

MAJOR PROJECTS GUIDANCE FOR LOCAL GOVERNMENT

Overview

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About Part C

Part C covers the development of the project from the time the Council approves the business case to the point where it is ready to embark on the tender process for the project (covered in Part D, *Tender process*). The project development stage sees the forward procurement path for the project outlined. This may comprise project establishment activities such as:

- project planning and due diligence
- development of the commercial framework
- development of the legal and technical documents.

Key objectives of the project development stage

By the end of the process described in Part C, the Council should be in a position to:

- finalise the legal, technical and financial documents for the project
- request Council approval to proceed to the tender stage of the project
- request approval for expenditure of funds, within a budget allocation, for the tendering process and the appointment of advisers and consultants if required.

Each Council will have its own approval procedures, and the project development processes for some projects funded by other levels of government will be affected by relevant State, Territory or Federal policies and procedures as well as the requirements of the funding agreement. Part C provides a flexible framework for project development to accommodate the specific requirements of the Council or other levels of government.

Key documents

Key documents to be prepared during the project development stage include:

Project plan: the implementation plan for the project, including the tasks required to be performed, the proposed timeline and the project budget.

Governance plan: a plan for the governance arrangements for the project development stage.

Resourcing plan: an outline of the resources required for the project development stage.

Due diligence report: this includes the findings of investigations into site issues, existing contractual arrangements affecting the project, statutory approvals/requirements and other matters.

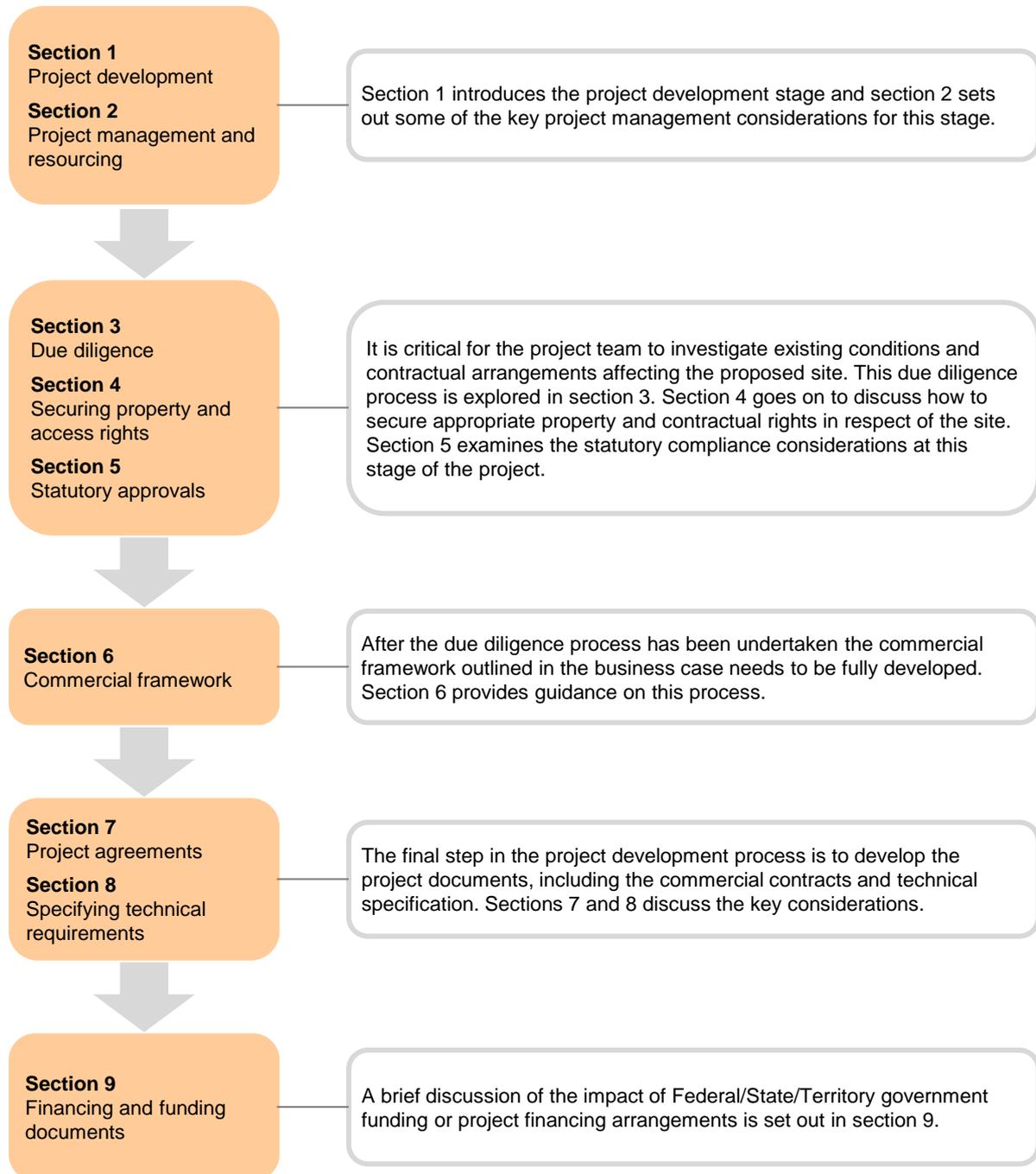
Commercial framework: documentation of the 'deal' required by the Council to meet its objectives.

Technical requirements: the Council's technical requirements for the project, which may take a number of forms, from a detailed prescriptive specification to output based performance requirements.

Project agreements: a draft suite of agreements and associated documents required to deliver the project.

Overview of Part C – Project development

Figure 1: Overview of Part C – Project development



1. Project development

The project development stage sees the project move from a business case to a fully planned and documented project. If done well, this stage can put the Council in a strong position when approaching the market to tender the project.

It is important that sufficient time and resources are devoted to the project development activities and that the process is undertaken in a methodical and thorough manner. Changes to the project after the tender process has commenced can prolong the negotiation phase of the tender process, and if the changes are significant or numerous, there is a risk of the market losing confidence in the project or the process.

2. Project management and resourcing

2.1 Key elements of project planning

The importance of robust project planning for the project development stage cannot be overstated. The success of the project will be heavily influenced by the quality of the upfront investment made by the Council in the project planning activities, in terms of both time and financial investment. The key elements of project planning for the project development stage are:

- overall project plan – scope, timeline and budget
- resourcing – work streams, advisers and consultants
- governance and probity
- stakeholder management.

Each of these is considered below.

2.2 Project plan

A detailed project plan should be developed at the outset of the project development stage. The outline project plan developed for the business case will provide a good starting point.

The project plan should incorporate items such as:

- the activities being undertaken (scope) and the key deliverables for each of those activities
- the key milestones for the deliverables
- the decision/approval points for the Council
- the decision/approval points for other levels of government/authorities if required (for example, where a gateway review is a condition of State Government funding)
- the review processes
- an outline of the specific skills and levels of resources required for both internal and external resources (this may be dealt with as a section of the project plan or attached as a separate resourcing plan)

- any acquisition of sites (if required)
- the purchase of equipment and materials (if required)
- the consultation with stakeholders
- the planning approval¹ processes
- the tender process timetable
- any arrangements for obtaining committed funding and finance (if required) for the project.

A well-developed project plan will assist the project team to determine the activities that need to be undertaken to manage risks, allocate resources and develop realistic timelines and budgets. It will also enable the project director, steering group and the Council to monitor progress.

2.3 Scope of project development activities

Determining the scope of the project development activities is an essential first step for the project team in developing the project plan. This will be largely dictated by the procurement model selected and the business case.

Procurement model

The procurement model chosen by the Council will heavily influence the scope of the activities to be undertaken by the project team during the project development stage. The following factors are directly associated with the selected procurement model:

Design: the nature and extent of the project design to be produced by or on behalf of the Council is largely dictated by the procurement model selected (for example, will the design documents comprise a fully documented design, a preliminary design or a functional design brief, an output/performance specification or a detailed prescriptive specification?).

Timing: the critical milestones for the project timeline and the likely lead time to commencement of construction will be heavily influenced by the procurement model (for example, an alliance or design and construct procurement is likely to involve a shorter lead time than a design, build, finance and maintain procurement).

Budget: the project development and procurement budgets allocated and approved by the Council will have been developed around the procurement model (for example, a relatively simple construct only procurement does not require the same project development budget as a complex Public Private Partnership (PPP) arrangement).

Project team: the size, structure and expertise of the project team is dictated partly by the procurement model (for example, a finance/financial modelling work stream will be required for a PPP procurement which is not necessarily the case in a design and construct procurement).

Final business case

The business case provides a critical tool for determining the scope of the project development activities and for keeping control of project development, in particular balancing the parameters laid down in the business case in terms of needs, affordability and timescales.²

¹ The application that is made for the use and development of the project site is referred to, often interchangeably, as an application for 'development permission or approval', 'planning permission or approval' or 'planning consent'.

² *Rethinking Service Delivery, Volume Four: Outline Business Case to Contract Signing*, Office of the Deputy Prime Minister, Strategic Partnering Taskforce, United Kingdom (February 2004) p 20.

At the outset of the project development stage, the project team should revisit the business case to confirm the content. This has the advantage of ensuring project team members are familiar with the objectives and findings and other details.

The project team should also review the business case with a view to preparing the 'final business case'. The review should ensure that key assumptions remain current and relevant, particularly in connection with the current commercial environment. This is particularly important if there has been a significant lapse of time between the preparation of the business case report and the commencement of the project development stage, or if there has been a significant change of circumstances affecting the project. Table 1 presents a checklist for reviewing the business case with a view to developing the final business case and establishing the scope of the project development activities to be undertaken during the project development stage.

Table 1: Final business case checklist	
Element of the business case	Project development activities
Policy and business context	
Alignment with relevant State, Territory and Federal Government policy	<ul style="list-style-type: none"> ▪ confirm the requirements of applicable policies and procedures which must be complied with in relation to the project ▪ assemble evidence of assessment and compliance with the relevant requirements.
Alignment with the Council's strategic plan and other plans and policies	<ul style="list-style-type: none"> ▪ ratify any project requirements arising from the Council's strategic plan and other Council plans and policies ▪ gather evidence of assessment and compliance with the relevant requirements.
Project goals, objective and benefits	<ul style="list-style-type: none"> ▪ confirm/review the project goals, objectives and benefits ▪ confirm and establish the Key Performance Indicators (KPIs) for the project goals, objectives and benefits, ensuring they are clearly identifiable, objectively measurable and directly linked to the Council's requirements ▪ develop a method for the ongoing monitoring, assessment and reporting of KPIs during the project development stage.
Stakeholder requirements	
Stakeholder identification and consultation	<ul style="list-style-type: none"> ▪ confirm/review key stakeholders ▪ revise, further develop and implement the stakeholder engagement plan (see section 2.9 <i>Stakeholders</i> and section 7 of Part B1, <i>Stakeholder analyses</i> for further information on stakeholder engagement processes) ▪ document the stakeholder engagement process and report on the manner in which stakeholder issues have been/will be addressed (or if they will not be addressed, why).
Regional collaboration	<ul style="list-style-type: none"> ▪ consult with (and document consultation with) affected neighbouring Councils

Table 1: Final business case checklist	
Element of the business case	Project development activities
	<ul style="list-style-type: none"> ▪ establish a framework for the collaborative process, if regional collaboration has been recommended (see section 3.6 of Part A, <i>Stakeholders</i> for further information regarding regional collaboration) ▪ embark on ACCC approval process where required.
Project delivery	
Project options and critical assumptions and constraints	<ul style="list-style-type: none"> ▪ confirm/review the recommended project option and associated critical constraints and assumptions ▪ identify the work streams that need to be developed to ensure that each component of the recommended project option is addressed ▪ arrange training where required to ensure the project team and relevant work streams fully understand the procurement method adopted.
Procurement strategy and design	<ul style="list-style-type: none"> ▪ review/confirm the procurement strategy ▪ outline the work streams that need to be developed to ensure that each component of the procurement model adopted is addressed ▪ arrange training where required to ensure the project team and relevant work streams fully understand the procurement method adopted ▪ develop the technical/design documents (see section 8, <i>Specifying technical requirements</i>)
Funding and financing strategy	<ul style="list-style-type: none"> ▪ establish, document and implement the funding strategy, incorporating any financing requirements for the project (see section 6.3, <i>Funding strategy and procurement method</i>, and section 9, <i>Finance and funding documents</i>) ▪ review/confirm the proposed financing arrangements for the project; and plan, document and implement the financing arrangements ▪ monitor and report on compliance with any applicable inter-government funding agreements.
Budget	<ul style="list-style-type: none"> ▪ develop a detailed budget for the project development stage (within the budget approved by the Council) ▪ create a detailed budget for the project as a whole (within the budget approved by the Council), see section 2.5, <i>Budget</i>).
Timeline	<ul style="list-style-type: none"> ▪ outline the timetable for the project development stage, tendering process and project delivery in more detail (see section 2.4, <i>Developing a project delivery timeline</i>).

