

# MAJOR PROJECTS GUIDANCE FOR LOCAL GOVERNMENT

Overview

Part A: Strategic assessment

Part B1: Business case – developing the business case

Part B2: Business case – procurement options

Part B3: Business case – funding and financing options

Part C: Project development

**Part D: Tender process**

Part E: Contract management

Part F: Project review

Annexure 1: Reports to the Council

Annexure 2: Sources of power for local government

Annexure 3: Risk checklist

Annexure 4: Gateway review process

Annexure 5: Case studies

Bibliography



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# Contents

- ABOUT PART D .....1**
- OVERVIEW OF PART D – TENDER PROCESS .....2**
- 1. THE TENDERING PROCESS .....3**
  - 1.1 Overview .....3
    - Process requirements for major projects ..... 4
    - Requirements for regional collaboration ..... 6
  - 1.2 Contracting with local government.....6
    - Ability to contract..... 6
    - Tender documentation may be binding..... 6
  - 1.3 Best value and competition .....7
  - 1.4 Probity .....8
  - 1.5 Third party challenges to the process .....10
- 2. EMBARKING ON THE TENDER PROCESS.....11**
  - 2.1 Evaluation team .....11
    - Evaluation plan..... 11
    - Evaluation criteria..... 12
  - 2.2 Communicating with tenderers .....13
    - Communication protocol ..... 13
    - Forms of communication with tenderers ..... 14
    - Interactive tender process..... 15
- 3. EXPRESSION OF INTEREST STAGE .....15**
  - 3.1 Developing the invitation for EOI .....16
    - Level of detail for the invitation for EOI ..... 17
    - Company information required to assess 'capability' ..... 17
  - 3.2 Advertising the invitation for EOI.....18
    - Evaluation of EOI responses ..... 18
    - Short-listing of EOI respondents ..... 19

3.3	Relevant legislative requirements and guidelines for the EOI process .....	19
<b>4.</b>	<b>REQUEST FOR TENDER STAGE.....</b>	<b>26</b>
4.1	Developing the Request for Tender .....	26
4.2	Clarifying or seeking additional information .....	27
4.3	Close and record of tenders.....	27
4.4	Relevant legislative requirements and guidelines for the RFT process.....	28
<b>5.</b>	<b>EVALUATION OF TENDER SUBMISSIONS.....</b>	<b>32</b>
5.1	Tender evaluation committee.....	32
5.2	Tender evaluation plan.....	33
5.3	Evaluation criteria and value for money.....	33
5.4	Communication with tenderers .....	34
5.5	Non-conforming bids .....	34
5.6	Evaluation report .....	34
	The Council's right not to select any tender .....	35
5.7	Short-listing options.....	35
	BAFO .....	35
	Interactive bidding/negotiation process.....	35
5.8	Relevant legislative requirements and guidelines for the evaluation process .....	36
<b>6.</b>	<b>NEGOTIATION .....</b>	<b>41</b>
6.1	Negotiation strategy .....	42
	Negotiation Plan .....	42
6.2	Negotiation phases .....	43
6.3	Limitations to negotiations .....	44
	Creating impressions .....	44
	Negotiations in accordance with tender documents .....	44
<b>7.</b>	<b>SELECTION OF PREFERRED TENDERER .....</b>	<b>44</b>
<b>8.</b>	<b>BRIEFING UNSUCCESSFUL TENDERERS .....</b>	<b>44</b>
8.1	Notification .....	44
8.2	Relevant legislative requirements and guidelines for briefing unsuccessful tenderers .....	45

<b>9.</b>	<b>CLEAR AUDIT TRAIL .....</b>	<b>47</b>
<b>10.</b>	<b>COMPLETION .....</b>	<b>48</b>
10.1	Award of contract .....	48
10.2	Contractual close .....	48
10.3	Financial close .....	49
<b>11.</b>	<b>FURTHER RESOURCES .....</b>	<b>49</b>

**TABLES**

Table 1:	Process requirements for major projects.....	5
Table 2:	Key probity principles in the tendering process.....	9
Table 3:	Key considerations for drafting the evaluation plan .....	12
Table 4:	Key considerations in developing evaluation criteria .....	13
Table 5:	Key considerations for drafting the communication protocol .....	13
Table 6:	Content of the invitation for EOI .....	16
Table 7:	Key evaluation criteria for the EOI response.....	18
Table 8:	Developing the EOI .....	19
Table 9:	Publishing the EOI.....	22
Table 10:	Assessing EOI.....	24
Table 11:	Requirements for developing RFT .....	28
Table 12:	Evaluation of tenders.....	36
Table 13:	Notifying successful/unsuccessful tenderers .....	45

**FIGURES**

Figure 1:	Overview of Part D – Tender process.....	2
Figure 2:	Tendering process stage by stage .....	3
Figure 3:	Expression of interest stage.....	15
Figure 4:	Request for tender stage.....	26

## About Part D

Local government is in the business of acquiring or procuring goods, services and works for the benefit of the community they serve. An effective and transparent tender process that achieves value for money is in the interest of all project stakeholders – the Council, the community and the bidding parties.

Part D focuses on structuring an effective tender process by looking at each of the stages involved.

### Key objectives of the tender process

Having completed the tender process in accordance with this section, the Council will have achieved:

- a tender process that is:
  - structured to facilitate competitive tendering
  - transparent in order to withstand public and private scrutiny
  - clearly defined with specified timeframes
  - structured to achieve certainty and value for money while effectively managing process risks
  - compliant with statutory requirements
  - in accordance with good probity principles
- the appointment of the tenderer most capable of delivering the works and/or services with the best value for money
- a binding contract with the preferred tenderer.

### Key documents

During the tender process the project team will prepare the following key documents:

**Invitation for Expressions of Interest (EOI):** document prepared by the Council requesting expressions of interest from the market regarding the performance of the project.

**Request for Tender (RFT):** document prepared by the Council inviting tenders for the delivery of works or services for the project, including a price for those works/services.

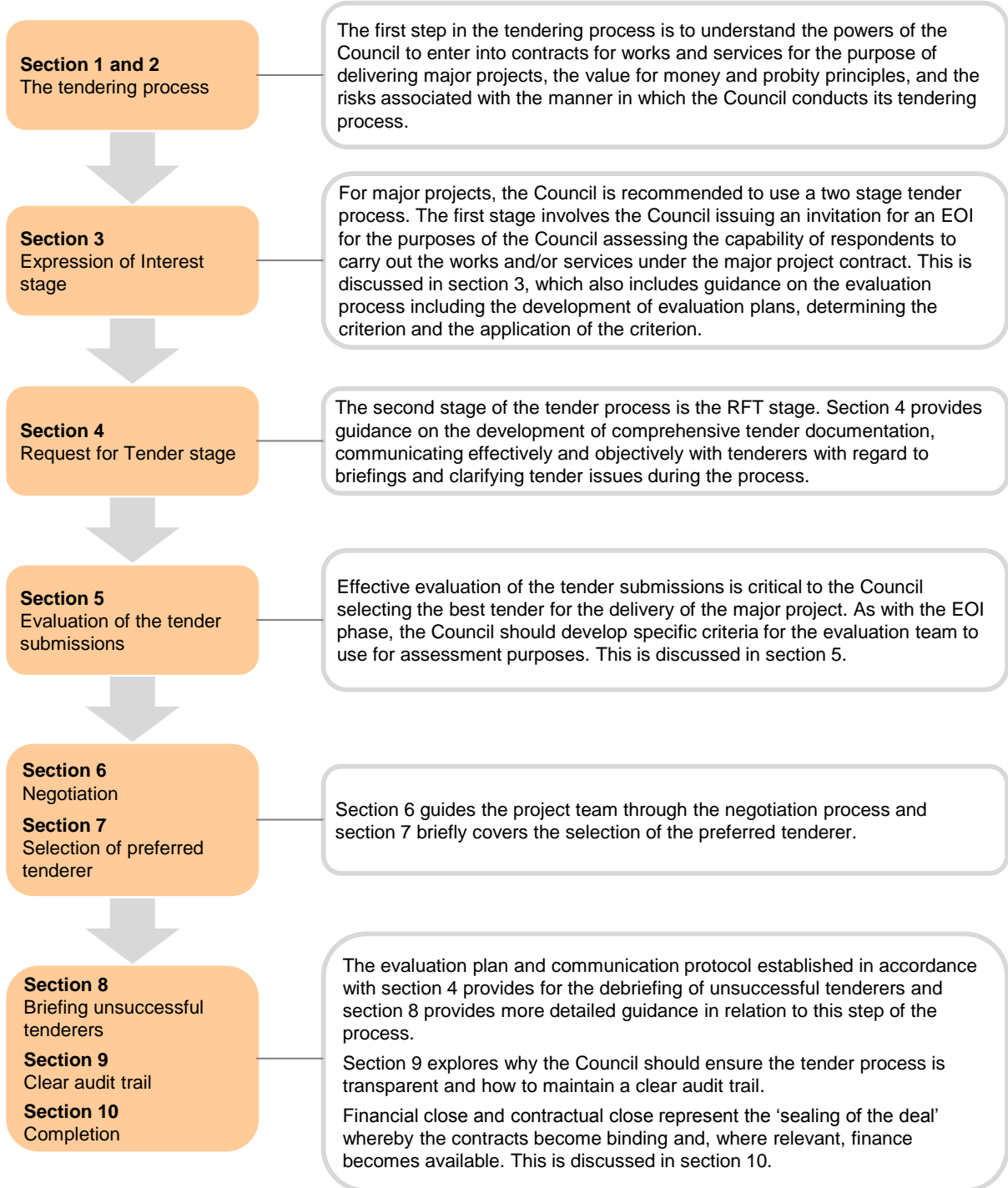
During the tender process, the project team will assess the following documents:

**EOI:** document prepared by potential tenderers in response to the Invitation for EOI regarding the project.

**Tender:** document prepared by tenderers submitting a bid for the performance of works or services for the project in response to the RFT.

# Overview of Part D – Tender process

Figure 1: Overview of Part D – Tender process



# 1. The tendering process

It is through the tender process that the Council selects its preferred contractor for the delivery of the major project, and awards a contract for the related works and/or services.

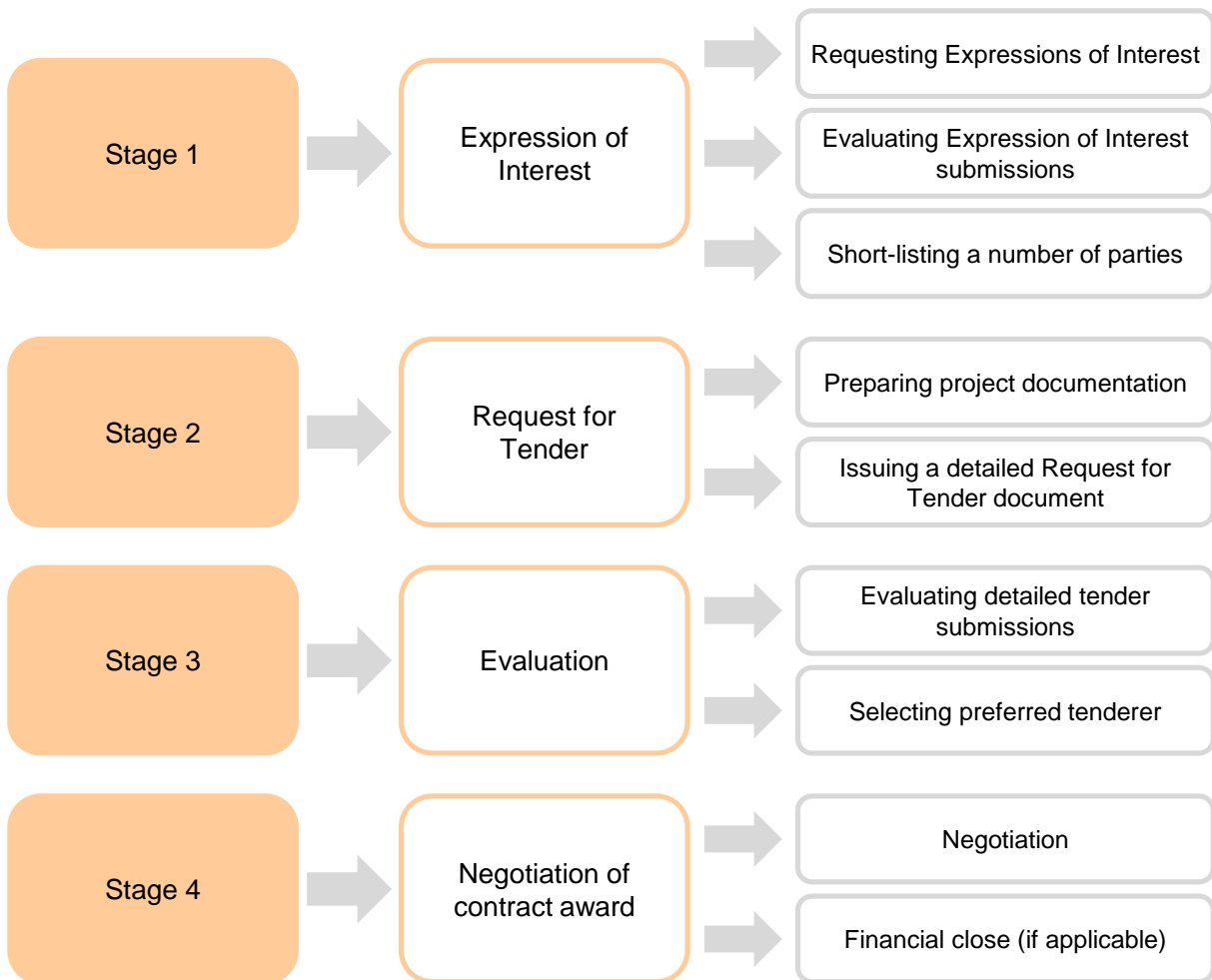
The Council's tender process must comply with the tendering framework for local government. This framework imposes a number of controls within which the Council's own process should be undertaken in addition to legislation, regulations and best practice guidance. These 'controls' are designed to ensure that the process is carried out in accordance with probity principles, and in a competitive environment conducive to the Council achieving best value in the award of public contracts for major project works and/or services.

