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Amendments to version 20140221-v2.0 of the Procurement Handbook include a revision to the Table of Contents Page and the inclusion of Appendices 1–8 only. No amendments have been made to the body of the document. LGAProcurement recommends that users of the Procurement Handbook always check the LGAProcurement website – www.lgaprocurement.sa.gov.au to ensure that they are using the current version of this document.
The Local Government Association designated 2012 as the Year of Procurement for Local Government, to reflect the importance of procurement and purchasing in Local Government.

Councils spend more than $720 million a year on materials and contracts and in 2010/11 gross capital expenditure was a record high $610 million. These monies are public funds, raised either through rates revenue or from grants allocated by the State and Federal Governments. Therefore, Councils must be above reproach in their use of public money.

A component of our work on procurement this year is the Local Government Association’s Procurement Handbook, which I am delighted to endorse.

The Local Government Association is committed to assisting South Australian Councils to achieve best practice in their procurement activities. This agenda for improvements in procurement practices is driven by the need for Local Government to maximize the value for every dollar it spends in terms of price, quality and service. It is also driven by the requirement that all procurement activities are conducted in a way which is robust, transparent and instills confidence in Councils’ procurement operations.

This Handbook is a guide for Councils in ‘best practice’ procurement. To assist Councils in this process the Local Government Association has also commissioned a complementary suite of template documentation and model policies for use by procurement practitioners as a starting point in their activities. These initiatives will be backed up by significant training and an advisory service to give Local Government procurement practitioners the best possible opportunity to achieve procurement excellence. Councils are encouraged to take advantage of all these tools when undertaking procurement activities.

The role of procurement is to assist the delivery of outcomes to communities, not to be a constraint. This Handbook gives guidance and support to Local Government procurement practitioners consistent with the Local Government Act 1999, standards of probity, good governance and best commercial practice. While individual Councils will have their own policies and associated procedural guidelines, the Handbook and templates do provide a useful starting point for Councils, which can then be tailored to best fit with individual Council’s needs.

I commend this Handbook, the model policies and the associated templates to all Local Government procurement practitioners in South Australia.
Part 1

Overview
1 Introduction

As part of its initiative ‘2012 – The Year of Procurement For Local Government’, the LGA has commissioned this Handbook for Procurement in Local Government in South Australia (Handbook) to support the release of its Suite of Standard Form Documents (Templates).

South Australian Councils commit an estimated $1.5 billion annually to support their operations through a range of procurement processes. These procurement processes are conducted in an increasingly demanding commercial environment that can expose Council officers and Councils to high levels of risk. These risks include not achieving the best possible outcomes in terms of price, issues with the nature of the goods purchased (ie not fit for purpose), the failure to achieve appropriate service levels or not achieving procurement outcomes which are accountable and transparent.

Effective management across the procurement lifecycle, from the conception of a procurement, through contracting to project closure is vital to Local Government in achieving outcomes which are on time, to budget and in accordance with the specifications. To do this certain policies, legislation, procedures and protocols need to be followed and it is essential to achieving best practice that procurement practitioners understand these. A well planned procurement will help ensure that legislation is followed, policies adhered to, pitfalls are avoided and a successful outcome is achieved.

Ultimately, the use of sound procurement and contract management principles will assist Local Government in achieving superior procurement outcomes which translate to identified outcomes for their communities. This Handbook provides an effective ‘how to’ framework for procuring goods, works and services in the Local Government sector. It gives some context to the Templates and provides user friendly guidance to assist in the selection of the appropriate documents for use in your procurement activities. While this Handbook covers the primary issues related to procurement in the Local Government sector, it should always be read in conjunction with the Council’s own procurement policy, procedures and guidelines.

Further information in relation to this Handbook is available from LGA Procurement.

2 Structure Of This Handbook

This Handbook is divided into a number of parts, each of which deals with a specific aspect of the procurement process. Even though all procurement has some common elements, the best practice requirements for each purchase will vary, depending on the particular procurement’s size, risk profile and complexity. By recognising these differences Councils will be able to adapt and apply the process outlined in this Handbook in a way which will best achieve their individual requirements.

3 What Is Procurement?

3.1 Procurement encompasses the whole process of acquiring property, goods, works or services.

3.2 Procurement begins when a Council starts identifying a need and deciding on its procurement requirement.

3.3 Procurement continues through the processes of risk assessment, seeking and evaluating alternative solutions, contract award, delivery of and payment for the property, goods, works or services and, when relevant, the ongoing management of a contract and the consideration of options related to the contract. Procurement also extends to the ultimate disposal of property at the end of its useful life and any necessary transition planning.

3.4 An essential part of the procurement cycle is the ongoing monitoring and assessment of the procurement, including the property, goods, works or services procured.
Procurement is not just the act of purchasing. Consider the entire procurement continuum.

4 Legislative Context And Governance

4.1 The Local Government Act 1999 (SA) (LG Act) governs the way Councils conduct their procurement activities. Please note the following relevant provisions of the LG Act, current as at 18 September 2012.

4.1.1 Section 7 which outlines the functions of Councils:

7–Functions of a council

The functions of a council include —

(a) to plan at the local and regional level for the development and future requirements of its area;

(b) to provide services and facilities that benefit its area, its ratepayers and residents, and visitors to its area (including general public services or facilities (including electricity, gas and water services, and waste collection, control or disposal services or facilities), health, welfare or community services or facilities, and cultural or recreational services or facilities);

(c) to provide for the welfare, well-being and interests of individuals and groups within its community;

(d) to take measures to protect its area from natural and other hazards and to mitigate the effects of such hazards;

(e) to manage, develop, protect, restore, enhance and conserve the environment in an ecologically sustainable manner, and to improve amenity;

(f) to provide infrastructure for its community and for development within its area (including infrastructure that helps to protect any part of the local or broader community from any hazard or other event, or that assists in the management of any area);

(g) to promote its area and to provide an attractive climate and locations for the development of business, commerce, industry and tourism;

(h) to establish or support organisations or programs that benefit people in its area or local government generally;

(i) to manage and, if appropriate, develop, public areas vested in, or occupied by, the council;

(j) to manage, improve and develop resources available to the council; and

(k) to undertake other functions and activities conferred by or under an Act.
4.1.2 **Section 8 which outlines the principles to be observed by Councils:**

8–Principles to be observed by a council

A council must act to uphold and promote observance of the following principles in the performance of its roles and functions –

(a) provide open, responsive and accountable government;
(b) be responsive to the needs, interests and aspirations of individuals and groups within its community;
(c) participate with other councils, and with State and national governments, in setting public policy and achieving regional, State and national objectives;
(d) give due weight, in all its plans, policies and activities, to regional, State and national objectives and strategies concerning the economic, social, physical and environmental development and management of the community;
(e) seek to co-ordinate with State and national government in the planning and delivery of services in which those governments have an interest;
(f) seek to facilitate sustainable development and the protection of the environment and to ensure a proper balance within its community between economic, social, environmental and cultural considerations;
(g) manage its operations and affairs in a manner that emphasises the importance of service to the community;
(h) seek to ensure that council resources are used fairly, effectively and efficiently;
(i) seek to provide services, facilities and programs that are adequate and appropriate and seek to ensure equitable access to its services, facilities and programs;
(j) achieve and maintain standards of good public administration; and
(k) ensure the sustainability of the council’s long term financial performance and position.

4.1.3 **Section 48 which outlines the prudential requirements for certain activities conducted by Councils:**

48–Prudential requirements for certain activities

(aa1) A council must develop and maintain prudential management policies, practices and procedures for the assessment of projects to ensure that the council –

(a) acts with due care, diligence and foresight; and
(b) identifies and manages risk associated with a project; and
(c) makes informed decisions; and
(d) is accountable for the use of council and other public resources.

(a1) The prudential management policies, practices and procedures developed by the council for the purposes of subsection (aa1) must be consistent with any regulations made for the purposes of this section.

(1) Without limiting subsection (aa1), a council must obtain and consider a report that addresses the prudential issues set out in subsection (2) before the council –

(b) engages in any project (whether commercial or otherwise and including through a subsidiary or participation in a joint venture, trust, partnership or other similar body) –

(i) where the expected expenditure of the council over the ensuing five years is likely to exceed 20 per cent of the council’s average annual operating expenses over the previous five financial years (as shown in the council’s financial statements); or
(ii) where the expected capital cost of the project over the ensuing five years is likely to exceed $4 000 000 (indexed) or;
(iii) where the council considers that it is necessary or appropriate.
(2) The following are prudential issues for the purposes of subsection (1):

(a) the relationship between the project and relevant strategic management plans;

(b) the objectives of the Development Plan in the area where the project is to occur;

(c) the expected contribution of the project to the economic development of the local area, the impact that the project may have on businesses carried on in the proximity and, if appropriate, how the project should be established in a way that ensures fair competition in the market place;

(d) the level of consultation with the local community, including contact with persons who may be affected by the project and the representations that have been made by them, and the means by which the community can influence or contribute to the project or its outcomes;

(e) if the project is intended to produce revenue, revenue projections and potential financial risks;

(f) the recurrent and whole-of-life costs associated with the project including any costs arising out of proposed financial arrangements;

(g) the financial viability of the project, and the short and longer term estimated net effect of the project on the financial position of the council;

(h) any risks associated with the project, and the steps that can be taken to manage, reduce or eliminate those risks (including by the provision of periodic reports to the chief executive officer and to the council); and

(i) the most appropriate mechanisms or arrangements for carrying out the project.

(2a) The fact that a project is to be undertaken in stages does not limit the operation of subsection (1)(b) in relation to the project as a whole.

(3) A report is not required under subsection (1) in relation to —

(a) road construction or maintenance; or

(b) drainage works.

(4) A report under subsection (1) must be prepared by a person whom the council reasonably believes to be qualified to address the prudential issues set out in subsection (2).

(4a) A report under subsection (1) must not be prepared by a person who has an interest in the relevant project (but may be prepared by a person who is an employee of the council).

(4b) A council must give reasonable consideration to a report under subsection (1) (and must not delegate the requirement to do so under this subsection).

(5) A report under subsection (1) must be available for public inspection at the principal office of the council once the council has made a decision on the relevant project (and may be available at an earlier time unless the council orders that the report be kept confidential until that time).

(6) However, a council may take steps to prevent the disclosure of specific information in order to protect its commercial value or to avoid disclosing the financial affairs of a person (other than the council).

(6a) For the purposes of subsection (4a), a person has an interest in a project if the person, or a person with whom the person is closely associated, would receive or have a reasonable expectation of receiving a direct or indirect pecuniary benefit or a non-pecuniary benefit or suffer or have a reasonable expectation of suffering a direct or indirect detriment or a non-pecuniary detriment if the project were to proceed.
(6b) A person is closely associated with another person (the **relevant person**) –

(a) if that person is a body corporate of which the relevant person is a director or a member of the governing body; or

(b) if that person is a proprietary company in which the relevant person is a shareholder; or

(c) if that person is a beneficiary under a trust or an object of a discretionary trust of which the relevant person is a trustee; or

(d) if that person is a partner of the relevant person; or

(e) if that person is the employer or an employee of the relevant person; or

(f) if that person is a person from whom the relevant person has received or might reasonably be expected to receive a fee, commission or other reward for providing professional or other services; or

(g) if that person is a relative of the relevant person.

(6c) However, a person, or a person closely associated with another person, will not be regarded as having an interest in a matter –

(a) by virtue only of the fact that the person –
   (i) is a ratepayer, elector or resident in the area of the council; or
   (ii) is a member of a non-profit association, other than where the person is a member of the governing body of the association or organisation; or

(b) in a prescribed circumstance.

(6d) In this section, $4 000 000 (indexed) means that that amount is to be adjusted for the purposes of this section on 1 January of each year, starting on 1 January 2011, by multiplying the amount by a proportion obtained by dividing the CPI for the September quarter of the immediately preceding year by the CPI for the September quarter, 2009.

(6e) In this section –

**employee** of a council includes a person working for the council on a temporary basis;

**non-profit association** means a body (whether corporate or unincorporated) –

(a) that does not have as its principal object or 1 of its principal objects the carrying on of a trade or the making of a profit; and

(b) that is so constituted that its profits (if any) must be applied towards the purposes for which it is established and may not be distributed to its members.

(7) The provisions of this section extend to subsidiaries as if a subsidiary were a council subject to any modifications, exclusions or additions prescribed by the regulations.
4.1.4 **Section 49 which deals with the requirements for contracts and tenders policies:**

49—Contracts and Tenders policies

(a1) A council must develop and maintain procurement policies, practices and procedures directed towards –

(a) obtaining value in the expenditure of public money; and

(b) providing for ethical and fair treatment of participants; and

(c) ensuring probity, accountability and transparency in procurement operations.

(1) Without limiting subsection (a1), a council must prepare and adopt policies on contracts and tenders, including policies on the following:

(a) the contracting out of services; and

(b) competitive tendering and the use of other measures to ensure that services are delivered cost-effectively; and

(c) the sale or disposal of land or other assets.

(2) The policies must –

(a) identify circumstances where the council will call for tenders for the supply of goods, the provision of services or the carrying out of works, or the sale or disposal of land or other assets; and

(b) provide a fair and transparent process for calling tenders and entering into contracts in those circumstances; and

(c) provide for the recording of reasons for entering into contracts other than those resulting from a tender process; and

(d) be consistent with any requirement prescribed by the regulations.

(3) A council may at any time alter a policy under this section, or substitute a new policy or policies (but not so as to affect any process that has already commenced).

(4) A person is entitled to inspect (without charge) a policy of a council under this section at the principal office of the council during ordinary office hours.

(5) A person is entitled, on payment of a fee fixed by the council, to a copy of a policy under this section.

5 **Policy Objectives**

5.1 A Council’s Section 49 Policy pursuant to Section 49 of the LG Act (Section 49 Policy) establishes the procurement framework within which Councils are able to determine their own specific procurement practices.

5.2 Councils may also prepare their own associated operational guidance or procedures related to procurement.

5.3 A Council’s Section 49 Policy should provide clear direction to enable the Council to achieve best practice in relation to its purchasing functions.
5.4 Procurement should be undertaken by Councils in a way which:

5.4.1 encourages purchases being made in an open, fair and transparent manner;

5.4.2 facilitates achieving value for money in the acquisition through the most appropriate provider, ensuring open and effective competition;

5.4.3 supports environmentally safe and sustainable procurement;

5.4.4 appropriately manages risks;

5.4.5 promotes efficient purchasing practices and their continuous improvement;

5.4.6 encourages local and Australian businesses;

5.4.7 encourages the maintenance of assets at high standards in the most cost effective manner; and

5.4.8 ensures the integrity of all procurement processes conducted by Councils (ie in accordance with their legislative and common law responsibilities).

*Maintain as much flexibility (appropriate to the Council’s commercial requirements) as you can in your Section 49 Policy.*

*Take advantage of the ability to procure in the way best suited to the circumstances and achieve the best result for the Council.*

*Do not unnecessarily tie yourself up in red tape.*
6  The Principle Of Value For Money

6.1 Councils should strive to achieve value for money in their procurement activities. Achieving this requires a comparative analysis of all the relevant costs and benefits of each proposal throughout the whole procurement cycle.

Value for money is not measured by reference to price alone.

6.2 Cost is not the only factor in assessing and determining value for money. Other factors for consideration include:

6.2.1 the maturity of the market for the property or service sought;

6.2.2 the performance history of each prospective supplier (ie supplier capability);

6.2.3 the relative risk of each proposal;

6.2.4 the flexibility to adapt to possible change over the lifecycle of the property or service;

6.2.5 the technical merits of the product or service;

6.2.6 financial considerations, including all relevant direct and indirect benefits and costs over the whole procurement cycle;

6.2.7 the anticipated price that could be obtained, or the costs that may be incurred at the point of disposal;

6.2.8 the value of contract options (ie contract extension options); and

6.2.9 the availability of maintenance, service and support.
7 The Effective Use Of Resources

7.1 The LG Act requires the fair, effective and efficient use of resources by Councils (see section 8(h)).

7.2 This responsibility can be discharged by Councils during procurement activities by ensuring that they have an appropriate framework in place (ie policies, procedures and guidelines) to facilitate achieving value for money in procurement processes. Achieving a fair, effective and efficient use of resources also means ensuring that the resources used in conducting procurement activities achieve the maximum value for the resources used.

7.3 To ensure that the property, goods, works or services being sought will make the maximum possible contribution to the relevant outcome, Councils need to:

- 7.2.1 correctly identify the need;
- 7.2.2 accurately draft functional specifications;
- 7.2.3 rigorously assess responses and negotiate the final contract; and
- 7.2.4 diligently manage the contract.

8 Accountability And Transparency

Accountability means that Local Government practitioners who operate in the procurement space are responsible for their decisions and actions and take responsibility for the resulting outcomes. Transparency means that Local Government practitioners are able to give reasons for the decisions they make.

Documentation is critical to accountability and transparency. It provides a record of procurement activities and how they have been conducted, which in turn facilitates scrutiny of these processes. Councils must ensure that there is sufficient documentation to provide an understanding of the reasons for the procurement, the process that was followed, all relevant decisions and the reasons supporting those decisions. Some suggestions in relation to documentation and appropriate record keeping are made throughout this Handbook.

9 The Procurement Process

9.1 The stages of a procurement process are illustrated in the flow chart below.

9.2 These steps are described in more detail in the explanatory notes which are contained in Part Three of this Handbook.
Start Here

Need identified for goods, works or services

Define the need and the specification. Analysis of outcomes required

Review of previous related procurements: lessons learned exercise

Goods, works or services procured in accordance with internal procedures and the terms of the existing arrangement

Is the scope covered by an existing arrangement? (ie LGA Procurement, prequalified supplier, G6, State Government)

If Yes

If No

Risk assessment completed

Approach to market documentation prepared (including proposed contract if possible)

Develop the procurement strategy including:
» method of approach to market
» documentation required
» internal approvals / authorisations required

Identify the value of the procurement – whole of life costing

Establish the potential sources of supply

Approach to market undertaken

Evaluation of responses

Negotiations with potential suppliers

Selection of provider, including undertaking all recommendation and approval processes and notifying the successful and unsuccessful suppliers

In what circumstances will external advice or support be required and obtained

Transition planning (if necessary)

Contract management

Finalisation and execution of contract with supplier

Finalisation and execution of contract with supplier

Expiry / transition actions

Lessons learned exercise
10 Policies

10.1 In order to effectively manage the entire procurement process, Councils should have in place a number of policies to support the process. These policies may include:

10.1.1 Section 49 Policy;
10.1.2 Delegations Manual;
10.1.3 Governance Policy;
10.1.4 Risk Management Policy;
10.1.5 OHS & W Policy;
10.1.6 Contract Management Policy;
10.1.7 Purchase Card Policy;
10.1.8 Prudential Management Policy;
10.1.9 Service Range Policy and any associated Service Level Policies; and
10.1.10 Internal Financial Controls Policy.

10.2 You will need to consider the relevance and application of the policies in place at your Council. Also, this Handbook should be read in conjunction with any procedural guidelines in place at your Council.
Set out below are some of the terms used regularly in the Handbook or in the Templates and their meanings.

**Approach To Market**

A general, collective term for the processes that can be used to invite suppliers to provide quotes and proposals, or to tender.

**Business Need**

Is the underlying reason for making a procurement. It clearly states why goods, works or services are needed, what these will deliver and what resources exist to pay for them.

**Commercial-in-Confidence**

Information contained within a document marked commercial-in-confidence is confidential. The information cannot be released without permission.

**Complex Procurement**

A procurement project in which a number of factors must be identified and managed to ensure an appropriate, effective outcome. Complexity is based on the degree of value and risk.

**Contract**

A contract is a formal agreement for the delivery of specified goods, works or services.

**Contract Management**

The process used to ensure that the terms of a contract are met and that the expected value is achieved.
Contract Management Plan

A plan that outlines the steps to be taken to manage a contract. It identifies which person is responsible for each step, the timing and the resources.

Evaluation Criteria

The individual points against which all received offers, including quotes, tenders and EOI will be measured. The criteria are based on the specifications given to potential suppliers and which, in turn, have formed the basis of their quote or tender.

Evaluation Plan

A plan of the processes that will be followed in evaluating the quotes, tenders or EOI received. It includes timing, membership and weightings.

Expressions of Interest (EOI)

The documentation submitted by potential suppliers in response to a Request for Expressions of Interest.

Market Approach Strategy

The strategy used for inviting potential suppliers to provide an offer to supply goods, works or services. The options available in particular circumstances will depend on the individual Council’s Section 49 Policy.

Negotiation Plan

A plan for the conduct of negotiations, detailing what is sought from the supplier as well as the elements of the supplier’s response that are not required.