Table 1: Final business case checklist	
Element of the business case	Project development activities
Governance, probity and resourcing	
Governance plan	<ul style="list-style-type: none"> ▪ expand the governance plan so as to clearly articulate the governance arrangements for the project ▪ confirm the roles and responsibilities for all project team members, reporting and communication protocols and relevant delegations of authority (see section 2.6, <i>Governance plan</i>).
Probity plan	<ul style="list-style-type: none"> ▪ develop a probity plan and determine whether probity professionals should be appointed (see section 2.10, <i>Probity</i>).
Resourcing plan	<ul style="list-style-type: none"> ▪ prepare a detailed resourcing plan for the project development stage (see section 2.7, <i>Resourcing plan – the project team</i>) ▪ assess the need for the appointment of any advisers and consultants and their scope of work ▪ identify any additional training required for members of the project team/work streams ▪ produce a high level resourcing plan for the tendering and contract management stages of the project.
Commercial framework and risk management	
Due diligence	<ul style="list-style-type: none"> ▪ confirm/review the proposed site(s) ▪ produce a due diligence report of existing conditions affecting the project, such as site conditions, legislative restrictions, property rights, third party contracts (see section 3, <i>Due diligence of existing conditions</i>).
Secure the site	<ul style="list-style-type: none"> ▪ obtain relevant property and contractual rights associated with securing and accessing the site (see section 4, <i>Confirming the site and securing access rights</i>).
Compliance (see the risk analysis in the business case for a high level review of compliance issues)	<ul style="list-style-type: none"> ▪ develop a compliance regime with respect to relevant legislative requirements and applicable industry standards, best practice guidelines, policies etc. (see section 5, <i>Statutory approvals</i>).
Market sounding	<ul style="list-style-type: none"> ▪ determine whether further market sounding is required, and if so, plan and implement (see section 6.4, <i>Market conditions</i>).
Risk assessment	<ul style="list-style-type: none"> ▪ develop the risk analysis further and create a strategy for managing the key risks (see section 6.6, <i>Assessing project risk</i>). ▪ determine the insurance requirements for the project (see section 6.7, <i>Insurance</i>).
Commercial framework	<ul style="list-style-type: none"> ▪ develop and document the detailed commercial framework (see section 6.8, <i>Documenting the commercial framework</i>).

Table 1: Final business case checklist

Element of the business case	Project development activities
Project agreements	<ul style="list-style-type: none"> ▪ determine whether project documents will be fully developed or whether only term sheets will be used for the tendering process (see section 7.1, <i>Term sheet or full contract documents?</i>). ▪ develop, where relevant, key contract documents for the purposes of tendering the project (see section 7, <i>Project agreements</i>).
Contingency planning	<ul style="list-style-type: none"> ▪ develop contingency plans further with respect to key project risks (taking into account the cost and time impacts that key risks may have on project delivery) ▪ determine the impact of failure to meet critical milestones and budget constraints and put in place monitoring and compliance processes.

The final business case may be the subject of a gateway review in some jurisdictions. See Annexure 4, *Gateway review process* for further information.

2.4 Developing a project delivery timeline

The project plan needs to include a timeline for the project development activities and the delivery of the project through the tender process and contract management stages.

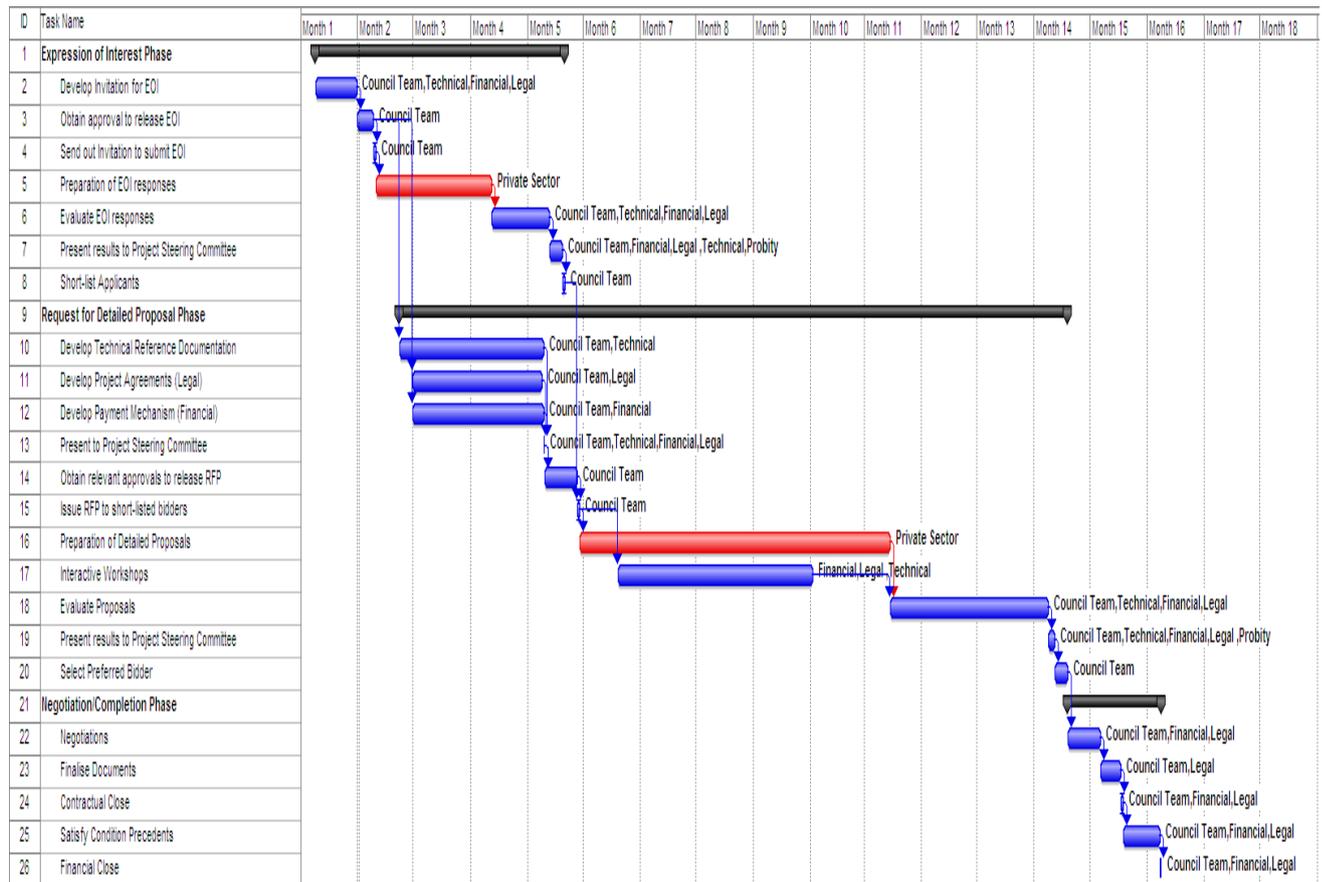
Once the scope of the project development activities has been established, the next task is to develop a realistic project delivery timeline to assist with the implementation and management of these activities.

The project team should ensure the following information is reflected in the timeline:

- work streams – for example, technical, financial, legal, etc.
- tasks within work streams – for example, evaluation of tenders, clarification questions, assessment of risk pushback, and assessment of value for money under financial evaluation
- timeframes for each task – this can be very detailed and presented on a daily, weekly or monthly basis
- interdependencies between tasks – for example, the technical team may need to provide cost inputs for the financial model which will need to be prepared by the financial team
- key project milestones, including any approvals required.

A timeline that has the capacity to recognise interdependencies between tasks and automatically factor in the consequential effects associated with early completions and/or delays, adds significant value from a project management perspective. Dynamic project timelines can be developed using project management software packages (such as Microsoft Project), which can present timelines in the form of a gantt chart. Figure 2 is an example of a gantt chart.

Figure 2: Sample gantt chart



It is important that a member of the project team regularly monitors activities against the project delivery timeline and update the timeline as necessary. Timelines for tasks, together with any updates, should be regularly communicated by the project manager to the project team. The timing of Council meetings will need to be factored into the timeline where appropriate (for approvals etc.).

2.5 Budget

Throughout the project development stage, the project manager must assess and secure the appropriate level of funding needed for the project team to deliver on their identified tasks. This needs to be included in the project plan, together with a detailed budget showing the allocation of those funds to particular activities. In this connection, a certain level of contingency needs to be built into the budget. (For further guidance on contingency planning see section 4.10 of Part E, *Contingency planning*).

All project expenditure must be approved by the Council prior to being incurred. Where it is anticipated that expenditure may exceed the funds that have been approved and allocated to the project, the project manager will need to seek the approval of the Council for any additional amounts. Depending on the level of funding to be approved for project expenditure, it may be necessary for the project manager to take into account the timing of the Council meetings. This information should also be factored into the project delivery timetable to ensure that any delay caused as a result of the timing for a Council meeting has been taken into account.

2.6 Governance plan

The high level governance plan for the project, which was developed at the business case stage, needs to be reviewed and further developed in so far as it relates to the implementation of the project development activities. This may include:

- reviewing the plan to ensure it reflects any relevant changes in circumstance (especially if there has been a lapse in time since the preparation of the plan), and incorporates any requirements or conditions of the Council's approval relating to governance aspects of the project
- adding further detail to enable implementation, especially where the plan developed is very high level
- updating the delegations register to reflect any delegations granted by the Council when approving the project proceed to the project development stage.

It is recommended that more structured governance arrangements be put in place at this stage to guide the Council. The particular structure will differ between projects depending on a wide range of factors. As a minimum, a project steering committee should be established in addition to the project team and the work stream groups.

For further discussion on possible governance structure, see section 2 of Part E, *Project management and resourcing*.

2.7 Resourcing plan – the project team

The resources required to implement the project plan should be detailed in a resourcing plan. (The resourcing plan may form a section of the project plan, or it may be a separate document referred to in the project plan). This should identify the resources required for each task in the project plan and can include individual resources or work stream teams.

The high level resourcing plan developed during the business case stage may provide the foundation for the resourcing plan. However, the resourcing plan needs to be developed in conjunction with the project plan and cannot be finalised until the project plan scope, timelines and budgets have been detailed.

If resources are not properly allocated in accordance with the timeline and the project plan, additional costs may arise and delays incurred. Inadequate resources will likely to lead to frustration in developing the project and may result in poor decisions being made. A key lesson from completed projects is the need to have dedicated resources at key stages of the project to avoid conflicting priorities causing delays and other problems.³

Assembling the team

To achieve optimal project outcomes, the Council will need to establish a multi-disciplined project team with suitable experience and expertise. The project team assembled to develop the business case needs to be expanded in order to implement the project plan. The resourcing plan reflects and accommodates the governance arrangements for the project as outlined in the governance plan.

A number of work streams should be established to deal with the key areas of project development. The particular work streams required for each project will differ depending on the requirements of each project, but may include:

³ *Rethinking Service Delivery, Volume Four: Outline Business Case to Contract Signing*, above n2, p 23.

- stakeholder engagement and public relations/communications
- site/real estate/securing the site
- compliance – statutory compliance/legislative requirements
- risk analysis and management
- insurance
- commercial
- legal
- technical/design
- value for money assessment
- market sounding
- funding and financing
- budget monitoring and analysis
- program/timetable
- governance and probity.

Each work streams should have a clear understanding of what is required to deliver. The project team will need to ensure that there is an appropriate allocation of resources to the work streams to enable them to achieve their objectives.

When assembling the project team, consideration needs to be given to the capacity of particular team members. Their ability to continue to be involved with the project during the contract management stage, as part of the contract management team also needs to be assessed. There are significant benefits in maintaining continuity of some project team members through both stages of the project, in particular knowledge retention.

Where this is not possible, consideration should be given to the early involvement of the contract management team in the project development and tendering stages. For a discussion on the benefits of maintaining continuity of resources and the benefits of early involvement of the contract management team (including who should be involved at this early stage) see section 2.5 of Part E, *Early involvement of the contract management team*.

Effective project teams typically comprise a combination of internal and external resources, thus benefiting from members with intimate knowledge of the Council and local government, and members with experience of projects of a similar nature and scale.

Internal resources

The project manager will need to review the tasks identified in the project plan and undertake an analysis of the expertise available within the Council to perform those tasks. The risks associated with keeping tasks in-house as opposed to contracting them out to external advisers should be considered when undertaking this analysis.

External resource

The appointment of an external adviser can add significant value to the project. External advisers can often provide experience and expertise gained whilst advising on prior projects with similar attributes. In addition to using their experience from other projects, external advisers can also be a source of valuable contacts, which can assist in structuring the project team and assessing the performance of the project as it progresses.

2.8 Advisers

The key advisers commonly engaged on a local government major infrastructure project and the services they provide are set out in Table 2.⁴

Table 2: Advisers	
Type of adviser	Services
Financial⁵	<ul style="list-style-type: none"> ▪ advise on scoping the project ▪ assist with the preparation of a financial appraisal ▪ assist with the preparation of the business case ▪ aid in market sounding and profile raising for the project ▪ support the development of value for money evaluation frameworks ▪ advise on risk analysis, facilitate risk workshops and quantify risks ▪ design payment mechanisms and review payment structures ▪ evaluate financial aspects of tenders ▪ provide financial advice and support during negotiations.
Commercial	<ul style="list-style-type: none"> ▪ advise on potential commercial opportunities ▪ input to the commercial sections of the project documentation ▪ identify risks associated with commercial opportunities.
Legal	<ul style="list-style-type: none"> ▪ advise on the procurement approach and structuring of the transaction ▪ structure and draft tender and project documentation ▪ guide the tender process and negotiations with tenderers ▪ finalise contracts ▪ advise on legal issues including taxation, property, planning, environment, banking, competition, and intellectual property etc.