In addition, in some jurisdictions some projects may be subject to a gateway review. In such cases, the project team will need to ensure that those reviews are carried out at the times required (this differs between jurisdictions). For further information see Annexure 4, Gateway review process.

## 1.1 Overview

Figure 2 illustrates the four stage tendering process in each State and Territory.

**Figure 2: Tendering process stage by stage**





Critical decisions the Council will be required to make during the tender process include:

- assessing the level and method of interaction with the market (briefings, seminars, interactive meetings)
- determining the evaluation criteria for the assessment of submissions
- selecting the number of tenderers to be shortlisted at the Expression of Interest phase to proceed to the Request for Tender stage
- deciding on the number of tenderers with whom the Council wishes to negotiate
- selecting the preferred tenderer.

## Process requirements for major projects

Tendering processes differ between each of the States and the Northern Territory, although the key stages are carried out following a similar procedure. These tendering processes are summarised in Table 1.

<b>Table 1: Process requirements for major projects</b>							
	<b>Victoria</b>	<b>New South Wales</b>	<b>Queensland</b>	<b>Western Australia</b>	<b>South Australia</b>	<b>Northern Territory</b>	<b>Tasmania</b>
	Required for works contracts above \$200,000 and goods or services contracts above \$150,000	Required for all contracts above \$150,000, and PPPs	Required for all contracts above \$150,000	Required for goods and services contracts above, or expected to be above \$100,000	Not prescribed, however the Council must prepare and adopt policies on competitive tendering and state when such policies apply	No direct requirements	Required for supply or provision of goods and services contracts above \$100,000
<b>Expression of Interest (EOI)</b>	<b>Optional</b> for all projects	<b>Optional</b> for all projects but mandatory for PPPs	<b>Optional</b> for all projects however the Council must pass a resolution that an EOI is in the public interest	<b>Optional</b> for all projects, however the Council must be satisfied there is good reason to invite EOIs	<b>Optional</b> for all projects unless otherwise stated in applicable policies	<b>Optional</b> for all projects	<b>Optional</b> for all projects
<b>Request for Tender (RFT)</b>	RFT documentation must be in a prescribed form and contain the prescribed details	RFT documentation must address a number of conditions relating to the project/contract details	No requirements	RFT documentation must contain prescribed details	No requirements, unless mandated by applicable policies	No requirements	RFT documentation must contain prescribed details
<b>Evaluation and selection</b>	Best value principles are to be applied to the evaluation process The Council does not have to accept any tenders, nor does it have to accept the lowest tender price	The Council must accept either the most economically advantageous tender or decline to accept any tender	No requirements	The Council must assess tenders that are not rejected in accordance with evaluation criteria The Council may decline to accept any tender	No requirements, unless mandated by applicable policies	Nothing prescribed	If a multiple-stage tender process is selected, the general manager is to ensure the criteria used is consistent

Relevant legislation, regulations and best practice guidelines governing the process in each of the States and the Northern Territory are set out in Tables 8-13.

## Requirements for regional collaboration

Tendering requirements may differ where the Council joins forces with other Councils to procure a project:

**Victoria** – where two or more Councils undertake a joint procurement exercise, one Council must take the lead in conducting the tender process, acting as agent for the other Councils. Here, the participating Councils will be deemed to have satisfied procurement requirements through the actions of the 'agent' Council.

**New South Wales** – as with Victoria, one Council can appoint another to take the lead, however this appointment must be made by formal delegation. Only certain Council powers may be subject to this kind of delegation.

**Queensland, Western Australia, South Australia, Northern Territory and Tasmania** – there are no specific provisions with regard to joint procurement. However in the Northern Territory, municipal and regional shires are encouraged to work together and share resources through regional plans and agreements. The *Local Government Act 2008* (NT) sets out requirements for the development of regional development plans.

## 1.2 Contracting with local government

Local government powers are derived from State and Territory legislation and regulations (see Annexure 2, *Sources of power for local government* for more details).

Councils have a general power to do all things necessary, or convenient for, or incidental to, the achievement of their objectives and performance of their functions. They also have a number of specific powers; one of which is the power to enter into contracts.

### Ability to contract

Councils are generally required to advertise across the community and undertake a competitive tendering process with respect to a contract for works and/or services where the value of the contract exceeds a specified monetary threshold (see Table 1 in section 1.1, *Process requirements for major projects*).

For a more detailed overview of the powers of local government in each of the States and the Northern Territory, see Annexure 2, *Sources of power for local government*.

### Tender documentation may be binding

When inviting parties to tender, the Council should ensure that its conduct is deemed to be an invitation to treat as opposed to a process contract.

An invitation to treat in the context of tendering is an expression of willingness to accept offers from respondents. It is non-binding and the Council is not compelled to accept or reject any offers.

A process contract is a binding contract between the Council and tenderers, obligating the Council to adhere to the tender processes outlined within the tender documentation provided. Any departure by the Council from its terms may expose it to challenges from unsuccessful tenderers for breach of contract, possibly entitling unsuccessful tenderers to damages.

## Process contract or invitation to treat?

The Federal Court has provided guidance on when a tender process is regarded as a process contract instead of an invitation to treat. The tender process is more likely to be viewed as a process contract when:

- the tender documentation expressly or impliedly states that legal obligations are intended to be created in relation to all or part of the process outlined
- mandatory, contractual language is used in the tender documents which dictates a strict process and sets out the rights and obligations of the tenderers
- the tender documents do not expressly exclude or disclaim the tender documentation forming a process contract
- the tender documents include a limitation of liability clause
- the tenderer is required to provide a security deposit or performance bond in relation to its participation in the tender process.

(For more information on the High Court decision see *Hughes Aircraft Systems International v Airservices Australia (1997)* 146 ALR 1).

## 1.3 Best value and competition

Councils are under an obligation to select the tenderer that provides best value or value for money for the contract. The expressions 'best value' or 'value for money' mean obtaining the optimal outcome at the best possible price and does not necessarily mean choosing the lowest price.

When assessing best value or value for money, the Council should weigh up the benefits of engaging the tenderer against the costs associated with the engagement.

Factors the Council may wish to consider when assessing whether a tender submission provides value for money may include:

- the quality of the works/services offered to the Council as compared with that of the marketplace
- whether the tenderer's approach aligns with or adds value to community expectations and values
- opportunities for the wider community, particularly with regard to employment growth and/or retention
- the value of potential partnerships
- environmental advantages
- the allocation of risk between tenderer and the Council
- costs associated with engagement.

Effective competition will assist the Council to achieve value for money. To maintain effective competition it is important for the Council to understand the market it will be engaging with and the most effective form of engagement (for example briefings, interactive meetings, etc). The work the

Council has undertaken with regard to the development of the business case and the communication protocol will assist with this.

The number of tenderers to progress from the EOI stage to the RFT stage should be considered in the light of achieving a competitive outcome, whilst at the same time minimising the participating costs for potential tenderers.

### Local industry incentives

Various policies encourage local government to appoint local contractors and use local products for the construction of infrastructure.

Taking such policies into consideration can affect the nature of the tendering process for a major infrastructure project, and may obligate the Council to prioritise this criteria. In the event such policies are not mandatory, the Council should carefully consider whether adhering to such policies would result in best value and whether a local contractor has the appropriate expertise.

The Council may wish to consider whether imposing requirements for the contractor (where possible) to employ local industry and utilise local products, is a more suitable option for adhering to the principles that rest behind these policies.

## 1.4 Probity

There is increasing pressure on local government to establish tendering processes aligned to probity principles, in order to withstand the increasing scrutiny of local government.

Benefits of effective management of probity in tendering include:

- enhancement of confidence in local government tendering processes
- greater willingness to invest time and resources in participating in the process
- minimisation of the risk of a third party challenge to the process or public criticism.

The Council's tender process should be developed taking into account the key probity principles which are outlined in Table 2).

### Table 2: Key probity principles in the tendering process

#### Fair and equitable

- treat all tenderers, and conduct the process, fairly and equitably
- ensure all tenderers have access to the same information in order to prepare their tenders
- avoid inherent bias in the tender process particularly with regard to decisions relating to advertising the tender, marketing the process and establishing timeframes
- tender process to be conducted in accordance with the terms and conditions provided to tenderers
- ensure tenderers do not engage in collusive or anti-competitive conduct.

**Table 2: Key probity principles in the tendering process**

<b>Open and transparent process</b>
<ul style="list-style-type: none"> <li>▪ establish and monitor compliance with all guidelines relating to probity issues including conflicts of interest, confidentiality and fair treatment of tenderers</li> <li>▪ disclose evaluation methodology and criteria to tenderers.</li> </ul>
<b>Confidentiality and security</b>
<ul style="list-style-type: none"> <li>▪ establish procedures to protect the competitive position of tenderers and the commercial interests of the Council in balance with the accountability requirements of the Councils</li> <li>▪ ensure information of commercial sensitivity is used and stored in a physically secure environment, and ensure access to such information is restricted to nominated individuals that have given confidentiality undertakings</li> <li>▪ implement security arrangements to deal with storage of hard copy and electronic information</li> <li>▪ enforce restriction on the release of sensitive information</li> <li>▪ establish procedures for any breach of confidentiality and/or privacy.</li> </ul>
<b>Management of conflicts of interest</b>
<ul style="list-style-type: none"> <li>▪ ensure all tenderers and project team members involved in the tendering process provide a conflict of interest undertaking</li> <li>▪ maintain a conflicts of interest register.</li> </ul>
<b>Minimising potential liability relating to the tendering process</b>
<ul style="list-style-type: none"> <li>▪ ensure effective contract risk management practices are in place.</li> </ul>
<b>Maintain a clear audit trail</b>
<ul style="list-style-type: none"> <li>▪ at the outset, clearly identify the roles for each of the parties engaged in the conduct of the process including allocation of reporting and recording obligations</li> <li>▪ document the entire process, including taking meeting/telephone notes and securing storage of electronic documentation, documentation of process and probity issues and the resolution of such issues.</li> </ul>

Part C provides an overview of the role of the probity adviser and probity auditor in relation to the overall procurement process. These roles are most important at the tendering stage of the procurement process, and involve the tasks outlined below. See section 2.10 of Part C, *Probity*.

## **Role of the probity adviser in the tendering process**

The role of the probity adviser during the tender process involves:

- providing advice on the conduct of the tender process and evaluation procedures
- ensuring the Council complies with the process terms and conditions
- making sure the tender submissions are assessed in accordance with the established evaluation criteria
- monitoring the tender, evaluation and selection processes to ensure the fair and equal treatment of all tenderers
- reporting to and advising the tender steering group, and monitoring any other meetings that may be necessary to ensure compliance with probity principles
- advising upon the composition of the tender evaluation team to ensure they are suitably qualified for the purposes of evaluating submissions and that there is no conflict of interest.

