



New South Wales Government

NSW Government Procurement Guidelines

Tendering Guidelines

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These guidelines were prepared by the NSW Department of Commerce for the NSW Government. They are available from the procurement process maps on <http://www.treasury.nsw.gov.au/procurement/procure-intro.htm>

For further information on these guidelines contact NSW Procurement help desk by phone 02 9372 8600 or e-mail gpshep@commerce.nsw.gov.au

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Related Guidelines

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1 Introduction

1.1	Context, purpose and scope
1.2	Principles
1.3	Significant issues

1.1 Context, purpose and scope of Guidelines

The NSW Government Procurement Policy Framework, available on the NSW Treasury website www.treasury.nsw.gov.au, has a fundamental objective to ensure that NSW Government procurement achieves value for money. Efficiency and effectiveness, probity and equity, and effective competition are key principles underpinning the Policy Framework.

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

Refer to Figure 1 *Context of the Tendering Guidelines in the NSW Government Procurement Policy Framework*, which is based on a ten-step approach to the planning and delivery of procurement.

The *Guidelines* are designed to provide agencies with a structured approach to planning and implementing tendering and associated processes to complement those in the [NSW Government Code of Practice for Procurement](#). However, agencies may need and thus be required to have more detailed procedures for specific agency tendering activities.

In addition, they are intended to provide industry with an appreciation of the processes required to be undertaken by NSW Government agencies to ensure fairness and probity in tendering.

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

further explanation of the subject matter. The Guidelines may be revised periodically.

1.2 Principles

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

Agency resources should generally be used in preference to private sector procurement provided value for money can be achieved. Refer to [Premier's Circular No. 04-17](#) (*Guidelines for the Engagement and Use of Consultants*) where consultant engagements are being considered.

In the case of road-related projects the Roads and Traffic Authority can be directly approached in terms of [Premier's Circular 03-24](#) (*The Roads and Traffic Authority (RTA) as a Contractor to Agencies*).

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

The *Guidelines* encourage decision-making principles for tendering that achieve the desired outcome:

Planning to achieve best value for money. This means tendering should not be process driven but based on a strategy derived from the specific circumstances;

Achieving process probity in all phases of the tendering process with arrangements that avoid conflict of interest and the perception of corruption;

Ensuring appropriate tender documentation is developed to produce the best outcome, without limiting the flexibility of the agency to choose a suitable tenderer or tenderers that offer attractive solutions;

The optimal involvement of service providers in the tendering process by: (where appropriate) a first stage prequalification process to limit the field of tenderers so that the agency has a suitable short list to select from to achieve the best outcome; considering reasonable alternative tenders where permissible; and giving early advice to tenderers not in contention; and

Using the advantages of proven technologies such as electronic tendering ([eTendering](#)).

1.3 Significant issues

Probity

The application of probity principles may vary depending on the nature and subject of the particular tender but generally require that:

- all tenderers are treated fairly and equitably, consistent with the rules of natural justice and procedural fairness;
- an appropriate while flexible and transparent tender process, including an evaluation methodology or approach is established;
- all confidential information is protected in accordance with any contractual arrangements;
- strategies are in place to maintain the integrity of the tendering process when in-house bids may be involved; and
- potential and/or actual conflicts of interest are identified, declared and avoided.

The NSW Independent Commission Against Corruption (ICAC) has publications on these matters. This information is available at www.icac.nsw.gov.au.

The use of probity auditors or advisers should be the exception rather than the rule. Refer to the ICAC publication [Probity and probity advising – Guidelines for managing public sector projects](#) together with [Premier's Memorandum 98-12 \(Use of Probity Auditors by Public Sector Agencies\)](#).

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

Agencies and service providers must not engage in the practice of bid shopping.

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

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

Some legal considerations

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

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

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

Maintenance of records

To assist agencies to manage a tendering process, release of information associated with the process and to establish contract records, it is essential that full tendering process records are created and maintained.

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

Australia and New Zealand Government Procurement Agreement

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

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

The Department of State and Regional Development’s NSW Government Preference Schemes outline the application of price preferences to local (Australian and New Zealand) goods and related services. Details of the Schemes are given in the NSW Government Economic Development Guidelines, available from Section 6.1 of the Government’s procurement process maps at <http://www.treasury.nsw.gov.au/procurement/procure-intro.htm>.

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

Further information on the ANZGPA is at <http://www.apcc.gov.au> and Premiers Memorandum 98-7 [Australia and New Zealand Government Procurement Agreement](#).

Australia – United States Free Trade Agreement, Government Procurement Chapter

The NSW Government has agreed to participate in the Government Procurement Chapter of the Australia – United States Free Trade Agreement (AUSFTA) that came into effect from 1 January 2005. The Chapter sets out the standard to be applied in the conduct of relevant government procurement.

Treasury Circular TC 04/11 [Australia-United States Free Trade Agreement Implications for NSW Government Procurement](#) identifies the key issues arising from the Agreement.

The Agreement requires NSW Government agencies to not discriminate in their procurement activities against suppliers from the United States. The NSW Government has until 1 January 2008 to phase out any non-compliant preference schemes.

The special requirements of the Agreement with tender processes are incorporated in these *Guidelines*. The Agreement is available at <http://www.fta.gov.au>.