⁴ Adapted from *Technical Note No. 3. How to Appoint and Manage Advisors to PFI Projects*, Treasury Taskforce, 3.3-3.6, United Kingdom. These tasks represent activities undertaken throughout the procurement process from strategic assessment to project completion.

⁵ Often the financial adviser and the commercial adviser is the same consultant.

Table 2: Advisers	
Type of adviser	Services
Technical	<ul style="list-style-type: none"> ▪ advise on technical assumptions for the business case ▪ draft or review technical aspects of the tender documents ▪ assist in developing the specification, project requirements or performance measures. ▪ undertake technical evaluations of tenders ▪ counsel on quality assurance during the construction phase ▪ provide input into the project risk analysis ▪ complete asset valuations.
Probity	<ul style="list-style-type: none"> ▪ assist in developing a probity framework for the project ▪ monitor probity compliance ▪ draft probity report.

The Council may also wish to consider whether it requires the services of other advisers in addition to those in Table 2, which may include advisers in the following work streams:

- economics
- communications
- policy
- insurance
- project management
- planning
- real estate
- design/technical specification.

Tendering to appoint an adviser

The Council will often appoint advisers by a competitive tender process. See Part D, *Tender process* for guidance relating to undertaking a tender process.

To assist advisers in assessing the level of experience and expertise required, and to price their advisory services, the Council should include the following information in its Request for Proposal (RFP):

- a clear description of the scope of work to be provided
- a copy of the contract for their appointment, detailing the fee and payment terms, intellectual property rights and termination rights
- an outline of the evaluation criteria against which their proposal will be assessed.

The effective management of external advisers can often influence their performance, such as minimising the risk of a misalignment of expectations, which leads to unsatisfactory outcomes. The project manager should establish a key point of contact for each adviser and identify which member of the project team is authorised to give instructions to the adviser.

Regular reports should be generated showing expenditure against budget for all advisers to enable the Council to monitor and manage consultants' fees and the project development budget.

2.9 Stakeholders

Key stakeholders in the project will have been identified in the business case and a process for engaging stakeholders may have been implemented at that time. Stakeholder management is an ongoing process and should continue in a structured manner during the project development stage.

The project plan should include the stakeholder management process for the project development stage. As a minimum, this process should involve regular reporting to specific stakeholders (such as government or existing service users) and the wider community. Key decisions and progress on the project can be reported in a number of forms including:

- a dedicated part of the Council's website
- sections of the Council's regular newsletter or newsletters developed specifically for the project
- reports in internal staff publications
- letters to stakeholders.

It may be useful if the format and frequency of these reports are documented in the project plan.

If stakeholders have a decision making role in the project development activities, this should be documented in the project plan and appropriate allowances made in the timetable.⁶

2.10 Probity

Effective probity management

Effective probity management has many benefits for the Council, such as:

- satisfying legislative requirements relating to probity (for example, conflict of interest/misuse of power)
- providing transparent and measurable standards against which conduct can be assessed
- instilling confidence in the private sector to contract with local government, thereby enhancing competition and best value for money on local government projects
- injecting confidence in the community regarding the decision making processes of the Council and the expenditure of rate payers money
- minimising the risk of an unsuccessful tenderer or other third party challenging the validity of the Council's decision making process. Even unfounded challenges can cause delay to a project, and cause the Council to incur costs defending a legal action and cause reputation damage

⁶ *Rethinking Service Delivery, Volume Four: Outline Business Case to Contract Signing*, above n2, p 21-22.

- reducing the risk of fraud or corruption
- protecting and enhancing the good reputation of the Council.

A challenge to the probity processes of the Council on a project can be detrimental, both to the Council itself and to the future of the project. This harsh lesson was learnt by Liverpool City Council in New South Wales on the Oasis Project where the failed project was the subject of a public inquiry in which the probity management and governance arrangements of the Council were the subject of criticism.

Lessons learned: The Liverpool Oasis Project

The *Liverpool City Council Public Inquiry Report of July 2004*⁷ highlighted the importance of good project governance and probity processes in relation to a major project for the re-development of Woodward Park. A number of recommendations were made including the following:

- councils should adopt proper and adequate systems to ensure that in conducting their own dealings, and those with the public, they meet the legislative requirements in respect of transparency, accountability and due process
- in order to ensure the independence and reliability of advice, Councils must put in place clear decision trees, consider the advice to be obtained, and then set appropriate terms of reference for their professional advisers
- consideration should be given to providing a definition of, or guidelines prescribing, probity standards to be adopted by Councils.
- if Councils perceive they have a conflict of interest affecting the Council's role as planning and consent authority, they may invite State or other local government bodies to act in their place, and/or make referrals to an independent panel of experts
- measures should be put in place to ensure that Councillors receive instruction, guidance and assistance in how tasks are undertaken when considering or entering into a public private partnership
- Council meetings dealing with major infrastructure projects in which the Council is engaged (projects which are likely to absorb substantial Council resources and have substantial impacts on the Council area) should be open to the public
- reports going before the Council contain full, fair and honest assessments of the benefits and challenges of a project
- any delegation made by a Council should require regular and comprehensive reports back to the governing body. Such reports should provide the pros and cons of each issue considered, yet should not anticipate the governing body's decision
- delegations should define specific tasks and set the time period over which the delegation applies.

⁷ Emeritus Professor Maurice Daly BA PhD MIMC, *Liverpool City Council Public Enquiry, Final Report and Recommendations Volume 3* (July 2004).

Probity plan

The risks associated with probity are best managed by the use of a probity plan, identifying the probity issues and risks associated with the project, and detailing the probity procedures and/or options for managing those risks.

The governance plan developed at the business case stage should have included an overview of the probity framework for the project. The project team should now ensure a probity plan is prepared and consider whether a probity adviser and/or auditor should be appointed at this stage of the project. This will depend on the nature of the project and to some extent the market conditions and political sensitivity of the project.

The probity plan should be endorsed by the project steering group.

Probity adviser

Major projects are generally more complex, politically sensitive and susceptible to third party challenges than smaller, routine projects undertaken by the Council. As a result, the Council should consider the appointment of a probity adviser for the project.

A probity adviser assists the Council in maintaining the integrity of the project so as to engender stakeholder and community confidence in the procurement process by the Council. The role of the probity adviser includes establishing the probity framework, providing advice and assistance during each stage of the project on probity issues and compliance with government regulations, policies and best practice guidelines and undertaking risk assessments.

It is recommended that the probity adviser be appointed early on in the project development process, and that the appointment continue at least until contract award.

Key tasks of a probity adviser

A probity adviser focuses on 'how' a process complies with the set criteria, standards and probity principles.

The tasks of a probity adviser are to:

- develop the probity plan together with project team
- attend key meetings
- undertake the probity adviser duties and responsibilities as outlined in the probity plan
- deal with and manage probity related issues – not provided for in the probity plan – and incorporate them into the probity plan for the auditor to consider
- prepare a final report (and interim reports where requested) on the probity related issues of the project.

Probity auditor

The Council may also consider the appointment of a probity auditor for the purposes of conducting a review of the project processes and assessing whether the project has been conducted in accordance

with the project procedures. Unlike a probity adviser, probity auditors play an independent auditing role and are not advisers to the Council.

The Council should ensure that the probity auditor has the authorisation to carry out the services it is engaged to carry out. This may involve contacting or reporting to government agencies or industry regulators.

Key tasks of a probity auditor⁸

A probity auditor focuses on ‘whether’ a process complies with the set criteria, standards and principles. The key tasks of a probity auditor are to:

- investigate and review project processes and associated documentation. This includes:
 - overseeing project processes
 - assessing whether the Council is complying with relevant legislation, regulations, policies and best practice guidelines
 - ensuring no conflict of interest or bias is prevalent in project processes
 - reviewing and assessing key documentation
 - monitoring confidentiality procedures.
- ensure that any probity problems or issues are managed satisfactorily. Activities include:
 - undertaking a risk assessment and identifying any potential probity issues
 - recording any probity issues that arise
 - recommending management practices for the resolution of probity issues
 - suggesting processes for decision making
 - contacting or report to government agencies or industry regulators where necessary
- prepare reports to the Council which:
 - provide an independent assessment as to whether the probity processes as identified in the probity plan have been complied with, taking into consideration probity standards
 - furnish information to support the findings and conclusions of the probity auditor
 - recommend practices for the application of probity principles.

The roles of probity adviser and probity auditor should not be undertaken by the same consultant, to prevent a situation where an actual or perceived conflict of interest may arise. The Council should be mindful that the engagement of probity advisers and auditors would not relieve the Council of its responsibility to exercise good probity practices.

⁸ *Queensland Purchasing, Better Purchasing Guide, Ethics, Probity and Accountability in Procurement*, Department of Public Works, Crime and Misconduct Commission (October 2006); *Probity Auditing: When, Why and How*, Independent Commission Against Corruption (December 1996).

The Victorian Government Purchasing Board's *Probity Guidelines for Tendering and Contracting* includes a useful probity audit checklist, which outlines the specific tasks of a probity auditor.⁹

2.11 Ongoing review

As the Council progresses through the project development stage, the project team should undertake an ongoing review of the business case against each of the outcomes and findings to confirm that the activities undertaken during project establishment are focused on achieving the intended benefits. The Council's approval of the business case and any limitations imposed in that approval should also provide a constant point of reference throughout the project development process.

This review process should be incorporated into the project plan. When undertaking the review process, the project team should continually assess whether the commercial framework for the project reflects the optimum balance between costs, risks and benefits.

3. Due diligence of existing conditions

To enable the Council to develop the commercial terms for the delivery of the project, it is necessary for the Council to fully determine the nature and extent of any service or asset related risks to the project. In order to determine such risks the Council will be required to gain a complete understanding of the existing conditions and arrangements in place.

To achieve this, the Council needs to undertake a due diligence process that involves the collation, examination and evaluation of all relevant information. Failure to do so may result in additional costs, delays and even project failure.

Upon completion of the due diligence process, the Council should prepare a due diligence report that assesses the findings. It should be disclosed to all members of the project team and to tenderers as part of the RFT documentation.

Table 3 outlines the key issues that Council should investigate and the documents that may need to be reviewed in order to undertake the due diligence process.

Table 3: Due diligence checklist		
Key issues	Purpose of evaluation	Documents to be collated
Ownership and occupation rights	<p>Confirm that the boundaries or dimensions of the land identified on the registered title correspond with the location of the site on the ground.</p> <p>Assess all ownership and occupation rights over the proposed site (Council, Crown or private party).</p> <p>The Council will need to satisfy itself that any third party rights do not hinder its ability to undertake or manage the project effectively.</p>	<ul style="list-style-type: none"> ▪ certificate of title ▪ survey of land boundaries ▪ ▪ leases/licences (if any) ▪ funding agreements ▪ services agreements ▪ maintenance agreements.

⁹ Victorian Government Purchasing Board, *Probity Guidelines for Tendering and Contracting* (1 June 1998).

Table 3: Due diligence checklist

Key issues	Purpose of evaluation	Documents to be collated
<p>Planning conditions (zoning)</p> <p>Every parcel of land is subject to a planning scheme.¹⁰ This arrangement sets out the types of land use and developments that are allowed, prohibited or for which a permit is required.</p>	<p>Confirm whether there are any specific requirements or conditions such as heritage overlay in the planning scheme that may affect the project.</p> <p>Where the proposed land use for the project is prohibited on the site, the Council or its contractor may seek a planning scheme amendment to obtain the relevant approvals.</p>	<ul style="list-style-type: none"> ▪ planning scheme or planning property report ▪ planning scheme amendment forms or documentation (if required).
<p>Easements</p> <p>Rights enabling a third party to use the site (or a part of the site) for a specific purpose, such as parking, utilities and/or footpaths.</p> <p>Easements may be statutory or implied. They are not always registered on the title to the land.</p>	<p>Confirm whether there are any easements that may affect the project.</p>	<ul style="list-style-type: none"> ▪ certificate of title ▪ property deeds and agreements ▪ documents from the relevant Council and other authorities (water authority) ▪ site inspection reports – there may be indications on the proposed site of continual third party use that may lead to an implied easement or right of way.
<p>Covenants</p> <p>Rights created by an agreement between a beneficiary and the current land owner.</p> <p>Covenants are registered on title and bind the original parties to the agreement and subsequent owners of the land.</p> <p>Covenants will not prohibit the Council from dealing with the land as such. However, if the Council's dealing with the land breaches a covenant, this will create a defect in the title which may affect the Council's future dealings with the land.</p>	<p>Confirm whether there are any covenants that may affect the project.</p>	<ul style="list-style-type: none"> ▪ certificate of title ▪ property deeds and agreements.

¹⁰ The individual planning instruments are known as 'planning schemes' in Victoria, Queensland, Northern Territory, Tasmania and Western Australia, 'development plans' in South Australia and 'local environmental plans' in New South Wales.