Nominated Contact Officer

An individual nominated by a Council as the only point of contact for potential suppliers during a procurement process. The nominated contact officer is usually the only person on whom a potential supplier can rely for information regarding a procurement.
Probity

Is a risk management approach to ensure that selection and decision making processes will be found to be honest, fair and defensible if scrutinised. The processes should achieve both accountability and transparency and provide parties to the procurement process with fair and equitable treatment.

Probity Plan

A plan that outlines the procedures and protocols that will be followed in order to ensure probity.

Procurement

A series of activities that are undertaken when purchasing goods and services, based on three key phases: planning, purchasing and Contract Management. Each phase must be completed to ensure success.

Procurement Strategy

A document that sets down the strategy for a procurement project, including the approach to market and the evaluation and approval processes.

Purchasing

Purchasing is the second of the three phases of procurement. During this phase the acquisition plan developed in the first phase is implemented.

Request For Expressions Of Interest (REOI)

The first stage of a two-stage process, in which suppliers are invited to register interest for the supply of goods and services. Potential suppliers may then be short listed for a Select Tender Process.

Request For Quotes (RFQ)

A process for inviting quotes from potential suppliers for goods, works or services required to achieve a stated outcome.

Request For Tender (RFT)

A process in which an invitation to potential suppliers to submit offers for clearly described goods, works or services is publicly advertised.
Risk

The potential for something to go wrong, including the risk that the expected outcome will not be achieved, and the risk that the selected outcome may have a negative impact on the community.

Risk Management Strategy

A complex strategy that outlines the procedures and strategies that will be implemented to identify and manage risks.

Select Tender

A process in which selected potential suppliers are invited to submit offers or proposals for goods or services. It can be used as the second stage of a two-stage procurement process.

Simple Procurement

A simple procurement is one that has been assessed according to its total value and its potential risks, and a determination has been made that it has a relatively low value for the Council and does not carry a significant risk.

Tender

A proposal, bid or offer that is submitted in response to a Request for Tender. It is one of several different market-approach strategies. It is also incorrectly and confusingly used as a general term for approaching the market.

Value

Value has two meanings. Generally, it refers to the measure of total expenditure for the duration of a contract. However, value can also be used as short hand for ‘value for money’. The context generally indicates which of the two meanings is intended.

Value For Money

A concept that allows the relative benefits of different procurement options to be measured by taking into account all the costs incurred over the procurement. Also referred to as ‘whole-of-life costing’ or ‘total cost of ownership’. 
Part 3

Conducting A Best Practice Procurement And Using The LGA’s Templates
1 **Introduction**

1.1 This Part Three deals with commonly applied principles which are generally accepted as best practice procurement procedures and discusses how the Templates can be used by you in your procurement activities. The principles set out in this Part Three can be used as a guide in the preparation and conduct of any procurement.

The process of procurement usually consists of the following steps:

| 1.1.1  | Defining the need and specifications. |
| 1.1.2  | A review of the lessons learned exercise and previous procurement activities to determine the best way forward. |
| 1.1.3  | Establishing the potential sources of supply. |
| 1.1.4  | Identifying the value of the procurement. |
| 1.1.5  | Conducting a risk assessment in relation to the proposed procurement. |
| 1.1.6  | Determining the most suitable procurement methods/procurement strategy. |
| 1.1.7  | Conducting a risk assessment. |
| 1.1.8  | Identifying the documentation required. |
| 1.1.9  | Obtaining the appropriate internal approvals. |
| 1.1.10 | Approaching the market. |
| 1.1.11 | Evaluating responses, negotiating and selecting a supplier. |
| 1.1.12 | Obtaining approval for the decision. |
| 1.1.13 | Finalisation and execution of the contract. |
| 1.1.14 | Monitoring performance of the supplier. |
| 1.1.15 | Assessing performance of the provider and transition planning. |
2 Identification Of The Need And Acquisition Planning

2.1 It is important that every purchase is planned in advance. This helps ensure an effective value for money outcome that complies with the LG Act and Council’s own policies and procedures. This also assists with limiting the compliance and administrative costs for both Councils and suppliers.

2.2 Start by clearly defining the need for the purchase and specifying what is to be purchased.

2.2.1 You will identify the business need for the procurement through:

- a verbal or written request by a senior manager;
- a recurring need;
- a requirement for an input into a larger project; or
- seeking to meet a strategic objective of the Council.

2.3 Initiating Procurement – Checklist for Procurement

A preliminary analysis initiates the procurement process by setting out clearly some or all of the following:

<table>
<thead>
<tr>
<th>Checklist For Procurement</th>
<th>Details</th>
</tr>
</thead>
<tbody>
<tr>
<td>✓ What is being procured (specification in output terms, quality, required life etc.)</td>
<td></td>
</tr>
<tr>
<td>✓ Opportunities in the procurement project (diversity of suppliers, potential savings, maintenance diversity, inefficiencies, demand consolidation opportunities etc.)</td>
<td></td>
</tr>
<tr>
<td>✓ Timing requirements (analysis of all critical dates)</td>
<td></td>
</tr>
<tr>
<td>✓ Delivery needs (regional or metropolitan, single or multiple locations)</td>
<td></td>
</tr>
<tr>
<td>✓ An analysis of the risks involved (what can wrong and the likely consequences)</td>
<td></td>
</tr>
<tr>
<td>✓ Related procurement experience</td>
<td></td>
</tr>
<tr>
<td>✓ The likely sources of supplying competition, including opportunities for regional and smaller medium sized enterprises involvement</td>
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<tr>
<td>✓ Baseline price data and estimated savings</td>
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<tr>
<td>✓ Initial cost benefit analysis of the proposed procurement. Establish affordability</td>
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<tr>
<td>✓ Identification of key indicators for successful procurement</td>
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<tr>
<td>✓ Identity of decision makers for the procurement process</td>
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</table>

This document should set the basic financial and operational framework for the procurement process. It forms the basis of the procurement strategy described in more detail in paragraph 2.5 of this Part Three.
2.4 Understanding the Procurement Environment is Critical: The Lessons Learned Exercise

2.4.1 Understanding the procurement environment is fundamental to the development of relevant procurement strategies.

2.4.2 Never underestimate the value of reviewing/analysing previous procurements and their outcomes (including a spend analysis and the solution to any problems).

2.4.3 Assessment of historical procurement data will assist you to achieve value. This assessment should include the following:

   2.4.3.1 identification of the goods, works or services required to be purchased;
   2.4.3.2 scope of previous purchases;
   2.4.3.3 how much has been traditionally spent;
   2.4.3.4 the frequency of the purchase;
   2.4.3.5 performance measures used and their effectiveness;
   2.4.3.6 who the goods, works or services have previously been purchased from; and
   2.4.3.7 how have they been purchased (ie procurement method).

Ask yourself: What happened last time and what I can learn from that to ensure that this procurement achieves its outcome and delivers value for money?

2.5 Procurement Strategy

2.5.1 All procurement should be conducted in a way which assists Councils to deliver their strategic objectives.

2.5.2 The procurement strategy is a comprehensive document that outlines the stages in the project and how they will be managed including the approach to market strategy, evaluation plan and details of relevant approval processes.

2.5.3 The procurement strategy will be determined, in part, on the basis of the information developed during the preparation of the checklist for procurement described in paragraph 2.3 of this Part Three and the ‘lessons learned exercise’ described in paragraph 2.4 of this Part Three. It should also build on any business case that may have already been developed to help define and guide the procurement process.
2.5.4 The procurement strategy needs to take into account some or all of the following:

2.5.4.1 objectives of the procurement and targets;
2.5.4.2 market/supply issues;
2.5.4.3 size of the market (is the market known?);
2.5.4.4 number of competent suppliers;
2.5.4.5 capacity of the market to meet the requirements and the life the contract/project (e.g. skills, resources, other major projects);
2.5.4.6 maturity of the market and potential changes;
2.5.4.7 attractiveness of the business on offer to the market (i.e. size of requirement, size of market);
2.5.4.8 rate of technology change in the industry sector;
2.5.4.9 key cost drivers;
2.5.4.10 evaluation methodology;
2.5.4.11 the development of evaluation criteria which should include both qualitative and quantitative criteria to assist with ascertaining what reflects value for money;
2.5.4.12 an analysis of whether there are any relevant conditions for participation (i.e. compliance with minimum standards, policies or legislation);
2.5.4.13 how to determine the ranking of evaluation criteria;
2.5.4.14 what type of contract is appropriate (i.e. lump sum, schedule of rates, panel, period, performance based, partnership, strategic alliance).

2.5.5 The complexity of the procurement strategy will depend on the circumstances of the case.

3 Defining The Specifications

3.1 Begin defining the specifications as soon as possible.

3.2 Specifications should provide sufficient detail for a potential supplier to ascertain the Council’s needs. The specifications should:

3.2.1 be clear, concise and unambiguous;

3.2.2 not be too prescriptive, because this might limit the range of goods, works or services offered; and

3.2.3 clearly identify the outcome sought by the Council.
3.3 If appropriate, incorporate requirements in specifications that help achieve the Council’s economic, social and environmental objectives.

3.4 Also consider any other specific requirements such as warranties, timeframes, quality standards, delivery insurance or packaging.

3.5 The degree of detail in the specifications will be commensurate with the degree of complexity, risk and value of the procurement. The specifications need to be realistically aligned with the budget for the purchase and be commensurate with the complexity and risk involved.

3.6 All specifications need to be prepared in a way which encourages competition (i.e., in a way which encourages potential suppliers to respond).

3.7 Specifications should clearly distinguish between requirements which are mandatory and those which are only desirable.

3.8 There are three main types of specifications:

3.8.1 functional specifications which outline outcomes to be achieved;

3.8.2 performance orientated specifications which define the performance but not the methods used to achieve them; and

3.8.3 technical specifications which detail physical characteristics, such as size, capacity and type of materials required.

**Good Practice Tip:** the cost of the procurement process can be reduced if the specifications:

» are standardised for similar requirements;

» are concise and accurate; and

» can readily be incorporated into a contract.
4 Establishing Potential Sources Of Supply

4.1 The following are examples of information sources that may be used to identify potential suppliers:

4.1.1 previous orders;
4.1.2 newspapers and trade journals;
4.1.3 telephone directory;
4.1.4 catalogues;
4.1.5 the internet;
4.1.6 industry and government directories;
4.1.7 agency knowledge of suppliers who have previously provided relevant goods or services;
4.1.8 recommendations or good reports from public sector and Local Government colleagues;
4.1.9 researching industry association websites to find potential suppliers with specific expertise;
4.1.10 consult colleagues at other Councils and gain an appreciation of their experiences in procuring the same goods, works or services and new products; and
4.1.11 consult with colleagues as necessary, especially when working in an unfamiliar situation, such as the procurement of a new service or product. Take advantage of in-house resources, such as corporate knowledge or other areas of particular expertise (ie engineering services). Keep users informed and involved.

5 Identifying The Value Of The Procurement

5.1 The value of the procurement must be determined taking into consideration the procurement’s whole of life costs. To determine the value of the procurement you need to consider the purchase cost, installation costs, maintenance and repair costs, disposal costs, disposal value and any transition costs.

5.2 It is relevant to consider other work or projects which could be combined and packaged with the current procurement to improve the outcome of the procurement process.

5.3 Do not piecemeal procure to avoid your policy/procedural threshold for particular procurement methodologies.
6 Identifying The Documentation Required

The documentation required is usually commensurate with the total value of the procurement or, if the procurement is high risk, by reference to this risk profile. What will be sufficient documentation will vary depending on the nature of the procurement being undertaken. The issues are dealt with in more detail in the section of this Handbook entitled ‘A High Level Overview Approaching the Market’ (see paragraph 10 of this Part Three).

7 Conducting A Risk Assessment

7.1 There are a number of potential risks in the procurement process. Risk assessment is really just a consideration of what could go wrong, the likelihood of things going wrong and what will happen as a result (i.e. what is the consequence).

7.2 Each Council should have a comprehensive risk analysis procedure which will be appropriate for use by it prior to entering into any procurement process. The checklist in Part Five of this Handbook identifies potential risks in the procurement process, the likely consequences and suggestions for actions which may minimise/avoid the likelihood of the risk occurring. Part Five also contains a suggested outline for a Risk Management Plan.

8 Obtain The Appropriate Internal Approvals

8.1 Councils should have regard to their own internal procedures and delegations to determine what internal approvals are required to proceed with the procurement.

8.2 These approvals should all be in place prior to proceeding with any approach to market. If not, this needs to be clearly articulated in the approach to market documentation.

9 Justification Of Choice Of Procurement Method

9.1 Councils should select the method of approaching the market which is best suited to the procurement. Determining the best method in the circumstances should be based on the consideration of the following issues:

9.1.1 the nature of the procurement;

9.1.2 the value of the procurement;
9.1.3 the risk associated with the procurement;

9.1.4 whether the market for the procurement is known; and

9.1.5 what is the most efficient process to achieve the Council’s objectives in a timely and cost efficient way.

Consider the following table:

<table>
<thead>
<tr>
<th>Procurement Method Justification Guide</th>
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<tr>
<td><strong>Transaction Type</strong></td>
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<td><strong>Low Value, Low Risk, High Volume Of Transactions</strong></td>
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9.2 Low Value/Low Risk Procurement

In low value/low risk procurements Councils should give emphasis to efficiency so that the cost of undertaking the procurement does not exceed the total cost of the acquisition. The procurement must still reflect value for money.

**Good Practice Tip:** When entering into arrangements for the supply of goods, works or services having a written agreement in place gives both parties certainty regarding the terms of their arrangements – this protects both parties during the life of the agreement.

*Purchase Orders are often used as the contractual vehicle for low value, low risk procurements. If you elect to proceed by way of a purchase order, it is essential that the Council incorporates appropriate terms and conditions into the purchase order. These are attached to the purchase orders in the Templates. Be careful of issuing a purchase order with no attached terms and conditions when requisitioning goods, works or services.*

*If this occurs it is CRITICAL that the PURCHASE ORDER contains a TERM to the effect that by delivering the goods or performing the works or services the contractor agrees to be bound by the Council’s standard terms and conditions of engagement available on the Council’s website.*

*The clause should set out the hyperlink to the website and it is ESSENTIAL that the current version of these terms and conditions of engagement appear on the Council’s website.*

9.3 High Value/Low Risk Procurement

The primary considerations in this type of procurement are value for money and efficiency. For ongoing requirements, longer term contracts with price checking mechanisms will assist Councils to determine/assess whether they are achieving value for money and will be efficient because they remove the requirement to go through a procurement selection process regularly.

9.4 Low Value/High Risk Procurement

The main emphasis in this type of procurement should be on minimising the risk to Councils by using appropriate controls, such as adequate contract documentation. In this type of procurement cost would not be the major indicator of value for money.
9.5 High Value/High Risk Procurement

This type of procurement will generally require a contract where specific risk issues are identified and the parties agree to share responsibility for these issues.

As a general rule, the greater the risk and/or the higher the value, the more effort should be spent in planning and documentation. To consider how much effort is necessary, consider both value and risk as shown in the diagram below.

Part Five of this Handbook deals with risk management in more detail.

10 A High Level Overview Of Approaching The Market

10.1 Introduction

10.1.1 An approach to the market is when a Council issues a notice inviting potential suppliers to participate in a procurement.

10.1.2 Open approaches to the market include RFT, REOI and request for applications for inclusion on a standing offer panel.

10.1.3 Select approaches to the market include invitations to tender in a select process in accordance with a select tendering process or other requests for proposals or quotes.

10.1.4 The choice of approach to market mechanism will be influenced by a number of factors including the nature of the procurement (value, complexity, risk profile), the characteristics of the supply market and the Council’s strategic objectives.

10.1.5 The procedural aspects of the approach to market process are discussed in greater detail in paragraph 13.5 of this Part Three. While this section deals with tender processes, bear in mind that these principles apply equally to EOI processes and RFQ processes.
10.2 Request Documents

10.2.1 Request documents are the documents provided by Councils to potential suppliers to enable them to understand and assess the requirements of the Council and to prepare submissions in response to an approach to the market.

10.2.2 Request documentation should include the information necessary to enable potential suppliers to prepare and lodge responsive submissions.

10.2.3 A request document should include a complete description of:

10.2.3.1 the procurement, including the nature, scope, and where known, the quantity of the property and services to be procured and any requirements to be fulfilled including technical specifications, plans, drawings or instructional materials;

10.2.3.2 any conditions for participation including any financial guarantees, information and documents that potential suppliers are required to submit;

10.2.3.3 all evaluation criteria to be considered in assessing submissions; and

10.2.3.4 any other terms and conditions relevant to the evaluation of submissions.

10.3 Conditions For Participation

10.3.1 Councils may specify conditions for participation. These are basic requirements with which a potential supplier must be able to comply in order to participate in a procurement.

10.3.2 Conditions for participation usually relate to matters that will ensure that a potential supplier has the legal, commercial, technical and financial abilities to fulfil the requirements of the procurement.

Good Practice Tip: Establish the rules, document them and then stick to them.
10.4 Specifications

10.4.1 Councils should ensure requirements and specifications are developed based on a sound and unbiased understanding of market capabilities and commercial practices.

Good Practice Tip: Effective, functional, clear specifications are one of the key success factors in value for money procurements.

10.4.2 Please see paragraph 3 of this Part Three for more detail regarding Specifications.

10.4 Developing Evaluation Criteria

Evaluation criteria are used to assess the suitability of a potential supplier who responds to the approach to market. Request documents usually include some or all of the following criteria:

10.4.1 Prequalification criteria. These are usually able to be answered on a ‘yes/no’ basis and are not points scored. In making this assessment the potential supplier must be able to comply with every detail of the requirement (ie ‘Are you a licensed plumber’ or ‘do you comply with Australian Standard…’). A failure to answer ‘yes’ to all of the prequalification requirements will eliminate the potential supplier from further consideration.

10.4.2 Compliance criteria. Again these are not usually points scored, rather an assessment is made on a ‘yes/no’ or a ‘complies/partially complies/does not comply’ basis. In making this assessment a potential supplier may not need to comply with every detail of the requirement. Typically compliance criteria include issues such as:

10.4.2.1 product compliance with the specification;
10.4.2.2 possession of or intention to acquire the appropriate insurances; and
10.4.2.3 safety, environmental and sustainable policies and procedures.

10.4.3 Qualitative criteria. For those potential suppliers who are compliant, an evaluation is then made of each of their responses to the qualitative criteria. These are usually scored and may be weighted to reflect their degree of importance from the Council’s perspective.

It is critical that the evaluation criteria and weightings are clearly set out in the request documents. This is discussed in more detail in paragraph 13.5 of this Part Three.

10.5 Occupational Health Safety And Welfare

10.5.1 All suppliers should, as a minimum, be capable of and agree to comply with the standards prescribed by the Occupational Health, Safety and Welfare Act 1986 (SA) and its Regulations.

10.5.2 Additional OHS&W requirements should be outlined in the request documents and resulting contract (or other documents evidencing the agreement between the Council and the supplier).
10.6 Environmental

Are there any environmental factors which need to be considered or any standards which need to be complied with? Individual Councils will have their own environmental policies to take into account.

10.7 Modification Of Request Documents

If a Council modifies the request documentation or any aspect of any request documents it must transmit all modifications in the form of an addendum:

10.7.1 to all the potential suppliers who are participating at the time the information is amended, if known, and in all other cases in the same manner as the original information; and

10.7.2 in adequate time to allow potential suppliers to modify and/or re-lodge their initial submissions.

Please see paragraph 13.5 of this Part Three, dealing with addenda.

10.8 Time Limits

10.8.1 Councils need to provide sufficient time for potential suppliers to prepare and lodge submissions in response to request documents. This will be determined on a case by case basis.

10.8.2 If a Council intends to specify conditions for participation that require potential suppliers to undertake a separate registration or prequalification procedure, the Council must include the time limit for responding to the registration or prequalification in the request documents. Any such conditions for participation must be published in sufficient time to enable all interested parties to complete the registration and qualification procedures within the time limit for the procurement.

10.8.3 All potential suppliers participating in a procurement must be required to lodge submissions in accordance with a common deadline. Any time limit imposed in relation to any aspect of a procurement must be applied consistently to all participating potential suppliers.

10.9 Receipt And Opening Of Submissions

10.9.1 Councils must observe procedures to receive and open all submissions which guarantee fairness and impartiality.

10.9.2 A Council should not penalise any potential supplier whose submission is received after the specified deadline if the delay is solely due to mishandling by the Council.

10.9.3 If a Council provides potential suppliers with an opportunity to correct unintended errors of form between the opening of submissions and any decision, the Council must provide the same opportunity to all participating potential suppliers.