The probity auditor is primarily involved in 'signing off' on each stage of the tendering process, and the process overall. The probity auditor will assess compliance of the tender process with good probity practice.

## **1.5 Third party challenges to the process**

Poor procurement practices may increase the likelihood of the Council's tender processes being challenged by an aggrieved third party. In order to minimise the risk of an aggrieved tenderer judicially challenging the Council in undertaking the evaluation process or tender briefings, it is recommended that the Council:

- includes a statement in the tender documentation that no legal obligations are intended to be created in relation to all or part of the tender process outlined within
- ensures the tender conditions enable the Council to make the decision to re-tender, appoint or not appoint a contractor at their discretion
- ensures all pre-award communications, including correspondence, negotiations and project briefings, are carried out consistently between tenderers
- complies with all terms of its RFT, particularly with regard to undertaking the evaluation process and timetable
- assesses tender submissions strictly in accordance with the evaluation criteria circulated to tenderers, applying the relevant weighting and not taking into account any criteria that has not been identified
- circulates the Council responses to questions raised by tenderers to all tenderers in the same manner, at the same time.

## 2. Embarking on the tender process

Prior to approaching the market it is important for the Council to clearly identify its objectives for the tendering process, and to develop a tender evaluation framework to achieve these objectives.

The tender evaluation framework will consist of:

- a procedure for the establishment of an appropriately qualified evaluation team
- a robust evaluation plan setting out the evaluation procedure
- an evaluation criteria that assists the Council to identify the tenderer most capable of delivering the major project for best value
- a communication protocol that identifies how to approach and engage with the market, having taken into consideration market sounding research undertaken at the business case stage.

### 2.1 Evaluation team

The Council will need to establish an evaluation team possessing the relevant skills and experience to evaluate the submissions against the evaluation criteria.

It is not necessary that the evaluation team at the EOI stage is the same as the evaluation team at the RFT stage. However, it is important for equality and fairness reasons that the Council ensures, in so far as it is possible, that the same evaluation team members assess each of the submissions for each respective stage.

The team may comprise of individuals or a number of smaller teams established for the purposes of evaluating a particular aspect of the EOI or tender submissions. For example, the Council may establish a design evaluation team to assess the design aspects of the submissions, and a commercial evaluation team to assess the commercial aspects.

Evaluation team members are expected to:

- be open minded
- act with integrity and honesty
- be impartial and objective
- treat each tenderer fairly and equally
- be familiar with the evaluation plan, its procedures and methodologies, and the evaluation criteria
- make recommendations reflecting the outcome of the evaluation process.

### Evaluation plan

The Council will need to develop an evaluation plan to ensure a consistent approach is undertaken with regard to the assessment of each submission, thereby ensuring that the tender process presents a 'level playing field' for participating tenderers. The key considerations in developing an evaluation plan are set out in Table 3.



**Table 3: Key considerations for drafting the evaluation plan**

Objectives of the evaluation process should be identified
Procedures should be established for the determination of the evaluation criteria and criteria weighting
Procedures should be developed for the establishment of the evaluation team
Each tender submission should be assessed: <ul style="list-style-type: none"> <li>▪ by the same people qualified to conduct the evaluation</li> <li>▪ in accordance with the same criterion as each tenderer</li> </ul>
Evaluation methodology should not confer an advantage or disadvantage upon one or more tenderers
Procedures should be established for the receipt and opening of tenders – tender submissions to be logged, catalogued and registered at the time
Procedures should be established for the treatment of confidential information
Procedures should be consistent with internal Council procedures already in place as well as the evaluation criteria
Evaluation Plan should be finalised prior to the receipt of a submission (whether EOI or RFT)
A timetable should be established for the tender process that is not inherently unfair to any tenderers, especially where tenderers may be required to respond to clarification requests or provide additional information
The roles for those involved in the process should be determined, including decision-making powers and ability to reject/ignore findings of the evaluation team
Procedures should be established to deal with: <ul style="list-style-type: none"> <li>▪ a change in evaluation criteria after notification of criteria to the tenderers</li> <li>▪ non-confirming tenders</li> <li>▪ deal with unexpected occurrences without disruption to the tender process.</li> </ul>

Whilst there is no requirement for the Council to make the evaluation criteria available to respondents at the time the briefs are circulated, this practice may assist respondents to obtain a better understanding of the aspects of the project that are most important to the Council, which in turn will assist them to produce a higher quality submission relevant to the Council.

The Council should develop the evaluation plan before it receives any EOI submissions, and obtain approval of the evaluation plan from its probity adviser prior to implementation.

## Evaluation criteria

For both the EOI and RFT stages, the evaluation criteria needs to be clearly articulated to potential tenderers along with clear requirements for what needs to be submitted as part of the tender process.

The evaluation criteria should be developed to ensure that it effectively assesses whether respondents have the capability to meet the Council's project objectives. Those assessed to have the required capability should be shortlisted by the Council to be invited to participate at the RFT stage.

A number of different factors are used to assess EOI submissions, often differing greatly depending upon the nature of the major project and the particular the Council. The Council should consider the information set out in Table 4 when developing its evaluation criteria.

<b>Table 4: Key considerations in developing evaluation criteria</b>	
<b>The criterion</b>	The Council will need to identify the key performance indicators that are deemed critical for demonstrating capability for the delivery of the project. It is these key performance indicators that will form the basis of the evaluation criteria.
<b>Weighting the criterion</b>	<p>The importance placed on each criterion will assist the Council to determine the weighting for the various criteria.</p> <p>Submissions are usually split up into sections and evaluated separately, either on a pass/fail basis or given a graded mark e.g. 8 out of 10.</p> <p>The weighting of the available marks can also be vastly different depending on the type of tender and the Council's priorities. For example, one tender may be weighted 60% quality and 40% price, whilst another may be 30% quality and 70% price.</p>
<b>Difference between EOI and RFT criterion</b>	<p>The evaluation criteria for the EOI and the RFT stage will differ, for the following reasons:</p> <ul style="list-style-type: none"> <li>▪ the EOI stage is for the purposes of assessing 'capability'</li> <li>▪ the RFT stage is for the purposes of assessing the contractor's offer to provide the works and/or services</li> <li>▪ the information provided by the respondents for each of the stages is different for the above reasons.</li> </ul>

## 2.2 Communicating with tenderers

### Communication protocol

To ensure that each tenderer is treated in a fair and equitable manner, the Council should develop a communication protocol detailing the methods of communication to be used during the EOI and tender stage.

Key considerations for drafting a communication protocol are set out in Table 5.

<b>Table 5: Key considerations for drafting the communication protocol</b>
Ensure that no information is provided to any tenderer that may:
<ul style="list-style-type: none"> <li>▪ confer an unfair advantage, or disadvantage, upon a tenderer</li> <li>▪ breach confidentiality requirements.</li> </ul>
When providing and recording information:
<ul style="list-style-type: none"> <li>▪ ensure contact with tenderers only occurs through a nominated contact point</li> </ul>

### Table 5: Key considerations for drafting the communication protocol

- consider the restrictions that need to be placed on information given in response to tenderers' enquiries
- document communication with tenderers and implement appropriate document management systems
- establish a contact log containing a formal record of all communications with tenderers and their representatives and advisers.

Protocols or procedures for formal communications with tenderers, for example, any meetings, interviews, site visits and presentations should:

- outline at what stage of the tender process these meetings need to occur and what constraints should be placed on the information provided at those meetings
- document the procedures governing the issue of clarifications by tenderers to ensure that these do not amount to variations of their tenders
- take place in accordance with the format, procedures and protocols established and agreed prior to the meeting
- ensure consistency for all tenderers.

Changes to the tender process should:

- be communicated to all tenderers promptly so as to minimise any potential detrimental outcomes for them. The ultimate strategy adopted depends on the degree of variation contemplated and should be assessed on a case-by-case basis.

## Forms of communication with tenderers

### Physical or electronic 'data room'

The Council could make available all EOI and RFT documents, supporting information, feasibility studies, searches or any other type of project information available in a data room.

Access arrangements (including, where appropriate, confidentiality requirements and restrictions on printing) for the information and disclaimers regarding the reliance placed on such information would need to be carefully developed by the Council's legal advisers.

### Nominated period for questions of the Council

The Council may either nominate a project team member or set up an appropriate web forum, such as a blog with restricted access, for the purposes of receiving and responding to queries raised by tendering parties. The opportunity to raise queries should be time limited and the Council should ensure that all queries and responses are communicated to all tendering parties at a similar time using the same method of communication.

### Briefings

It is recommended that the Council hold briefing sessions for the benefit of tenderers to assist them to gain a better understanding of the project requirements and the Council's objectives for the project,

thus producing higher quality tender submissions with more opportunity (where requested by the Council) for innovation.

Briefings are also an effective way of generating interest in the major project in the event the Council's market sounding has indicated that competition in the tender process may be challenging. They are also a time efficient method for the Council to communicate details regarding the project, and to provide a question/answer session for all tenderers.

Following the release of the RFT documentation, the Council may wish to hold a group briefing for all interested parties to explain the Council's objectives for the project, the work undertaken to date, the requirements sought in the submissions (particularly where the evaluation criteria has not been made available to tenderers) and any other relevant information.

### Interactive tender process

Interactive sessions are particularly useful where the project scope is not prescriptive, provides opportunity for innovation, and/or where there is a high level of public/private interfacing for the project such as projects requiring the private sector to develop an asset for the purposes of public sector operation.

This process provides tenderers with an opportunity to obtain feedback from the Council on their designs and concepts for their proposal prior to its submission, and may involve a series of sessions. For example, they may include technical sessions, service specification sessions and commercial sessions. The aim is to provide tenderers with as much feedback and support as required in order to produce a high quality submission.

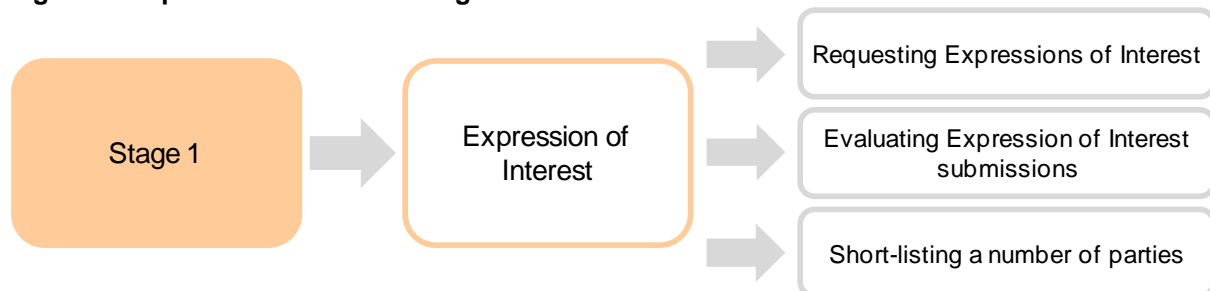
The sessions are usually held with individual tenderers, and the Council must ensure that they treat all tenderers in a fair and equal manner, so as not to confer any advantage on one particular party. It is recommended that the Council develops an interactive process protocol, with the assistance of the probity adviser, for circulation to the participating tenderers to ensure the process is undertaken in a consistent manner between tenderers.

The interactive process does not form part of the evaluation process and is a form of communication only.

## 3. Expression of interest stage

Issuing an invitation for an EOI, whilst optional for many works and/or services contracts within all of the States and the Northern Territory, is recommended for any Council undertaking a major project. It is the first stage in the tender process and involves the following steps set out in Figure 3.

**Figure 3: Expression of interest stage**



An invitation for EOI is the initial questionnaire seeking information about a company to enable the Council to assess:

- its suitability, capacity and capability with regard to the delivery of the major infrastructure project
- the level of market interest in the major project.

An EOI is most often used as a tool for short-listing organisations for the RFT stage. Only the top scoring organisations will be asked to participate at the RFT stage, due to the high bid costs (of the Council and participants) associated with the effort involved in preparing the tender documentation, the preparation of the tender submissions and evaluation of the submissions.

The Council will need to ensure that an adequate number of organisations are selected to proceed for the purposes of creating effective competition at the RFT stage.

### 3.1 Developing the invitation for EOI

An invitation for EOI will consist of a general overview of the project. It will provide enough information for the responding parties to gauge a view as to:

- whether the project is suited to their skill set and relevant experience
- who they may consider joining with to tender
- assessing the project risks.

It is the task of the Council's legal advisers to develop the EOI, which should generally include the documents outlined in Table 6.