Table 3: Due diligence checklist		
Key issues	Purpose of evaluation	Documents to be collated
Prohibitions or restrictions created under section 173 of the <i>Planning and Environment Act 1987</i> (Victoria only)	<p>Confirm whether there are any section 173 agreements that would affect the project by:</p> <ul style="list-style-type: none"> ▪ prohibiting, restricting or regulating the use or development of the land and/or ▪ imposing conditions that require the land to be used or developed for specified purposes. 	<ul style="list-style-type: none"> ▪ certificate of title ▪ section 173 agreements.
Infrastructure agreements under Part 2 of the <i>Sustainable Planning Act 2009</i> (Queensland only)	<p>Confirm whether there are any infrastructure agreements that would affect the project by:</p> <ul style="list-style-type: none"> ▪ prohibiting, restricting or regulating the use or development of the land and/or ▪ imposing conditions that require the land to be used or developed for specified purposes. 	<ul style="list-style-type: none"> ▪ certificate of title ▪ infrastructure agreements from the Council.
Agreements under section 69 and Schedule 7 of the <i>Planning and Development Act 2005</i> (Western Australia)	<p>Confirm whether there are any agreements which may affect the project by:</p> <ul style="list-style-type: none"> ▪ prohibiting, restricting or regulating the use or development of the land and/or ▪ imposing conditions that require the land to be used or developed for specified purposes. 	<ul style="list-style-type: none"> ▪ certificate of title ▪ agreements between Council (as the planning authority) and land owners.
Planning agreements under section 93F of the <i>Environmental Planning and Assessment Act 1979</i> (New South Wales)	<p>Confirm whether there are any agreements which may affect the project by:</p> <ul style="list-style-type: none"> ▪ prohibiting, restricting or regulating the use or development of the land and/or ▪ imposing conditions that require the land to be used or developed for specified purposes. 	<ul style="list-style-type: none"> ▪ certificate of title ▪ planning agreements.
Agreements under section 71 of the <i>Land Use Planning and Approvals Act 1993</i> (Tasmania)	<p>Determine if there are any agreements affecting the project by:</p> <ul style="list-style-type: none"> ▪ prohibiting, restricting or regulating the use or development of the land and/or ▪ imposing conditions that require the land to be used or developed for specified purposes. 	<ul style="list-style-type: none"> ▪ certificate of title ▪ agreements between Council (as the planning authority) and land owners.

Table 3: Due diligence checklist		
Key issues	Purpose of evaluation	Documents to be collated
Mortgages, charges and caveats	Determine whether there are mortgages, charges or caveats registered over the proposed site that may need to be discharged or removed by a certain stage of the project.	<ul style="list-style-type: none"> ▪ certificate of title ▪ property deeds and agreements ▪ financing agreements ▪ registrations affecting the property on the Personal Property Securities Register.
Heritage controls Places with heritage significance are usually protected by a 'heritage overlay' which are contained within council planning schemes.	<p>Confirm whether any part of the site is of heritage significance or 'listed'.</p> <p>Confirm whether the site may be culturally sensitive and protected under Federal or State/Territory legislation.</p> <p>Confirm whether the listing of the land within the site requires special or additional approvals prior to using or developing that heritage place.</p> <p>If any of these issues are relevant, confirm whether they limit the Council's ability to deal with the proposed site, for example protection of indigenous, archaeological, historical, and/or ethnographic objects and sites.</p>	<ul style="list-style-type: none"> ▪ planning scheme ▪ planning documents indicating approvals have been or need to be sought ▪ assessment of the heritage significance of the proposed site ▪ any documents relating to indigenous significance.
Environmental (including flora and fauna)	<p>Confirm the presence of any environmental factors that may limit the use of the site or whether any approvals are required.</p> <p>Ascertain whether environmental impact assessments or additional environmental approvals might need to be provided by the Council or the contractor.</p>	<ul style="list-style-type: none"> ▪ environmental impact assessment reports ▪ planning documents indicating environmental approvals have been or need to be sought ▪ any assessments of any flora and fauna on the proposed site.
Site conditions The geotechnical conditions of the site – both surface and subsurface conditions, as well as conditions relating to the airspace above the site.	<p>Assess the surface, subsurface and airspace conditions of the site.</p> <p>Determine if there are any geotechnical conditions affecting the use of the land in the manner contemplated by the project.</p> <p>Assess whether treatment of the land is required, and what that entails.</p> <p>Reports should be provided to tenderers to assist in determining construction methods and pricing.</p>	<ul style="list-style-type: none"> ▪ geotechnical surveys and reports ▪ soil reports ▪ water table reports ▪ site inspection reports.

Table 3: Due diligence checklist

Key issues	Purpose of evaluation	Documents to be collated
<p>Contamination</p> <p>Contamination within the site could have financial and scheduling implications affecting the viability of the project taking place at the chosen location within the identified timeframe, and may pose serious health and safety risks to individuals during the construction and subsequent operation of the project.</p> <p>The proposed use for the site dictates the level of assessment and subsequent management required to be undertaken for a known or suspected contaminated site.</p>	<p>Based on the history of the land use, confirm whether site investigations are necessary to assess the contamination risk of the site and the extent of those investigations.</p> <p>Any reports should be assessed to ascertain the viability and/or suitability of the land for the planned use.</p> <p>Any reports obtained should be provided to tenderers to assist in pricing the construction risks. Based on the information obtained, the Council will need to decide the extent to which contamination risk will be allocated to the contractor, having regard to the impact this may have on cost.</p>	<ul style="list-style-type: none"> ▪ assessments of historical land use data and present use of the site (including for agriculture, mining, industry, storage and use of chemicals, gas, wastes, hazardous substances and dangerous goods) ▪ reports documenting whether there is contamination of the site and/or any exposure to migration of contamination from nearby land and water bodies ▪ environmental impact assessment reports.
<p>Adjoining land</p>	<p>Assess whether the Council or project participants require access to the adjoining land to undertake the project, or if any other related rights are necessary.</p> <p>If so, confirm ownership of relevant adjoining land.</p>	<ul style="list-style-type: none"> ▪ certificates of title ▪ site inspection reports.
<p>Condition of existing assets</p> <p>A baseline assessment of existing assets is an important starting point from which to determine the works and services that should be performed as part of the project. It also enables the performance of the contractor to be measured.</p>	<p>Confirm the condition of existing assets (which might include buildings, footpaths, roads, street furniture, facilitates etc.). The Council may carry out inspections and audits or engage a technical consultant to do so.</p>	<ul style="list-style-type: none"> ▪ asset condition surveys and reports.

Table 3: Due diligence checklist

Key issues	Purpose of evaluation	Documents to be collated
<p>Existing contractual arrangements</p> <p>In order for the Council to carry out the project, it may be necessary to exit, terminate, modify or suspend the Council's existing contractual arrangements.</p>	<p>Determine what existing contractual arrangements affect the proposed site or project plan.</p> <p>Assess the ability of the Council to exit, terminate or suspend existing contractual arrangements. The Council should assess key terms in the relevant documents such as the contract term (including any options to renew), payment, suspension and termination, forfeiture, penalty and compensation.</p>	<ul style="list-style-type: none"> ▪ existing contracts for works or services ▪ supply contracts ▪ licences affecting the proposed site ▪ any other contractual arrangements affecting the proposed site or the types of works and services to be provided.

Following completion of the due diligence process, the findings of the report should be assessed to determine whether they have an impact on the project plan. In particular, the project team should consider the impact on the proposed location of the site or sites, the proposed commercial terms, delivery timetables and budgets. The process of terminating or reorganising the project to deal with existing conditions and arrangements can be a lengthy and complex exercise, and this also needs to be factored into the timeline and costings for the project.

4. Confirming the site and securing property and access rights

Using the information gathered during the due diligence process, the project team is able to make more informed decisions regarding the project, including whether to proceed with the project at the proposed site or whether to change the proposed scope or procurement process. The project team needs to assess whether any such changes are a material departure from the approved business case and therefore require the approval of the Council.

Once the Council has confirmed the site and/or assets for the project, the Council should consider what actions it may need to take in order to mitigate any risks associated with undertaking the project at the confirmed site. This may include:

- terminating or modifying existing contracts or entering into new contractual arrangements
- acquiring or disposing of land or other property rights in respect of the site – purchase, sale, compulsory acquisition
- acquiring rights to adjoining land.

These are considered in the following sections.

4.1 Contractual arrangements

Existing contractual arrangements

Where the due diligence report concludes that for the Council to carry out the project it is necessary to exit, terminate, modify or suspend certain existing contractual arrangements between the Council and third parties, a plan should be developed as to how this will be done. The project manager should determine whether and when this plan should be implemented.

Where the contract documentation does not enable the Council to make the changes it requires, the Council may need to negotiate a separate arrangement with the other party to the contract. For project planning purposes, the Council should bear in mind that such negotiations can often be lengthy and complex and should therefore factor this into their project delivery timetable and budget.

Providing for new contractual arrangements

The Council will need to identify any new property rights or contractual arrangements to be obtained in order to proceed with the project. This may include rights granted in a licence or lease to either use or pass over adjoining land for construction purposes or rights relating to the use of the site both before and after the construction phase.

4.2 Acquiring and disposing of property rights

Purchase of land and compulsory acquisition

The Council may need to acquire land, or an interest in land, for the purposes of establishing the site for the project. Land can be acquired by private agreement or under compulsory acquisition legislation (with or without the land owners' consent). Interests in land include the fee simple, easements, rights of way and leases.

In certain circumstances the Council may have the power to purchase land that is required for the project. The compulsory acquisition process is complex and highly prescriptive, requiring the Council to advertise, follow strict time requirements, and make offers to landowners in accordance with specified 'formulas'. The Council must ensure that it seeks legal advice prior to embarking on the process.

Any decision by the Council to acquire land should be made by a resolution of full the Council. In some States, this is a legislative requirement. In States where it is not a formal requirement, it is best practice to adopt this approach, particularly given the high risk associated with a third party challenge or review of the process by a government watchdog.

Sale of land

In some cases, the project may involve the Council selling or transferring land. This may involve a sale or transfer to:

- a third party as part of the funding arrangements for the project (see section 3.3 of Part B3, *Asset sale*)
- the contractor or other project participant as part of a land exchange or land transfer arrangement (see section 3.4 of Part B3, *Land exchange and transfer of land*).

Whilst local government has the power to dispose of its assets, the process for the sale of land differs between each of the States.¹¹

In all jurisdictions, when disposing of land by either sale, lease, licence or another method, local government is required to demonstrate that the disposal provides 'value for money', with the exception of New South Wales where it is termed 'fair value'.

All else being equal, the Council should dispose of land to the highest bidder. In some cases there may be arguments in favour of selling to a specific party who did not offer the highest purchase price, but who is able to offer distinct and special benefits over and above the other bidders.

See Annexure 1, *Sources of power for local government* for further details as to the process to be followed and the Councils' statutory powers to transfer land.

4.3 Rights to adjoining land

Adjoining owners have a right to refuse to allow any other person to encroach upon their land or over their land. Therefore, it is necessary for the Council and project participants to obtain any rights in relation to adjoining land that are necessary to deliver the project.

Some examples of the types of rights the Council may need to obtain include:

- right to pass over the land, for example where the site is surrounded by privately owned property, or site access via the site itself is insufficient
- right to erect structures overhanging the land, such as scaffolding
- right to over sail a crane jib, for example where the crane operates in the airspace of the adjoining property
- right to carry out investigations on the land, for example where there may be issues of migratory contamination.

In order to obtain such rights, the Council should seek to enter into a licence agreement with the adjoining land owner. The licence should identify the rights granted by the adjoining land owner to the Council and the period of time for which they apply. It may be necessary for the Council to pay a licence fee in exchange for the granting of such rights.

4.4 Access rights

Whilst the Council may have secured access rights to the site, it is necessary to ensure that the same rights are secured for those project participants that require access for the smooth running of the project.

It is for these purposes that the Council should ensure that any access rights secured are transferable to its consultants, agents, contractors, subcontractors, financiers or any other project participants that may require access.

To assist with the co-ordination of tasks that need to be executed (on the site by each of the project participants) in accordance with the project delivery timetable, the Council should establish an appropriate site access regime. A well-prepared access regime will minimise the risk of delay to the project, and cost overruns as a result of such delay.

¹¹ In Victoria, Councils are required to follow general principles and best practice as set out in the *Local Government Best Practice Guideline for the Sale, Exchange and transfer of Land* (June 2009).

As such, the Council will need to retain a right of access to the site at all times for monitoring and reporting purposes and for any reasonable actions or steps to be undertaken in relation to statutory or regulatory compliance.

Developing the access regime

The access regime should identify:

- the period for which each party requires access
- the area of the site to which access is required
- any anticipated disruption to other occupants of the site that may be caused during this period, and actions to be undertaken to minimise such disruption
- occupational health and safety measures/compliance
- management strategy for unavoidable intervention with pedestrian or vehicular traffic movements
- management strategy for unavoidable blockage of access to any premises.

5. Statutory approvals

The Council may be required to seek statutory approvals from local, State, Territory or Federal Governments, industry regulators or other statutory bodies.

Statutory approvals relevant to a major infrastructure project are project specific, and will generally focus on the nature of the works being undertaken, the nature and location of the site and the nature of the completed asset and any operational aspects of the project. In some cases, the Council as project owner/proponent will be required to obtain the approval or consent, and in some circumstances the Council can pass that obligation onto the contractor or other project participant with an appropriate level of control over the subject of the approval.

5.1 Planning

Planning and other statutory approvals required by virtue of the location, nature or proposed use of the site would affect the use or development of the land or premises in accordance with the project purposes.

The type of approval required differs between jurisdictions, as each State and Territory has its own planning legislation as well as other planning policies and instruments.

The Council may need to consider the possibility that the proposed use or development of the site may not be permitted under the relevant planning scheme or plan. Only those purposes that are permitted under the planning scheme may be the subject of an application for use and/or development consent.

If aspects of the project proposal are prohibited on the project land, where possible, the Council or contractor may seek to put forward a planning control amendment so that the approvals for the proposed land use and/or development are able to be obtained, or at the very least can be made the subject of a planning application so that the merits of the proposal can be examined.