10.9.4 A Council should only give further consideration to a submission if at the time of opening the submission includes the minimum content and format of submissions as stated in the request documents issued. That is, the submission must be in a form meeting the required format and include all required information, statements, certifications and declarations.
11 Selecting A Purchasing Method

11.1 Selecting the most appropriate method for a particular purchase is an important aspect of the procurement process. The LG Act, combined with your Council’s internal policies, procedures, the degree of complexity and the risk associated with the procurement, will assist you to determine the appropriate procurement method.

11.2 Purchasing Traditionally Has Been Categorised Into Two Categories:

11.2.1 Simple Purchasing:
- this includes direct purchasing (by corporate credit card, cash payment) and obtaining verbal and written quotes; and

11.2.2 Complex Purchasing:
- this includes RFT processes, REOI processes, Select tender processes, compiling a panel of suitable providers, standing offer or preferred supplier arrangements and establishing a register of pre qualified suppliers.

Listed below is a brief explanation of each of the different ways in which simple and complex can be undertaken.

11.3 Simple Purchasing

The 3 methods of simple purchasing are:

11.3.1 Direct Purchasing
- In some situations, it is more practical for Councils to buy goods or services direct from a selected supplier.

11.3.2 Verbal Quotes
- Each Council should have its own internal policies and procedures, which determine at which monetary thresholds and by which process verbal quotes may be sought.

11.3.3 Written Quotes
- A request for quote (RFQ) may be used when the Council wishes to obtain written quotes. This should be done in accordance with the Council’s Section 49 Policy and any associated procedures.

11.4 Complex Purchasing

The methods of complex purchasing are set out below:

11.4.1 Open Tenders
- An RFT is the document used by a Council to request industry to submit tenders. An RFT invites respondents to submit firm contractual offers, which the Council may accept to form a contract. Compare this with a REOI where potential suppliers merely indicate a willingness and capability to engage in a process that may, or may not, result in a contract being awarded to them.
- An RFT may be issued on an open or select basis.
11.4.2 Panels Of Suitable Providers

11.4.2.1 A Council may compile a panel of the names of persons/organisations suitably qualified for the anticipated provision of goods, works and services. A panel is usually compiled by:

(a) inviting expressions of interest from persons/organisations to be included on the panel; and

(b) selecting persons/organisations from an RFT process.

11.4.2.2 A panel may be appropriate when:

(a) there are a number of suppliers who can provide the goods, works or services and there is some advantage to the Council in having a choice of suppliers (ie to avoid conflicts of interest);

(b) there is an outgoing demand from the Council;

(c) the procurement requirement cannot be accurately predicted; and

(d) the volume of work may be too large for one supplier.

11.4.2.3 Establishing panel arrangements can offer substantial benefits to Councils, including:

(a) reducing purchasing, administration and transaction costs;

(b) offering greater choice because of the breadth of potential supply;

(c) having fast and streamlined access to suppliers;

(d) standardizing and increasing consistency in procurement documentation across an industry or work requirement;

(e) maintaining competitive tension over the duration of the panel arrangement; and

(f) providing an opportunity for a better strategic relationship with suppliers.

11.4.2.4 Panels can be structured so that they are either open (meaning a supplier who applies and whose tender is evaluated as being acceptable) can be added to the panel or (most often) closed, where additional suppliers are not added to the panel arrangement once it has been established.

11.4.2.5 It is critical that the rules and the evaluation process for adding new members to the panel are clearly articulated in both the approach to market documents and the evaluation plan. Adding new panel members after the initial appointment process can give rise to probity concerns, so it is critical that any addition to a panel is handled strictly in accordance with the rules that the Council has set for itself in respect of the process.

11.4.2.6 It is also critical that all panel contracts provide for the right of the Council to remove panel members or add products and services as circumstances change. Bear in mind that the more stringent and in favour of the Council these provisions are will be reflected in the suppliers’ pricing to take into account their risk.

11.4.2.7 It is critical that the panel documentation does not make any commitment to a supplier to procure any specific volume of business activity during the panel contract period. Panel contracts are normally established with a finite number of suppliers for a finite period of time, however there is no magic number of panel members. It will depend on the circumstances.
### 11.4.3 Requests For Expressions Of Interest

11.4.3.1 A REOI is an invitation to register interest for the supply of a (usually) loosely defined requirement.

11.4.3.2 Seeking EOI is usually the first stage of a two stage process. A REOI can be followed by either an open or a select tender for the goods or services sought.

11.4.3.3 REOI should be used where all the following criteria apply:

(a) the solution/product to meet Council requirements is not known;
(b) potential suppliers are not known; and
(c) the process will be cost effective.

11.4.3.4 REOI should be used as a basis for:

(a) potential product identification;
(b) short listing suppliers; or
(c) reducing the cost to sellers for bid preparation.

### 11.4.4 REOI Should:

11.4.4.1 be issued generally (ie the process must be open);

11.4.4.2 have identical specifications and briefings to all bidders;

11.4.4.3 not be taken as an invitation to supply goods, works or services;

11.4.4.4 not give any supplier an advantage;

11.4.4.5 not put individuals/organisations to great expense; and

11.4.4.6 not carry any commitment that the Council will proceed to invite tenders.

### 11.4.5 Standing Offer And Preferred Supplier Arrangements

11.4.5.1 A standing offer arrangement is an arrangement to which a Council is a party with a supplier for the supply of goods, works or services at a fixed price for a stated period.

11.4.5.2 A preferred supplier arrangement is an arrangement under which a Council and a supplier agree that goods, works or services will be supplied under agreed pricing conditions for a stated period.

11.4.5.3 A Council should only establish a standing offer arrangement or a preferred supplier arrangement if:

(a) the supply of goods, works or services is needed in large volumes or frequently;
(b) the Council is able to obtain better value for money by aggregating demand for the goods, works or services needed; and
(c) the goods, works or services needed can be stated in terms that would be well understood in the industry concerned.
11.4.6 Register Of Pre-Qualified Suppliers

11.4.6.1 A Council may establish a register of pre-qualified suppliers of particular goods, works or services if:
   (a) the preparation and evaluation of invitations each time the goods, works or services are needed would be costly;
   (b) the capability or the financial capacity of the supplier of the goods, works or services is critical;
   (c) the supply of the goods, works or services involves significant security considerations;
   (d) a precondition of an offer to contract for the goods, works or services is compliance with particular standards or conditions decided by the Council; or
   (e) the ability of local business to supply the goods, works or services needs to be found out or developed.

The mechanisms of the various methods of simple and complex purchasing are set out in more detail below.

12 Simple Purchasing

12.1 Direct Purchasing

12.1.1 Direct purchasing is purchasing from a single source without first obtaining competing bids.

12.1.2 Proceeding this way is only suitable for low value, low risk goods, works and services. In addition you must refer to your internal policies and procedures for guidance on the use of this approach to market mechanism.

12.1.3 Council officers may use their general knowledge of the market, in store price comparisons, catalogues, supplier websites and any other reasonable means to determine whether the purchase represents value for money.

12.1.4 Appropriate written records of all purchases must be kept.

12.1.5 If low value goods are purchased frequently then it is most likely that same analysis of the procurement methodology needs to be undertaken by the Council. For instance, there may be a cost benefit to the Council in establishing an account arrangement with a supplier at negotiated rates.

12.1.6 Orders must not be split to avoid a Council’s procurement method thresholds (i.e. to avoid competitive procurement processes).

12.1.7 Direct purchasing is illustrated by the flow chart below.
How To Undertake A Direct Purchase

Ask The Following Questions:

**Determine Requirements**
- Is it available using an existing contract between Council and a supplier?
- Is it goods/services/works?
- How many units/hours?
- What type? – make/model/colour
- Delivery details – time/place/date
- Who will collect/sign for goods?
- Ensure no ambiguities

**Determine Approximate Price And Purchasing Authority**
- Is it within the allocated budget?
- How much do you anticipate the requirements costing?
- Do you have delegated purchasing authority?

**Selection**
- Telephone/call in person during normal business hours
- Ensure relevant details are at hand
- Read back all figures given for clarity
- Ask for written confirmation

**Written Confirmation Received**
- Ensure written confirmation matches what you requested
- Ensure no additional or different contractual terms have been added

**Arrange Payment And Delivery**
- Ensure that sufficient details are collected and received in some form of writing
- Check what has been supplied is in accordance with the contract
12.2 Verbal Quotes

12.2.1 You may invite verbal quotes from time to time for low value low risk procurements.

12.2.2 You must be guided by your internal policies and procedures proceeding this way.

12.2.3 As a guide, you should obtain a minimum of three verbal quotes. However, more or less may be invited depending on the nature of the purchase and the market from which it is being sourced.

12.2.4 You must keep appropriate written records of our verbal enquiries and ensure that these contain as much detail as possible in the circumstances. In addition, appropriate records of all purchases need to be kept.

12.2.5 As a courtesy advise any unsuccessful bidders of the result. Ideally a short email could be sent with this information.

12.2.6 The verbal quote procedure is illustrated by the flow chart set out below.
How To Purchase Using Verbal Quotes

### Ask The Following Questions:

**Determine Requirements**
- Is it goods/services/works?
- How many units/hours?
- What type? – make/model/colour
- Delivery details – time/place/date
- Who will collect/sign for goods?

**Determine Approximate Price And Purchasing Authority**
- How much is available in the budget to spend?
- How much do you anticipate the requirements costing?
- Do you have delegated purchasing authority?

**Obtain At Least Three Verbal Quotes**
- Call during supplier’s normal business hours
- Ensure relevant details are at hand and are given to supplier’s consistently
- Read back all figures given for clarity
- Ensure the contact person has the authority to give the quote
- Request written confirmation of the quote

**Evaluation And Selection**
- Ensure that sufficient details are collected and received
- Note brief reasons for selection and also evaluation methodology if applicable

**Issue Purchase Order**
- Purchase order confirms the order description and details stating the terms and conditions under which Council accepts the goods, works or services

**Arrange Delivery From Selected Supplier**
- File all correspondence and documents received together including telephone messages
- Check what has been supplied is in accordance with the contract
12.3 Request For Quotes

Applicable Templates

» RFQ: Services (Short Form)
» RFQ: Services (Long Form)
» RFQ: Goods (Short Form)
» RFQ: Goods (Long Form)

Councils may invite written quotes.
Councils need to be guided by their internal policies and procedures if proceeding this way. Ordinarily, at least three written quotes should be obtained.

12.3.1 Requests For Quotes

There are four stages to preparing a Request for Quotes (RFQ):

12.3.1.1 Preparing the RFQ

12.3.1.2 Written specifications (if required). The aim of the specifications is to ensure that the supplier is aware of the Council’s requirements. Clearly defining the goods, works or services required helps suppliers accurately price their bid.

12.3.1.3 Appropriate Evaluation Criteria

The choice of selection criteria will depend to a large extent on the nature and complexity of the requirements.

For low value, low risk requirements, award may be to the lowest priced conforming quote (ie an offer that meets the minimum standards and is the lowest priced).

In this case all evaluation criteria would be compliance criteria (Yes/No).

12.3.1.4 A Price Schedule

Consider the following:

(a) lump sum;
(b) schedule of rates; or
(c) costs plus methodology.
12.3.2 Other Issues

12.3.2.1 Conditions of the RFQ

Ensure that the closing date, time and lodgement method are clearly stipulated. This is critical from a probity perspective.

12.3.2.2 Form of Responses

Consider if the use of a standard format for responses will assist. If they would, you could develop the format from the documents comprising the Tender Return Schedules contained in the RFT in the Templates.

12.3.2.3 Addenda to an RFQ

This issue of Addenda is dealt with in relation to tender processes in more detail in paragraph 13.5 of this Part Three. These principles apply equally to the RFQ process. Critically, you must ensure that the same information if made available to all potential suppliers.

12.4 Issuing RFQ

RFQ should be issued simultaneously to all potential suppliers. This ensures that each potential supplier receives an equal opportunity to respond.

12.4.1 Documenting And Evaluating RFQ

12.4.1.1 All Quotes submitted must be collected as soon as possible after the stipulated closing date and time.

12.4.1.2 A list of the respondents' names and addresses should be compiled.

12.4.1.3 You should check that each respondent has fulfilled any compliance criteria set out in the RFQ.

12.4.1.4 Details of the evaluation should be recorded in writing.

12.4.2 Acceptance Or Non Acceptance Of Quotes

12.4.2.1 Acceptance of a quote should be confirmed in writing. All unsuccessful respondents should also be informed in writing.

12.4.2.2 A flow chart depicting the written quotes process is set out below.
How To Purchase Using Written Quotes

**Ask The Following Questions:**

- Determine Requirements
  - Is it goods/services/works?
  - How many units/hours?
  - What type? – make/model/colour
  - Delivery details – time/place/date
  - Who will collect/sign for goods?

- Determine Approximate Price And Purchasing Authority
  - How much is available in the budget to spend?
  - How much do you anticipate the requirements costing?
  - Do you have delegated purchasing authority?

- Obtain Written Quotes
  - Usually a minimum of three written quotes should be obtained. In the case of a long form request for quote, the request for quote should include the following components:
    - written specification
    - general conditions
    - selection criteria
    - price schedule
    - conditions of responding
  - In the case of a short form request for quote only the request for quote document itself is relevant

- Evaluation And Selection
  - Issue the quotation sending the same issue to all suppliers at the same time

- Issue Purchase Order/Enter Into Contract
  - There are two stages to evaluating a written quotation:
    - assessing compliance
    - assessing selection criteria and price
  - Note brief reasons for selection and also evaluation methodology if applicable

- Arrange Delivery From Selected Supplier
  - Send written notification of selection or non-selection
  - Enter into written agreement
    - Check that what has been supplied is in accordance with the Contract
  - File all correspondence, purchase order and documents received together including telephone messages
13 Requests For Expressions Of Interest And Requests For Tender

13.1 Requests For Expressions Of Interest

Applicable Templates

» REOI: Goods
» REOI: Services

13.1.1 Councils may invite REOI before inviting RFT as part of a staged procurement process.

13.1.2 Usually a Council will prepare a short list from the persons/organisations who responded to the REOI and invite RFT from the persons on the short list. Depending on the Council’s policies and procedures, it may also direct source the requirement from this short list.

13.1.3 Once a preliminary selection of potential suppliers has been made from the respondents to the REOI, the Council may then issue an RFT to the short listed potential suppliers.

13.2 Developing The Request For Expressions Of Interest

13.2.1 The REOI should be designed to elicit information from the prospective suppliers, which will enable the Council to identify suppliers with the capacity to satisfactorily deliver the requirements.

13.2.2 The structure and content of the REOI documentation will vary according to the complexity and value of the required goods, works and services.

13.2.3 In general, the REOI is a simplified version of an RFT. A REOI is formed by collating the following:

13.2.3.1 Request for Expressions of Interest;
13.2.3.2 specifications; and
13.2.3.3 respondent’s submission form (if you are specifying the form of the response from potential suppliers).

This can be prepared by amending the Tender Return Schedules contained in the RFT in the Templates.

13.2.4 The specifications contained in the REOI will often be less detailed than those which may be contained in the subsequent RFT. You may also use the REOI to seek conceptual suggestions about the final form of the project, in circumstances where you are looking to potential suppliers to provide expertise in relation to a particular area.

It is important that the REOI clearly states that this may be a two-stage process, which may involve short listed acceptable tenderers being invited to participate in an RFT process.

13.3 Contractual Conditions

13.3.1 The issue of a REOI (in the form contained in the Templates) does not commit the Council to proceeding with an RFT.

13.3.2 Consequently, it is not essential to include conditions of contract in the REOI. However, depending on the circumstances you may wish to advise the tenderer potential suppliers at the REOI stage of the conditions of contract that may be included in the RFT if the project proceeds. This is most common when a standard form contract will be used, for instance an Australian Standard construction contract.
13.4 Conditions Of REOI

Generally, the conditions associated with the issue of a REOI will be similar to the conditions of tender included in an RFT.

13.4.1 Developing Evaluation Criteria And An Evaluation Methodology

13.4.1.1 It is necessary to include selection criteria in the REOI as a tool for selecting acceptable respondents for short listing to the next stage of the procurement process.

13.4.1.2 In most respects, developing evaluation criteria and an evaluation methodology is similar to that for the RFT process, which is discussed in more detail in paragraph 13.5 of this Part Three, entitled ‘Developing Evaluation Criteria & Evaluation Methodology’.

13.4.2 Requesting Indicative Pricing

It is not always necessary to request pricing at the REOI. If the Council does not request this information in the REOI it must clearly state that short listed acceptable potential suppliers be required to submit firm pricing at the RFT stage.

13.4.3 Advertising The REOI

REOI are invited in the same way as RFT. In particular, the invitation should be:

13.4.3.1 issued in such a way that it is brought to the attention of potential suppliers. This may be by publication by way of the Council’s website, advertisement in The Advertiser newspaper or other local newspaper or other means; and

13.4.3.2 subject to Council’s internal policy, allow potential suppliers sufficient time to respond fully.

Good Practice Tip: Expressions of Interest processes should be subject to the same strategic planning process as tender processes. As part of this planning a timetable should be developed allowing sufficient time for each aspect of the process.

13.4.4 Addenda

The process for changing REOI (including the specifications) is the same as the process for changing an RFT. This is discussed in more detail later in paragraph 13.5 of this Part Three.

13.4.5 Briefings

The procedure for briefings prior to REOI submission to clarify aspects of the REOI is the same as the procedure for pre tender briefings to clarify RFT documentation. This is discussed in more detail later in this Part Three.
**Good Practice Tip:** whether a briefing is required is a question to be assessed and answered in light of the relative complexity of the procurement. For instance, if the REOI is part of a staged procurement process it may be more worthwhile to hold a briefing at the tender stage.

13.4.6 Closing And Opening The EOI

The guidelines for closing and opening tenders, also be employed for the closing and opening of EOI. This is discussed in more detail in paragraph 13.5 of this Part Three. Adherence to these procedures is critical to maintaining probity.

13.4.7 Evaluating EOI

13.4.7.1 The primary rule in evaluating any EOI is that the response is treated fairly, impartially and objectively. Each EOI must be evaluated against the selection criteria and weightings which were determined in the formation of the REOI. Council policies must also be considered and applied.

13.4.7.2 The procedure for evaluating EOI is the same as for evaluating tenders. This is discussed in more detail in paragraph 13.5 of this Part Three.

13.4.7.3 The process for clarification of an EOI is the same as the process for clarification of a tender. Please see paragraph 13.5 of this Part Three.

13.4.8 After Evaluation Of EOI

13.4.8.1 The Council should notify, in writing, each person who submitted a response to the REOI that:

(a) Council has decided not to invite tenders; or

(b) Council has prepared a short list from the persons who responded to the invitation and may invite tenders from the persons on the short list; or

(c) Council has prepared a short list from the persons who responded to the invitation and the person is not on the short list.

13.5 Requests For Tender

Applicable Templates

» RFT: Services (Open)

» RFT: Services (Select)

» RFT: Goods (Open)

» RFT: Goods (Select)
Generally, the preparation for the request for open tender or a select tender will proceed as illustrated in the flow chart below:

1. Developing A Specification
2. Choosing Contractual Conditions
3. Deciding On Conditions Of Tender
4. Developing Selection Criteria And Evaluation Methodology
5. Developing A Price Schedule
6. Advertising The Tender
7. Issuing Addenda (If Necessary)
8. Holding Pre Tender Briefings (If Necessary)
9. Opening And Closing Tenders Received
10. Evaluating The Tender
11. Producing A Recommendation Report
12. Arranging Formal Approval
13. Awarding The Contract (including negotiations, contract finalisation and contract execution)
14. Advising Unsuccessful Tenderers
15. Hosting Formal Debriefings (If Necessary)
16. Administering The Contract
13.5.1 Documents Required To Put Together An RFT Ready For Release To The Market

13.5.1.1 To put together an RFT you will need the following documents:

(a) Request for Tender (containing the conditions of tender);
(b) specifications;
(c) Tender Response Schedules; and
(d) an indicative Contract.

13.5.1.2 How to select the appropriate documents from the Templates to suit your circumstances, put these documents together and conduct a tender process is discussed in more detail below.

13.5.2 Request For Tender

The RFT contains the conditions of tender which are a separate set of conditions to the conditions of contract. They are the rules which govern the RFT process. They facilitate an even playing field for each potential supplier submitting a tender.

13.5.3 Developing The Specifications

13.5.3.1 The role of the specifications is to provide potential suppliers with a concise, logical and unambiguous description of the requirements of the Council.

13.5.3.2 This is discussed in more detail in paragraph 3 of this Part Three.

13.5.4 Tender Responses

The Tender Response Schedules provide the format for tenders to be submitted by potential suppliers. You should amend these to suit your needs as necessary. Please note that any modifications need to be made in a way which is consistent with the Conditions of Tender. If you are in doubt, seek legal advice about the amendments you have made.

