Small to medium enterprises (SMEs)</b>	Firms with less than 200 full-time equivalent employees and/or less than \$10 million turnover (ABS).
<b>Specification</b>	The statement which clearly and accurately describes the essential requirements for goods, services or works. It may also include the procedures by which it will be determined that the requirements have been met and performance required under a contract.

<b>Social procurement</b>	The use of procurement processes and purchasing power to generate positive social outcomes in addition to the delivery of efficient goods, services and works.
<b>Strategic procurement plan (SPP)</b>	Refers to a detailed plan for a proposed procurement process. It outlines the procurement strategy for major contracts and draws a strategic connection between the higher level project planning and implementation through procurement.
<b>Superintendent</b>	The person appointed to the position nominated as the superintendent in a contract for the purpose of overseeing the council's interests.
<b>Superintendent's representative</b>	The person appointed by a contract superintendent to act on his or her behalf.
<b>Sustainability</b>	Activities that meet the needs of the present without compromising the ability of future generations to meet their needs.
<b>Tender</b>	An offer in writing to supply goods and/or services, usually submitted in response to a public or selective invitation such as a request for tender.
<b>Tender briefing</b>	A forum held where a council representative(s) briefs prospective tenderers regarding a tender process and responds to questions.
<b>Tenderer</b>	Refer to 'bidder'.
<b>Tender process</b>	The process of inviting parties to submit a quotation by tender using public advertisement, followed by evaluation of submissions and selection of a successful bidder or tenderer.
<b>Thresholds</b>	The value above which a procurement, unless exempt, is subject to the mandatory procurement procedures.
<b>Value for money</b>	The optimum combination of quality, quantity, risk, timeliness, on a whole-of-contract and whole-of-asset-life basis (VAGO).