5.2 Environmental

Most decisions made in respect of the planning process for a major infrastructure project will have an effect on the physical environment.

In some cases, in order to obtain planning approval (and depending upon the nature and location of the project proposed) environmental impact assessments or additional environmental approvals might need to be obtained by the Council or the contractor.

Environmental Impact Assessments (EIA)

An EIA is a general term to describe an assessment of the possible positive and negative impacts that a proposed project may have on the environment. The assessor should take into consideration all the environmental, social and economic aspects of a proposed project.

Obtaining such an assessment may be costly and time-consuming for both the Council and private developers.

The requirement to obtain an EIA might be triggered under either Commonwealth or State/Territory legislation (or both). Usually, if it is decided that a project proposal is likely to have a significant environmental impact, an EIA must be prepared, exhibited for comment and, in some cases, tested in a public hearing and assessed, before the decision maker charged with considering the planning merits of a proposal can consider granting its approval.

Other environmental controls or approvals

Consideration of environmental issues is inherent within the planning approvals process. A project may require particular scrutiny over and above the assessments required by legislative EIA requirements or the planning approval process. Additional approvals may be triggered under specific State/Territory legislation because of the scale, nature or potential environmental impact of a project. For example, a project that has high potential to cause adverse environmental impact by virtue of its proximity to sensitive environmental areas, such as wetlands or coastal areas.

In other cases, while an approval may not be required under a particular piece of legislation prior to project commencement, it may be incumbent on those applying for planning approval to demonstrate how the project is consistent with the objectives or controls of particular environmental legislation.

5.3 Section 173 agreements

Victorian Councils should seek to determine whether any section 173 agreements affect the proposed site. Section 173 of the *Planning and Environment Act 1987 (Vic)* enables Councils to enter into agreements with land owners to prohibit, restrict or regulate the use or development of the land and/or impose conditions subject to which the land may be used or developed for specified purposes.

Section 173 agreements can be registered against the land title, therefore binding not only the current landowner to the covenants set out in the agreement, but also future land owners.

In its capacity as a planning authority, the Council will find section 173 agreements are useful in safeguarding the future use of the land. As such, the Council is able to exercise greater control over the development process through the use of these agreements, which often accompany permits, planning schemes/planning scheme amendments or transfers for the sale of the Council land.

For the Council as a project proponent, the manner in which a section 173 agreement affects the proposed site should be taken into account in the due diligence process.

5.4 Other authority consents

Although a project may have received planning approval, prior to the commencement of the project, the Council or another project participant may need to obtain additional statutory approvals, licenses or work permits. For example:

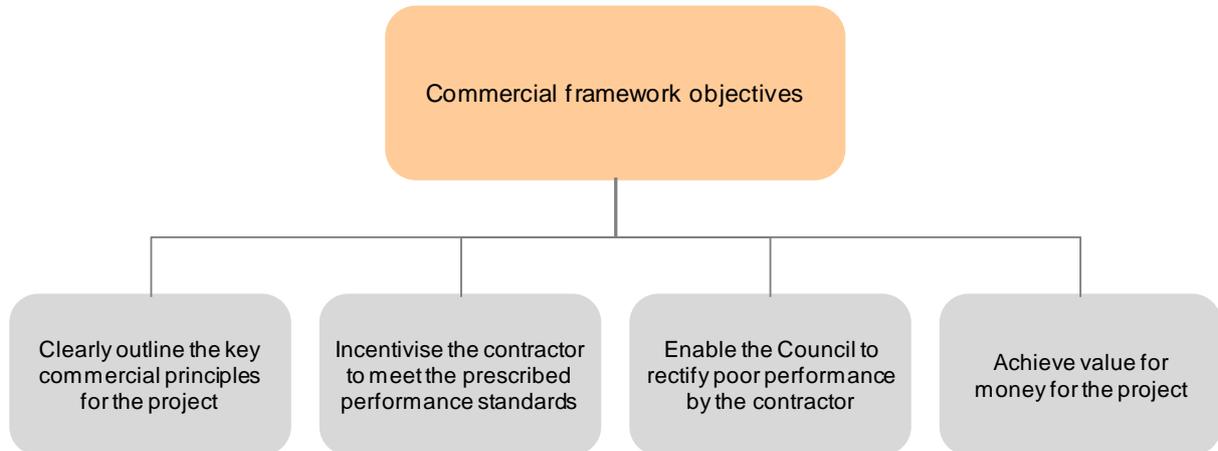
- ACCC approval for regional collaboration projects
- building permit and other works permits
- for an energy project, such as a co-generation plant at a leisure centre, consideration needs to be given to regulatory requirements regarding connection to the energy grid.

6. Commercial framework

6.1 Further developing the commercial framework

As noted in section 11.5 of Part B1, *Developing the commercial framework*, the commercial framework represents the commercial arrangement that the Council is seeking for the project. In other words, the commercial framework is 'the deal' between the Council and the other project participants – identifying what the Council is giving away and what it is getting in return. The objectives of the project team in developing the commercial framework are illustrated in Figure 3.

Figure 3: Objectives of the commercial framework



A key task in the project development stage is to develop a detailed commercial framework for the project.

6.2 Start with the business case

The business case should have included a high level commercial framework for the project based on the project objects and scope, financial modelling, consideration of socio-economic impacts and the funding method and project delivery model adopted for the project (see section 11.5 of Part B1, *Developing the commercial framework*).

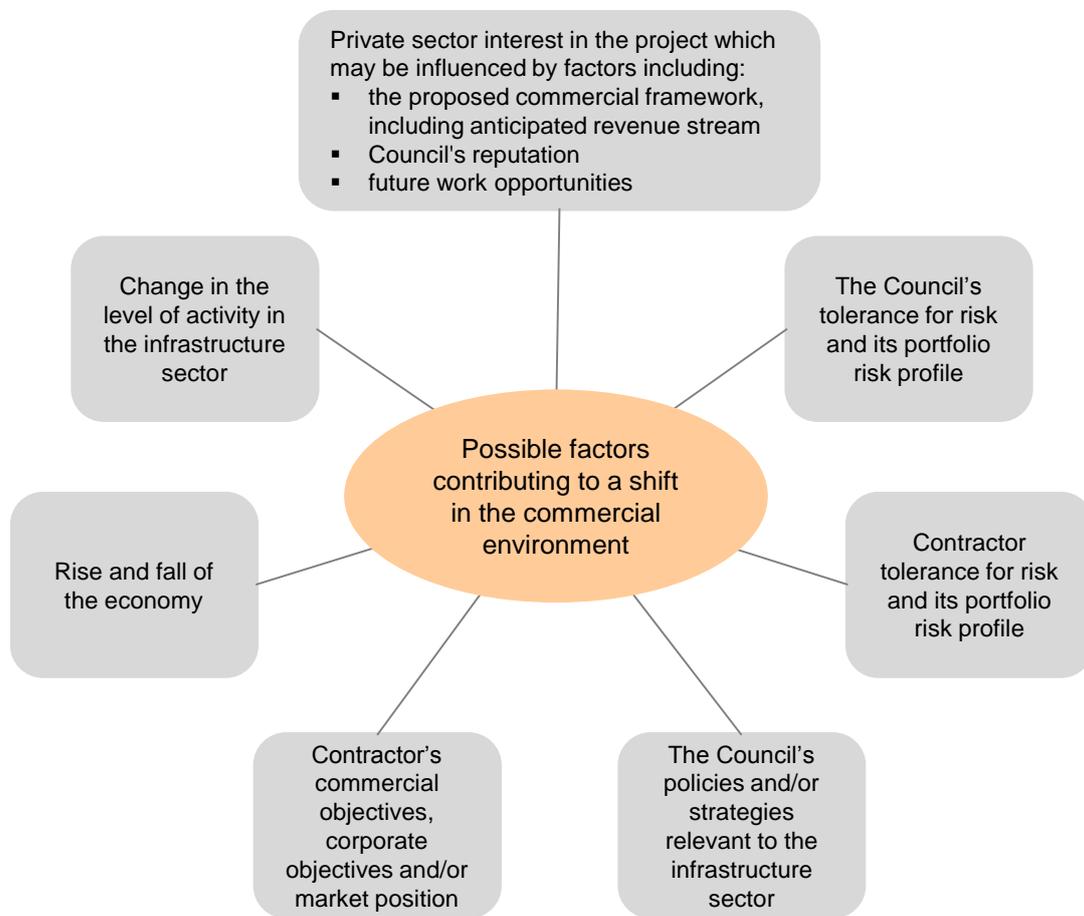
This should form the starting point for developing a more detailed commercial framework in the project development stage. To the extent that any underlying assumptions in the business case have

changed or if there have been other changes arising out of other project development activities, the impact of these changes needs to be considered when developing the detailed commercial framework.

6.3 Changing market conditions

The project team needs to have a sound understanding of the prevailing commercial environment, both at the time the business case was developed and at the time the project development activities are being undertaken. Any changes in market conditions need to be identified and analysed in the context of the commercial principles. Ideally, the commercial principles need to be flexible enough to accommodate changes due to a shift in the market. Changes in the commercial environment may arise due to a number of factors. Examples are set out in Figure 4.

Figure 4: The changing commercial environment



The Council will need to consider whether the above factors are likely to impact upon its ability to achieve the project objectives, and if there are project risks that need to be considered in light of section 6.6, *Assessing project risk*.

6.4 Funding and procurement model

The funding strategy and procurement method adopted by the Council has a significant impact on the commercial framework. If there has been a material change in the funding strategy or procurement model since the development of the high level commercial principles at the business case stage, this will obviously have a significant impact on the commercial principles. The project team will need to take this into account in developing the detailed commercial principles.

6.5 Interface with wider policies

The Council is encouraged to consider environmental and social impacts in its commercial framework and to use strategic and sustainable procurement processes to achieve an outcome that contributes to the strengthening of the community – provided the approach continues to demonstrate value for money. For a further discussion of the issues for consideration when developing the commercial framework, see section 11.5 of Part B1, *Developing the commercial framework*.

6.6 Assessing project risk

The development of the project's commercial framework should integrate the project's risk management plan developed as part of the project's business case. This stage will enable the Council to mould its desired risk profile for the project. A project risk register and risk management plan should have been developed at the business case stage to identify risks, assess the probability of occurrence, and determine the impact on the project. This may have been undertaken as a high level outline or in more detail including financial quantification. At this stage, the project team may need to refine and further develop the risk assessment. This includes pricing the risks (the financial impact assessment) if not already done, and putting an appropriate framework in place to ensure the Council's desired risk profile is reflected in the project documentation.

Risk strategies/treatment options

As outlined in section 10 of Part B1, *Risk Analysis*, the risk treatment stage of the risk management process involves identifying appropriate strategies to deal with identified risks. It is recommended that the project team categorises each of the risks identified and assessed in accordance Table 4, to determine the risk treatment options available to the Council. The Council's risk management strategies will need to be incorporated into the commercial framework and the commercial principles associated with the day-to-day operation and management of the project.

Table 4: Risk management strategies	
Risk strategies	Treatment options
<p>Risk prevention where it may be possible for the risk to be avoided</p>	<ul style="list-style-type: none"> ▪ reconfigure the commercial framework to avoid or eliminate the risk – for example, site risks may be avoided where it is possible to change the site location.
<p>Impact mitigation where the impact of the risk may be reduced</p>	<ul style="list-style-type: none"> ▪ reconfigure the commercial framework so as to reduce the risk ▪ obtain warranties and/or indemnities from the contractor in relation to the risk ▪ obtain insurance, performance security, or implement appropriate contract management strategies (see the section on risk management below).

Table 4: Risk management strategies

Risk strategies	Treatment options
<p>Risk transfer where it may be appropriate for the risk to be transferred from the Council to another party</p>	<ul style="list-style-type: none"> ▪ consider whether to allocate risk to the contractor or another project participant (see the section on risk allocation below) ▪ assess the need for a contingency plan.
<p>Risk acceptance where it is appropriate for the Council to retain the risk, and manage it internally</p>	<ul style="list-style-type: none"> ▪ consider whether the Council should retain the risk, for example where it is not commercially viable to allocate the risk to the contractor or where the Council is in the best position to manage the risk (see the section on risk allocation below) ▪ obtain insurance, performance security, or implement appropriate contract management strategies (see the section on risk management below) ▪ assess the need for a contingency plan.

Risk allocation

Allocating project risks through contractual arrangements can be an effective means of managing a project's risks. In negotiating the delivery of a project with a preferred contractor, the Council should be cognisant of the project's risks and clearly identify which party is exposed to the consequences of particular risks. The financial responsibility associated with specific risks could be transferred to the contractor through the primary project agreement (for example, financial responsibility for site contamination). In addition, the primary project agreement could build in appropriate incentives to drive the contractor's behaviour (for example managing timing risks through liquidated damages for late delivery).

The overarching principle is that risks should be allocated to the party best placed to manage them – this will result in the most efficient pricing of project risk. The aim should not be to allocate all project risks to the contractor, as this will lead to excessive risk premiums being paid by the Council, which in turn will have a negative impact on value for money.

The risk management checklist in Annexure 3, *Risk checklist* may be used as a template for allocating and documenting the allocation of risk.

Risk allocation considerations

- which party is best placed to control the events that may produce the risk?
- who is best placed to manage the risk?
- is the premium charged by the party assuming the risk, reasonable and cost-effective?
- is the party (that holds the risk) able to sustain the consequences if the risk occurs?
- as a consequence of transferring the risk, are there any new risks transferred back to the other party?