13.5.5 Developing Evaluation Criteria And Evaluation Methodology

13.5.5.1 The material below applies equally to the development of evaluation criteria and an evaluation methodology for:

(a) RFQ;
(b) REOI; and
(c) RFT.

13.5.5.2 The use of well-defined evaluation criteria enables potential suppliers to focus on their responses (ie Quotes, EOI or tenders), which assists Councils to assess their relative merits.

13.5.6 Evaluation Criteria Will Usually Address The Following Areas:

13.5.6.1 compliance with certain prequalification requirements;
13.5.6.2 compliance with contractual terms and conditions;
13.5.6.3 the technical merit of the goods, works or services offered;
13.5.6.4 the capability of the tenderer potential supplier to fulfil the specified requirements, including technical and management competence, financial viability, relevant skills, experience and availability of key personnel, environmental impact considerations, records management capability; and
13.5.6.5 an assessment of the risks or constraints associated with each offer.
13.5.7 Assuming The Prequalification Criteria Are Met, There Are Three Major Types Of Evaluation Criteria:

13.5.7.1 compliance criteria;
13.5.7.2 qualitative criteria; and
13.5.7.3 price criteria.

13.5.8 Compliance Criteria

13.5.8.1 Compliance criteria relate to the fundamental conditions of the quote or tender. They are usually assessed on a “Yes/No” basis; ie either that criterion is fully satisfied or not satisfied at all.
13.5.8.2 Typically, compliance criteria are easy to objectively measure as meeting or exceeding the minimum acceptable standard.
13.5.8.3 For example:
(a) compliance with contractual and technical specifications;
(b) meeting relevant Council procurement policies;
(c) attendance at site inspection/site visit;
(d) compliance with necessary licences and standards; and
(e) financial capacity to perform the contract.

13.5.9 Qualitative Criteria

13.5.9.1 Generally, qualitative criteria are more likely to be assessed subjectively and higher performance gives more benefits to the Council buyer.
13.5.9.2 For example:
(a) organisational capacity;
(b) demonstrated relevant prior experience;
(c) infrastructure within South Australia to service the Council;
(d) quality of contract;
(e) environmental sustainability;
(f) demonstrated contract records management capability; and
(g) management methodology.

Good Practice Tip: Conditions for participation may require relevant prior experience where that is essential to meet the Council’s requirements but must not specify that the potential supplier must have previous experience with that particular Council.
13.5.10 Advertising The Request For Tender

13.5.10.1 RFT should be invited by being issued in such a way that the RFT is brought to the attention of potential respondents.
13.5.10.2 This may be by publication on the Council's website, advertisement through the SA Tenders and Contracts website (http://www.Tenders.sa.gov.au), in The Advertiser newspaper, or other local newspaper or by other means.

13.5.11 The Advertisement Should Include The Following Details:

13.5.11.1 a brief description of the goods, works or services required;
13.5.11.2 information as to where tender documents may be obtained;
13.5.11.3 particulars identifying a person from whom more detailed information as to tendering may be obtained;
13.5.11.4 the date and time by which tenders must be submitted; and
13.5.11.5 if a mandatory pre tender briefing is to be conducted, this should be stipulated in the advertisement.

13.5.12 Period For Submission

13.5.12.1 The period for the submission of tenders should be in accordance with the Council's internal policy and allow potential respondents sufficient time to respond meaningfully. This will vary depending on the nature and complexity of the goods, works or services being purchased.
13.5.12.2 Also, it is useful if the closing time:
   (a) is not on a Monday;
   (b) is not immediately before or after a public holiday; and
   (c) does not coincide with a recognised industry year end close down.

13.5.13 Addenda

13.5.13.1 Addenda must be issued when alterations, additions or deletions are required to the RFT or to notify changes which materially impact on the tender process or to provide clarification on an aspect of the RFT. Potential suppliers should be required to acknowledge receipt of addenda immediately on receiving the documentation. By way of example, if, during the tender period:
   (a) the Council's circumstances change;
   (b) information or clarification is provided to one tenderer that could materially change the understanding of the requirement or provide an advantage; or
   (c) the Council decides (whether due to a tenderer's request or changes to the requirements) to extend the closing time for tender submissions,
this information should be provided to all potential respondents in exactly the same format as the RFT. This requirement applies equally to REOI and RFQ.
13.5.13.2 Reasonable steps must be taken to ensure that all people and organisations that have sought and/or obtained the RFT documents are informed of the changes. To maintain probity, as a minimum, any addendum should be issued in exactly the same way as the original RFT and at the same time to all potential respondents.
13.5.13.3 If any aspect of the RFT (including but not limited to the specification) is amended, the addendum must allow sufficient time for tenderers to be able to incorporate the changes into their tenders.
13.5.14 Pre Tender Briefings

13.5.14.1 Some projects require detailed information to be provided to tenderers or site visits to be undertaken. These pre tender briefings are optional and may not be appropriate for all RFT processes.

13.5.14.2 Briefing sessions are an important opportunity for potential tenderers to ask detailed, project specific questions that will aid them in the preparation of their tender.

13.5.14.3 Pre tender briefings may be made compulsory for all potential tenderers to attend. Briefings should only be made compulsory where it is absolutely necessary. If a compulsory briefing is required, the RFT needs to clearly state that the pre tender briefing is mandatory and to outline the consequence of non-attendance. Also, attendance at a mandatory briefing should be made a compliance criteria. If the briefing is compulsory and a tenderer fails to attend, any tender submitted by them should not be considered during evaluation.

13.5.14.4 It is necessary to ensure that the date of the pre tender briefing is a sufficient time after advertising the tender invitation to allow tenderers to gain an understanding of the requirement.

13.5.14.5 It is recommended that:
(a) a register of attendance be maintained;
(b) all questions be noted down; and
(c) a written response to any amendments or clarification be circulated to all persons who attended the session or who received the tender documentation by the issue of an addendum.

13.5.15 Closing And Opening Tenders

13.5.15.1 Councils should be guided by their own internal policies and procedures regarding the closing and opening of tenders.

13.5.15.2 By way of general guidance tenders should not be opened, examined or assessed until after the closing time for submission of tenders. It is good practice, upon receipt of a tender, for a Council employee to record on the tender, the time and date it was received. Increasingly, Council’s are electing to receive tenders electronically. This can be done through SA Tenders and Contracts, see www.tenders.sa.gov.au for more information. The Templates provide an option for electronic submission.

13.5.15.3 Councils may, from time to time, engage a third party such as an engineering firm, to conduct a tender process. If it does so, proceeding this way must be supported by the Council’s procurement policy. Further, the third party will be subject to the same requirements as the Council in the conduct of the tender process, including tender opening. Councils need to be careful to ensure that these requirements are written in to any agreement with the third party and are appropriately contract managed by the Council.

13.5.15.4 It is good practice when opening tenders to ensure that:
(a) more than one employee of the Council is present; and
(b) details of all tenders received are recorded on a tender register. A tender register is an essential part of the procurement process. It gives the Council an accurate, timely record of the tenders it received and means that if the tenders opening process is ever challenged from a probity perspective the Council has a record of events to support its position.

13.5.15.5 The tender register may include details such as:
(a) contract name and number;
(b) advertisement date;
(c) name and address of the tenderer; and
(d) date and time the tender was received.
13.5.15.6 The original tenders received should be placed on Council’s file and the copies distributed to the evaluation panel members.

13.5.15.7 The RFT in the Templates specifically provides that:
(a) tenders must be in the tender box by the closing time; and
(b) the Council may extend the closing time at its discretion.

13.5.15.8 It is recommended that tenders received after the closing time be stamped “late tender” and the time and date of receipt recorded. This information should be transcribed to the tenders register.

13.5.15.9 If Council extends the closing time, then it must do so by the issue of an addendum and the addendum must be issued to each potential tenderer who has received or been provided with a copy of the RFT. Council should not extend the closing time simply to facilitate the acceptance of a late tender response from a particular tenderer.

13.5.15.10 It is important that employees return any tenderers’ telephone calls (and keep file notes of these conversations) and acknowledge any tenderers’ correspondence during the tender period.

13.5.16 Late Tenders

13.5.16.1 Councils need to have appropriate guidelines in place to deal with handling late tenders. This is a matter for individual Councils, though some suggestions in respect of these guidelines are set out below. In setting these guidelines Councils need to adhere to appropriate standards of probity and in particular, to the obligation to treat all participants in the process fairly, impartially and objectively. If the Council has any uncertainty about the treatment of a late tender it should seek legal advice.

13.5.16.2 As a starting point, all tenders received after the nominated Closing Date in the RFT need to be identified as late and managed separately to tenders received prior to the Closing Date.

13.5.16.3 Usually late tenders should not be accepted. Individual Councils are able to set their own policies in relation to whether late tenders ought to be accepted or not. These policies must emphasise that the decision of whether or not to evaluate a late tender needs to be made in light of appropriate standards of probity. For instance, a Council may elect to have a policy which allows for the evaluation of late tenders in exceptional circumstances. These could include:
13.5.16.3.1 if there has been some fault in the Council’s receiving arrangements for tenders;
13.5.16.3.2 if there has been some fault or incident outside the control of the tenderer (ie natural disaster, mishandling by the Council, significant postal or courier delay which could not be reasonably foreseen by the tenderer, major security incident or e-delivery system downtime); and
13.5.16.3.3 if no tenders have been received within the time provided.

13.5.16.4 The reasons for accepting a late tender should be clearly documented. Potential suppliers submitting late tenders should be advised in writing as soon as possible whether their tender will be evaluated or not. If they are not accepted, late tenders should not be opened except where the tenderer’s contact details cannot otherwise be identified.

13.5.17 Evaluating The Tender

13.5.17.1 After tenders have been received it is time for evaluating the offers made by potential suppliers.

13.5.17.2 The primary rule in evaluating tenders is that all tenders must be treated fairly, impartially, objectively and with due diligence. If the request for tender specifies evaluation criteria or weightings, then tenders must be evaluated against the evaluation criteria and weightings specified in the request for tender.
13.5.18 Tender Evaluation Plan

13.5.18.1 Prior to issuing any request documents the evaluation criteria must be determined. These should be documented in the procurement strategy if one is prepared.

13.5.18.2 Prior to the tender closing date a detailed tender evaluation plan should be created. The degree of complexity required will depend on the quantum, complexity and risk profile of the procurement.

13.5.18.3 Members of the evaluation team must be informed of the evaluation’s scoring and weighting process. This is often done through the distribution of the tender evaluation plan.

13.5.19 Ensuring Procedural Fairness And Probity

13.5.19.1 Procedural fairness is defined as the duty to act fairly and the duty to adopt fair procedures which are appropriate and adapted to the circumstances of a particular case.

13.5.19.2 Adhering to adequate standards of probity throughout the procurement will ensure that this is not an issue. Probity generally is described in more detail in Part Seven of this Handbook.

13.5.20 Selecting An Evaluation Method

As mentioned above the complexity of the evaluation methodology will reflect the complexity, quantum and risk profile of the procurement. The evaluation criteria, weightings and methodology cannot be changed once the approach to market process has closed.

Only information put forward by the potential supplier should be used in the evaluation. Known, historical or tacit knowledge about the organisation by any evaluation team member that was not submitted by the potential supplier should not be considered during the evaluation process.

13.5.21 Initial (Desktop) Evaluation

Compliance Requirements

This initial assessment is to ensure that a legal, compliant offer has been received. Tenders must be checked to ensure conformance with all the aspects of the approach to market documents. These requirements are not point scored.

13.5.22 Pre-Qualification Requirements

Tenders are assessed on a 'yes/no' basis as to whether any prequalification requirements are met. An assessment of 'no' against any requirement will eliminate the supplier from further evaluation. These requirements are not point scored.

13.5.23 One Stage Evaluation

In a One Stage Evaluation the price and the qualitative criteria are evaluated together as a component of the entire tender and is not excluded from the assessment of the qualitative components of the offer. This process is most often used for simple, low value, low risk procurements where price is the most important factor. An assessment of the qualitative requirements provides the evaluation point with the capacity to determine whether a supplier has the ability to complete the task required. Qualitative requirements may be weighted. If a weighting is given it provides a guide to indicate if certain aspects are more important than others.
13.5.24 Two Stage Evaluation

13.5.24.1 A Two Stage Evaluation process involves an assessment first of the qualitative criteria and then after that assessment is complete, an assessment of the price offered.

13.5.24.2 Tenders are announced as either acceptable or unacceptable based on the qualitative criteria. At this stage unacceptable offers are set aside from further consideration. The second part of the assessment then relates to cost.

13.5.24.3 The Two Stage Evaluation process is better suited to high risk, high cost procurements.

13.5.25 Scoring Criteria

Detailed evaluation requires comparing tenders against each of the evaluation criteria. To score you must choose an appropriate scale and define an objective method for comparing each tenderer’s score. Consider the table below.

<table>
<thead>
<tr>
<th>Score</th>
<th>Qualification</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>9–10</td>
<td>Excellent</td>
<td>Full achievement of the requirements specified in the documentation for that criterion. Demonstrated strengths, no significant weaknesses or omissions</td>
</tr>
<tr>
<td>7–8</td>
<td>Very Good</td>
<td>Sound achievement of the requirements specified in the documentation for that criterion. May contain minor weaknesses or omissions which may be acceptable as offered</td>
</tr>
<tr>
<td>5–6</td>
<td>Satisfactory</td>
<td>Reasonable achievement of the requirements specified in the documentation for that criterion. Some weaknesses or omissions which could be corrected/overcome with minimum effort</td>
</tr>
<tr>
<td>2–4</td>
<td>Unsatisfactory</td>
<td>Minimal achievement of the requirements specified in the documentation for that criterion. Some weaknesses or omissions that may be possible to correct/overcome and make acceptable</td>
</tr>
<tr>
<td>1</td>
<td>Poor</td>
<td>Existence of numerous weaknesses or omissions that are difficult to correct/overcome and make acceptable</td>
</tr>
<tr>
<td>0</td>
<td>No Score</td>
<td>Totally deficient and non compliant</td>
</tr>
</tbody>
</table>

13.5.26 Evaluation Panel

13.5.26.1 The number of persons allocated to the evaluation panel will depend on the needs of the Council, as well as the nature and complexity of what is being purchased and the risks associated with it. You should assess this on a case by case basis.

13.5.26.2 Usually at least three Council employees should be appointed to evaluate complex tenders. However, for non-routine or high risk procurements it is recommended that the evaluation panel consist of a sufficient number of employees with the requisite mix of skills to evaluate that tender. For large, complex or sensitive contracts, an independent person, who can provide external scrutiny to demonstrate the integrity of the process, may be appointed.

13.5.26.3 One person should be nominated as chairperson of the evaluation panel. The chairperson will be responsible for ensuring that decisions are made in a timely manner and for the preparation of the final recommendation report.

13.5.26.4 Once the tenders have been ranked, the evaluation panel must make a value judgment as to the cost affordability, qualitative ranking and risk of each tender, in order to determine the tender which is most advantageous to the Council.
13.5.27 Clarification

13.5.27.1 To assist the Council in deciding which tender would be the most advantageous to accept, a tenderer potential supplier may be requested to clarify the information provided in the tender. This right is specifically provided for in the Templates.

13.5.27.2 If a clarification is necessary the following information should be documented:

(a) why was clarification sought;
(b) what was clarified and where changes were made;
(c) who was involved in the clarification process; and
(d) when the communication took place and in what form.

13.5.27.3 Documented information on clarifications should be included as part of the tender evaluation report.

13.5.28 Undertaking A Due Diligence

Due diligence is a formal stage during contract negotiations and management in which both parties have an opportunity to test their expectations and understanding of the contract. The due diligence phase is where false assumptions should be identified with subsequent negotiations resolving any misunderstandings.

13.5.29 Conducting Negotiations

13.5.29.1 The request documents contained in the Templates allow for Councils to negotiate with all or any potential suppliers. Doing so does not rule out using other bidders until the contract is executed between the Council and the successful supplier.

13.5.29.2 It is always wise to develop a negotiation plan and have a strategy in place. You will have a good idea of the key drivers from the Council’s perspective and should have a good understanding of what motivates the supplier. Principles to bear in mind to assist with achieving a successful negotiation are:

(a) ethics and fairness;
(b) preparation and planning;
(c) behaviour; and
(d) resolving deadlocks.

13.5.29.3 Critically you must conduct negotiations within the confines of appropriate standards of probity. This means that what you procure as a result of negotiations must not be materially different to the requirement for which you approached the market. What is ‘materially different’ is a question of degree assessed with respect to the circumstances of each case. If you are in any doubt whether the negotiated outcome is materially different to the outcome sought in the approach to market then you should seek specific probity advice.
13.5.30 Preparing For Negotiations

13.5.30.1 Depending on the scale of the procurement, some preparation may be necessary in order to conduct a successful negotiation. Consider the following:

13.5.30.2 Team: Identify the negotiation team.

13.5.30.3 Goals: Have clearly articulated goals identified for the outcome of the negotiations. Think about what the supplier may be seeking to achieve from the negotiations. Understand your position based on market capability.

13.5.30.4 Governance: Have a clearly identified governance framework for the negotiation process.

13.5.30.5 Concessions: What concessions can the Council and the supplier make for each other to facilitate the deal? This also needs to be done with both parties understanding the market/supplier capability.

13.5.30.6 Alternatives: If the Council cannot reach an acceptable agreement with the supplier with whom it is negotiating, what are the alternatives? What are the consequences if the Council is not able to achieve a deal with the supplier? What are the consequences (i.e., higher price or compromised quality)? What alternatives or workarounds can the supplier offer?

13.5.30.7 Relationships: Is there an existing relationship between the parties? What impact (if any) does this have? Are there hidden issues which will impact on negotiations and how will the Council handle these?

13.5.30.8 Consequences: What are the consequences for both parties of an unsuccessful negotiation?

13.5.30.9 Possible Solutions: Based on all the information what possible solutions are there?

13.5.31 During Negotiations

It is essential that careful minutes are taken during negotiations and that any agreement reached is documented and circulated to the parties shortly after the negotiation session. Once final agreement is reached it is important that the negotiated agreement is reflected in the contract executed between the parties.

13.5.32 Negotiations And Probity

13.5.32.1 It is crucial that the probity of the tender process is maintained throughout the negotiation process. The Council, after it has chosen a preferred tenderer, but before it has entered into a contract, may make minor variations to the goods, works or services required or the terms and conditions of the tender documentation.

13.5.32.2 What constitutes a ‘minor variation’ is a question of fact and degree in each case. A minor variation should not materially alter the original scope of the requirement particularised in the RFT. This would disadvantage other tenderers, as they would not have an opportunity to tender for the varied requirements.

13.5.32.3 If the preferred tenderer is unwilling to enter into a contract to supply the varied requirement, or the Council and the preferred tenderer cannot agree on the content to be included in the contract as a result of the variation, the Council may choose the tenderer (if any) whose tender the Council considers would be the next most advantageous.
13.5.33 Recommendation Report

13.5.33.1 On completion of the evaluation, the selection of the successful tenderer should be documented in a formal report. The report should accurately reflect the conclusions made by all members of the evaluation panel, with adequate details to substantiate these conclusions.

13.5.33.2 The report should indicate the ranking of tenders based on the weighted score for each tender.

13.5.33.3 All panel members should sign the foot of the report to show that they concur with the decision and the decision-making process. Any dissenting reasons should also be documented.

13.5.34 Formal Approval

13.5.34.1 The recommendation report should be submitted to the approving body or person for formal approval; ie Manager, Chief Executive Officer or Council. Your own internal policies and procedures will provide specific direction.

13.5.35 Award Of Contract

13.5.35.1 Once the appropriate body has ratified the recommendation, the contract between the Council and the successful tenderer can be executed.

13.5.35.2 All tenderers should be advised promptly in writing of the Council’s decision. Avoid verbal feedback to tenderers prior to the execution of a contract.

13.5.36 Formal De-Briefing

13.5.36.1 After the execution of a contract, unsuccessful tenderers may be given feedback about the weaknesses in their tender. This feedback should be through the chairperson and a nominated member of the evaluation panel, on request by the unsuccessful tenderer. It is important that the Council employees return tenderers’ telephone calls and acknowledge tenderers’ correspondence.

13.5.36.2 The feedback should be limited to the facts of the unsuccessful tender. Any comparisons should be made against the selection criteria rather than with the successful tenderer. Explicit advice about future tenders should be avoided. Tenderers should be dealt with objectively and with courtesy.

13.5.37 In House Bids

13.5.37.1 An in house bid is a proposal drawn up by staff to deliver an outcome to the Council which would otherwise be procured through outside sources. In house bids are fully developed responses prepared by staff in response to an approach to market by the Council.