Table 6: Content of the invitation for EOI
<b>Overview:</b> a broad description of the project as a whole and key details on the project drawing on information developed at the business case stage
<b>Objectives:</b> the Council's objectives for the project and how they align with the Council's wider strategic objectives
<b>Works/services:</b> information on the works and services to be procured by the Council including the timetable for provision and any challenges associated with such provision
<b>Company information:</b> clear instructions for the company information to be provided by the responding party e.g. financial information, quality assurance information, health and safety information, resourcing information, etc.
<b>Evaluation criteria:</b> a benchmark used by the Council to assess the EOI submissions for the purposes of producing a short list
<b>Submission requirements:</b> process and place for submission, and identification of a due date for submission and consequences of failure to meet that date.

The invitation for an EOI does not usually require the responding organisation to:

- submit any pricing for the contract
- undertake any financial modeling
- spend a lot of time and money on developing its submission.

Additional legislative requirements for each of the States and the Northern Territory with regard to developing the EOI are set out in Table 8, *Developing the EOI*.

## Level of detail for the invitation for EOI

The level of detail for the invitation for EOI will largely depend upon the number of contractors capable of carrying out the project as identified from the market sounding undertaken at the business case stage.

Where there are a large number of capable contractors, the invitation for the EOI should:

- contain a high level of detail about the project
- request detailed company information to assist the Council to differentiate between contractors
- develop evaluation criteria that are very specific – focusing on the criteria that are of most importance to the Council.

The above will assist respondents to gain detailed knowledge of the project and relevant information to assist the Council to differentiate between the tenderers through the evaluation process, thus making it easier to identify those respondents that should be short-listed for the next stage.

Where there are a small number of capable contractors, the invitation for an EOI should:

- use encouraging language to entice capable contractors to participate
- provide a general overview of the project
- request company information that will assist the Council to determine whether the respondent is capable of delivering the project. However, this should not be so prescriptive that it becomes difficult for contractors to be short-listed and therefore deters them from participating.

## Company information required to assess 'capability'

To enable the Council to assess the capability of an organisation through the EOI process, the Council may wish to request information within the following categories:

- financial standing/capacity
- legitimacy and status, including corporate structure
- quality assurance
- ability to deliver, including relevant experience and resourcing
- environmental and sustainability
- equal opportunities
- health and safety
- proposed insurance regime
- conflict of interest disclosure.

The information requested must be consistent with the evaluation criteria developed by the Council, in order for the Council to be able to undertake a productive assessment of capability.

## 3.2 Advertising the invitation for EOI

For all of the States other than South Australia and the Northern Territory, the Councils are required to advertise contracts that exceed the monetary threshold, which includes advertising the Council's request for EOI.

However, in the case of South Australia, advertising is best practice and is in accordance with the fairness and transparency principles that are most important to the tender process.

Councils are recommended to include the following information in their advertisement:

- the works and services for procurement
- the Council's expectations for the provision of information relevant to the EOI response
- details regarding how the EOI response will be assessed
- enquiry contact details
- web address (where relevant) where EOI documents can be located.

Advertising obligations may require the Council to advertise the EOI in a newspaper as well as on its website. If State, Territory or Federal procurement policies apply, there may be additional requirements to use State, Territory or Federal e-tendering websites.

### Evaluation of EOI responses

EOI responses are to be evaluated objectively according to the evaluation criteria established by the Council for the invitation of EOI. Table 7 provides examples of key evaluation criteria for the EOI stage.

An effective method of identifying the contractors that are capable of meeting the Council's standards for undertaking the project is to evaluate the contractor based on a pass/fail criteria for those skills the Council views are critical.

**Table 7: Key evaluation criteria for the EOI response**

Demonstrated understanding of the project objectives, the required service delivery outcomes and the risks and challenges of the project
An outline of their proposed approach to the project and the proposed solutions to the project objectives
Capability and experience in delivering projects of a similar nature and in working with local government
The tenderers' financial standing and capacity to undertake the project and, where relevant, the ability to secure finance.

Tenderers may also be required to attend an interview or present their submission to the Council as part of the evaluation process, however this is more common at the RFT phase than at the EOI stage.

## Short-listing of EOI respondents

It is a fine balance between short-listing a manageable number of respondents and maintaining competition throughout the process. Short-listing a large number of respondents may result in respondents losing interest when weighing the chances of success against the time and expenses necessarily incurred in preparing a tender submission. Furthermore, it may defeat the purpose of the Council undertaking an EOI phase.

A shortlist of at least three respondents usually ensures adequate competition at the tender stage and will cover the risk of the tender process coming to an end due to the withdrawal of an interested party.

The shortlist will need to be approved by the Council prior to notifying the respondents of whether they have been shortlisted. It is best practice and in accordance with principles of transparency for the Council to provide unsuccessful respondents with feedback regarding the evaluation and scoring of their submission.

### 3.3 Relevant legislative requirements and guidelines for the EOI process

The relevant legislative requirements and guidelines for developing the Council's expression of interest document are as set out in Table 8 below.

Table 8: Developing the EOI		
Source		Requirements for developing EOI request
<b>Victoria</b>		
<i>Local Government Act</i> 1989 (Vic)	s 186 (1), (2), (3)	<p>The EOI request must:</p> <ul style="list-style-type: none"> <li>▪ give public notice of the purpose of the contract and invite tenders from anyone interested in undertaking the contract</li> <li>▪ give public notice of the purpose of the contract or the project and invite expressions of interest from anyone interested in the contract or all, or part of, the project.</li> </ul> <p>All EOIs received must be registered. When the Council is ready to enter into the contract it must invite tenders from some or all of those who registered their interest in undertaking the contract (or part of the project to which the contract relates).</p> <p>The public notice, tenders and EOIs must be in the prescribed form.</p>
<i>Department of Treasury and Finance (DTF) - Investment Lifecycle Guidelines (ILG) – Project Tendering</i>	4.3.1	The EOI request should have clear rules on the closing time, date and place for lodging EOIs, evaluation criteria and confidentiality.
	4.3.2	<p>An EOI request usually includes:</p> <ul style="list-style-type: none"> <li>▪ a statement that the EOI process is the first of a two-stage tender process and a brief explanation of what is anticipated in each stage</li> </ul>



<b>Table 8: Developing the EOI</b>		
<b>Source</b>		<b>Requirements for developing EOI request</b>
		<ul style="list-style-type: none"> <li>▪ a description of the project and the requirements to be tendered</li> <li>▪ the conditions applying to the EOI process, including the evaluation criteria for short-listing, the closing date, time and place for lodging the EOI.</li> </ul> <p>It may also include:</p> <ul style="list-style-type: none"> <li>▪ an overview of the likely commercial structure or indicative commercial terms</li> <li>▪ the proposed project timetable</li> <li>▪ detailed project-specific information which can be included as appendices</li> <li>▪ a schedule for respondents to complete detailing relevant information such as company details, a capability statement, and the company's approach to meeting the requirements</li> <li>▪ a request for particular information needed to prepare the RFT documents.</li> </ul>
	4.4.1	The Code of Practice for the Victorian Building and Construction Industry also states you must ensure adequate funding is available before starting the tendering process.
<i>Victorian Industry Participation Policy (VIPP)</i>		There are no requirements at the EOI stage.
<b>New South Wales</b>		
<i>Local Government (General) Regulation 2005 (NSW)</i>	r 168	<p>An EOI request must be made in the relevant newspapers and must include:</p> <ul style="list-style-type: none"> <li>▪ a brief description</li> <li>▪ the contact details of the person to whom enquiries should be submitted</li> <li>▪ the deadline for submissions (which must be at least 21 days after publication)</li> </ul> <p>details on where and at what cost the tender documents relating to the proposed contract can be obtained.</p>
	r 170	<p>The tender documents must be available and need to:</p> <ul style="list-style-type: none"> <li>▪ specify works/goods/services</li> <li>▪ outline how and when instalments will be paid (if an instalment contract)</li> <li>▪ indicate the tender assessment criteria</li> </ul>

<b>Table 8: Developing the EOI</b>		
<b>Source</b>	<b>Requirements for developing EOI request</b>	
		<ul style="list-style-type: none"> <li>▪ provide contact details</li> <li>▪ stipulate if formal tender documents will be necessary and how to get them.</li> </ul>
<i>Guidelines on the Procedures and Processes to be followed by Local Government in Public-Private Partnerships (2005)</i>	2.3.6 - 2.3.7	<p>An EOI request is required for PPP projects.</p> <p>The EOI request should be based on the Council's business case and its details must be provided to and approved by the Project Review Committee (PRC) before proceeding.</p>
<i>Tendering Guidelines for NSW Local Government DPCDLG (2009)</i>	3.5.2.1	The Council can request an EOI from suitably qualified interested contractors by advertising in the relevant newspapers. This must include the relevant details and provide at least 21 days for the submissions of tenders.
<b>Queensland</b>		
<i>Local Government (Finance, Plans and Reporting) Regulation (2010) (Qld)</i>	r 177 (3)	Before inviting an EOIs the Council must pass a resolution deciding that it will be in the public interest and keep a record of its reasons for deciding so.
<b>Western Australia</b>		
<i>Local Government (Functions and General) Regulations 1996 (WA)</i>	r 21 and 22	Before inviting an EOI the Council must believe there is a good reason to do so due to the nature or preparation costs of the goods/services required. The Council must give state-wide public notice that EOIs are sought, describe the goods/services required, how, where and by what time EOIs must be submitted (at least 14 days after publication) and provide contact details.
<b>Tasmania</b>		
<i>Local Government (General) Regulations 2005 (Tas)</i>	r 26(3)-(4)	<p>The EOI request must specify the goods/services required, contract identification details, deadline and place for submission and appropriate contact name.</p> <p>The General Manager must ensure that it provides potential EOI respondents with details of the goods/services required, EOI evaluation criteria, evaluation method, details of further stages in the tender process as well as reference to the Council's own tender code (which should follow the <i>Draft Code for Tenders and Contracts 2005</i>).</p>
<b>South Australia</b>		
None applicable		

**Table 8: Developing the EOI**

Source	Requirements for developing EOI request
<b>Northern Territory</b>	
None applicable	

The relevant legislative requirements and guidelines for publishing the Council's EOI document are as set out in Table 9 below.

**Table 9: Publishing the EOI**

Source	Requirements for publishing EOI
<b>Victoria</b>	
<i>Local Government Act 1989 (Vic)</i>	s 186(1) (b), (3), s 82A(2) The EOI request must give public notice of the purpose of the contract or project, which requires a notice to be published in a newspaper circulating in the municipal district of the Council and a notice to be published on the website of the Council.
<i>Department of Treasury and Finance (DTF) - Investment Lifecycle Guidelines (ILG) – Project Tendering</i>	4.3.1 The EOI request should clearly state details such as the closing time, date and place for lodgement, as well as evaluation criteria and confidentiality.
<i>Victorian Industry Participation Policy (VIPPP)</i>	No requirements at the EOI stage.
<b>New South Wales</b>	
<i>Local Government (General) Regulation 2005 (NSW)</i>	r 168 An EOI advertisement must be published, with a brief description of the works, goods, facilities, services or property concerned. Contact details and deadline (at least 21 days after the date of publication or of first publication of the advertisement) should be included.
	r 164 To meet the requirement of public notice (LGA 1993 55(4)) an EOI request must be published in a Sydney metropolitan daily newspaper and either/both of: <ul style="list-style-type: none"> <li>▪ a newspaper circulating in the Council area, or</li> <li>▪ a newspaper circulating in the district where potential tenderers are likely to be undertaking business or residing.</li> </ul>
	r 171, 172 EOI deadline can be less than 21 days (but at least 7 days) if the Council believes exceptional circumstances require this. A record must be kept of the decision, who made it and the circumstances involved.