Risk management

There are various ways in which the Council can mitigate project risk through the careful application of a variety of tools and techniques. The most common of these are outlined below.

Project security

The Council needs to ensure that the contractor has, or has access to, sufficient resources to be able to absorb the financial impact arising from the risk allocated to them under the project documents.

Surety bonds or bank guarantees can be useful for transferring risk to a third party, usually a bank or insurance company, and are available in the following forms:

- **negotiation bond:** a bond for the period between tender submission and execution of the project documents, guaranteeing the contractor honours their tender submission
- **conditions precedent bond:** a bond guaranteeing a party's satisfaction of a condition precedent stipulated in the project documents
- **advance payment bond:** a bond covering an advance payment to the contractor for material not yet incorporated into the works, or works or services not yet performed
- **performance bond:** a bond for an agreed term guaranteeing the performance of the contractor in accordance with the project documents
- **parent company guarantee:** a guarantee required where the contractor is not the ultimate holding company in a company group and the Council is not satisfied with the security available directly from the contractor.

The Council should be able to make a call upon the bond or guarantee in the event of a contractor default or an outstanding debt due under the contract from the contractor to the Council (for example for liquidated damages).

Insurance

See section 6.7, *Insurance* for more information on the use of insurance as a risk management strategy.

Contract management

Robust contract management strategies – including compliance programs, monitoring and review processes as well as contingency plans – are critical tools for managing risk. For guidance on these and other contract management strategies see Part E, *Contract management*.

6.7 Insurance

Insurance is one means by which the parties can mitigate their exposure to project risks, having the effect of transferring some of the risk to the insurance company.

There are numerous types of insurance available in respect of a major infrastructure project. The more common types of insurance relevant for a major infrastructure project are set out in Table 5.

Table 5: Insuring against risk	
Insurance types	Nature of the insurance
<p>Contract works</p> <p>often referred to as 'Construction All Risk', 'Construction Material Damage' or 'Property Damage' insurance</p>	<ul style="list-style-type: none"> ▪ insures against loss or damage to the works ▪ the insurance should cover the cost of reinstating the works if damaged, including ancillary costs such as cleaning debris and price escalation ▪ the policy should be in the joint names of the Council and contractor.
<p>Business interruption</p>	<ul style="list-style-type: none"> ▪ insures against consequential or pure economic losses resulting from an interruption to or interface with business following damage to an asset insured against loss or damage in the point above.
<p>Workers compensation</p>	<ul style="list-style-type: none"> ▪ insures against liability for death or injury to employees – in many jurisdictions this insurance is provided under a legislative regime.
<p>Public liability</p>	<ul style="list-style-type: none"> ▪ insures against liability for damage to third party property or personal injury or death arising in connection with the works/project ▪ the policy should be in the joint names of the Council and contractor, and provide for respective rights and interests of all parties engaged in connection with the project.
<p>Product liability</p>	<ul style="list-style-type: none"> ▪ insures against liability for damage to third party property or personal injury or death arising in connection with the insured's product ▪ the policy should be in the joint names of the Council and contractor, and provide for respective rights and interests of all parties engaged in connection with the major infrastructure project.
<p>Professional indemnity</p>	<ul style="list-style-type: none"> ▪ insures against liability for breach of professional duty (for example, design faults, or professional advice that is incorrect) ▪ to be provided on a 'claims basis' meaning that the insurance must be in place at the time the claim for fault or error is made. Therefore, this insurance should be renewed for a period after completion of the service/works provided ▪ the policy will usually be in the name of the professional service provider, although it can be obtained as project specific insurance in joint names (at a significant cost).
<p>Project insurance</p>	<ul style="list-style-type: none"> ▪ this is a project specific insurance which combines insurance for damage to the works and public/products liability, and may also include marine/transit insurance, business interruption insurance or motor vehicle insurance ▪ the policy is typically procured by the Council and should be in the joint names of the Council and contractor.

The project team is likely to benefit from the services of an insurance adviser who has experience in advising on public sector infrastructure projects with a similar risk profile to that of the project.

The role of the insurance adviser would involve:

- analysing the risks for the project and the availability of insurance products in respect of those risks, and whether such insurance is necessary, unnecessary or recommended
- advising the Council as to the particulars for insurance, including, which party's name should be noted on the policy, who should be responsible for the premiums, levels of coverage and deductibles, application of proceeds and the validity period of the insurance policy
- ensuring that the contractual terms contained in all project documents are appropriate and consistent with the terms of the insurance policy, and ensuring that the project documents will not lead to the invalidation of the Council's insurance (any variations to the project documents should also be checked to ensure they meet these requirements)
- sourcing and implementing appropriate insurance, within Australia, or where necessary, overseas (prior to the contract being awarded).

Table 6 provides a basic insurance risk coverage checklist for the Council to use when assessing the need for insurance.

Table 6: Insurance risk coverage checklist	
Stage of the project	Issues
Prior to contract award	<ul style="list-style-type: none"> ▪ ensure appropriate and adequate insurance coverage has been selected ▪ ensure material matters relating to the relevant risks have been adequately disclosed in accordance with the insurance company's requirements ▪ ensure the contractual terms contained in all project documents do not invalidate the insurances required by the Council, and that the following matters are covered for each insurance required: <ul style="list-style-type: none"> ▪ 'named insureds' properly specified ▪ copies of the relevant policy wordings and schedules required ▪ requirements as to limits of indemnity and periods of cover ▪ ensure contractual indemnities and limitation of liability provided for in the project documentation do not impact upon preferred insurance regime ▪ consider the (possible) effect of applicable Commonwealth and State proportionate liability legislation (this will likely require legal advice) ▪ understand the obligations of the parties under the relevant policy to assist in investigation and/or defence of a claim and/or whether to refrain from making admissions or entering into compromises ▪ understand the rights available to recover costs and expenses once a claim has been made.
During the project	<ul style="list-style-type: none"> ▪ determine if there has been a circumstance, fact, event, occurrence, loss or a claim made, which requires notification ▪ ascertain if there has been a change in work scope, or a variation that may impact upon insurance coverage.

6.8 Documenting the commercial framework

Having undertaken the processes outlined so far in this Part C, the Council will be able to collate all the information obtained and the advice received to develop a comprehensive commercial framework that represents 'the deal' the Council is proposing to prospective tenderers.

The commercial framework will inform other project development activities from this point, particularly the development of contracts and technical documents. It is critical that the commercial framework is clearly documented and distributed as a reference point for the project team.

The commercial framework document needs to be reasonably detailed if it is to be useful. The preceding sections of this section 6, *Commercial framework* outlined some of the key matters for consideration in developing the commercial framework.

Table 7 provides some examples of the more detailed issues that should be documented in the commercial framework and the types of questions to be addressed. The list is not intended to be an exhaustive list of the commercial issues to be considered for major infrastructure projects, but is a sample of the kinds of risks and issues that may be relevant to the project.

Table 7: Issues relevant to the commercial framework	
Commercial issue	Considerations for the Council to assist with the establishment of the commercial principles
<p>Vires the relevant powers and authorisations required for the parties to enter into the project documents</p>	<ul style="list-style-type: none"> ▪ what are the Council's powers for carrying out the project? ▪ do any approvals or consents need to be obtained? ▪ what are the project participants' powers for carrying out the project? ▪ who is authorised to sign the agreements?
<p>Conditions precedent those conditions that need to be satisfied or waived prior to the key project documents becoming binding upon the parties</p>	<ul style="list-style-type: none"> ▪ what are the conditions precedent? ▪ are there any circumstances under which the conditions precedent can be waived? ▪ when do the conditions precedent need to be met, and if they are not met by such time, what are the consequences?
<p>Contract term the contract term for each key project agreements</p>	<ul style="list-style-type: none"> ▪ how long is the term for each key project document? ▪ do the terms of each document align/dovetail as required? ▪ can the contract terms be extended? ▪ can the contract term be terminated?
<p>Site selection and conditions surface, subsurface and airspace</p>	<ul style="list-style-type: none"> ▪ what comprises the site for the project? ▪ are there any notable known adverse site conditions? ▪ how will the site be assembled, and what is involved? ▪ is the confirmation of the site dependent upon any statutory approvals or other circumstances?

Table 7: Issues relevant to the commercial framework	
Commercial issue	Considerations for the Council to assist with the establishment of the commercial principles
<p>Environmental issues</p> <p>environmental issues affecting the site or the project scope</p>	<ul style="list-style-type: none"> ▪ are there any relevant environmental requirements? ▪ will it be necessary to undertake an environmental impact assessment and/or obtain environmental approvals? ▪ are there any contamination or pollution issues?
<p>Native title and artefacts</p> <p>third party native title claim affecting the site</p> <p>artefacts of significance discovered on the site during the construction period</p>	<ul style="list-style-type: none"> ▪ is there any existing/potential native title claim in respect of the site – if yes, who bears the risk? ▪ if an artefact is found at the site: <ul style="list-style-type: none"> ▪ who is responsible for its removal and at who's cost? ▪ who is responsible for any compensation payable? ▪ who owns the artefact in the event it is not claimed?
<p>Planning and other approvals</p> <p>planning and other statutory approvals and licences required for the project</p>	<ul style="list-style-type: none"> ▪ what (if any) planning approvals, other statutory approvals, licences or permits are required for the project? ▪ who is responsible for obtaining each approval/licence/permit? ▪ what are the deadlines for obtaining these approvals/licences/permits? ▪ who bears the cost? ▪ who bears the risk of delay (and the associated delay costs) where approvals/licences/permits delay the project? ▪ are there any existing planning requirements that need to be complied with and who is responsible for compliance?
<p>Site access</p> <p>access by the contractor, the Council, other contractors of the Council, the financier and third parties</p>	<ul style="list-style-type: none"> ▪ what is the availability of the site? ▪ do any third party rights exist? ▪ what is the site access regime (access or possession, co-ordination with other contractors, Council and financier access rights etc.)? ▪ who will be responsible for the security and maintenance of the site during the construction phase?
<p>Tenure</p> <p>ownership and occupation rights in relation to the site during construction and operation phases (if relevant)</p>	<ul style="list-style-type: none"> ▪ what property rights need to be put in place to carry out the project, for example, licences, leases, sub-leases, etc.? ▪ will there be a transfer of ownership in land?
<p>Design</p> <p>design responsibilities need to be determined (generally dictated by the Council's preferred procurement model)</p>	<ul style="list-style-type: none"> ▪ who is responsible for the design? ▪ what warranties are required in respect of the design? ▪ who bears the cost of the design defects? ▪ what liability does the contractor have in respect of any design/requirements of the Council? ▪ if there is a design approval regime, what will it be?

Table 7: Issues relevant to the commercial framework	
Commercial issue	Considerations for the Council to assist with the establishment of the commercial principles
<p>Construction, commissioning and completion</p> <p>construction, commissioning and completion responsibilities for the asset/services</p>	<ul style="list-style-type: none"> ▪ who is responsible for the construction and commissioning of the project asset(s)? ▪ what is the completion regime and what requirements need to be satisfied to achieve the completion milestones for example: <ul style="list-style-type: none"> ▪ mechanical completion and practical completion ▪ performance testing periods ▪ defects period ▪ final completion ▪ how are defects to be dealt with both during construction and post completion?
<p>Relief events</p> <p>circumstances that give rise to extensions of time and/or delay costs</p>	<ul style="list-style-type: none"> ▪ what are the relief events? ▪ how does the contractor obtain an extension of time (qualifying criteria and process requirements)? ▪ how long is the contractor entitled to time relief? ▪ who will bear the costs?
<p>Security</p> <p>liquidated damages</p> <p>bank guarantees/retention</p> <p>parent company guarantees</p>	<ul style="list-style-type: none"> ▪ is security required for performance, advanced payment, payment for unfixed items, other matters? ▪ does the Council wish to have an entitlement to liquidated damages, and if so under what circumstances? ▪ does the Council wish to make provision for a parent company guarantee under particular project agreements?
<p>Service requirements, standards and specifications and consequences for late or inadequate performance</p> <p>relevant for most projects even where post construction maintenance/service does not form part of the central procurement model</p>	<ul style="list-style-type: none"> ▪ what are the service requirements post construction? ▪ what are the performance standards and specifications? ▪ how will performance be assessed, and what are the KPIs? ▪ what are the consequences of poor or outstanding performance?
<p>Maintenance and refurbishment</p> <p>post completion maintenance and refurbishment responsibilities</p>	<ul style="list-style-type: none"> ▪ does the Council require the contractor to maintain and/or refurbish the constructed asset?
<p>Performance monitoring and review</p> <p>performance monitoring</p> <p>audits</p> <p>reporting</p>	<ul style="list-style-type: none"> ▪ does the Council wish to establish a project control group to monitor and review progress? ▪ what auditing rights does the Council require? ▪ what information does the Council require the contractor to provide with respect to assessing performance, for example monthly progress reports, test results and having the Council inspector present at testing etc.?