13.5.37.2 Critically, from Councils’ perspective, in house bids need to be carefully managed in order to avoid any probity concerns tainting the approach to market process. The following tips should be kept in mind in the preparation of any in house bid.

(a) The approach to market documentation will need to specifically allow for an in house bid.

(b) The critical success factor from a probity perspective is ensuring competitive neutrality and this will be able to be achieved through the management of information. Critically the Proximity Plan needs to have some protocols around the management of documents and information associated with the procurement (ie appropriate security around any information that would give the in house team an advantage with their bid).

(c) It is difficult to avoid a perception of a probity breach with an in house bid. This is because of the likelihood that the persons involved in the development of the technical requirement will most likely be the Council’s experts in this area and have been exposed to helpful information during the preparation of the technical requirement to which ordinary bidders would not be exposed.
(d) There needs to be a risk management plan in place to manage this perception.
(e) Any individual who has been exposed to the development of the procurement’s technical requirement should not participate in the in house bid team.
(f) There should be physical separation of procurement team and in house bid team.
(g) Chinese walls need to be established at the Council between those responsible for the procurement and those involved in the in house bid.
(h) Think about getting the various teams to sign a confidentiality and conflict of interest declaration (ie those involved in preparation of the in house bid, management of the procurement process and evaluation of responses).
(i) There need to be appropriate arrangements in place to manage the protection of competing external bidders in the post bid phase.

13.5.37.3 The above tips should be fully documented and provided to all relevant employees. They should also be made available on request to external organisations involved in the procurement process.

Applicable Templates – Agreements

» Purchase Order: Goods
» Purchase Order: Works
» Agreement for Purchase of Goods (Panel and Continuing)
» Agreement for Purchase of Goods (Continuing)
» Agreement for Purchase of Goods (One Off)
» Professional Services Agreement (Panel and Continuing)
» Professional Services Agreement (Continuing)
» Professional Services Agreement (One Off)
» Minor Works Agreement
The Fundamentals Of Contract Law – Basic Elements Of A Contract

A contract is a legally binding agreement between two or more parties. Contracts may be verbal or written or a mixture of both. Contracts are enforceable by law. In order to form a contract there are a number of elements which must be present. These are described in more detail below.

1.1 Offer And Acceptance

An offer signals the intent on behalf of one party to enter into a contract. The offer must be communicated in a clear, identifiable manner. Generally the offer remains open for acceptance until it is either withdrawn or unless it is clearly communicated that the offer will lapse at a certain time.

**An offer can be distinguished from an RFT which is (at law) not considered an offer but an invitation to treat. The supplier responding to the invitation to treat (ie RFT) is in fact making an offer to the inviter (the Council). The same applies with REOI and RFQ.**

The acceptance of an offer must be totally unconditional and must address all the terms of the offer. Any acceptance which contains within it a condition which in one or another seeks to alter the terms of an offer is usually considered to be a counter offer.

**Good Practice Tip: Never allow a contractor to start work without a written contract in place.**

1.2 Intent To Create Legal Relationships

A contract cannot be formed unless there is an underlying intention to create a legal relationship between the parties.

1.3 Consideration

The law states that something of value must be given in return for something of value that is offered. The values coming from one party to another do not need to be equivalent.

1.4 Legal Capacity

The parties to a contract must be legally competent entities capable of becoming legally bound. An entity can be a natural person or a corporation (including companies, incorporated associations, statutory bodies of incorporated Ministers of the Crown).
1.5 Consent

There must be genuine consent between the parties. The law allows for remedies in certain circumstances where genuine consent is absent, including in circumstances where there has been fraud, misrepresentation or mistakes of law or fact.

**Point To Note:** unless there is consent there can be no agreement and, therefore, no contract.

1.6 Legality Of Objects

If the contract has as its objective something that is not proper and/or is illegal, then the contract itself will be considered to be illegal and void (ie where performance would breach OHS&W legislation).

1.7 Certainty Of Terms

It is essential that the parties agree on all critical matters in respect of the contract. If the parties have failed to agree on all essential matters, for example the price, a court may hold that there is a contract.

1.8 Other Points To Note

The rights and obligations arising from a contract will only bind the parties to a contract. For example, if a sub-contractor fails to carry out its actions satisfactorily, the principal cannot take action against the sub-contractor directly. The principal would need to take action against the head contractor who may look to the sub-contractor for redress.

1.9 Why Is It Important To Enter Into A Contract?

Entering into written contracts protects the parties’ rights. For instance:

1.9.1 it formalizes the parties’ obligations and rights;

1.9.2 it controls and allocates risk;

1.9.3 it eliminates the need for further negotiations;

1.9.4 it secures the supply of goods and services; and

1.9.5 it sets out how exceptions will be handled by the parties.

From a risk management perspective it is essential that Councils ensure that in every procurement scenario a written contract is executed by the parties that reflects their entire agreement.

A contract is not just for when things go wrong – it sets the groundwork to ensure that things go right. It ensures that the parties sit down and articulate exactly what the other expects from the relationship.

Importantly the contract provides clarity on each parties’ roles and responsibilities. This critical aspect is dealt with in more detail in the Contract Management section of this Handbook.
The terms of the contract are there to protect both parties by giving certainty of rights. In order to use the contract to the Council’s best advantage it is essential that you understand the basic structure of a contract. This structure is set out in the table below.

<table>
<thead>
<tr>
<th>Clause</th>
<th>Meaning</th>
</tr>
</thead>
<tbody>
<tr>
<td>Term</td>
<td>Duration of contract including the duration of any options to extend the contract</td>
</tr>
<tr>
<td>Dates</td>
<td>The start and expiry date of the contract</td>
</tr>
<tr>
<td>Background/Recitals</td>
<td>Provides context to the contract by setting out the factual background that led to the execution of the contract</td>
</tr>
<tr>
<td>Definitions</td>
<td>Terms that are used frequently throughout the contract are defined so that the contract is more concise and easier to read</td>
</tr>
<tr>
<td>Operative Clauses</td>
<td>These clauses set out the scope of the contract (i.e., who has to do what and when) and include scope, performance standards, delivery requirements</td>
</tr>
<tr>
<td>Commercial Provisions</td>
<td>Include issues such as pricing, price adjustments and how they are calculated, payment and payment withholding/disputes</td>
</tr>
<tr>
<td>Representations And Warranties</td>
<td>Both parties generally give warranties and make representations that certain things are true</td>
</tr>
<tr>
<td>Insurances</td>
<td>Specifies the insurance requirements</td>
</tr>
<tr>
<td>Liabilities</td>
<td>Specifies any limitations on liability</td>
</tr>
<tr>
<td>Intellectual Property</td>
<td>Clarifies the parties’ agreement in relation to the ownership of and licensing of any intellectual property used or generated for the purposes of the contract</td>
</tr>
<tr>
<td>Termination</td>
<td>How the parties can terminate the contract for default or convenience and the parties’ agreement as to any damages payable in those circumstances</td>
</tr>
<tr>
<td>Boilerplate Clauses</td>
<td>These clauses set out the parties’ rights in certain circumstances and are consistent throughout the Templates:</td>
</tr>
<tr>
<td></td>
<td>» Confidentiality » Severability</td>
</tr>
<tr>
<td></td>
<td>» Governing Law » Variation and Waiver</td>
</tr>
<tr>
<td></td>
<td>» Force Majeure » Dispute Resolution</td>
</tr>
<tr>
<td></td>
<td>» Notices » Entire Agreement</td>
</tr>
<tr>
<td>Schedules</td>
<td>Schedules often contain the technical detail relevant to the contract. For instance, the specification, service level agreements, key performance indicators, a description of the scope and so forth are typically contained in schedules</td>
</tr>
<tr>
<td>Execution And Witnessing</td>
<td>Ideally all the execution clauses will be contained on one page. Bear in mind, however that the Templates provide for contracts to be executed by counterparts. If you proceed this way it is essential that the Council retains a copy of both counterparts</td>
</tr>
</tbody>
</table>
1.11 Payment Structures

There are a variety of ways in which payment can be structured under a contract and how payment is structured will necessarily have an impact over the overall value for money equation, as different payment structures have an impact on a supplier’s cashflow. These include:

1.11.1 fixed price contracts

1.11.2 escalation – rise and fall

1.11.3 lump sum;

1.11.4 schedule of rates;

1.11.5 bill of quantities;

1.11.6 cost reimbursable; and

1.11.7 incentive contracts.

Depending on the terms of the contract, pricing may be fixed or subject to escalation. It is critical that this is reflected in the contract.

1.12 Fixed Price Contracts

Fixed price contracts have no provision for price adjustment during the term and no provisions entitling a supplier to any escalation. A fixed price contract passes risk to the supplier and in this way provides an incentive to the supplier to control costs and perform effectively. A fixed price contract will usually be higher in price because the council has passed its risk to the supplier (ie the Council will pay a premium because it has passed its risk). Payments are usually made at agreed intervals.

1.13 Escalation – Rise And Fall

An agreed price articulated in a contract can be varied to allow pricing movements and this is known as ‘escalation’ or ‘rise and fall’. The pricing movement is generally tied to specific agreed parameters which are recorded in the contract (ie a suppliers’ EBA for labour rates or the cost of a commodity on an agreed stock exchange or published petrol prices). This type of mechanism is typically used when:

1.13.1 a major component of the cost delivery model is subject to wide market price fluctuation;

1.13.2 the term of the contract is significant and there are likely to be price increases or decreases over the life of the contract; or

1.13.3 a major component of the works is subject to a currency risk.
1.14 Lump Sum

A lump sum contract is one where the total payment amount is fixed and payments are made by instalments at certain intervals, or on the achievement of certain milestones. A lump sum contract will usually provide for the instalment payments not to exceed a certain amount and also contain an agreed description of the milestones which, when achieved, entitle the supplier to payment.

1.15 Schedule Of Rates

A schedule of rates involves an agreed list of itemized units of purchase and is most often used when it is not possible to accurately estimate the extent or duration of the work and consequently the cost of the work. As with a bill of quantities described below, when using this model it is critical that the Council has effective cost control mechanisms in place.

1.16 Bill Of Quantities

A bill of quantities is similar to a schedule of rates model but it has quantities stated against each component of the work and this is used to estimate the total cost of the product. The bill of quantity model commonly has ‘provisional’ or ‘contingency’ sums included in the pricing structure, where itemized costs were not available at the time of contract execution. This pricing structure is most commonly used in the construction industry. When using this model it is critical that the Council has effective cost control mechanisms in place.

1.17 Cost Reimbursable

Cost reimbursable regimes allow for the payment of allowable incurred costs to the extent prescribed in the contract. Usually the contract will provide for an upper limit on the costs incurred and specifically establish an amount which the supplier is not entitled to exceed, except at the supplier’s own risk. Cost reimbursable arrangements also involve paying a supplier a margin on top of the actual costs incurred to represent their profit. These types of arrangements should only be used when the uncertainties associated with performance of the contract do not allow for costs to be estimated sufficiently accurately to use one of the other fixed price models.

1.18 Incentive Contracts

An incentive contract is designed to provide a motive for the supplier to perform efficiently from a cost perspective by providing a profit motive. If a supplier completes the contract while incurring less cost than originally anticipated, the supplier will receive more profit. In order to do this, incentive contracts specify a target cost, a target profit, a price ceiling, and a profit adjustment formula. Notably, the incentive increases or decreases are applied to performance targets rather than minimum performance requirements. Critically, incentives only work when performance can be tied to measurable outcomes such as delivery times, customer satisfaction, response times, amount of downtime and quality measures.
1.19 Discharging The Contract

A contract may be discharged (or technically ended) in one of the following ways:

1.19.1 it contains a stated value and that value has been reached;

1.19.2 it contains an expiry date and that date has passed;

1.19.3 the term has expired;

1.19.4 it has been terminated with a supplier; or

1.19.5 it is no longer capable of being exercised ie it is ‘frustrated’.

1.20 How Can A Contract Be Renewed?

A contract can be renewed in one of two ways:

1.20.1 by exercising an option to renew contained in the contract. If proceeding this way you must ensure that the technical requirements of the contract to renew are met; and

1.20.2 by mutual agreement. The agreement reached needs to be recorded in writing by the parties in unambiguous terms.

1.21 A Contract Should Detail The Powers Which Can Be Exercised Following A Breach

The failure by a party to perform obligations under a contract is known as a breach of contract.

1.21.1 An effectively drafted contract should clearly detail the powers which can be exercised following any breach. Examples of breaches include:

1.21.1.1 failure to make payments on time;

1.21.1.2 failure to complete on time; and

1.21.1.3 failure to carry out instructions.
1 Risk Management

1.1 The Australian/New Zealand Standard AS/NZS ISO 31000:2009, Risk Management – Principles and Guidelines describes risk as the effect of uncertainty on objectives. Risk management is described as the coordinated activities to direct and control an organisation with regard to risk.

1.2 Risk is part of the environment within which Councils operate. Risk management involves the systematic identification analysis, treatment and, if appropriate, acceptance of risks. Risk management is integral to the cost effective delivery of services, works and the acquisition of goods by Councils.

1.3 As a general principle, risks should be borne by the party best placed to manage them. Councils should not accept risks which another party is better placed to manage.

1.4 Councils need to carefully monitor the terms and conditions, including pricing, on which risk allocations are determined, to ensure they reflect value for money.

1.5 Insurance is one way of treating risks. Local Government Risk Services (LGRS) was established to manage and service the insurance and risk management needs of Local Government in South Australia. The LGA Mutual Liability Scheme (LGAMLS) provides South Australian Councils with fully integrated risk, claim and legal services for civil liabilities. Councils should conduct their procurement activities in consultation with LGAMLS to ensure they are adequately covered by their insurers.
1.6 Limiting a contractor’s liability to the Council should only ever be agreed to after thorough risk analysis and in conjunction with your insurers.

When considering the issue of limitation of liability Councils should consider LGAMLS’ Guidelines for Limiting Liability. In addition, Councils should consider LGAMLS’ ‘One System’ with respect to OHS&W matters and adapt as necessary in Request Documents and Agreements. Both are available at www.lgrs.com.au

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Risk allocation is always reflected in contract price.

Identify the risks and manage them properly and you will save money.

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1.7 Risk management in procurement means ensuring that the potential risks associated with a particular scenario are identified, assessed and managed to ensure that unexpected or undesirable outcomes are minimised while deriving the maximum benefit to the Council from the procurement.

1.8 The procurement of services ought to be conducted in a way that imposes, as far as practicable, the same level of accountability and responsibility on the service provider as would exist if the agency carried out the services itself.

1.9 Depending on the nature of the procurement, the level of detail required in the management of risk will vary. Consider the following questions to assist with determining the complexity of the procurement:

i. Does the supply market have the capacity to meet current and anticipated demands?

ii. Can the Council continue to function if the supply is interrupted (i.e., continue to meet ratepayers’ needs)?

iii. Is there a low probability that the goods/services will become obsolete or be superseded during the life of the contract?

iv. Is provision an ongoing use of the goods/services considered to be safe?

v. Is stakeholder and public interest in the purchase low?

If you answered ‘yes’ to all the questions above then the procurement is most likely to be considered low complexity and, consequently, lower risk.

If you answered ‘no’ to any of the above questions it is more likely that the procurement will be considered higher complexity and higher risk.

Stating the objectives of the procurement within a clearly defined context provides a strong focus for the identification of risks.
# 2 Risk Management Checklist

The potential risks in the procurement process, their consequences and some suggestions for their treatment are set out in the table below.

<table>
<thead>
<tr>
<th>Identifying The Need</th>
<th>Likely Consequences</th>
<th>Action</th>
</tr>
</thead>
</table>
| **Understatement Of The Need** | » Purchase of unsuitable product or service  
» Money wasted  
» Need not satisfied  
» Additional cost | » Analyse need accurately  
» Ensure industrial relations, environmental, OHS&W, economic and workforce outcomes are considered |
| **Overstatement Of The Need** | » Greater expense  
» Poor competition | » Analyse need accurately, include functional and performance requirements |
| **Insufficient Funding** | » Delay in making the purchase  
» Additional costs for re-tender | » Obtain appropriate approvals before undertaking process  
» Improve planning |
| **Impractical Target Dates** | » Inadequate service provider responses  
» Reduced competition  
» Delivery schedule not met | » Improve forecasting, planning and consultation with users  
» Improve communication with potential service providers |
| **Probity Failure** | » Increased procurement costs  
» Misuse of resources  
» Most suitable product not obtained  
» Unethical conduct | » Implement best practice policies, guidelines and practices  
» Maintain ethical environment  
» Improve training of personnel  
» Put suitable controls and reviews in place  
» Improve communication with potential service providers |
| **Misinterpretation Of User Needs** | » Totally unacceptable purchase or not most suitable product or service  
» Time lost  
» Increased costs  
» Possible downtime | » Improve consultation with users  
» Obtain clear statement of work and definition of need |
### Developing The Specification

<table>
<thead>
<tr>
<th>Risk</th>
<th>Likely Consequences</th>
<th>Action</th>
</tr>
</thead>
</table>
| **Narrow Definition Or Commercial Specification (E.G. Brand Name)** | » Fewer alternatives  
» Most suitable product or service may not be obtained  
» Increased costs | » Define the required outcomes  
» Develop functional or performance specifications |
| **Definition Of Inappropriate Product Or Service** | » Need not satisfied  
» Time lost  
» Increased costs  
» Possible downtime | » Ensure specification is consistent with needs analysis  
» Market knowledge  
» Functional or performance specifications |
| **Biased Specification**                  | » Inadequate service provider response  
» Claims of unfair dealings | » Use common use contract  
» Use functional or performance specifications  
» Control mechanism to review specification before release |
| **Inadequate Specification Or Statement Of Work (For Services)** | » Variety of offers  
» Insufficient responses  
» Products offered not meeting needs  
» Difficult to evaluate | » Be familiar with requirements  
» Use functional or performance specifications  
» Use expressions of interest or requests for information |

### Selecting The Procurement Method

<table>
<thead>
<tr>
<th>Risk</th>
<th>Likely Consequences</th>
<th>Action</th>
</tr>
</thead>
</table>
| **Failure To Identify Potential Sources** | » Lack of offers from suitable service providers | » Improve acquisition planning and system selection  
» Improve market knowledge  
» Seek industry participation |
| **Selecting Inappropriate Method**        | » Need to seek offers again  
» Possible cost variations  
» Failure to obtain value for money  
» Excessive number of inappropriate bids  
» High cost to bidders  
» High cost of evaluating enders | » Procurement policies, Guidelines and practices  
» Improve knowledge and expertise in tendering methods  
» Improve tender documentation and clearly identify in request for tenders the selection criteria  
» Provide staff with appropriate training and experience |
## Contract Documents

<table>
<thead>
<tr>
<th>Risk</th>
<th>Likely Consequences</th>
<th>Action</th>
</tr>
</thead>
</table>
| Terms And Conditions Unacceptable To Service Providers | » Loading of costs in offers  
» Having to modify tender terms and conditions  
» Disruption  
» Low response | » Improve tender planning and procurement system selection  
» Assess and allocate risks appropriately  
» Gain commercial expertise  
» Use commercially acceptable terms  
» Assess conditions of contract and select appropriate conditions  
» Provide staff with appropriate tender planning and procurement skills | |
| Providing Inadequate Information Method   | » Loading of costs in offers  
» Variations in offers  
» Having to provide clarifying information, causing delays in tender closing  
» Additional costs tenders | » Ensure staff have appropriate tender planning and documentation training and experience  
» Improve tender planning and preparation  
» Review tender documents before issuing them and ensure selection criteria contain the critical factors on which assessment of tenders will be based | |

## Seeking, Clarifying And Closing Offers

<table>
<thead>
<tr>
<th>Risk</th>
<th>Likely Consequences</th>
<th>Action</th>
</tr>
</thead>
</table>
| Failure To Adequately Address Service Provider Enquiries | » Claims of unfair practices  
» Offers with qualifications by tenderers  
» Withdrawal of offers | » Implement standardised procedures for responding to enquiries  
» Provide staff with appropriate tender management training and experience  
» Respond in a timely manner to service provider enquiries  
» Allow adequate time for tenderers to respond | |
| Actual Or Perceived Favouritism In Providing Information | » Service provider complaints  
» Withdrawal of offers | » As per above actions  
» Provide all service providers with any addendum that may be required | |
| Actual Or Perceived Breach Of Confidentiality | » Service provider complaints  
» Mistrust by service providers | » Establish formal security procedures  
» Train staff in their obligations  
» Perform regular audits and reviews of security processes  
» Advise service providers of measures | |
## Seeking, Clarifying And Closing Offers