<b>Table 9: Publishing the EOI</b>		
<b>Source</b>	<b>Requirements for publishing EOI</b>	
	The deadline can be extended beyond 21 days if the Council takes all reasonable steps to advise persons where it has already invited EOIs. Records must be kept of the circumstances requiring the extension and who decided to make the extension.	
<b>Queensland</b>		
<i>Local Government (Finance, Plans and Reporting) Regulation (2010) (Qld)</i>	r 177(5)	An EOI request must be published in a newspaper that circulates generally in the local government area and allow for written tenders for at least 21 days after the notice is published.
<b>Western Australia</b>		
<i>Local Government (Functions and General) Regulations 1996 (WA)</i>	r 21, 14 and 15	If an EOI is sought, the Council must give state-wide public notice and specify a deadline at least 14 days after the date of publication
<i>Local Government Act 1995 (WA)</i>	s 1.7 and 1.8	State-wide public notice refers to a notice in a newspaper circulating generally throughout the State (at least once) and exhibited to the public on a notice board at the Council's office.  It also needs to be exhibited on a notice board for public display at every Council office in the district for a reasonable time, which must be at least 7 days or the prescribed time.
<b>Tasmania</b>		
<i>Local Government (General) Regulations 2005 (Tas)</i>	r 26(3) and (4)	The General Manager is to request an EOI by publishing a notice at least once in a daily newspaper circulating in the municipal area, specifying: <ul style="list-style-type: none"> <li>▪ the goods/services required</li> <li>▪ contract identification details</li> <li>▪ deadline and place for submission</li> <li>▪ contact name relating to the submission</li> <li>▪ EOI evaluation criteria and evaluation method</li> <li>▪ details of further stages in the tender process</li> </ul> The notice must also make reference to the Council's own tender code (which should follow the <i>Draft Code for Tenders and Contracts (2005)</i> ).
<b>South Australia</b>		
None applicable		

**Table 9: Publishing the EOI**

Source	Requirements for publishing EOI
<b>Northern Territory</b>	
There are no tendering requirements, but if public notice is required in accordance with the Council's internal policies, regulation 2 of the <i>Local Government (Administration) Regulations 2008</i> deem public notice to be publishing the notice in a newspaper circulating in the Council's area.	

The relevant legislative requirements and guidelines for assessing the Council's expression of interest document are as set out in Table 10 below.

**Table 10: Assessing EOI**

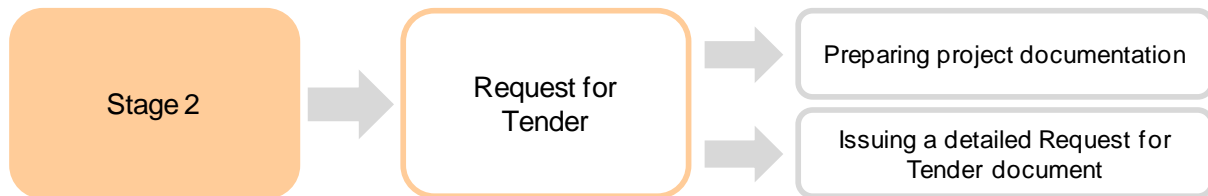
Source	Requirements for assessing EOI
<b>Victoria</b>	
<i>Local Government Act 1989 (Vic)</i>	<p>s 186 (2) Received EOIs must be registered and the Council must invite some or all of the EOI respondents to participate at the RFT stage.</p> <p>s 186 (1)(b) Any person interested in undertaking some or the entire project may respond to an EOI invite.</p>
<i>Department of Treasury and Finance (DTF) - Investment Lifecycle Guidelines (ILG) – Project Tendering</i>	5.1 The Gate 3 review process is to be undertaken at this stage.
<i>Victorian Industry Participation Policy (VIPPP)</i>	There are no requirements at the EOI stage.
<b>New South Wales</b>	
<i>Local Government (General) Regulation 2005 (NSW)</i>	<p>r 168 (3) All EOI responses must be considered and the Council is to take into account the applicants' experience in similar contracts and their capacity to fulfil the proposed contract.</p> <p>r 168 (4) After assessment, the Council can send a RFT in writing to some or all of the respondents, or decline to invite tenders from any of the applicants.</p>
<i>Guidelines on the Procedures and Processes to be followed by LG in PPPs (2005)</i>	2.4 Where there is limited interest in the EOI stage, the Council may go to a preferred partner stage by negotiating between the 2 or 3 best EOI responses, following a recommendation from the evaluation panel.  This process should be carefully documented.

<b>Table 10: Assessing EOI</b>		
<b>Source</b>		<b>Requirements for assessing EOI</b>
<b>Queensland</b>		
<i>Local Government (Finance, Plans and Reporting) Regulation (2010) (Qld)</i>	r 177 (6)	The Council may prepare a shortlist from those who responded to the EOI request and invite written tenders.
<b>Western Australia</b>		
<i>Local Government (Functions and General) Regulations 1996 (WA)</i>	r 23	An EOI must be rejected unless it was submitted at the correct place and on time.  The Council can reject an EOI if it does not comply with any other specified requirement without considering its merits.  The Council must consider all EOIs, which fulfil the requirements and decide whether any EOI respondent would be capable of satisfactorily supplying the good or services.  Such persons are to be listed by the CEO as an acceptable tenderer.
	r 24	A written notice stating the people listed by the CEO as acceptable tenderers (or that no tenderer is invited or any other outcome) is to be given to all EOI respondents.
<b>Tasmania</b>		
<i>Local Government (General) Regulations 2005 (Tas)</i>	r 26	All EOI respondents who have fulfilled the criteria should be sent an RFT. If the Council only receives one EOI, it can enter into a contract with that respondent where the respondent submits a tender, or with approval of an absolute majority of the Council.  The General Manager must ensure the consistency of criteria used at both the EOI and tender stage of the tender process.
<b>South Australia</b>		
None applicable		
<b>Northern Territory</b>		
None applicable		

## 4. Request for tender stage

The organisations that have been shortlisted at the EOI stage will be invited to proceed to the RFT stage of the tender process. The steps involved in the RFT phase are illustrated in figure 4.

**Figure 4: Request for tender stage**



The Council's legal advisers are responsible for developing the RFT. The project contract will form part of the RFT documentation enabling the respondents to gain a clear understanding of the obligations and liabilities that they will be responsible for should they undertake the major project. This will also assist the respondents to submit a price that is accurate and competitive.

The Council having undertaken the relevant procedures set out in Parts A, B and C of this Guidance should be in a position to submit the project contract as part of the RFT documentation, and it is only in exceptional circumstances that the Council should be issuing a heads of terms agreement in replacement of the project contract.

### 4.1 Developing the Request for Tender

As in the case of the development of the EOI documents, the nature of the RFT documents will depend upon the evaluation criteria the Council established for the RFT phase.

The Council is required by legislation to state the nature and purpose of the works and/or services being procured within the RFT document.

Generally, a tender document may include:

- all relevant project information including background information
- clear instructions for respondent's tender submission
- specifications for the works and/or services
- draft project contract/s
- works and/or services specifications
- risk allocation matrix
- qualitative questions to be answered by the tenderer
- pricing and delivery schedule for tenderer to complete
- probity and confidentiality agreement
- conflict of interest disclosure declaration
- non-collusion declaration

- evaluation criteria
- form of tender declaration to be signed by tenderer
- identification of a deadline for submissions.

The Council is in a considerably stronger bargaining position prior to the selection of the preferred tenderer, and therefore (in so far as it is reasonably possible) the Council should aim to have reached agreement on the heads of terms or project contract during the competitive tender process. Upon the appointment of the preferred tenderer, in so far as the heads of agreement or project documents enable the contractor to negotiate or finalise contractual terms, it is to be expected that the contractor will seek to implement terms that are in their own favour due to the reduction in competitive tension.

For guidance on how to prepare the contract documents for the projects, see section 7 of Part C, *Project agreements*.

## 4.2 Clarifying or seeking additional information

Following the close of submissions, it may be necessary for the Council to require tenderers to clarify parts of their tender submission or provide additional information, for the purposes of evaluation.

Where information within a tender submission is unclear, for assessment purposes the Council may request the tenderer to clarify or to provide an explanation of the submission content. The information provided to assist the Council to interpret the tenderer's submission will not have the effect of amending the content within a tenderer's submission.

The Council may, however, request the tenderer to submit information in addition to that contained within its tender submission. Provided the Council accepts the additional information, this will result in an amendment to the tenderer's submission. This may result in a more favourable evaluation result to the tendering party that may not have otherwise been achieved.

The following steps will assist with the effective management of these processes to ensure alignment with legal and probity principles in order to minimise the risk of a third party challenge to the process:

- undertake the process in accordance with the terms and conditions provided to tenderers
- ensure that clarification requests are concise and only cover the information required for the purposes of interpreting the tender submission in relation to the evaluation criteria
- consider, for purposes of fairness and equality, whether it is more appropriate to make the request of all tenderers so as not to disadvantage any party by not providing them with the opportunity to clarify or provide additional information
- maintain confidentiality throughout the process
- determine whether the information provided should be included in the tender submission for evaluation or whether this may confer a disadvantage upon other tenderers.

## 4.3 Close and record of tenders

It is recommended that the Council allows tenderers approximately 6-8 weeks to prepare their tender. This should be a sufficient length of time for tenderers to produce a detailed and high quality response.

In New South Wales, Western Australia and Tasmania, legislation requires Councils to allow a specific number of days from the date the tender documents are released to submit their tender response (21



days for New South Wales and 14 days for Western Australia and Tasmania). This applies unless there are exceptional reasons for a shorter period.

## 4.4 Relevant legislative requirements and guidelines for the RFT process

The relevant legislative requirements and guidelines for the request for tender process are as set out in Table 11 below.

Table 11: Requirements for developing RFT		
Source		Requirements for developing RFT
<b>Tasmania</b>		
<i>Local Government (General) Regulations 2005 (Tas)</i>	r 26	<p>All EOI respondents who have fulfilled the criteria should be sent an RFT. If the Council only receives one EOI, it can enter into a contract with that respondent where the respondent submits a tender, or with approval of an absolute majority of the Council.</p> <p>The General Manager must ensure the consistency of criteria used at both the EOI and tender stage of the tender process.</p>
<i>Local Government (General) Regulations 2005 (Tas)</i>	r 26	<p>All EOI respondents who have fulfilled the criteria should be sent an RFT. If the Council only receives one EOI, it can enter into a contract with that respondent where the respondent submits a tender, or with approval of an absolute majority of the Council.</p> <p>The General Manager must ensure the consistency of criteria used at both the EOI and tender stage of the tender process.</p>
<b>Victoria</b>		
<i>Local Government Act 1989 (Vic)</i>	s 186(3)	Public notices, tenders and EOIs must be in the prescribed form and contain the prescribed details.
<i>Department of Treasury and Finance (DTF) – Investment Lifecycle Guidelines (ILG) – Project Tendering</i>	4.4.2	<p>The RFT usually includes:</p> <ul style="list-style-type: none"> <li>▪ background information about the project</li> <li>▪ evaluation criteria, closing date and time and place for lodgement</li> <li>▪ requirements, specification, designs and other project requirements</li> <li>▪ contract terms reflecting risk allocation</li> <li>▪ tender response schedules.</li> </ul>
<i>Victorian Industry Participation Policy (VIPP)</i>	2.1	<p>VIPP applies to all contracting arrangements for projects above the VIPP threshold including any subcontracted elements, which may be below the threshold.</p> <p>The VIPP threshold is where the Victorian Government's funding or provision of a grant exceeds \$3 million in</p>

<b>Table 11: Requirements for developing RFT</b>		
<b>Source</b>		<b>Requirements for developing RFT</b>
		<p>metropolitan Melbourne and \$1 million in regional Victoria.</p> <p>Nothing is required at the EOI stage, but information on the VIPP must be included in any RFTs (see below).</p> <p>The RFT documentation should notify tenderers of the requirements of the VIPP.</p>
<b>New South Wales</b>		
<i>Local Government (General) Regulations 2005 (NSW)</i>	r 168	The Council must invite tenders to be submitted before the date specified in the invitation (at least 21 days after publication) and give details of where, when at what cost tender documents can be obtained.
	r 170	<p>Tender documents must outline the work/goods/services to be provided, or property to be disposed of. Tender assessment criteria must be specified as well as contact details. They should indicate if formal tender documents must be submitted and how they can be obtained.</p> <p>Further details must be included if it is an existing contract for waste or domestic services.</p>
	r 171	If the Council believes the required deadline is inappropriate in the circumstances, an earlier deadline may be given (at least 7 days post publication/date of invitation). A record must be kept of the circumstances requiring an earlier deadline and the name of the staff member who made the decision.
	r 172	If the Council becomes aware that the deadline may not allow a meaningful tender, it may specify a later deadline. If it has already issued invitations or tender documents it must take all reasonably practicable steps to inform those persons of the later deadline, and records must be kept of the circumstances requiring the later deadline and the name of the staff member who made the decision.
<i>Tendering Guidelines for NSW Local Government 2009</i>	3.6	<p>Tendering documents consist of:</p> <ul style="list-style-type: none"> <li>▪ conditions of tendering with: <ul style="list-style-type: none"> <li>▪ summary of critical details</li> <li>▪ outline of applicable policies</li> <li>▪ overview of purpose of procurement</li> <li>▪ conditions for submission</li> <li>▪ evaluation process and criteria</li> <li>▪ details of information sought from tenderers divided into separate schedules for specific requirements</li> </ul> </li> </ul>

<b>Table 11: Requirements for developing RFT</b>		
<b>Source</b>	<b>Requirements for developing RFT</b>	
	<ul style="list-style-type: none"> <li>▪ detailed statement of requirements</li> <li>▪ proposed conditions and terms of contract</li> <li>▪ statement that a binding contract exists until the successful tender is accepted</li> <li>▪ copies of or reference to other relevant documents</li> <li>▪ statement that unethical conduct will disqualify and information on what tenderers are to do if they suspect such conduct, and the action the Council will take.</li> <li>▪ the form of contract to be entered into by the successful tenderer</li> <li>▪ plans, specifications/description of goods being sought</li> <li>▪ copy of the Council's statement of business ethics and code of conduct, detailed statement of requirements including specifications plans drawings</li> <li>▪ requirements that tenderers comply with the codes and standards applicable</li> <li>▪ further to regulation 170, enough detail to: <ul style="list-style-type: none"> <li>▪ give a clear understanding of the proposed procurement, what is expected from tenderers, type of decision that will flow from the assessment of the tenders</li> <li>▪ provide contact name and details</li> <li>▪ specify assessment criteria</li> <li>▪ elicit all information necessary to award tender</li> <li>▪ indicate whether there are any formal tender documents that must be submitted, how they must be obtained.</li> </ul> </li> </ul>	
<b>Queensland</b>		
None applicable		
<b>Western Australia</b>		
<i>Local Government (Functions and General) Regulations 1996 (WA)</i>	r 14(1)-(2) and (3)-(4)	A state-wide public RFT is to be provided if tenders are required to be publicly invited, unless the CEO has generated a list of acceptable tenderers as a result of an EOI process. If a list has been generated, only acceptable tenderers are required to be provided with an RFT.