Table 7: Issues relevant to the commercial framework	
Commercial issue	Considerations for the Council to assist with the establishment of the commercial principles
<p>Price and payment price structure payment regime</p>	<ul style="list-style-type: none"> ▪ what are the proposed price structures for key project agreements? For example: <ul style="list-style-type: none"> ▪ lump sum ▪ cost plus ▪ guaranteed maximum price ▪ schedule of rates ▪ hourly rates ▪ how is the fee to be calculated? ▪ how often can a payment claim be submitted? For example: <ul style="list-style-type: none"> ▪ periodically (for example monthly) ▪ upon achievement of specified milestones ▪ what proportion, if any, of the service fee is abatable? ▪ is the fee subject to rise and fall, indexation, foreign exchange movements etc.? ▪ are disbursements included in the fee or claimed separately?
<p>Benchmarking comparing costs throughout the life of the project can assist with value for money assessments and ensure costs remain competitive</p>	<ul style="list-style-type: none"> ▪ is there any opportunity for benchmarking? ▪ if so, how are any increases/decreases to the relevant payments apportioned?
<p>Sub-contractors collateral warranties subcontractor approval form of subcontracts</p>	<ul style="list-style-type: none"> ▪ does the Council require collateral warranties from sub-contractors? ▪ does the Council require subcontracts to be in a particular form, or include particular provisions? ▪ does the Council wish to pre-approve subcontractors?
<p>Variations cost and time implications process requirements</p>	<ul style="list-style-type: none"> ▪ what variations are permitted and who may suggest them (the Council and/or the contractor?) ▪ what is the procedure for instructing and approving variations? ▪ what costs are payable for variations? (consider overheads and profit, margin, contractor proposed variations) ▪ who bears the risk of delays due to variations?
<p>Changes in law</p>	<ul style="list-style-type: none"> ▪ who bears the risk of a changes in law, and under what circumstances? ▪ what are the process/claim requirements? ▪ does the agreement distinguish between discriminatory and general changes in law?

Table 7: Issues relevant to the commercial framework	
Commercial issue	Considerations for the Council to assist with the establishment of the commercial principles
<p>Force majeure unforeseeable events beyond the reasonable control of the parties, which may have a catastrophic effect on the viability of the project</p>	<ul style="list-style-type: none"> ▪ what are the force majeure events for relevant project agreements? ▪ who will bear the cost and time risks associated with a force majeure event? ▪ which force majeure events are insurable? ▪ when will termination rights arise (if at all) for prolonged force majeure and who may exercise them?
<p>Insurance relevant to the construction and operation phases</p>	<ul style="list-style-type: none"> ▪ what insurances are necessary for the project? ▪ who is responsible for obtaining the various insurances? ▪ what are the requirements for each insurance? (for example, named insureds, period of insurance, limits of indemnity, deductibles, evidence of insurance, application of proceeds, reinstatement obligations, cross liability etc.) ▪ who is responsible for the payment of the insurance premiums and deductibles? ▪ are there notice requirements to consider?
<p>Default default events consequences of default co-ordination of project agreements</p>	<ul style="list-style-type: none"> ▪ what are the default events in the key project agreements? ▪ what are the consequences of a default event? ▪ who bears the costs in relation to a default event? ▪ do the default provisions of the project agreements align/dovetail as necessary?
<p>Termination grounds for termination consequences of termination co-ordination of project agreements</p>	<ul style="list-style-type: none"> ▪ when can the agreement be terminated? (for example, default, force majeure, for convenience) ▪ what payments are due, and to whom, on termination? ▪ what are the restrictions on termination? (for example, direct agreements with financiers) ▪ what are the consequential impact of termination on other project documents? (for example, do the termination provisions of the project agreements align/dovetail as necessary?)
<p>Step-in Council step in rights financier step in rights</p>	<ul style="list-style-type: none"> ▪ does the Council wish to reserve the right to step in, and if so in what circumstances? ▪ will the financier (if there is one) require step in rights, and if so in what circumstances? ▪ what are the parties' rights, obligations and liabilities in relation to the Council/financier exercising step in rights?
<p>Exit arrangements and handover – maintenance and operation agreements procedures for handover at the end of the contract term need to be put</p>	<ul style="list-style-type: none"> ▪ what is the required asset condition at the end of the contract term, to enable handover of the asset to the Council? ▪ what procedures need to be in place to ensure business continuity at the end of the contract term?

Table 7: Issues relevant to the commercial framework	
Commercial issue	Considerations for the Council to assist with the establishment of the commercial principles
in place to effect a smooth transition with minimal business and service interruption	<ul style="list-style-type: none"> ▪ what rights need to be terminated? ▪ what are the residual liabilities after handover for the contractor?
Dispute resolution dispute process	<ul style="list-style-type: none"> ▪ what is the dispute resolution procedure for the key project agreements (consider dispute escalation, litigation v arbitration, alternative dispute methods) ▪ are the dispute resolution procedures consistent across the project agreements, and do they align/dovetail as necessary?
Indemnities and warranties warranties may reduce the amount of due diligence to be undertaken, or transfer the responsibility for due diligence to another party indemnities are a contractual promise to hold the indemnified party harmless against specified losses or damages that they may suffer indemnities can be time limited or financially capped	<ul style="list-style-type: none"> ▪ what warranties will the Council require in the key project agreements? ▪ what warranties will the Council provide to the contractor (if any)? ▪ what indemnities are required by the Council? ▪ is the Council prepared to give any indemnities? ▪ what are the limits of any such indemnity?
Probity probity requirements	<ul style="list-style-type: none"> ▪ what obligations should be included in relevant project agreements to assist/enable the Council to comply with its probity requirements?
Confidentiality confidential information	<ul style="list-style-type: none"> ▪ what aspects of the project should remain confidential? ▪ what constitutes confidential information and who should be privy to it? ▪ what safeguards can be put in place to ensure confidentiality is maintained?
Intellectual property ¹² ownership rights licences for the use liability	<ul style="list-style-type: none"> ▪ what is the relevant intellectual property in the project? ▪ who will retain ownership of the intellectual property rights? ▪ will any licences for the use of intellectual property need to be granted? ▪ what are the consequences of infringing third party intellectual property rights in connection with the project?

It is anticipated that in establishing the commercial framework for the project, the Council will be heavily reliant upon the advice and guidance of its commercial and legal advisers.

¹² *Working with Government: Risk Allocation and Commercial Principles*, New South Wales Treasury (May 2007). See also *Partnerships Victoria, Standard Commercial Principles Guidance Material*, Department of Treasury and Finance (June 2005).

6.9 Finalising the commercial framework

Once the commercial framework has been documented, it should be compared with the business case. If there are any material departures, the project team should consider whether it is necessary to obtain the Council's approval for such departures or amend current instruments of delegation.

Only once the Council has finalised its commercial framework will it be in a position to proceed with the development of the project documents and embark upon the competitive tender process.

As previously noted, it is likely that amendments will be made to the commercial framework during the tender phase when the Council and the contractor negotiate the project agreements. However, a clearly documented commercial framework can assist those involved in the negotiations to maintain a clear picture of the Council's key objectives for the project as well as the impact of compromising particular elements of the framework.

7. Project agreements

The development of the Council's project agreements should be driven by the Council's legal advisers. The commercial framework provides a useful starting point for instructing legal advisers on the 'deal' to be reflected in the contract documents.

For complex projects it is important that all legal documents for the project (collectively the 'project documents') are consistent and work interactively with each of the individual project documents. This includes project delivery agreements, funding agreements and any financing documents relevant to the project.

The Council is in a considerably stronger bargaining position prior to the selection of the preferred tenderer. Therefore (in so far as it is reasonably possible) the Council should aim to have reached agreement internally on the commercial framework, and have developed the project documents prior to approaching the market with a competitive tender process.

Upon the selection of the preferred tenderer, it is to be expected that the tenderer will seek to negotiate terms that are more favourable to it.

7.1 Term sheet or full contract documents?

Taking into account the advice of its legal advisers, the project team needs to make a decision as to whether it is more appropriate to provide tenderers with:

- term sheets outlining the key commercial and risk allocation principles for the project, or
- fully documented project agreements.

In general, it is more advantageous for the Council to have fully developed contract documents before embarking on the tender process, given the relative strength of the Council at that stage and the competitive tension that the tender process creates.

Where the project team opts to use term sheets for the tender process, they should create a clear and unambiguous outline of the key terms and associated risk allocation in each of the key project documents.

The advantages and disadvantages of each of these approaches is summarised in Table 8.

Table 8: Term sheets v full contract documents	
Term sheet	Full contract documents
Advantages:	Advantages:
<p>Having greater flexibility in the document provides more opportunity for the contractor to enhance the commercial framework through innovation, explore complex or one-off issues, refine the service specification and/or the performance regime.</p> <p>Difficulties with the bankability of the commercial framework can be rectified at the tender stage, before time and money are invested in fully documenting the agreements.</p> <p>There is greater opportunity for the contractor to clarify issues or for the Council to be made aware of objections to particular contract provisions.</p>	<p>Greater certainty for the Council and the tenderer provides the tenderer with a clear and complete indication of its responsibilities and obligations for the project.</p> <p>The tenderer should be able to make a reasonable assessment as to the financial impact of the risk allocation and therefore provide a firm price.</p> <p>The tenderer should be able to confirm the availability/unavailability of private finance and the cost of such finance.</p> <p>The tenderer should be able to develop a business case and financial modelling setting out the predicted revenue stream for the life of the project (where relevant).</p> <p>There is less chance of the Council having to compromise on the structure for its commercial framework.</p>
Disadvantages:	Disadvantages:
<p>It may be more difficult for the tenderer to provide a firm price.</p> <p>The tenderer may not be able to confirm whether private finance is available due to there being insufficient detail available in relation to the project.</p> <p>There is more scope for the successful tenderer to increase its price during the contract negotiations, on the basis that the term sheet is not properly or fully identify a particular risk or association risk allocation.</p>	<p>There is little or no opportunity for innovation with regard to the commercial framework.</p> <p>Where the agreements need to be substantially redrafted (for example due to the Council and preferred tenderer heavily negotiating the terms, or where there are problems with the bankability arrangements), this will result in increased costs to the Council and delay.</p>

7.2 Key contracts

The broad range of procurement delivery models covered in this Major Projects Guidance makes it difficult to provide the Council with samples and/or details of all key contracts and documents relevant to each major infrastructure project. Generally, however, project documents may include:

- an overarching project agreement between the Council and main contractor/consortium. For example:
 - project alliance agreements (alliance only)

- project agreement
- development agreement
- concession agreements (DBFM, DBFM)
- construction works contract(s) and specifications
- site agreements/property leases/licences
- operations and maintenance agreements
- supply and off-take agreements
- service contracts
- operational licences/regulatory approvals
- security documents (for example parent company guarantees and bank guarantees)
- finance documents
- inter-government funding agreements.

The project team will need to rely on their legal advisers for guidance on the types of agreements and other legal instruments that are required for the project. The key terms for the project agreements will reflect those commercial issues outlined in Table 7 that are relevant to the Council's project.

7.3 Document management

The Council's legal advisers should be responsible for ensuring that the overall commercial framework established by the Council is reflected in the project documents, and are explained to, and understood by, the project team and the Council.

In addition to advising on the development of the project documents, the Council's legal advisers should have responsibility over the document management for all of the legal project documents. This responsibility involves managing the various versions of the project documents that evolve through the document development and negotiation processes, and assessing which parties need to review changes or provide further instructions. Amended documents should only be circulated to parties with a direct interest, in order to avoid unnecessary discussions and delays.

All matters agreed upon should be recorded in meeting notes and confirmed at the end of each meeting, or otherwise documented to reduce the risk of issues being revisited and to provide clear instructions for contract drafting purposes.

The project program should establish deadlines for the submission of draft and final documents to the Council, and time periods for negotiation with tenderers and completion of the project documents.

7.4 Tailored contracts v standard forms

Standard form contracts are widely used in the construction industry and, with some important special conditions, are suitable for much of the Council's infrastructure procurement. However, the use of standard form contracts will often be inappropriate for the purposes of a major infrastructure project, given the complexity, value and scale of the project and its importance to the Council and stakeholders.

For a major infrastructure project, the Council will generally need to develop project specific contracts, based upon the commercial framework established for the project by the Council.

8. Specifying technical requirements

8.1 Developing the technical documents

The Council's requirements for the works and services for the project must be clearly and accurately documented in the project documents. It is this information upon which tenderers cost their submission and it is these documents that define what the contractor or service provider will do and to what standard.

Establishing the Council's technical requirements for the project is a critical work stream during the project development stage, which must be completed prior to embarking on the tender process. This does not always mean that detailed design documents need to be produced prior to tendering the project. There is a range ways in which the technical requirements and associated design documents can be developed for the project. These are considered below.

8.2 Design brief

For a major infrastructure project, it is likely that the Council will engage a technical adviser to assist with the preparation of the technical requirements, starting with a design brief. The Council may have already engaged a technical adviser during the business case stage.

The nature of the design brief will depend on the nature of the technical requirements being developed, and in particular, whether the Council will be providing tenderers with a detailed prescriptive specification or an output/performance specification.

8.3 Link to procurement model

The use of a prescriptive or output based specification for the project largely depends upon the procurement model chosen.

For example, a detailed, prescriptive specification is the forward procurement path for a construct only procurement, whereas a Design, Build, Finance, Operate (DBFO) procurement is requires the use of an output specification. Part B2, *Procurement options*, sets out the nature of the specification used for different procurement models.

The following sections provide an overview of prescriptive and output based specifications.

8.4 Prescriptive specification

A prescriptive specification, sometimes also referred to as a material specification, is a detailed description of the works or services which are to be performed by the contractor or service provider. This type of specification is said to be based on the specification of inputs and forms the basis of the traditional construct only procurement model.

Prescriptive specifications are often very comprehensive and generally include detailed drawings/design, sometimes even stating the brand of the material, its thickness, what it is made of, its colour, durability, the standards it is required to meet, how it is applied, any relevant preparation for its application, and the location of its application, etc.