<table>
<thead>
<tr>
<th>Risk</th>
<th>Likely Consequences</th>
<th>Action</th>
</tr>
</thead>
</table>
| Insufficient Number Of Responses          | » Need to undertake process again
   » Increased costs
   » Delayed delivery to the client
   » Poor value for money due to limited competition | » Use appropriate tender advertisement strategy to increase competition
   » Provide service providers with advance notice of tender requests
   » Improve tender documentation and specifications
   » Allow sufficient time for tenderers to respond |
| No Response From Known Quality Service Providers | » Reduced competition
   » Increased costs of products or services | » As above actions for insufficient number of responses
   » Improve your market knowledge
   » Review specifications or conditions
   » Seek feedback from known service providers on their non response |

## Evaluating Offers

<table>
<thead>
<tr>
<th>Risk</th>
<th>Likely Consequences</th>
<th>Action</th>
</tr>
</thead>
</table>
| Failure To Follow Effective Evaluation Procedures | » Inconsistent evaluations
   » Possible service provider complaints
   » Subjective not objective evaluation of offer | » Provide staff with appropriate tender assessment and evaluation training and experience
   » Improve tender assessment and evaluation processes
   » Maintain, audit and review evaluation procedures |
| Breaches Of Security                      | » Claims of unethical or unfair practices
   » Loss of faith with service providers | » Maintain, audit and review security procedures
   » Review and improve the agency’s Code of Conduct as appropriate
   » Provide staff with appropriate training and experience and monitor performance |
| Offers Fail To Meet Needs                  | » Need to call tenders again
   » Additional costs
   » Delay in delivery | » Improve market knowledge
   » Improve tender documentation
   » Conduct market research
   » Develop functional or performance specifications |
| Failure To Identify A Clear Winner And Decision Made On Subjective Grounds | » Claims of unethical and unfair behaviour
   » Service provider complaints | » Ensure selection criteria contain the critical factors on which assessment of tenders will be based and are clearly identifiable to tenderers in tender documents
   » Ensure selection criteria are appropriate and measurable before tenders are called |
## Selecting The Preferred Service Provider

<table>
<thead>
<tr>
<th>Risk</th>
<th>Likely Consequences</th>
<th>Action</th>
</tr>
</thead>
<tbody>
<tr>
<td>Selecting An Inappropriate Service Provider</td>
<td>» Failure to fulfil the contract</td>
<td>» Provide staff with appropriate tender evaluation, financial and technical skills training and commercial expertise</td>
</tr>
<tr>
<td></td>
<td>» Improve evaluation procedures</td>
<td></td>
</tr>
<tr>
<td></td>
<td>» Improve selection criteria and clearly identify to tenderers in tender documents</td>
<td></td>
</tr>
<tr>
<td></td>
<td>» Reject unacceptable offers</td>
<td></td>
</tr>
<tr>
<td></td>
<td>» Perform financial, technical and company evaluations before awarding contract</td>
<td></td>
</tr>
<tr>
<td>Selecting Inappropriate Product</td>
<td>» Failure to meet the client’s need</td>
<td>» Ensure users are involved in the selection process/evaluation</td>
</tr>
<tr>
<td></td>
<td>» Complaints</td>
<td>» Improve technical evaluation procedures and train staff as appropriate</td>
</tr>
</tbody>
</table>

## Seeking, Clarifying And Closing Offers

<table>
<thead>
<tr>
<th>Risk</th>
<th>Likely Consequences</th>
<th>Action</th>
</tr>
</thead>
<tbody>
<tr>
<td>Not Matching The Expectations Of Buyer And Service Provider</td>
<td>» Contract disputes</td>
<td>» Improve communication</td>
</tr>
<tr>
<td></td>
<td>» Delivery delays</td>
<td>» Provide staff with training in contract planning and management</td>
</tr>
<tr>
<td></td>
<td>» Cost variations</td>
<td>» Define terms carefully</td>
</tr>
<tr>
<td></td>
<td>» Reduction in value for money</td>
<td>» Record each party’s obligations</td>
</tr>
<tr>
<td></td>
<td>» Purchase of less suitable product</td>
<td>» Clarify all ambiguities before signing the contracts</td>
</tr>
<tr>
<td></td>
<td>» Inefficient use of resources</td>
<td></td>
</tr>
<tr>
<td>Deadlock On Details Of Agreement</td>
<td>» Delays in delivery</td>
<td>» Look at alternatives to share risk</td>
</tr>
<tr>
<td></td>
<td>» Need to restart procurement</td>
<td>» Distinguish between essential and non-essential goals and requirements</td>
</tr>
<tr>
<td></td>
<td>» Possible cost of legal action</td>
<td></td>
</tr>
<tr>
<td>Failure To Secure Mandatory Conditions</td>
<td>» Inability to finalise contract</td>
<td>» Establish baseline before negotiations</td>
</tr>
<tr>
<td></td>
<td>» Delays in delivery</td>
<td>» Distinguish essential goals from others</td>
</tr>
<tr>
<td></td>
<td>» Variations in cost</td>
<td>» Consider variations to contract</td>
</tr>
<tr>
<td></td>
<td>» Inefficient use of resources</td>
<td>» Provide negotiators with adequate training</td>
</tr>
<tr>
<td>Unfair Or Onerous Requirements On The Service Provider In The Contract Conditions</td>
<td>» Contract disputes</td>
<td>» Provide negotiators with adequate training and support</td>
</tr>
<tr>
<td></td>
<td>» Invalidity of contract</td>
<td>» Negotiate commercial terms</td>
</tr>
<tr>
<td></td>
<td>» Legal action</td>
<td>» Terms should be fair and reasonable</td>
</tr>
<tr>
<td></td>
<td>» Poor service provider/customer relationship</td>
<td></td>
</tr>
</tbody>
</table>
### Seeking, Clarifying And Closing Offers

<table>
<thead>
<tr>
<th>Risk</th>
<th>Likely Consequences</th>
<th>Action</th>
</tr>
</thead>
<tbody>
<tr>
<td>Failure To Reflect The Terms Offered And Agreed In The Contract</td>
<td>» Contract disputes</td>
<td>» Check final draft of contract with service provider</td>
</tr>
<tr>
<td></td>
<td>» Legal action</td>
<td>» Keep records of all negotiations and agreement</td>
</tr>
<tr>
<td></td>
<td>» Poor service provider/customer relationship</td>
<td></td>
</tr>
<tr>
<td>Inadvertently Creating A Contract Without The Delegate’s Prior Approval Inappropriate Product</td>
<td>» Expense of negotiating out the contract and paying damages</td>
<td>» Procedure in place to ensure delegate’s approval obtained first</td>
</tr>
<tr>
<td></td>
<td>» Committing to other associated work prior to main contract existing</td>
<td>» Provide negotiators with adequate training</td>
</tr>
</tbody>
</table>

### Contract Management

<table>
<thead>
<tr>
<th>Risk</th>
<th>Likely Consequences</th>
<th>Action</th>
</tr>
</thead>
<tbody>
<tr>
<td>Variations In Price And Foreign Exchange</td>
<td>» Cost overruns</td>
<td>» Agree on prices and the basis of prices</td>
</tr>
<tr>
<td></td>
<td></td>
<td>» Agree on a formula for calculating variations</td>
</tr>
<tr>
<td></td>
<td></td>
<td>» Consider a Bill of Exchange or other appropriate means to reduce the risk of exchange rate fluctuations</td>
</tr>
<tr>
<td>Unwillingness Of The Service Provider To Accept The Contract</td>
<td>» Delays in delivery</td>
<td>» Seek legal redress if non-acceptable causes loss</td>
</tr>
<tr>
<td></td>
<td>» Need to restart procurement</td>
<td>» Negotiate but retain integrity of the contract</td>
</tr>
<tr>
<td>Failure Of Either Party To Fulfil The Conditions Of The Contract</td>
<td>» Contract disputes</td>
<td>» Ensure good contract administration and performance management</td>
</tr>
<tr>
<td></td>
<td>» Failure to satisfy needs</td>
<td>» Hold regular inspections and ensure progress reports</td>
</tr>
<tr>
<td></td>
<td>» Delays in delivery</td>
<td>» Ensure all staff know responsibilities and conditions</td>
</tr>
<tr>
<td></td>
<td>» Downtime</td>
<td>» Ensure good record keeping and documentation</td>
</tr>
<tr>
<td></td>
<td>» Legal action</td>
<td></td>
</tr>
<tr>
<td>Inadequately Administering The Contract</td>
<td>» Cost increases</td>
<td>» Maintain up to date agency procedures and practices</td>
</tr>
<tr>
<td></td>
<td>» Failure of contract</td>
<td>» Ensure all staff are suitably trained and experience in contract planning and management</td>
</tr>
<tr>
<td></td>
<td>» Full benefits not achieved</td>
<td></td>
</tr>
<tr>
<td></td>
<td>» Delivery of unsatisfactory product</td>
<td></td>
</tr>
<tr>
<td></td>
<td>» Contract/supply disputes</td>
<td></td>
</tr>
<tr>
<td>Commencement Of Work By The Service Provider Before Contract Is Exchange Or Letter Of Acceptance Issued</td>
<td>» Potential liability to pay for unauthorised work</td>
<td>» Confirm verbal acceptance of contract with written advice</td>
</tr>
<tr>
<td></td>
<td>» Possibility of legal action for perceived breach of contract</td>
<td>» Accept all contracts in writing</td>
</tr>
<tr>
<td></td>
<td></td>
<td>» Ensure approvals are received before allowing work to start</td>
</tr>
<tr>
<td>Risk</td>
<td>Likely Consequences</td>
<td>Action</td>
</tr>
<tr>
<td>----------------------------------------------------------</td>
<td>----------------------------------------------------------</td>
<td>------------------------------------------------------------------------</td>
</tr>
<tr>
<td><strong>Unauthorised Increase In Scope Of Work</strong></td>
<td>» Unanticipated cost increases</td>
<td>» Ensure all contract amendments are issued in writing</td>
</tr>
<tr>
<td></td>
<td>» Contract disputes</td>
<td>» Record all discussions and negotiations</td>
</tr>
<tr>
<td></td>
<td></td>
<td>» Confirm instructions in writing</td>
</tr>
<tr>
<td><strong>Loss Of Intellectual Property</strong></td>
<td>» Loss of commercial opportunity</td>
<td>» Ensure suitable clauses are included in the contract</td>
</tr>
<tr>
<td></td>
<td>» Unwarranted reliance on service provider for product support</td>
<td></td>
</tr>
<tr>
<td><strong>Failure To Meet Liabilities Of Third Parties (ie Royalties Or Third Party Property Insurance)</strong></td>
<td>» Legal action</td>
<td>» Check that all obligations are covered in the contract</td>
</tr>
<tr>
<td></td>
<td>» Damage to the agency’s professional reputation</td>
<td>» Agree on responsibilities</td>
</tr>
<tr>
<td></td>
<td></td>
<td>» Implement appropriate safety standards and programs</td>
</tr>
<tr>
<td><strong>Loss Or Damage To Goods In Transit</strong></td>
<td>» Delays in delivery</td>
<td>» Include appropriate packaging instructions in specification</td>
</tr>
<tr>
<td></td>
<td>» Downtime</td>
<td>» Agree on insurance cover for service provider to provide</td>
</tr>
<tr>
<td></td>
<td>» Liability disputes</td>
<td>» Accept delivery only after inspection</td>
</tr>
<tr>
<td></td>
<td></td>
<td>» Know when title of goods is transferred to buyer</td>
</tr>
<tr>
<td><strong>Fraud</strong></td>
<td>» Misuse of resources</td>
<td>» Maintain an ethical environment</td>
</tr>
<tr>
<td></td>
<td>» Legal action</td>
<td>» Follow and maintain fraud control procedures</td>
</tr>
<tr>
<td></td>
<td>» Disruption to procurement activities</td>
<td></td>
</tr>
<tr>
<td><strong>Key Personnel Not Available</strong></td>
<td>» Progress on project disrupted</td>
<td>» Include requirement in Expression of Interest, Request for Information, Request for Tender, and ensure compliance in post tender negotiation</td>
</tr>
<tr>
<td></td>
<td>» Less expertise</td>
<td>» Know the market</td>
</tr>
<tr>
<td></td>
<td></td>
<td>» Accept risk and manage possible delay</td>
</tr>
</tbody>
</table>
### Typical Format Of A Risk Management Plan

#### 3.1 Procurement Context

- **3.1.1** Description of the procurement.
- **3.1.2** Identify the procurement and stakeholders.
- **3.1.3** Identify the risk criteria of the procurement.
- **3.1.4** Plan the major stages of the procurement.
3.2 Risk Identification

3.2.1 Identify and schedule potential risks and their effects.

3.3 Risk Analysis

3.3.1 Assess risk likelihood and consequences.

3.3.2 Determine risk levels.

3.4 Risk Assessment

3.4.1 Undertake risk priority ranking.

3.4.2 Determine risks to be accepted and monitored.

3.4.3 Identify risks to be treated.

3.5 Risk Treatment

3.5.1 Evaluate and select risk treatment options.

3.5.2 Prepare risk treatment plans and implementation strategies.

3.6 Ongoing Monitoring

3.6.1 Develop schedule for review.
1 Contract Management

1.1 The aim of Contract Management is to ensure that deliverables are provided to the required standard, within the agreed timeframe while achieving value for money.

1.2 It is important that contracts are actively managed throughout their life to help ensure contract performance is satisfactory, stakeholders are well informed and all contract requirements are met.

1.3 This guideline provides practical advice to Councils regarding the management of its contracts with service providers. Ultimately, the key to effective Contract Management is having clearly identified and agreed outcomes and actively working with the supplier to ensure the delivery and achievement of these requirements.

2 Key Tasks

2.1 The Key Tasks In Managing Contracts Are:

2.1.1 identifying and managing risks;
2.1.2 identifying and assigning responsibilities;
2.1.3 identifying and accessing the skills required;
2.1.4 identifying and involving stakeholders;
2.1.5 managing relationships;
2.1.6 managing contract start-up;
2.1.7 administering the contract;
2.1.8 monitoring and managing contractor performance;
2.1.9 ensuring agreed outcomes are achieved;
2.1.10 negotiating any contract variations;
2.1.11 managing contractual disputes and contract risks;
2.1.12 discharging the contract;
2.1.13 behaving ethically; and
2.1.14 keeping appropriate records.
2.2 Contact Management requirements progressively increase commensurate with the value, risk profile and complexity of the more complex or strategic contacts with higher values will generally require:

2.2.1 an active role for the contact manager;

2.2.2 the development of more strategic and comprehensive relationships with suppliers;

2.2.1 more communication; and

2.2.2 more comprehensive performance evaluation mechanisms.

3 Identifying And Managing Risks

<table>
<thead>
<tr>
<th>Sources Of Risk</th>
<th>Examples Of Risks</th>
</tr>
</thead>
</table>
| **Contract Management Capability**   | ➤ Failure to have sufficiently skilled and experienced resources to effectively manage the contract(s)  
➤ Lack of recognition of the importance of Contract Management  
➤ Failure to act on supplier under-performance  
➤ Failure to meet the strategic objectives of the procurement  
➤ Unethical behaviour, fraud or conflicts of interest  
➤ Failure to maintain appropriate/adequate records |
| **Supplier Performance**              | ➤ Failure to provide contract deliverables on time, to agreed quality standards  
➤ Changes in key personnel  
➤ Failure to adhere to agreed budget  
➤ Failure to comply with all contract provisions, for example, privacy, security, recordkeeping  
➤ Fraud and/or unethical conduct by the contractor |
| **Changes In Circumstances And/Or Requirements** | ➤ Contract changes not dealt with as contract variations  
➤ Changing scope, changing technology  
➤ Supplier not prepared to agree to contract variations to accommodate changes in entity requirements  
➤ Changes in circumstances not managed in a timely manner |
| **Stakeholder Relationships**         | ➤ Stakeholders not consulted and/or kept informed about contract performance  
➤ Changes in stakeholder expectations not communicated to contract manager  
➤ Differing and/or conflicting stakeholder expectations |
4 Identifying And Assigning Responsibilities

4.1 The contract manager is responsible for ensuring that the agreed deliverables are provided, on time and prior to payment being authorised. Persons responsible for Contract Management need to be accurately resourced and appropriately trained so that they have the skills and expertise that the Council needs to achieve the best value for money and an outcome consistent with its objectives.

4.2 Responsibility for the various tasks required to finalise the contract should be assigned and understood by all parties.

4.3 Identify and access the skills and experience required.

4.4 A range of skills are needed throughout the contracting cycle and the types of skills needed will vary with the different stages of contracting and with the size and nature of the contract.

4.5 Generally, one person will not have the contracting skills required over the entirety of the procurement continuum. This means that it is important to be able to recruit additional staff or have access to training and/or professional advice. The successful management of contracts will generally require skills and experience in the areas outlined below.

<table>
<thead>
<tr>
<th>Contract Management Skills And Experience</th>
</tr>
</thead>
<tbody>
<tr>
<td>Interpersonal And Relationship:</td>
</tr>
<tr>
<td>» Undertake tasks in a motivated and professional way</td>
</tr>
<tr>
<td>» Building strong relationships</td>
</tr>
<tr>
<td>» Understand the parties’ culture and ways of working</td>
</tr>
<tr>
<td>» Encourage cooperating and communicate verbally and in writing</td>
</tr>
<tr>
<td>Subject Matter/Industry Knowledge:</td>
</tr>
<tr>
<td>» Understand the contractual requirement and the market or able to quickly gain relevant knowledge</td>
</tr>
<tr>
<td>» Objectively assess goods and services and whether performance standards have been met</td>
</tr>
<tr>
<td>Project Management:</td>
</tr>
<tr>
<td>» Plan, schedule, organise work, manage tasks, and consult with stakeholders</td>
</tr>
<tr>
<td>» Motivate and lead people who may not be under the direct control of the contract manager</td>
</tr>
<tr>
<td>» Establish relationships to get tasks done in a timely way</td>
</tr>
<tr>
<td>» Use skills available to get the best possible result</td>
</tr>
<tr>
<td>Performance Management:</td>
</tr>
<tr>
<td>» Provide feedback, both positive and negative</td>
</tr>
<tr>
<td>» Explain Council’s position and understand legal position in addressing under-performance. Understand supplier’s environment</td>
</tr>
</tbody>
</table>
### Contract Management Skills And Experience

| Problem Solving: | » Have a positive approach to solving problems  
|                | » Encourage mutual cooperating to address issues  
|                | » Have the ability to make decisions in circumstances where there may not be full knowledge of all relevant facts in the available timeframe  
| Negotiation:    | » Deal with evolving and changing circumstances  
|                | » Have subject matter knowledge and be able to bring about mutually acceptable agreements  
|                | » Display professional behaviour  
|                | » Have relevant training or experience in planning for and conducting negotiations  
|                | » Manage robust dialogue  
| Accountability/Financial Management: | » Understand and apply relevant laws and accountability requirements and financial arrangements  
| Human Resource Management: | » Manage the team to maximise performance over the long term |

### 5 Identifying And Involving Stakeholders

5.1 A critical role in Contract Management is to ensure that stakeholders are kept informed about relevant matters and contract developments. What is required by way of liaison and involvement of stakeholders will vary from case to case. A communications protocol in a contract may set in place arrangements for the following types of communications:

- **5.1.1** first contract meeting. These are typically held once a contract is executed but prior to work commencing and gives both parties the opportunity to discuss in more detail how the outcomes required by the contract will be delivered.

- **5.1.2** formal meetings at which minutes are taken and distributed to all parties for agreement;

- **5.1.3** regular written communications between the parties including letters and emails; and

- **5.1.4** progress and performance reports.
6 Managing Relationships

6.1 Successful relationship management underpins overall successful Contract Management.

6.2 The type of contract, its size and duration as well as the culture of the parties and the personalities of the people involved will influence the relationship between the parties. It is important to establish and maintain a constructive relationship and regular communications. Providing positive and constructive feedback will assist in maintaining such a relationship.

6.3 Payments, including those for performance, should be made without unnecessary delays, unless there is a reason why the payment should not be made.

6.4 It is important to listen to the contractor, to identify any problems, address them promptly and explain decisions in an impartial way.

6.5 It is better practice for entities to adopt a structured approach to managing their relationship with the contractor. This is particularly important in contracts which involve ongoing service delivery or the provision of consultancy services that extend over a reasonable period of time. In these types of contracts the management of the relationship with the contractor could consist of:

   6.5.1 informal, day to day discussions and interactions between the contractor, the contract manager and relevant entity staff; and

   6.5.2 formal meetings at pre determined intervals with nominated personnel from both the acquiring Council and the contractor.