<b>Table 11: Requirements for developing RFT</b>		
<b>Source</b>		<b>Requirements for developing RFT</b>
		The RFT must include a description of the goods and services required, details of when, how and where tenders must be submitted, as well as where further information can be obtained.
	r 14(2a)	If the Council is required to tender, or otherwise decides to tender, it must specify (in writing) the criteria for deciding which tender should be accepted, before tenders are publicly invited.
	r 14(5)	The Council may vary the information provided after an RFT has been issued by taking reasonable steps to give each person who has sought copies of the tender documentation, or each acceptable tenderer (as the case may be) notice of the variation.
	r 15	Tenders must be able to be submitted for a period of at least 14 days after a RFT is issued.
<b>Tasmania</b>		
<i>Local Government (General) Regulations 2005 (Tas)</i>	r 24, r 26	<p>If EOIs have not been obtained, a RFT must be published at least once in a daily newspaper circulating in the municipal area. It needs to specify the nature of the goods and services required, provide any identification details allocated to the contract, and specify where and when the tender can be lodged and outline where additional information can be obtained from.</p> <p>The general manager must ensure prospective tenderers are supplied with the details of the criteria and method for evaluating tenders, any mandatory tender specifications and contract conditions as well as a reference to the Council's code relating to tenders and contracts (this information will have been provided at the EOI stage if such a process has been undertaken).</p> <p>If an EOI process has been undertaken, the general manager must provide an RFT to suppliers that have met the criteria determined by the Council in the EOI process. The general manager must ensure that criteria are consistently applied across the EOI and RFT processes.</p> <p>Tenders must be able to be submitted for a period of at least 14 days after an RFT is published or provided.</p>
<b>South Australia</b>		
<i>Local Government Association of South Australia Procurement Handbook (not mandatory)</i>	13.5.1-13.5.4	<p>The documents required to put together an RFT are:</p> <ul style="list-style-type: none"> <li>▪ the RFT itself, containing the conditions of tender</li> <li>▪ specifications (functional, performance and technical</li> </ul>

<b>Table 11: Requirements for developing RFT</b>	
<b>Source</b>	<b>Requirements for developing RFT</b>
13.5.5	<ul style="list-style-type: none"> <li>▪ Tender Response Schedules, including the format to be submitted by potential tenderers</li> <li>▪ an indicative contract.</li> </ul> <p>Development and evaluation guidelines for RFTs are shared with those for tenders. Refer Table 12 for more information.</p>
<b>Northern Territory</b>	
None applicable	

## 5. Evaluation of tender submissions

Following the deadline for the submission of all tender proposals, the Council will be required to undertake an evaluation exercise and appoint its preferred contractor. The evaluation must be conducted in a fair and transparent manner, with the evaluation process, and ultimate selection of a preferred tenderer, being defensible. Evaluation of tenders must be based on the conditions of tendering issued in the tender documents – failure to do so can lead to administrative and legal challenges.

### 5.1 Tender evaluation committee

The Council should establish a tender evaluation committee comprising members with the necessary skills and knowledge. Such members should be free of any actual or perceived conflict of interest. Committee members should include individuals across the committee with expertise in financial, commercial, legal, and technical issues relevant to the project. The committee may be supported by a number of sub-committees, which are typically based on specialisations (for example, financial, commercial, legal and technical). The committee should be established prior to issuing the tender documents.

The role of the tender evaluation committee is to:

- prepare a tender evaluation plan, which includes the evaluation methodology, criteria, and weightings – the tender evaluation plan should be finalised before the release of the tender documents (note, components of the plan may be incorporated into the tender documents)
- conduct the assessment of tenders in accordance with the evaluation methodology
- ensure compliance with evaluation procedures and processes, as outlined in the tender evaluation plan (for example, minutes of tender evaluation meetings)
- report on the review and assessment of tenders, which includes drafting a tender evaluation report outlining the evaluation process, outcomes, and recommendations.

## 5.2 Tender evaluation plan

One of the first tasks for the tender evaluation committee will be to develop the tender evaluation plan prior to issuing the tender documents. The evaluation plan should set out:

- members and the role of the tender evaluation committee (including any specialist advisers)
- the evaluation methodology and framework
- the evaluation criteria and weightings
- the evaluation schedule
- probity requirements
- the process for:
  - communicating with tenderers (for example, clarification process)
  - assessing alternative and non-conforming tenders
  - debriefing unsuccessful tenderers.

The probity adviser must sign off on the evaluation plan prior to the shortlisting or selection of the preferred tenderer.

## 5.3 Evaluation criteria and value for money

It is essential that the evaluation methodology and criteria presented in the tender evaluation plan are incorporated into the tender documents. If weightings are being applied to each criterion, it is best practice to include the weightings in the tender documents. Evaluation criteria should be aligned to the project's objectives, with the ultimate aim of assessing whether a proposal achieves the desired outcomes and represents value for money.

It is for the Council to decide whether the evaluation criteria forms part of the RFT documentation submitted to tenderers. In the event the evaluation criteria is disclosed to tenderers, the Council will be obligated to strictly comply with the evaluation criteria and assess all tenderers accordingly.

Evaluation criteria need to be developed to suit the characteristics of each project, and could include the following:

- overall value for money
- whole-of-life costs, including capital, operational and disposal costs
- innovative solutions offered
- delivery times offered
- previous performance of tenderer
- experience of tenderer and their personnel
- capability and capacity of the tenderer, including technical and financial
- proposed risk allocation

- occupational health and safety management practices and performance
- environmental management practices and performance
- community relations practices and performance
- compliance with tender requirements.

## 5.4 Communication with tenderers

The Council should make certain that its tender evaluation plan outlines the process for communicating with tenderers. All communications with potential tenderers should be conducted in accordance with the probity plan to ensure accountability and transparency during the tender evaluation phase. As such, the Council should ensure that:

- a tender register is maintained, outlining all requests for tender documents and clarifications
- all communications with tenderers are co-ordinated through a nominated contact person
- all communications to tenderers are in writing, and simultaneously sent to all tenderers
- all information provided to tenderers is consistent and documented
- all tenderers are made aware of any amendments to tender documents
- all tenderers are notified of the evaluation outcome.

## 5.5 Non-conforming bids

A non-conforming bid is a bid which does not conform to the requirements specified in the tender documents. It is not unusual for a Council to receive a number of non-confirming bids in response to a RFT for a major project.

In certain circumstances, non-conforming bids can provide innovative solutions to the proposed project which have not been considered by the Council. Accordingly, the Council will need to consider whether it will accept and evaluate any non-conforming bids. The Council's right to accept non-conforming bids should be specified in the tender documents. Accepting a non-conforming bid may give rise to probity issues given other tenderers have complied with the tender document specifications. Therefore, the Council should seek advice from its probity adviser when deciding whether to accept a non-conforming bid.

## 5.6 Evaluation report

The tender evaluation committee should prepare a report outlining the process and results of the tender evaluation. The format of the report should be specified in the tender evaluation plan. Where the committee is supported by sub-committees, a separate report should be produced by each sub-committee, which can then be consolidated into the final evaluation report. The report should include all information to allow the Council's key decision makers to make an informed decision, including:

- background information in respect to the invitation to tender
- details of the evaluation criteria and weightings
- particulars of all tenders received
- details of the evaluation and analysis of the tenders against the criteria

- a summary of the preferred tender, including rationale for preferred tender status (or rationale for there not being a preferred tender)
- a recommendation for the acceptance of the preferred tender (or non-acceptance of all tenders)
- a written confirmation from the probity adviser that the tender evaluation has been undertaken in accordance with the tender evaluation and probity plans.

## The Council's right not to select any tender

To cater for a situation where all of the tender submissions fail to deliver specified outcomes and/or value for money, the Council should reserve the right to:

- terminate the tender process
- reject all the tender submissions
- procure through other methods.

## 5.7 Short-listing options

Having carried out the evaluation process, it may be difficult for the Council to decide on which tenderer to appoint. However, where the Council believes that the appointment of one of the tenderers will achieve value for money, the Council may wish to shortlist the tenderers that have demonstrated value for money offers and clarify certain aspects of their tender submissions through additional selection processes which may involve, either:

- interactive bidding, or
- Best and Final Offer (BAFO).

### BAFO

A BAFO involves the Council submitting a detailed list of questions to tenderers regarding their tender submission, and informing the shortlisted tenderers of any tender deficiencies.

A BAFO will be appropriate only when all tenders submitted are too high cost or fail to meet the RFT requirements, as the process has the effect of encouraging fewer tenderers to submit a competitive price and agree to more favourable terms.

Other reasons for which the Council may choose to include a BAFO – as part of its tender process – include the opportunity to reduce the number of tenderers involved and to save on bidding costs for both the Council and tenderers.

Tenderers will be given a set period of time to revise their submission. The amended sections of their submission can then be re-evaluated and re-scored by the Council.

### Interactive bidding/negotiation process

An interactive bidding or negotiation process may be more useful than undertaking a BAFO process where the aspects of the tender submission that require clarification relate to a design or commercial issue. To maintain competitive tension, a set period for negotiation needs to be established and the probity officer should be involved in all negotiations, particularly when adjusting the allocation of risk or amending a contractual term.



For Victorian Councils, where the Victorian Industry Participation Policy (VIIP) applies, compliance with the policy may be a strong factor in determining the successful tenderer where there are two or more comparable tenderers.

## 5.8 Relevant legislative requirements and guidelines for the evaluation process

The relevant legislative requirements and guidelines for the evaluation process are set out in Table 12.