Prescriptive specifications are most effective where there is a reliable connection between the objectives of the project and the specified materials, means and methods. A prescriptive specification gives the Council close control over the final product or service, and has the benefit of being easy to price.

Local government has traditionally procured the bulk of its infrastructure using prescriptive specifications and is well versed in developing such specifications. Therefore, only a few points are included below on developing prescriptive specifications as follows:

Buildability: where a prescriptive specification is produced by the Council for the construction of an asset, the Council generally bears the risk of the 'buildability' of the design.

Design/fitness for purpose warranties: unless otherwise agreed, the Council bears responsibility for the design solution achieving its objectives and being fit for its intended purpose, and for any additional costs arising due to errors, omissions or ambiguities in the documents or the works not being properly or fully specified.

Clarity and consistency: to avoid ambiguity (and potentially additional costs to the Council and delays to the project) the specification must be clear, complete and consistent. Different components of the specification may be prepared by different people and it is important to thoroughly checking the entire document to ensure it is clear, complete and consistent.

Appropriate use of standard specifications: where standard specifications are incorporated into the specification for the project, it is important to ensure that the standard specification is up to date, complies with applicable legal requirements, and is consistent with the other sections of the specification.

Contract terms: the specification should not contain contract terms, particularly terms inconsistent with the project agreements.

8.5 Output specification

In contrast to a prescriptive specification, an 'output' or 'performance' specification sets out the user requirements or the functionality of the asset or services required by the Council. The design of the assets for the project, or the manner in which services are provided, are left to the contractor to determine within the parameters set out in the specification. This has the advantage of providing flexibility to the contractor to achieve efficient and innovative solutions in delivering the required outputs.

Output specifications that are unnecessarily onerous or prescriptive can be detrimental to the objectives of the project. Where possible, the output specification should provide the tendering party (and ultimately the contractor) with the opportunity to propose the most innovative, cost-effective and flexible solution by providing:

- scope for technical innovation
- flexibility in how the asset is designed or the services are provided
- integration of design and construction together with operational and maintenance services (if included in the scope), in order to achieve optimal construction and operational efficiency.

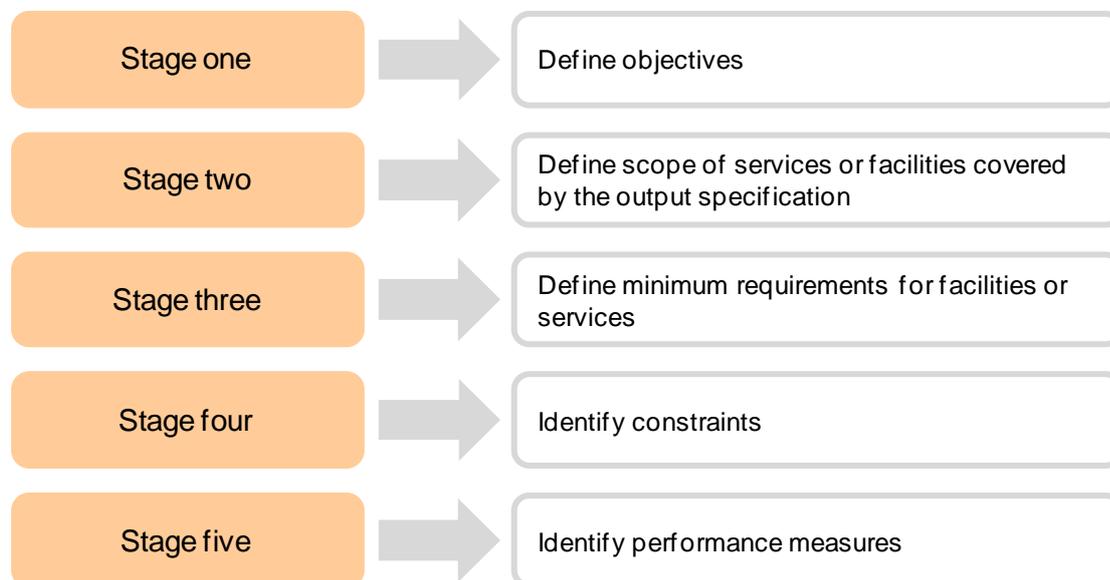
This approach is most beneficial to the Council when it is coupled with contract documents that provide for an effective risk transfer from the Council to the contractor, where this is achievable at a reasonable cost, creating a single point of responsibility.

An output specification works best when the Council has (or has engaged an adviser with) the necessary expertise to clearly articulate the requirements, and develop comprehensive performance indicators for assessing the performance and output requirements.

Developing an output specification

The key stages involved in preparing an output specification are illustrated in Figure 5.

Figure 5: Developing an output specification



The key elements to take into consideration when preparing the output specification are set out in Table 9.

Table 9: Key elements of an output specification	
Project description	An accurate and concise outline of the Council's requirements will ensure that the tendering parties understand the Council's needs in respect of the facility and/or services being tendered.
Organisational chart	This should include aspects of the Council's organisation and management system that may have important implications for the services to be provided, particularly where interfaces will rise.
Stakeholder requirements	Specific stakeholder requirements that the Council requires the contractor to cater for (the detailed requirements of which would be confirmed in the output specification) should be specified.
Project objectives	A description of the objectives of the project is essential. Of particular importance will be issues such as flexibility for future change, robustness of process for a range of load conditions, etc.
Performance standards	This should include: <ul style="list-style-type: none"> ▪ the extent and nature of the services to be provided over the operational term of the contract ▪ the minimum level of service standards to be achieved

Table 9: Key elements of an output specification

	<ul style="list-style-type: none"> ▪ the load criteria (volume, characteristics, variation) ▪ details of monitoring and compliance criteria ▪ the KPIs, all of which must be measurable, achievable and realistic.
Quality standards	<p>This should include:</p> <ul style="list-style-type: none"> ▪ minimum quality criteria to apply to the asset ▪ the codes and standards, which must be satisfied ▪ the requirements for design checking and approval. These would include the requirements to ensure good practices, quality control and quality assurance procedures, testing and commissioning criteria.
Constraints	<p>This involves defining the technical constraints which may have to be taken into account in the design, construction or operational phases of the project in order to meet EIS or planning objectives, the requirements of stakeholders, or other limits on the project. The Council's stakeholder engagement process may have resulted in the inclusion of contract requirements and constraints in the technical requirements.</p>
Baseline assessment	<p>Developing a clear baseline assessment against which service performance is measured is critical to the successful implementation of an output specification for the project.</p>

Performance requirements – KPIs and abatements

In order to assess the performance of the contractor with regard to the achievement or progress towards meeting the output specification requirements, the Council will be required to develop relevant KPIs. These will assist the Council to objectively verify and quantifiably measure the contractor's performance.

When drafting a KPI, the Council should identify the factors listed in the checklist below, all of which, where practical, should be reflected in the output specification or a project agreement as appropriate (for example the KPIs may be set out in the specification but the payment/abatement regime should be enshrined in the relevant project agreement).

Drafting KPIs

- identify which service component to which the KPI relates
- identify the required goals, standards and/or outputs relevant to the KPI
- identify the Council's method for measuring compliance with the KPI
- where appropriate, establish a sliding scale for performance and identify how the achievement of each level of performance correlates to the payment mechanism. For example, where the KPI is met – no reduction in fee, where KPI is 80 per cent satisfied – 5 per cent reduction in the fee payable, where KPI is <80 per cent satisfied -10 per cent reduction in fee payable.

- ensure that the KPIs are ‘SMART’:
 - **specific:** clear, unambiguous and easy to understand by those who are required to achieve them
 - **measurable:** by the Council, contractor and any third party assessor
 - **achievable:** the KPI must establish a realistic level of performance for the provision of the service/output
 - **relevant:** directly relates to the Council's objectives and outputs for the operations phase
 - **timed:** a timescale indicating when the KPI is to be achieved/measured should be clearly set out
- ensure the KPIs have sufficient flexibility and are robust enough to withstand amendments to the specification during the contract term.

The project documents should also set out an assessment procedure for reporting and recording the contractor's performance against the KPIs.

How to draft a KPI assessment system

- identify the assessor, and where the assessor is not the Council, identify a process for confirmation of the assessment by the Council
- specify the tools and/or methods used by the assessor for measuring the contractor's performance against the KPI
- specify clear timescales for the assessment to be carried out
- determine when the contractor's performance is at an unsatisfactory level and the circumstances in which the failure to perform needs to be rectified as well as a process for proceeding with the rectification.

Payment mechanism

If the project involves the payment of a service fee or availability charge during the operational phase (for example a DBFM or DBFO), the Council will need to incorporate into the commercial framework (and ultimately the project agreements) an appropriate payment mechanism for service delivery or availability throughout the life of the project. This payment mechanism will need to set out the amount of the fee, and should include an abatement regime.

The payment mechanism should:

- define the fee or fees payable in a clear manner
- establish the regularity of payment (for example monthly or annually)
- specify the timing of claims and payments
- determine who may submit and approve claims

- specify the detail to be included in payment claims
- be directly related to the LPIs/performance requirements
- outline the abatement regime, including the circumstances in which the fee will be abated and the method of calculating the abatement.

The abatement regime should specify the circumstances in which the service fee may be abated for failure to meet the KPIs or performance measures. Abatement regimes incentivise the contractor to continually meet (or exceed) the service requirements. The Council may also wish to include provisions which incentivise the contractor to improve their performance through innovation or where efficiency savings are made.

9. Finance and funding documents

This section is only relevant where the Council is obtaining funding from other levels of government for the project, or the Council or the contractor has obtained debt financing for the project.

9.1 Inter-government funding

Where the Council is the recipient of State, Territory or Federal Government funding for the project, it is likely that the Council will be required to enter into a funding agreement with the relevant government department.

The project team must ensure that in developing the project, any conditions of funding set out in the funding agreement will be satisfied. Often this will involve incorporating relevant provisions of the funding agreement in the project agreements and the specifications to pass through to the obligations to the relevant party.

The agreement may require that certain approvals be obtained or that the project being reviewed using the Gateway process. The project plan should take into account the likely timeframes for complying with such requirements. (See Appendix 4, *Gateway review process*).

As a project funder, the relevant government department will also be a key stakeholder in the project and should be consulted as part of the stakeholder engagement process.

9.2 Project financing

Where the Council is relying on debt finance for the project, or the procurement model necessarily involves the contractor arranging project financing for the project, another layer of complexity is added to the project development process. This is the case with PPP arrangements such as DBFO, DBFM, BOO, BOOT and BOT. See Part B2, *Procurement options*.

The financiers are likely to impose requirements in relation to the project arrangements, including the financial modelling for the project, the technical requirements and the project agreements. These need to be negotiated and agreed with the financiers, a process that can be involved and time consuming. The suite of financing agreements also needs to be finalised. The Council resources required to enable this to occur (in terms of both time and expertise) need to be factored in to the project plan and implementation timetable.

Where the project is being project financed, the Council would benefit from the services of a financial adviser throughout the project development stage.

10. Further resources

Victoria

Local Government Victoria Best Practice Procurement Guidelines, Department of Planning and Community Development (2013).

Partnerships Victoria Detailed Guidance Material: Updated Standard Commercial Principles, Department of Treasury and Finance, Partnerships Victoria (April 2008).

Partnerships Victoria: Guidance Material: Overview, Department of Treasury and Finance, Partnership's Victoria (July 2006).

New South Wales

Governance Health Check: Self Audit Guide to Good Governance in Local Government, Independent Commission Against Corruption (June 2004).

Technical Note No. 3: How to Appoint and Manage Advisors to PFI Projects, Treasury Taskforce (2010).

Working with Government: Risk Allocation and Commercial Principles, New South Wales Treasury (May 2007).

Queensland

Queensland Purchasing: Better Purchasing Guide: Ethics, Probity and Accountability in Procurement, Department of Public Works, Crime and Misconduct Commission (October 2006).

South Australia

Background Paper 1, An Historical and Political Context and the Imperatives for Governance Reform, Professor Dean Jaensch on behalf of Local Government Association of South Australia (April 2003).

Background Paper 2, Governance: Some Experiences of Local Government Professor Bill Russell on behalf of Local Government Association of South Australia, (April 2003).

Background Paper 3, Legal Responsibilities for Governance: Local Government, State Government, The Parliament, Business Sector, Michael Kelliedy on behalf of Local Government Association of South Australia (April 2003).

Community Engagement Handbook, A Model Framework for leading practice In Local Government in South Australia, Local Government Association of SA and the SA Government through the Office for State/Local Government Relations (March 2008).

Northern Territory

Local Government Association of the Northern Territory (LGANT) website: www.lgant.asn.au.

Options for Regional Governance in the Northern Territory, Consultation Paper, Regional Governance Working Group (March 2013).

Tasmania

Independent Review of Structures for Local Governance & Service Delivery in Southern Tasmania – Final Report, Independent Panel to the Southern Tasmanian Councils (2011).

The Practices of Local Governance: A Tasmanian Case Study, Denbeigh J Armstrong, School of Geography and Environmental Studies, University of Tasmania (April 2010).

Your Role as Councillor and Achieving Good Governance, Presentation at LGAT Pre-election Workshops, State of Tasmania, Local Government Division (6-9 June 2011).

Western Australia

Procurement Practice Guide: A Guide to Products and Services Contracting, for Public Authorities, Government of Western Australia, Department of Finance, Government Procurement (January 2013).