6.6 Maintaining a good relationship does not mean that the terms of the contract are not enforced where this is warranted. It is about enforcing the terms of the contract in a professional manner based on evidence of contractual performance. Provided the acquiring Council has fulfilled its responsibilities, has proved early warning of performance problems and has maintained a professional relationship (ie not waived its rights) enforcing the terms of the contract should be seen as a reasonable course of action and therefore not one which should adversely affect the relationship between the parties.

6.7 Where performance is being discussed, the contractor should be given the opportunity to present material on any factors that have caused performance difficulties and to discuss any proposed remedial actions.

6.8 Relationships should be managed in a professional manner and be based on cooperation and mutual understanding taking into account the need for probity and ethical behaviour.
7  Contract Management Starts At Contract Start Up

7.1  It is important to understand both the contract provisions and contractual relationships at the outset of the procurement process.

Good Practice Tip: the best Contract Management occurs when you, from the outset, have a thorough knowledge of both your rights and your responsibilities.

8  Management Of Unresolved Issues

8.1  In many instances, not all issues are resolved at the time of signing the contract. These need to be addressed in a timely way during contract start up. Unresolved issues can create problems when managing a contract if they are not properly dealt with.

8.2  In situations where there are issues which have not been fully resolved at the time of signing the contract, the contract manager should:

8.2.1  identify and record any agreements or arrangements made by the parties relating to this when the contract was negotiated;

8.2.2  identify and record aspects of the contract which have been potentially left for future development; and

8.2.3  identify and record aspects of the contract which will be subject to some other process, for example, subject to conditions of licences or third party planning or approvals.

8.3  Issues which require clarification or elaboration should be addressed promptly. The finalisation of these issues may require a contract variation or exchange of correspondence.
9 Administering The Contract

9.1 Contract Administration

Contract administration is an integral and important element of Contract Management and overlaps with monitoring and performance assessment. It encompasses various activities that need to be completed on a day to day basis, including:

9.1.1 developing and maintaining contact details of key people involved in the contract;

9.1.2 scheduling meetings and other actions required by the contract;

9.1.3 delivery and acceptance of goods or services;

9.1.4 making payments;

9.1.5 maintaining complete records for the contract itself; and

9.1.6 establishing and maintaining contract documentation.

9.2 Delivery And Acceptance

9.2.1 Delivery refers to receipt of the contracted supplies into the acquiring entity’s possession as specified under the contract. Particular care must be taken with phased delivery. If a contractor fails to deliver supplies by the delivery dates or to the delivery point specified in the contract there may be consequences for the contractor under the contract. The contract manager should ensure that various requirements regarding risk of loss or damage to the goods or services are carried out in accordance with the contract provisions.

9.2.2 Acceptance is the term used to describe the procedure by which the acquiring entity determines whether the goods or services meet contract requirements. In many contracts, acceptance of the contract deliverables will occur periodically throughout the life of the contract. In services contracts, services may be delivered on a continuing basis.

9.2.3 On delivery, goods or services need to be inspected or reviewed and, where necessary, tested against the standards specified in the contract, before formal acceptance under the contract is completed.

9.2.4 In the case of goods, the process of inspecting or testing the contract deliverables is often easier to apply than it is for services. In the case of services, performance measures such as service levels and compliance with reporting requirements may be part of the acceptance process.

9.2.5 Generally, the contract should set out the process for acceptance. This will usually require the contractor to provide the contract deliverables in the form specified by the contract. This may include providing a formal document to the contract manager and supporting evidence, such as the results of an acceptance testing, that the goods or services meet the contract requirements. The contract will usually set out a period in which the acquiring entity is able to decide whether to accept or reject the goods or services.
9.3 Payments

9.3.1 Contract payments should only be made in accordance with the provisions of the contract. They should only be made where the contractor manager is satisfied that the provisions have been fulfilled. Before payments are made evidence is required that the delegate has certified that goods and services have been received and they have met the required standard of performance.

9.3.2 It is also important that payments for satisfactory performance are made in line with the timeframes set out in the contract. Bear in mind that payments for satisfactory performance should not be delayed because this can undermine the relationship with the contractor.

9.4 Payment Documentation

Payments should be made following receipt of the correctly rendered invoice or other statement of expenditures. All necessary authorisations and approvals should have been obtained prior to making payment.

9.5 Contract Documentation

It is important that the most up to date version of the contract incorporating any variations is formally evidenced in writing and appropriately stored. This provides the basis for making payments and the ongoing management of the contract.

Case Study: The Benefits Of Good Recordkeeping

An entity was considering an extension of a major contract (in accordance with an option under the contract). All staff associated with the original tender process and initial operation of the contract had moved on to other jobs. An external consultant was engaged to assist in deciding whether the extension option should be exercised and then negotiating the extension. The consultant reported that the meticulous recordkeeping of the original contract manager had resulted in major savings in the updated contract. The records provided evidence of the effectiveness (or otherwise) of previous contract clauses, of successful approaches to managing services that could be included in the updated contract, and evidence of early problems that strengthened the agency’s negotiating position in exercising the option to extend the contract.
10 Manage Contractor Performance

10.1 Performance management must be undertaken throughout the life of the contract and for all contracts, whether straightforward or complex. Performance management involves:

10.1.1 Performance Monitoring: collecting data on performance. This means keeping good records;

10.1.2 Performance Assessment: deciding whether the performance meets the Council’s needs and the contractor’s contractual obligations; and

10.1.3 Taking Appropriate Action: such as understanding and extending features of good performance, correcting areas of under-performance and/or amending contract requirements to meet changing needs.

Good Practice Tip: Schedule Key Dates And Milestones

*It can be useful in the monitoring of contract performance to diarise or maintain a listing of all key dates and milestones. This information should be made available to all staff involved in managing the contract and to the contractor.*

10.2 Performance Assessment

10.2.1 Performance assessment is undertaken on the basis of information collected during the monitoring process. It is important that this process feedback is provided in relation to good and poor performance and that any performance problems are addressed promptly. If you do not address your performance problems promptly you may waive your rights in terms of particular behaviour.

10.2.2 Contract managers need to have assurance that the information used to assess performance, and to make or withhold contract payments, is accurate.
10.3 Managing Under Performance

10.3.1 In many cases contracts are completed without problems. However contract managers need to be prepared to address any problems promptly as they arise in accordance with agreed procedures.

10.3.2 Many contract performance problems can be avoided by managing the relationship well. Under performance can be minimised by having a performance regime that allows prompt and ongoing feedback, particularly in relation to critical timeframes or deliverables. The contract manager needs to be aware of any signs of potential under performance and be able to address them, to the extent possible, before they become serious.

10.3.3 At the early stages of underperformance, agreeing upon informal remedial action will often be the best and most economical approach. Such action could include replacing or using additional personnel, reporting back more frequently on progress and modifying processes or systems for clarifying the Council’s requirements.

10.3.4 Depending on the seriousness of the underperformance, the action taken may need to be more formal and could include:

10.3.4.1 withholding payments until performance returns to an acceptable level;
10.3.4.2 involving senior management from both parties in formal discussions or written communications;
10.3.4.3 developing strategies to address the problem and formally documenting them, and tracking whether they are working in practice; and
10.3.4.4 implementing other formal mechanisms included in the contract.

11 Negotiate Contract Variations

11.1 The ability to vary the contract should be directed or controlled by the Council and should only occur in defined circumstances.

11.2 It is accepted practice for the variation mechanism to provide for variations to be agreed between the acquiring entity and the contractor in writing through a formal amendment of the contract.

11.3 Bear in mind it is possible to inadvertently amend a contract by verbal agreement or conduct, even where there is a contractual provision expressly requiring a formal process to be followed. Consider the following contract variations checklist.
**Contract Variations Checklist**

*Key issues to consider in managing contract variations include:*

- **✓ following the procedures required by the contract**
- **✓ assessing the reasons for the proposed variation and whether these may indicate an emerging or actual performance problem**
- **✓ assessing the impact of the proposed variation on the contract deliverables, particularly whether the variation or the work it represents is actually required and whether it was part of the original contract deliverables**
- **✓ determining the effect the proposed amendment will have on contract price**
- **✓ considering the authority for making the variation**
- **✓ properly documenting details of the variation and its impact**
- **✓ meeting any reporting requirements**

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**12  Contract Management Plan**

12.1 Drafting a Contract Management Plan can be a useful Contract Management tool because it:

12.1.1 outlines the objectives and required outcomes from the contract and how this will be delivered;

12.1.2 it identifies the role, responsibilities and obligations of each party;

12.1.3 it identifies the strategic objectives of the contract and the critical success factors;

12.1.4 identifies any specific performance measurement and reporting requirements;

12.1.5 outlines the approach for dealing with contract variations; and

12.1.6 addresses the tasks necessary to ensure a successful contract outcome with the minimum risk.

12.2 The Contract Management Plan should include all details necessary to enable the contract manager to effectively manage the contract. This may include details regarding:

12.2.1 acceptance criteria;

12.2.2 communication and relationship management;
12.2.3 completion and renewal arrangements;
12.2.4 continuous improvement;
12.2.5 contract changes and variations;
12.2.6 contract deliverables;
12.2.7 contract management meetings;
12.2.8 data and information management;
12.2.9 dispute resolution processes;
12.2.10 ethical conduct;
12.2.11 financial management;
12.2.12 governance structures;
12.2.13 inspection and testing procedures;
12.2.14 insurances;
12.2.15 key success factors or performance indicators;
12.2.16 payment milestones;
12.2.17 performance monitoring and reporting;
12.2.18 quality assurance practices;
12.2.19 risk management;
12.2.20 schedule management;
12.2.21 statutory and regulatory requirements;
12.2.22 training; and
12.2.23 warranties.

The contract manager should regularly review and update this document to ensure that it meets the requirements of the contract as circumstances evolve.
Part 7

Maintaining Probity In Procurement Activities
1 Probity, Accountability And Transparency

1.1 Councils have the responsibility of ensuring that any procurement process is transparent and that its decisions are justified.

1.2 As a general rule, a well planned, conducted and documented procurement is more likely to withstand external scrutiny and provide substantiation of a particular decision.

1.3 Councils need to have procedures in place to ensure that procurement processes are conducted soundly and that procurement related actions are documented appropriately and in accordance with applicable legislation and policy. These considerations are relevant throughout the procurement process from the initial identification of the need through to the final disposal of any property. To ensure that procurement transactions are undertaken in an accountable and transparent manner Councils should:

1.3.1 have clear delineation of responsibilities and relationships;
1.3.2 ensure decisions are transparent;
1.3.3 identify conflicts of interest;
1.3.4 adhere to their Codes of Conduct;
1.3.5 ensure confidentiality as necessary and appropriate;
1.3.6 make sure public officers are accountable; and
1.3.7 have a complaints handling and resolution procedure.

1.4 Why is Probity Necessary?

1.4.1 The law and Local Government policy requires particular competitive processes to be followed.
1.4.2 Contemporary court decisions mean that in many circumstances those processes may be legally enforceable.
1.4.3 Impliedly, such processes must be fair and not misleading or deceptive.
1.4.4 Failing to conduct a procurement process with due regard to probity and fair dealing may potentially leave it open to challenge. Defending challenges is time consuming, costly, can undermine public confidence and can act as a distraction from Local Government’s core functions.
1.5 What does Probity Involve? (Common Probity Issues)

1.5.1 Disconnect Between Request For Tender And Evaluation Plan

1.5.1.1 There is an implied obligation on Local Government to evaluate bids according to the priorities and methodologies specified in the RFT.

1.5.1.2 In practice there is often a lack of consistency between an evaluation plan and the requirements specified in the applicable RFT. To avoid this problem, the RFT and evaluation plan should be drafted together to enable 'side by side' review to ensure that the evaluation methodology proposed is consistent with that in the RFT. For example, if the plan proposes threshold or mandatory requirements, these should be brought to the attention of bidders in the RFT. In addition, all steps in the evaluation process described in the RFT should be mirrored in the evaluation plan.

1.5.2 Disconnect Between Evaluation Criteria And Requested Information From Bidders

1.5.2.1 In order to ensure a fair evaluation process, bidders must be considered on the basis of the bids submitted. Agencies should give careful consideration to ensure that enough information is sought from bidders to enable full evaluation against each evaluation criteria.

1.5.2.2 Councils need to ensure that the RFT or approach to market documentation requires bidders to provide information by direct reference to evaluation criteria. Councils should ensure that the evaluation methodology is sufficiently broad to permit all relevant information submitted by the bidder to be taken into account.

1.5.3 Communication With Bidders

1.5.3.1 It is important for Councils to ensure that identical information is available to all potential bidders during a procurement process. In order for this to occur, procedures need to be established to govern communication with bidders. This is addressed through the Nominated Contact Person regime in the Templates.

1.5.3.2 Such procedures should stipulate that only authorised personnel are to provide information to potential bidders and this should be done through a centralised point, the Templates provide for all communication between potential suppliers and the Council during a tender process to be through the Nominated Contact Person. To avoid late queries regarding the tender process you may wish to include a clause to the effect that the Council is not obliged to answer questions submitted by potential suppliers with respect to a tender process less than three days prior to the Closing Date.

1.5.3.3 Council employees should not express any personal opinions on the procurement process, publicly, privately or on the email system, particularly in relation to preferred potential bidders or prices unless they are specifically authorised to do so. They should also refrain from making any comments or giving any information to the media regarding the procurement process.

1.5.3.4 If potential bidder briefings are conducted all material information provided at the briefing and during the procurement process should be documented and sent to all interested parties. Interested parties can be taken to include all people who have collected, been sent or downloaded from the Council’s website copies of the documentation relating to the relevant request for submissions.

1.5.3.5 However, Council should advise potential bidders that information will not be copied to other interested parties to the extent that it relates to information unique to the submission, or potential submission, of the potential bidder making the query.

1.5.3.6 It is also important for Councils to ensure that submissions and assessment data gathered during the evaluation phase are not communicated outside the evaluation team.

1.5.3.7 Through the adoption of comprehensive procedures governing communication during the procurement process, Council can play an important role in ensuring that all bidders compete on an even playing field.
1.5.4 Bid Repair Versus Bid Clarification

1.5.4.1 A bidder may be requested to clarify its bid where there is a conflicting statement or an ambiguity in that bid.

1.5.4.2 However, it is important to consider all requests for clarification and the answers provided to those requests carefully. In some cases, the answer given by a bidder may change its bid and therefore amount to ‘bid repair’ rather than ‘bid clarification’.

1.5.4.3 In addition, before asking for further information from bidders, Council’s should carefully consider whether their proposed questions are in fact seeking clarification of bid ambiguities, and not correction of mistakes or additions of omitted material.

1.5.4.4 Councils should also consider whether they may be affording an advantage or disadvantage to the other bidders by inviting additional information or clarification from one bidder and not the others. To ensure procedural fairness, it may be necessary to allow all bidders the opportunity to provide additional information.

1.5.5 Management Of Conflicts Of Interest

1.5.5.1 Conflicts of interest will arise where a member of a procurement team or an advisor to a procurement team has an affiliation or an interest which prejudices, or might be seen to prejudice, their impartiality.

1.5.5.2 All members of the procurement team and their advisors must declare all conflicts of interest before the beginning of the bidding process. In addition, conflicts of interest should be the first agenda item at all meetings of relevant teams, committees and panels.

1.5.5.3 The response to conflicts and potential conflicts of interest will vary depending on the nature of those conflicts. Where a serious conflict or potential conflict of interest is identified, the officer or advisor concerned should be removed from the procurement process. If a less serious conflict or potential conflict of interest is identified, some quarantining of the individual/sensitive information may be sufficient to deal with the problem.

1.6 How Do You Ensure Probity?

1.6.1 Know your business.

1.6.2 Build a probity culture.

1.6.3 Know basic law/policy/standards and guidelines.

1.7 Recording Of Decisions

Complete records must be maintained during the entirety of the procurement process, including all electronic communication.

1.8 Value For Money

1.8.1 Proper probity also ensures that emphasis is given to non price criteria, namely:

1.8.1.1 knowledge;
1.8.1.2 demonstrated relevant past performance/experience;
1.8.1.3 quality;
1.8.1.4 continuity; and
1.8.1.5 at the end of it ultimately common sense must prevail.
1.9 Documentation

1.9.1 Documentation is critical to accountability and transparency. This is because it provides a record of procurement activities and how they have been conducted.

1.9.2 Councils should maintain appropriate documentation for each procurement. The appropriate mix and level of documentation will depend on the nature and risk profile of the procurement being undertaken.

1.9.3 Ideally, there will be sufficient documentation to provide an understanding of the reasons for the procurement, the process that was followed and all relevant decisions, including approvals and authorisations, and the basis of those decisions.

1.9.4 The table below provides a guide to the types of documentation which may be required. What is appropriate will depend on the circumstances.

<table>
<thead>
<tr>
<th>Stage</th>
<th>Example Of Documentation Requirements</th>
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<tbody>
<tr>
<td>Identify Need</td>
<td>» Annual acquisition plan</td>
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<td></td>
<td>» Budget papers</td>
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<td></td>
<td>» Business case</td>
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<td>» Risk assessment</td>
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<td>» Legal advice</td>
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<td></td>
<td>» Procurement method decision</td>
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<td></td>
<td>» Evaluation plan, including selection criteria</td>
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<td></td>
<td>» Procurement budget</td>
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<td></td>
<td>» Time limits and timetable</td>
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<td></td>
<td>» Advertisements, tender notices and other invitations to quote, tender or express an interest or participate through a multi-use list</td>
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<td></td>
<td>» Probity Plan</td>
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<td></td>
<td>» Evaluation plan</td>
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<tr>
<td>Determine Suitable Process</td>
<td>» Request documentation (including draft contract)</td>
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<td></td>
<td>» Due diligence process</td>
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<td></td>
<td>» Tenders received and acknowledgements</td>
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<td>» Value for money assessment</td>
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<td>» Evaluation report and recommended decision</td>
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<tr>
<td>Conduct Procurement Process</td>
<td>» Probity report</td>
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<td></td>
<td>» Make decisions (including relevant approvals/or authorisations) and their basis</td>
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<td></td>
<td>» Contract negotiations and contract</td>
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<tr>
<td></td>
<td>» Provide advice to unsuccessful tenderers</td>
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<td>Stage</td>
<td>Example Of Documentation Requirements</td>
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<tr>
<td>Manage Contract/Relationship</td>
<td>» Contract Management plan</td>
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<td>» Performance indicators</td>
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<td>» Milestones</td>
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<td>» Performance reports</td>
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<td>» Correspondence between the parties</td>
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<td>» Requests for variation of the contract</td>
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<td></td>
<td>» Decisions regarding variation, records of the receipt of orders</td>
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<td></td>
<td>» Evaluations of property and/or services</td>
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<td>» Payment information</td>
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<tr>
<td>Manage Termination/Transition/Disposal</td>
<td>» Valuation</td>
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<td>» Record of special disposal requirements</td>
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<td>» Disposal strategy</td>
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<td>» Engagement of sale agent and instructions</td>
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<td>» Risk assessment</td>
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<td>» Evaluation plan</td>
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<td>» Advertisements or other invitations to do business</td>
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<td>» Responses from prospective buyers</td>
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<td>» Evaluation report</td>
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<td>» Probity report</td>
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<td>» Decisions and their basis</td>
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<td></td>
<td>» Contract documents</td>
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<td></td>
<td>» Payment information, including records of deposits</td>
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</table>

**Good Practice Tip:** *If in doubt write it down and keep the record.*
Handbook Appendix 1

Relevant Legislative Changes

Since the first publication of the LGA's Procurement Handbook in October 2012, there have been two legislative changes which directly impact on procurement practitioners in South Australia.

The first is the introduction of the Work Health and Safety Act 2012 (SA). With South Australia on board, Australia is a step closer to nationally harmonised workplace safety laws providing workers across Australia the same standard of health and safety protection regardless of where they work, or the work they do.

To progress nationally consistent laws, Safe Work Australia, an Australian Government tripartite agency focused on improving work health and safety arrangements across Australia, developed a model Work Health and Safety Act that could be adopted by each state, territory and the Commonwealth.

From 1 January 2013, South Australia’s work health and safety legislation—which includes the Work Health Safety Act 2012 (SA) and the Work Health Safety Regulations 2012 (SA) align with New South Wales, Queensland, Tasmania, the Australian Capital Territory, the Northern Territory and the Commonwealth. This legislative change is reflected in the LGA’s Suite of Templates.

The second is the Independent Commissioner Against Corruption Act, 2012 (SA) (ICAC Act). Critically for procurement practitioners in South Australia, the ICAC Act a contractor performing contract works on behalf of a Council will be considered to be a public officer for the purposes of the ICAC Act and therefore subject to it. For more information please see the LGAs ICAC Companion paper overview at http://www.lga.sa.gov.au/page.aspx?u=2970&c=28031.
Executing Agreements

To have a valid written agreement it must be signed by all the parties to the agreement and a failure to do so may result in the agreement being unenforceable (in whole or in part).