Table 12: Evaluation of tenders		
Source		Requirements for evaluating tenders
<b>Victoria</b>		
<i>Local Government Act 1989 (Vic)</i>	s 186(4)	The Council does not have to accept any tenders, nor does it have to accept the lowest tender.
	s 186(6)	Where practical, the Council should give 'effective and substantial preference' to the contracts for goods, machinery or material from Australia or New Zealand.
	s 208A-J	The Council must apply best value principles to its evaluation process, such that: <ul style="list-style-type: none"> <li>▪ all services meet quality and cost standards</li> <li>▪ all services provided are responsive to the needs of the community</li> <li>▪ all services are accessible to those for whom they are intended</li> <li>▪ continuous improvement in the provision of services is achieved</li> <li>▪ regular consultation is undertaken with the community in relation to its services</li> <li>▪ regular reports are made to the community on its best value performance.</li> </ul>
<i>Department of Treasury and Finance (DTF) – Investment Lifecycle Guidelines (ILG) – Project Tendering</i>	4.5	It is important to: <ul style="list-style-type: none"> <li>▪ appoint a probity adviser and/or auditor</li> <li>▪ appoint suitably qualified evaluation team members</li> <li>▪ establish an evaluation plan and probity plan to evaluate the tenders</li> <li>▪ document decisions effectively.</li> </ul>

<b>Table 12: Evaluation of tenders</b>	
<b>Source</b>	<b>Requirements for evaluating tenders</b>
<i>Victorian Industry Participation Policy (VIPP)</i>	<p>Information contained in the VIPP Plan should be assessed as a key criterion of the final tender evaluation.</p> <p>A higher prominence to VIPP should be given where:</p> <ul style="list-style-type: none"> <li>▪ a local tender is available that would bring significant benefits to the local economy</li> <li>▪ there is high participation by supply chains in the project</li> <li>▪ there will be engagement of local suppliers with high skill or technology requirements</li> <li>▪ there is potential for regional industry participation.</li> </ul>
<b>New South Wales</b>	
<i>Local Government Regulations 2005 (NSW)</i>	<p>r 177 The Council is to assess tenders as soon as practical after opening. It cannot consider late tenders, unless the tenderer can satisfy the Council their tender documents were posted or lodged at a post office or other delivery agency before the deadline and were received within a reasonable time.</p> <p>Fax and e-tenders are to be submitted electronically if the tender documents allowed for this, and transmission is to be received in full before deadline. If only formal documents were permitted, the Council does not have to consider e-tenders/faxes unless the tenderer can satisfy the Council that all essential information and formal tender documents were posted or lodged at a post office or other recognised delivery agency before the deadline and they were received them within a reasonable time.</p> <p>r 178 The Council must accept either the most advantageous tender, having regard to all the circumstances, or decline to accept any tender.</p> <p>r 178 (1A) If the contract is for domestic/waste management services, the Council must consider whether existing workers will be offered employment on comparable conditions.</p> <p>r 178(2) r 178(3) Any contract entered must accord with the tender, but if the Council does not accept any tenders, or does not receive any, it must by resolution either postpone or cancel the proposal or invite fresh tenders/EOI/applications from suppliers/negotiations.</p> <p>r 178(4) If the Council decides to enter further negotiations with any person, the resolution must state reasons for declining to invite fresh tenders or applications and why it decided to enter negotiations with the person.</p>

<b>Table 12: Evaluation of tenders</b>		
<b>Source</b>	<b>Requirements for evaluating tenders</b>	
	r 179	As soon as possible after entering into a contract or deciding not to accept any tender, the Council must publicly display the name of winner and the tender amount, and notify unsuccessful tenderers. In the event that no tenders have been accepted, the Council must display a public notice to this effect and notify all tenderers accordingly.
<i>Tendering Guidelines for NSW Local Government 2009</i>	3.15-17	<p>The role of the tender panel is to:</p> <ul style="list-style-type: none"> <li>▪ prepare an evaluation methodology statement explaining the various aspects of the evaluation criteria, their weightings and the method for consolidation of the evaluation score. This typically takes the form of a tender evaluation plan</li> <li>▪ conduct review and assessment of tenders</li> <li>▪ analyse tenderer performance against criteria</li> <li>▪ prepare a 'detailed and accessible' financial analysis of the tenders and comparison on the basis of unit price, service price, annual cost, total cost or other appropriate measures, depending on the nature of the tender</li> <li>▪ formulate a recommendation to the Council to award the contract and to which tenderer, or not to award a contract in relation to the tender</li> <li>▪ ensure that appropriate contract documents are prepared and kept with the Council's legal documents</li> <li>▪ ensure there is a proper complaints process</li> <li>▪ maintain minutes of proceedings and document proceedings.</li> </ul> <p>See [50-51] of the guidelines for suggested techniques to ensure probity and fairness throughout evaluation, such as having a team with no involvement in the procurement to establish the evaluation criteria weightings.</p> <p>Following the review of tenders by the evaluation panel, a report to the Council must be provided, to ensure sufficient time for the Council's decision.</p> <p>Please see guidelines for advice as to what the report to Council should include. This information should be confidential until the Council's decision is made.</p> <p>The acceptance of a tender must be by Council resolution. The minutes should record the names of the councillors who have supported and opposed the decision.</p> <p>The Council may only consider factors relevant to the tender when making the decision, otherwise it risks being exposed to legal challenges.</p>

<b>Table 12: Evaluation of tenders</b>		
<b>Source</b>	<b>Requirements for evaluating tenders</b>	
		Contracts must be entered into with the successful tenderer and the terms must be in accordance with the tender.
<b>Western Australia</b>		
<i>Local Government (Functions and General) Regulations 1996 (WA)</i>	r 18(1)	A tender must be rejected unless it is submitted at a place and within the time specified in the RFT.
	r 18(2)	A tender that is submitted at a place and within a time specified in the RFT must be rejected if it fails to comply with any other requirement specified in the RFT, without any consideration of the merits of the tender.
	r 18(3)	If the CEO has prepared a list of acceptable tenderers as a result of an EOI process, only tenders submitted by respondents on that list can be accepted.
	r 18(4) and (4a)	Tenders that have not been rejected under r 18(1), (2) or (3) are to be assessed by the Council in writing, to the extent that each tender satisfies the criteria for deciding which tender to accept. The Council is to decide which tender would be most advantageous, and may request further clarification of any of the information provided by the tenderer.
	r 18(5)	The Council may decline to accept any tender.
	r 18(6)	If the Council has accepted a tender, but no contract is created within 6 months (of the date of acceptance) and the Council and the successful tenderer agree not to enter into a contract, the Council may accept the next most advantageous tender from those submitted.
	r 18(7)	If the Council has accepted a tender and a contract is created within 6 months of acceptance of the tender, and the Council and the successful tenderer agree to terminate the contract, the Council may accept the next most advantageous tender from those submitted.
	r 24D	If a regional price preference policy has been adopted by the Council under r 24E, in assessing tenders, a preference may be given to a regional tenderer as if the price of the bids were reduced by: <ul style="list-style-type: none"> <li>▪ up to 10% (to a maximum price reduction of \$50,000) where the contract is for goods or services</li> <li>▪ up to 5% (to a maximum price reduction of \$50,000) where the contract is for construction (building) services</li> <li>▪ up to 10% (to a maximum price reduction of \$500,000)</li> </ul>

<b>Table 12: Evaluation of tenders</b>		
<b>Source</b>	<b>Requirements for evaluating tenders</b>	
		<p>where the contract is for goods or services, if the Council is seeking tenders for the provision of those goods or services for the first time, due to those goods or services having been undertaken by the Council up to that time.</p> <p>The discount can only be made from goods and services identified in the tender as being from regional sources.</p>
<b>Queensland</b>		
None applicable		
<b>South Australia</b>		
<i>Local Government Association of South Australia Procurement Handbook (not mandatory)</i>	13.5.17	All tenders must be treated fairly, impartially, objectively and with due diligence. If an RFT specifies evaluation criteria or weightings, the tenders must be assessed consistently against those criteria and weightings.
	13.5.18	Prior to the tender closing date, a detailed tender evaluation is to be created (this will be created prior to any RFT, if used).
	13.5.19	Adequate standards of probity should be maintained throughout the evaluation process.
	13.5.20 - 13.5.25	An evaluation methodology should be selected, with the details depending on the complexity, quantum and risk associated with the procurement. Such a methodology cannot be changed once the market has been approached.
	13.5.26	An evaluation panel should be used to evaluate tenders. The composition of the panel will depend on the complexity of the procurement. Once tenders have been ranked, the panel must make a value judgment in order to determine the tender that is most advantageous to the Council, with consideration given to price, qualitative ranking and risk.
	13.5.27	The Council should reserve the right to request additional information from a tenderer.
	13.5.28	Due diligence of the tender should be undertaken to identify any false assumptions or misunderstandings.
	13.5.29 - 13.5.32	The Council should develop a negotiation plan and have a strategy in place to negotiate with tenderers. It is critically important that negotiations are undertaken with appropriate standards of probity.

<b>Table 12: Evaluation of tenders</b>	
<b>Source</b>	<b>Requirements for evaluating tenders</b>
13.5.33 - 13.5.34	After evaluation, selection of the successful tenderer should be documented in a report signed by all members of the evaluation panel, with details to substantiate the selection and ranking of all tenders evaluated. The report should then be submitted to the appropriate body/person for formal approval.
13.5.35	The contract can be executed after the evaluation report is formally approved.
13.5.37	Any in-house tenders received by the Council need to be carefully managed, in order to avoid concerns with probity.  Management techniques include the development of a probity plan, protocols of document management, establishment of Chinese walls and disclosure in the RFT (or otherwise) that an in-house tender is to be developed.
<b>Northern Territory</b>	
<i>None Applicable</i>	
<b>Tasmania</b>	
<i>Local Government (General) Regulations 2005 (Tas)</i> r 26(7)	The General Manager is to ensure that the evaluation criteria used in the EOI and tender processes are consistent.

## 6. Negotiation

The purpose of negotiation is to obtain a mutually acceptable contract where each party achieves an outcome aligned with their needs. Successful negotiators seek to fully understand their own and the other party's needs in relation to the issues being negotiated. The Council should identify the other party's needs to help develop an effective negotiation strategy for dealing with that party's demands. The failure to consider the needs of the other party may result in an unsuccessful outcome for the Council.

A negotiation based on needs assessment should consider the inter-personal (i.e. negotiations between individuals) and inter-group (i.e. negotiations between organisations) dynamics. Once the inter-personal and inter-group needs are identified, common ground between the parties to a negotiation can be identified, and should be used as a starting point in the negotiation.

In conducting negotiations, the Council should adhere to a fair and accountable process, by ensuring:

- the Council officials conducting the negotiations have the skills, training and experience in commercial negotiations and also have the appropriate authorisation to make decisions
- the Council adopts a team approach, and ensures the negotiation process is adequately resourced

- the Council prepares a negotiation plan, outlining the aims, objectives, constraints and minimum bargaining positions
- the individuals involved in the negotiations do not have any conflicts of interest
- formal communication protocols are agreed and adopted by both parties
- advisers are involved at appropriate times
- confidentiality is maintained
- the negotiation process and outcomes are documented, including a marked-up contract where necessary.

The Council should ensure it maintains competitive tension among tenderers until all significant commercial issues have been agreed.

## 6.1 Negotiation strategy

Negotiation is a highly skilled task requiring multi-disciplinary input. The Council should establish a co-ordinated framework and strategy for negotiation for the purposes of reaching a mutually beneficial outcome during the negotiations phase.

The negotiation strategy is the Council's strategy for embarking upon negotiations with the preferred tenderer/s. The strategy is for the Council's benefit only and its contents should not be shared with tenderers.

It is essential that the Council plan their negotiation strategy prior to commencing with negotiations. This will assist the Council to frame or focus what it wishes to achieve from the negotiation phase and identify at which (if any) point it should be walking away from the deal or possibly consider retendering.

In developing its negotiation strategy, the Council should:

- list and rank their priorities together with alternatives, in the event the parties cannot reach an agreement
- know the difference between what Council needs in order to undertake the project and what Council wants
- identify what the 'bottom line' is for the project so the Council can determine when it should walk away from the deal or consider re-tendering
- define any time constraints and benchmarks
- assess potential liabilities and risks.

### Negotiation Plan

The negotiation plan is a plan that sets out the parties' framework for negotiations.

The negotiation plan should be shared with all negotiating parties to ensure that they are aware of the terms and conditions for the negotiation phase.

A negotiation plan should be prepared prior to negotiations commencing and should include the following key elements:

- the identity of the negotiation team/individual responsible for managing and undertaking the negotiations
- a definition of the negotiation issues and the Council's position
- direction on which party will control the re-drafting of any project documents
- the manner in which negotiations will be recorded, in particular the agreed matters
- an agreement not to revisit agreed matters or introduce new ones
- an agreed timetable
- an agreed dispute resolution process
- a list of the individuals with the requisite authority to agree to the negotiated positions
- requirements for reporting to the Council and State Government, where applicable
- finalising and executing contracts.

Negotiations are typically facilitated through the exchange of documentation setting out both parties' positions in relation to an issue. Tenderers will be required to justify why they are pursuing a different position to what was proposed by the Council during the tender process.

The Council should also be mindful of any price implications associated with accepting a change to the original contractual position, and assess whether this is also acceptable. To achieve this the Council will need to understand the pricing implication of each of the changes to the original contractual position.

## 6.2 Negotiation phases

Negotiations may take place before or after the selection of the preferred tenderer and should only be in the context of departures raised during the tender phase. The Council should bear in mind that its bargaining strength will weaken after the appointment of the preferred tenderer, given the competition for contract award will have ceased. The Council's negotiation framework should seek to maximise competitive tension to achieve desired outcomes. The Council should not impose unnecessary costs on bidders for the sole purpose of maintaining competitive tension.