There is no requirement for Councils to execute by common seal if it is executing under delegated authority. You must carefully check your delegations structure before proceeding to do so.

So far as contractors are concerned, how the agreement needs to be signed depends on the party signing the agreement (ie individual, company, trustee). It is critical that the party entering into the agreement is the same as the party who responded to the approach to market. This is because the Council will have evaluated offers and have made its selection on the basis of the competence, financial stability and capacity of the party which responded to the approach to market. If the contracting party put forward is not the same, the Council will be contracting with a party it did not select. This may have adverse consequences for the Council in terms of the capacity of the contractor and also raises issues from a probity perspective.

Individuals

When an individual signs an agreement, ideally the following should be shown on the agreement:

» the signature of the individual;
» the individual’s address (so that they can be identified);
» the date of signing;
» the signature of a witness; and
» the witness' address (so that they can be identified).

Company

The execution of agreements by companies is governed by section 127 of the Corporations Act, 2001 (Cth). Affixing the company’s common seal is not required if:

» there is more than 1 director, the agreement is executed by two directors or one director and the company secretary; or
» there is only a sole director/secretary, the agreement is executed by the sole director/secretary.

A company with a common seal may execute an agreement by affixing the seal and having this process witnessed by:

» two directors of the company, or one director and the company secretary; or
» if there is only a sole director/secretary, that sole director/secretary.

When entering into an agreement with a company it is always advisable to conduct a company search. A company search will list the names of office-holders in a company so that you can check to see that the people signing on behalf of the company are doing so with the appropriate authority. If they do not have authority, the company may not be bound by the agreement.
Trust

A trust is not a legal entity—it is made up of trustees who must deal with the trust property for the benefit of the beneficiaries of the trust. On this basis trustees must enter into agreements in their own personal names, not in the name of the trust.

The powers of trustees are set out in the trust deed governing the trust. When contracting with trustees, it is essential that the Council ensures that the transaction is one which falls within the ambit of the powers conferred on the trustee by the trust deed (otherwise this will be a breach of the trust and this will raise issues about the enforceability of the agreement). If the trust deed does allow the trustee this power, then the trustee will be able to sign an agreement on behalf of a trust and bind the trust to that agreement. When signing an agreement with a trust, the agreement should show the following:

» the name and signature of the trustee;
» the name of the trust which the trustee is signing on behalf of; and
» a statement that the trustee is signing in their capacity as trustee for the trust.
High Level Contract Management – Ideas For Generating Better Value From Existing Arrangements

It is well acknowledged that strategic procurement initiatives help Councils achieve cost savings and ultimately drive value for the Council. Certainly this is the case with new approaches to market and new requirements, but what about existing arrangements?

It is possible for Councils to generate cost savings under existing contracts. The critical success factor for Councils in any undertaking seeking to reduce the cost of its existing arrangements is to ensure that there is no disruption to the provision of key services to communities, that risk is managed in an appropriate way and that any variation to the contract is agreed by the parties in writing before the changes become operational. With these overarching objectives front of mind, here are some suggestions to drive cost savings in existing contracts.

1. Review your contract and objectively assess if Council is managing the contract in a way which ensures that the outcome is delivered in the most effective and efficient manner. This involves an analysis of whether those charged with management of the contract are appropriately qualified and skilled and understand how the contract works. If it is not being managed in an efficient and effective way, think about varying the contract to better suit the parties – if a contractor is subject to unnecessary administrative burdens, this will be reflected in the contract price.

2. In performance based contracting regimes it is critical that those responsible for monitoring contractor performance have a thorough understanding of how the performance based contracting regime works, including the key performance indicators. Value can be compromised, for instance, when all instances of contract non performance are not recorded and there is potential for overpayment to the contractor.

3. Check carefully that invoices are being paid in accordance with the rates set in the contract. For instance, if the contract price is calculated by reference to any form of rates or indices it is critical to ensure that invoices are being reviewed properly to ensure that the correct rates and indices are being applied at all times.

4. Conduct an assessment of whether the scope of services or capability being provided and paid for under the existing contract is being adequately utilised. If it is not, consideration should be given to amending the scope of services either by way of reducing the scope of services or looking at how any underutilised capacity can be better used by Council.

5. Consider including provisions in contracts requiring the contractor to endeavour to identify and implement cost saving measures throughout the term. In order to provide the contractor with an incentive to do so, consider allocating a share of any resultant savings to the contractor.

6. Traditionally parties have approached the issue of risk in a way which results in its allocation to the party best able to appropriately manage that risk. The contract price will always reflect this risk allocation and contractors will charge a premium for risk allocated to them unnecessarily. Reviewing the risk allocation to ensure that it is appropriate and that unnecessary risks are not being passed through to the contractor is one way to negotiate a reduction in contract price.

7. In circumstances where a contract contains provisions requiring performance security, consider whether these are appropriate or even necessary to allow Council to manage its risks. If they are not, the performance security could be released and Council could seek a corresponding cost saving from the contractor to recognise the capacity that has been freed up for the contractor.

8. Considering whether the scope of services provided under the contract as signed reflects the Council's current needs is another way to generate efficiencies. The contract may be amended to remove services which are no longer required, reduce the volume of certain services or reallocate services to other aspects of Council’s function to better reflect the Council’s current requirements. This analysis may also include consideration of whether the standard of services required pursuant to the contract is actually necessary. I have observed many instances of a premium service being provided when a 'homebrand' solution would be perfectly adequate.

While any amendment to a contract would need to be considered in light of Council’s procurement policy and probity considerations, there is room to negotiate efficiencies for both parties and have this better reflected in the existing contractual arrangements between them. Attention to this critical aspect of contract management is one way to drive value for money for your organisation.
Probity Considerations – Negotiations During The Tender Process

One of the ways to drive value for Councils is to negotiate with preferred participants during an approach to market process, but how far can push a negotiation without offending probity standards? While there are many benefits that Councils can achieve through effective negotiations, they must not undermine the integrity of the procurement process. Here are five pointers to keep in mind for the negotiation phase of any procurement process.

1. Make sure the approach to market documentation specifically reserves the right to negotiate with participants. Provide as much detail as you can in relation to the proposed process-unstructured, unequal or non-transparent negotiations are likely to leave Councils open to challenge from unsuccessful participants.

2. The evaluation team should shortlist the suppliers in the process that most closely meet the requirements of the proposed contract and will best deliver the Council’s objectives for the contract. The shortlist needs to be defensible, based on a robust evaluation – there needs to be a clear delineation between the shortlisted and the non-shortlisted participants. Information regarding the evaluation process should be kept in a way which is accountable and transparent.

3. There needs to be a plan about who will conduct negotiations on behalf of the Council (and, ideally, have set this out in the evaluation plan). The negotiation team needs to have no less than two members to ensure that the contents and intention of any discussions can be confirmed by a second person from the Council. Participants on behalf of the Council need to have appropriate skills to conduct the negotiation. The Council’s representatives need to keep careful, contemporaneous records of contract negotiation meetings and distribute these notes to all negotiation participants as soon as possible after the relevant meeting. Complete records of all meetings need to be maintained in order to form an audit trail and to demonstrate that the negotiations have been conducted with integrity.

4. Be aware of how the conduct of those Council Officers conducting the negotiation impacts on the formation of a contract. All Councils must be entirely clear with preferred suppliers with whom they have negotiations that participating in negotiations does not mean that the Council accepts their submission or any other submission. The purpose of negotiation is to achieve operational refinements or enhancements and this may include a review of the price. This should be confirmed when the parties execute a contract and not before.

5. Negotiations which change the scope of intent of the contract creating a material difference from what was sought at the approach to market stage will offend standards of probity and leave the Council vulnerable to a procurement challenge. If the consequence of negotiations is to wind up with a contract that is materially different to the requirement put forward in the approach to market process you have ‘shifted the goal posts’ and need to carefully consider what the appropriate action is in the circumstances. This may include inviting all participants in the original procurement process to participate in negotiations or having to abandon the process because the negotiation has resulted in such a fundamental change in scope or parameters to make it materially unfair to continue.
Handbook Appendix 5

Strategies For Engaging Consultants To Maximise Value

Set out below are several tips for the successful engagement of consultants so that both parties’ expectations are managed and the Council is best placed to achieve an outcome which drives its identified outcome, achieves value and is delivered on time and in accordance with the budget.

As we become busy with day to day competing business priorities, sometimes we demonstrate little patience with advice that suggests careful planning and consideration at the outset is the key to achieving value outcomes. The benefit of hindsight, however, consistently demonstrates that much time and effort can be saved over the course of the project if a few extra hours are invested at the beginning. Identifying and defining potential problems; considering alternatives or contingencies and drafting a clear statement of requirement are key factors in minimising potential problems. This analysis needs to be done during the planning phase for the procurement to give the Council the best possible opportunity to ‘get the deal right’.

At the outset the Council needs to consider whether engaging a Consultant is the best solution in all the circumstances. Whether the council should engage an external consultant will depend on factors such as the following:

» a lack of in-house resources;
» the need for specialised skills and experience; and
» the provision of independent advice either for the council itself or to enhance public credibility because of the expertise.

If the decision is made to proceed to engage a consultant, the Council needs to think about the best way to engage with the market to generate interest from the person or firm best placed to deliver the consultancy services to the Council. This means the Council needs to understand the market place in which it is operating, understand the pressure points on the players in the market place and have developed a strategy in terms of approaching the market designed to generate a response from the market place which represents value to the Council. The Council needs to do a due diligence with respect to its preferred consultant and ensure that it has drafted the evaluation criteria sufficiently broadly to enable the Council to properly assess whether a particular consultant has adequate experience and stability to deliver the outcome required by the Council.

Once the Council has selected its preferred consultant, attention needs to be given to the terms of the contract so that the parties are engaging with one another on a consensual, ‘no surprises’ basis. In particular, settling the agreement between the parties in relation to the following issues reduces the potential for uncertainty or disputes:

» The issue of variations and what this looks like from the parties’ perspectives. It is a good idea to articulate in the contract how variations will be assessed and costed and that there are some guidelines agreed between the parties at the outset in relation to the scope, timing and price of variations and how these will conceivably impact on the balance of the task at hand.

» The parties need to have a clear idea of the term of the contract, when the work is to commence and it must be complete. It is useful if the Council is realistic when setting deadlines and has a plan in place if these deadlines are not able to be met.

» It is critical that the parties assess and agree the insurance requirements associated with the project of the outset. The Council needs to check the certificates of currency of insurance and ensure that there is an annual review if the contract runs over a number of years. The Council also needs to consider the extended cover that is required after the completion of the services to ensure that the Council’s risk is appropriately managed.

» It is essential that the intellectual property provisions are dealt with appropriately. The Council should, as a minimum, insist on a warranty from the consultant that the deliverables do not infringe any third party intellectual property rights and that the consultant will indemnify the Council for any breach of any third party intellectual property.
Ordinarily councils will seek to own any intellectual property generated as consequence of the contractual arrangements. From time to time it may be sensible for the Council to consider licensing as opposed to ownership. A properly worded licence can confer substantial rights on the Council which mirror those of ownership, without the actual transfer of title of the intellectual property. From time to time it is prudent to consider this form of arrangement rather than a long, expensive, legal argument with a consultant regarding ownership of intellectual property rights.

In entering into a contract with a consultant the Council also needs to turn its mind to what will happen if the consultant refuses to perform. While termination for breach is a right which is usually conferred pursuant to a contract, there may be remedies other than termination which suit the Council better in the circumstances. These may include suspending payment of the fee, remedying the breach itself and deducting the cost of doing so from the fee due to the consultant and other legal remedies depending on the circumstances.

Adhering to these tips when engaging with consultants will help the Council to drive a deal which achieves value for the Council and puts the Council in the best position possible to deliver its identified outcomes.
Handbook Appendix 6

Contract Management And Probity – Improving Supplier Relationships

Local Government operates in a reasonably straightforward governance regime in South Australia. Having said that, for the uninitiated supplier, successfully engaging with Local Government can be daunting from time to time, particularly when suppliers do not fully understand the obligations on Local Government in terms of its governance structure and probity obligations. Local Government can provide support to suppliers to help build healthy relationships, particularly by relationships with suppliers in a positive, proactive way to help suppliers deliver the right outcome at the right price point for Local Government clients.

The following suggestions invariably assist in the development of stronger, more reliable, more cost effective long term relationships with suppliers.

1. Early and frank discussion to address issues and challenges as they arise often prevents any escalation to something more serious. This dialogue also helps to build trust and respect between the parties.

2. Communicating regularly and effectively creates a shared understanding. A shared understanding helps avoid confusion and misunderstanding. What is necessary communication wise will vary from situation to situation, but remember it is always beneficial to have a healthy dose of face to face interaction, not just a regular email exchange. This is a worthwhile time investment in your supplier relationship.

3. Establish your respective roles and responsibilities at the outset and remember them. If both parties understand their role, that of their counterpart and how the two fit together they are well placed to achieve value focused, mutually beneficial outcomes.

4. Understand the contractual obligation. In a positive contracting scenario both parties understand and uphold their contract obligations. Councils upholding their end of the bargain makes it more likely that contractors will go ‘the extra mile’ for the Council.

5. Behave ethically and honestly at all times. A culture of mutual trust and respect is most likely to motivate contractors to deliver outcomes to the council which are on time, in accordance with budget, in accordance with specifications, meet identified outcomes and deliver a value for money outcome to the Council.

6. Monitor the Contractor’s performance regularly. Pass on feedback in a constructive, proactive way. Remember that performance monitoring is not only about ensuring that you are getting the deliverables you require at the time you require them, it is an opportunity for both parties to achieve continuous improvement.

7. Work with your supplier to manage risk and to ensure that emerging risks are identified so that they can then be managed.

8. Seek professional advice as it is required. Make the investment in this advice early as this helps both parties prevent escalating costs.

9. Be reasonable and fair in your dealings with the supplier at all times. Noone responds well to a contract manager that is heavy handed, unreasonable or unfair. Think about extenuating circumstances that may impact on a situation and be solution focused in the resolution of emerging issues.

10. Set the basis for the working relationship from the get go and then make sure that this is reflected in the entire procurement process from the approach to market, in the executed contract all the way through to the contract management phase.
Handbook Appendix 7

Contract Management – The Status Of Unsigned Written Agreements

**Does an unsigned agreement necessarily bind the Council?**

**Conduct is Critical**

Councils in South Australia conduct themselves in a highly competitive market place and are often trying to provide significant community outcomes within tight timeframes with limited dollars available. While it is important to have a strong focus on the delivery of strategic outcomes, it sometimes means that Councils are left with limited capacity to ensure that they have documented the deal appropriately. From time to time these pressures can lead to disagreement between the contracting parties regarding whether, in fact, a binding agreement has been formed and, if so, the terms of the agreement. In this article I propose to look at some general principles to assist you in identifying whether or not the parties have formed a binding agreement. I also provide some tips to assist you in inadvertently binding your Council to an unsigned agreement.

**Think about the parties’ intention...**

The first question to be considered in determining whether a binding agreement has been formed is whether the parties have shown an objective intention to be bound.

The way in which parties have conducted themselves is a critical factor in determining whether the parties intended to be bound. The conduct of the parties as a whole both prior and subsequent to the alleged agreement is relevant in establishing the parties’ intentions. Matters such as performance or part performance of the proposed agreement can be a strong indicator that the parties intended to be bound.

The language used to record the agreement is also important in reflecting the parties’ intentions. You need to consider whether words indicating that the parties have reached an agreement have been used. For instance, if an exchange of correspondence refers to an offer being made by one party and that offer being accepted by the other party, it is likely that there has been offer and acceptance sufficient to demonstrate the establishment of a binding agreement. Other indicative factors can include the use of legal terminology, in particular the word ‘agree’ which has a legal meaning indicating a meeting of the minds.

Critically, Councils need to be aware that not all terms of the agreement need to be settled for there to be a binding agreement. The parties may have ‘agreed to agree’ on certain matters in the future after other issues have been dealt with. So, the rule of thumb is that an agreement can be binding even though not all the terms relating to its subject matter have been agreed, providing the agreement is capable of enforcement and there has been a sufficient degree of clarity.

**You do not need to sign an actual agreement to be bound...**

It is also critical for a Council to be aware that an agreement does not need to be signed for it to be enforceable. Parties can bind themselves through oral agreements, exchanges of letters, email correspondence and by their conduct. It is really important for Council officers to be aware of when their conduct could be construed as binding the Council.
What do you need to be aware of in a practical sense...

To prevent you inadvertently binding the Council:

1. Documents drafted during and after the negotiation process must clearly state that the parties only intend to be bound when the formal agreement has been signed by both parties.
2. Do not let the contractor commence work before the formal agreement is signed.
3. Ensure that in all your communications with the contractor, both written and oral, that you are entirely clear that the agreement will only be binding when both parties have signed, regardless on whether the parties have reached agreement on all the essential terms of the agreement.
4. When you send a final version of the agreement to the contractor for execution, include a reminder notice that the agreement is not binding until both parties have signed.
5. Do not perform any obligations under the agreement until it is signed.
6. If the contractor begins performing their obligations under the agreement before it is signed, notify them immediately in writing that you do not accept that their performance is pursuant to the negotiated agreement. It is important to recognise that engaging in sufficient acts of part performance of an unexecuted agreement may make the agreement binding.
Managing Contract Risk – Avoiding Ambiguous Terms In Contracts

A critical question for most Councils is ‘how can we as an organisation better manage our contractual risk’. Indeed, how can a more favourable risk profile can be achieved without simply allocating risk to the contractor. One simple mechanism is to avoid ambiguity in contracts. This is a risk minimisation mechanism that assists Councils to better manage their risk and do so in a way that does not necessarily translate to increased costs for the council.

In order to drive value for money it is critical that parties get the terms of the contract between them as clear as possible. In a perfect world every contract would be completely clear and the parties would not have any room for dispute regarding the terms of the contract. Any ambiguity in a contract is likely to lead to dispute about the intended meaning where one or other of the parties claim that more than one meaning is possible. In this article I explore some ways to avoid ambiguity and give both parties certainty about the terms on which they are engaging with each other.

There is a body of case law dealing with the resolution of ambiguous terms in contracts and this clearly points to the fact that many documents are capable of more than one interpretation. When resolving ambiguity the courts have generally applied the following process:

1. Determine the natural and ordinary meaning of the words used.
2. Consider the context of the contract. This may include looking at issues such as the purpose of the contract and the background provisions. As well as being an important way to pass on corporate knowledge, the background section is useful in terms of clarifying ambiguities.
3. Looking at any oral agreements reached by the parties prior to executing the contract (ie during negotiations).
4. Looking at the accepted industry use of particular words.
5. Looking at which of the possible interpretations is more reasonable.
6. Looking at a meaning that can reasonably be implied into the contract. This will only be possible in circumstances where there is no evidence to point to the parties having expressly excluded the implied meaning.
7. If the ordinary and natural meaning is not consistent with the context of the contract or seems absurd a court may modify the meaning of the provision(s) to better reflect the parties’ intentions at the time of contracting.

In the unusual case that there is still ambiguity after this process has been followed, the court needs to delve further to resolve the lack of consensus between the parties. The next step applied by the courts is to use the ‘contra proferentem rule’. This essentially means preferring the interpretation that works against whoever drafted the provision. So, a court will construe any ambiguity in a provision against the party who put forward the provision for inclusion in the contract or who seeks to rely on the provision. So, an ambiguous provision would work against the Council if:

1. The Council put forward the contract and/or provision. This is often the case when the Council put forward a standard form contract and refused to agree to any amendment(s).
2. The Council seeks to rely on a clause which would confer a benefit on it, for instance one that limits its risk or liability in some way. This occurs when the Council seeks to rely on a provision limiting its liability or one which confers a benefit, for instance, a guarantee.
So how do Councils avoid the application of the contra preferentem rule against them?

The courts have held that this is possible by including a clear clause in the contract that says that the contra preferentem rule does not apply. Before it agrees to do so, the Council needs to carefully consider whether this overall best suits the Council’s interests. This may not always be easy to decide.

The alternative to this, and better way, is to ensure that the contract is clear. This means that the parties have:

1. considered all the provisions;
2. are comfortable that they agree on their meaning; and
3. reflected their agreement in clear terms when drafting the contract.

It is critical that steps one to three above are complete before the parties execute the contract. This can be achieved by proper planning. This involves the parties devoting adequate time to this process and the parties paying careful attention to detail during the contract preparation process. Having a clear contractual understanding is one of the key ways that Councils can proceed confident that they have taken active steps to manage their risk in a way which still allows them to drive value for money outcomes.