Ideally, the Council will have agreed all, or the majority of, the financial and commercial issues for the project, and the contractual terms for the main project documentation, prior to appointing the preferred tenderer. Where the project involves private finance, it is likely tenderers will be required to ensure their financier(s) have reviewed and approved the contractual terms (including negotiated revisions), and confirmed their commitment to the tenderer's submission and proposed business plan for the delivery of the project.

There may, however, be a number of minor issues that require further negotiation and agreement prior to contact finalisation and execution – these will relate to finalising detailed drafting for the contracts or the collation of information for various schedules. This is not the stage to be undertaking substantive negotiations, which should have already taken place prior to appointment.

In conducting negotiations, the Council should always consider the project's primary objectives and generally not compromise on these. However, there may be times when the Council will need to compromise on some aspects of the project to ensure objectives are achieved.



## 6.3 Limitations to negotiations

### Creating impressions

When negotiating, the Council must be careful not to create an impression that it will proceed in a particular way so that:

- the Council can maximise its ability to achieve value for money by maintaining a competitive tension throughout the negotiation process
- the Council minimises the risk of a claim against it for damages based on estoppel or misrepresentation, particularly in the event the Council does not proceed in the manner suggested or the tenderer is not successful in being awarded the contract.

### Negotiations in accordance with tender documents

The Council and its preferred contractor are limited to agreeing to a contractual arrangement that is in accordance with the tender documents sent to all tenderers. Where the contractual arrangement proceeds on a materially different basis from the tender document, the Council will be required to either re-evaluate the tender submissions (whether they are still valid and open offers to the Council), give other tenderers the opportunity to revise their tenders or repeat the process.

## 7. Selection of preferred tenderer

The Council should select the most economically advantageous tender submission that ensures the tenderer will:

- comply and meet the requirements of the output specifications
- provide value for money for the contract term
- accept risk in accordance with an optimal risk allocation
- accept the contract terms as agreed
- comply with its financial obligations for the contract term.

The Council's appointment of the preferred tenderer should be in accordance with the terms of the tender documentation which should set out a process for appointment.

There may be circumstances where it is appropriate for the Council to consider reimbursing a portion of the losing tenderers' bid costs.

## 8. Briefing unsuccessful tenderers

### 8.1 Notification

Once the Council has awarded the contract to the preferred tenderer, the unsuccessful tenderers will need to be notified.

It is good practice to provide reasons for non-acceptance of a tender, and to provide an option for a debriefing with the unsuccessful tenderers.

The communication protocol should provide for the debriefing of unsuccessful tenderers which incorporates the following practices:

- information provided to unsuccessful tenderers should be consistent with the tender evaluation outcomes
- a standard approach towards debriefing should be applied in so far as reasonably practical
- a tenderer should not be provided with any information regarding other tenderers, other than information that is made publicly available, or information provided for comparative purposes that does not breach confidentiality principles
- more than one member of the project team should attend the debriefings
- debriefing sessions should be documented for the purposes of a clear audit trail.

In Victoria, where State or Federal funding has been received, additional requirements for disclosure to unsuccessful tenderers may apply, and the Council should seek legal advice in respect of their obligations.

In New South Wales, for high risk construction contracts, or where the value of the contract exceeds \$50 million, the Council may be required to obtain the approval of the NSW Treasurer prior to confirming the appointment of the preferred tenderer.

In Queensland, the Council is required to publish the result of the tender process on its website, and display the award prominently at the Council's office, detailing the party who has been awarded the contract, the contract value and the purpose of the contract.

Western Australia also has similar requirements.

## 8.2 Relevant legislative requirements and guidelines for briefing unsuccessful tenderers

The relevant legislative requirements and guidelines to consider when briefing unsuccessful tenderers are as set out in Table 13 below.

Table 13: Notifying successful/unsuccessful tenderers		
Source	Post appointment requirements	
<b>Victoria</b>		
None mandatory		
<i>Victorian Civil Construction Industry- Best practice guide for tendering and contract management</i>	5.3-5.5	The Council should notify unsuccessful tenderers in writing.  Preferably such notice would include the name of the successful tenderer, the awarded tender price, the lowest tender price and, if the lowest price was not selected, why the tender was awarded.

<b>Table 13: Notifying successful/unsuccessful tenderers</b>		
<b>Source</b>	<b>Post appointment requirements</b>	
<b>New South Wales</b>		
<i>Local Government Regulations 2005 (NSW)</i>	r 178(1)	<p>The Council must accept either the most advantageous tender, having regard to all the circumstances, or decline to accept any tender.</p> <p>Note: a decision to accept a tender can only be made by resolution of the Council (section 377 of the Act does not permit delegation of this task).</p> <p>If the Council accepts no tenders it must, by resolution, do one of the following:</p> <ul style="list-style-type: none"> <li>▪ postpone/cancel the proposal</li> <li>▪ invite fresh tenders based on the same or different details</li> <li>▪ invite fresh applications by public advertisement</li> <li>▪ invite fresh applications from recognised contractors</li> <li>▪ enter into direct negotiations with any person with a view to entering into a contract</li> <li>▪ carry out the proposal itself.</li> </ul>
	r 178(2)	Every contract the Council enters into under the tender must be with the successful tenderer and in accordance with the tender.
	r 179	<p>As soon as possible after entering into a contract or deciding not to accept any tender, the Council must:</p> <ul style="list-style-type: none"> <li>▪ notify all unsuccessful tenderers that its tender was unsuccessful or that none were accepted, and</li> <li>▪ publicly display the name of the appointed contractor and the tender amount or, if no tenders were accepted, a notice to that effect.</li> </ul>
<i>Tendering Guidelines for NSW Local Government 2009</i>	3.18	<p>The Council must notify unsuccessful tenderers as soon as practical after entering into a contract with the accepted tenderer or deciding not to accept any of the tenders.</p> <p>The Council must make a public notice of the outcome of the tendering process.</p> <p>In notifying unsuccessful tenderers, the Council should consider the Premier's Memorandum 2007-1 <i>Public Disclosure of Information arising from NSW Government Tenders and Contracts</i>, which outlines the minimum information that should be disclosed and that which should remain confidential.</p>

<b>Table 13: Notifying successful/unsuccessful tenderers</b>		
<b>Source</b>		<b>Post appointment requirements</b>
<b>Queensland</b>		
<i>Local Government (Finance Plans and Reporting) Regulations 2010 (Qld)</i>	r 186	As soon as practical after entering a contract over \$100,000, the Council must publish on its website and display prominently at its office all relevant details, including the appointed contracted , and the worth and purpose of the contract.
<b>Western Australia</b>		
<i>Local Government (Functions and General) Regulations 1996 (WA)</i>	r 19	The CEO must give each tenderer notice (in writing) with particulars of the successful tender, or advising that no tender was accepted.
<b>South Australia</b>		
<i>Local Government Association of South Australia Procurement Handbook (not mandatory)</i>	13.5.36	After execution of the contract, unsuccessful tenderers may be provided with a formal debrief.
<b>Northern Territory</b>		
None applicable		
<b>Tasmania</b>		
None applicable		

## 9. Clear audit trail

The Council should ensure that a clear audit trail of the tender processes exists in order to:

- demonstrate the objectivity, impartiality and transparency of the process
- validate the recommendations of the evaluation team
- adhere to any internal record and document management requirements of the Council
- assist in identifying any deficiencies within the process which may be addressed prior to the tender process being completed.

The Council should adopt the following document procedures:

- minute all meetings
- record all decisions

- file note all contact with any tenderers
- maintain copies of all correspondence with tenderers
- maintain a probity issues and conflicts register.

## 10. Completion

The procurement phase of a project is finalised when the project contract documents are signed and the requisite funds for the project have been made available, either by the Council or an external financier. These two events are often called contractual and financial close, and are briefly discussed below.

The Council and its preferred contractor are limited to a contractual arrangement that is in accordance with the tender document sent to all tenderers. Where the contractual arrangement proceeds on a materially different basis from the tender document, the Council will be required to either re-evaluate the tender submissions (where they are still valid and open offers to the Council) or repeat the tender process.

In some instances government approval may be required prior to the Council executing the contract. The Council should seek legal advice as to the extent of any applicable requirements.

### 10.1 Award of contract

Prior to awarding the contract, the project team needs to ensure that they have the proper authority to appoint the preferred tenderer as the contractor for the major project.

In order for such authorisation to be granted, the project team may be required to submit a report to the Council summarising the tender process, detailing each of the tender submissions received and setting out the conclusions as to why the preferred tenderer should be appointed as the contractor for the major project.

Once the project team is satisfied that the authorisation is in place to confirm the preferred tenderer for the project, written notification should be given to the contractor setting out:

- the contract
- the price structure for carrying out the major project
- key dates for the major project
- identification of the contract departures that have been accepted and those that are not acceptable.

### 10.2 Contractual close

The signing of project agreements is known as 'contractual close'. The project team must ensure that each of the contract documents are executed in accordance with the approved processes in each State and the Northern Territory and adhere to any particular Council policies or procedures.

When executing the contract documents, the Council should ensure that the individual executing the contract has the requisite authority to bind the Council. Similarly, the Council should ensure that the individual executing the contract documents on behalf of each counterparty (including the contractor, financier etc.) also has authority to enter into contracts on behalf of the relevant counterparty.

For the contracts to become effective and contractually binding on the parties, there will often be a number of conditions precedent which will have to be satisfied after the contracts are signed. Common examples of conditions precedent in infrastructure projects include:

- formal government approvals
- confirmation financing has become unconditional
- execution and delivery of ancillary contracts
- provision of an audited financial model
- insurances being in place
- foreign investment review board approval (*Foreign Acquisitions and Takeovers Act 1975* (Cth))
- private binding ruling from the Australian Tax Office (with respect to income tax and/or GST)
- approvals from the Australian Competition and Consumer Commission
- any other conditions agreed to be relevant.

The conditions precedent should be documented and an action plan developed to assist in achieving them. The action plan should include the conditions precedent, the tasks required to be undertaken, the people responsible for completing the tasks and the required timeframes. There should be regular updates in relation to progress against each of the conditions precedent.

## 10.3 Financial close

In projects which involve debt finance, 'financial close' is an additional step in the completion process. Financial close occurs when all of the project agreements and the financing agreements have been executed and any conditions precedent in those agreements have been met (or waived). This is the point at which the project's debt financing becomes unconditional and draw downs on the loan facility are permitted. Financial close procedures and processes may differ depending on the type of debt financing (e.g. bank debt or bond issue). Upon financial close there is sometimes an exchange of letters whereby both parties agree that financial close has occurred.

# 11. Further resources

## Victoria

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

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

*Procurement Probity Plan*, Department of Planning and Community Development (July 2012).

## New South Wales

*Council Procurement and Contract Management Practices – Contracts for Consultancy and Professional Service*, (Circulars to Councils), New South Wales Government, Division of Local Government, Department of Premier & Cabinet (25 November 2011).

*Direct Negotiations: Guidelines for Managing Risks in Direct Negotiations*, Independent Commission Against Corruption (May 2006).

*Procurement System for Construction: Procurement Practice Guide: Tendering construction works*, New South Wales Government (July 2008).

### **Queensland**

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

*Evaluating Offers in Purchasing: Better Purchasing Guide*, Queensland Government, Department of Public Works (August 2000).

*Negotiation in Purchasing, Better Purchasing Guide*, Queensland Government, Department of Public Works (August 2000).

*Procurement Guidance, Complaints management*, Queensland Government Chief Procurement Office, Department of Public Works (January 2010).

### **South Australia**

*LGA Procurement: Handbook*, Local Government Association of South Australia (November 2012).

*Procurement: Good Practice Guide*, Government of South Australia (undated).

### **Northern Territory**

*Procurement Directions*, Northern Territory Government, Department of Business (March 2013).

### **Tasmania**

*Code for Tenders and Contracts (draft)*, Local Government Association Tasmania (June 2005).

*Purchasing Goods and Services: A Guide for Government Buyers*, Department of Treasury and Finance, Procurement and Property Branch (May 2013).

### **Western Australia**

*Better Practice Review: City of Albany*, Government of Western Australia, Department of Local Government (July 2010).

### **General**

David Levin QC, 'The Unsuccessful Tenderer – Legal Rights and Remedies' *Building and Construction Law Journal*, (2010) Vol 26, pp 324-334.

Richard A Wilkinson, 'Risky business: Compiling a Tender Package' *Building and Construction Law Journal*, (2008) Vol 24, pp 377-393.