Electronic Tendering

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

Under Premier's Memorandum 2006-11 NSW Procurement Reforms, all NSW Government agencies, other than State Owned Corporations, are to make Requests for Tender documentation available and tenders able to be lodged through the NSW Government eTendering system (<https://tenders.nsw.gov.au>) by June 2007.

Contact email RFTenders@commerce.nsw.gov.au for more information.

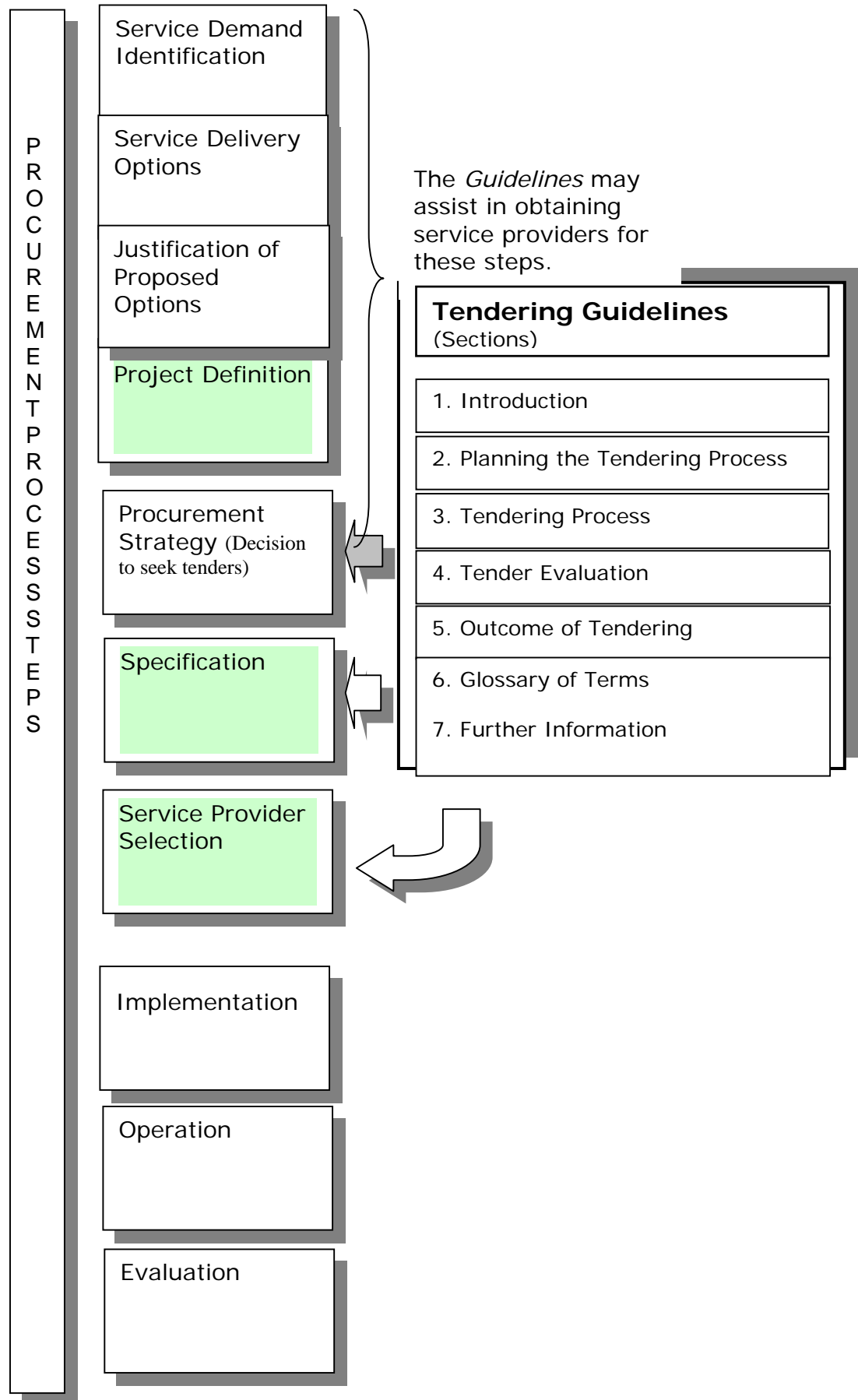
Agency Accreditation Scheme and Default Procurement System

The NSW Government has established an accreditation scheme that applies to agencies undertaking building and construction projects valued at more than \$1M. Agencies (NSW Government departments, statutory authorities, trusts and other government entities but not including State Owned Corporations) not accredited for the delivery phase of these projects, are required to undertake their procurement with the assistance of an accredited agency or a private sector expert prequalified for this purpose by the Department of Commerce. The private sector expert must use the guidelines, procedures and lists of prequalified service providers in the government's Default Procurement System for construction projects.

Details of the Agency Accreditation Scheme are available at <http://www.treasury.nsw.gov.au/procurement/pdf/accredit.pdf>

Details of the Default Procurement System are available at <http://www.commerce.nsw.gov.au/Government+Procurement>

Figure 1: Context of Tendering Guidelines in the NSW Government Procurement Policy Framework



2. Planning the Tendering Process

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

2.1 Initial planning

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

This planning should consider how process fairness and probity will be ensured, and whether there is a need for a probity plan and/or probity auditor. Examples where a probity auditor may be considered include:

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

When tenders from other Government agencies may be anticipated refer to Treasury's [Policy Statement on the Application of Competitive Neutrality](#) ([Treasury Circular TC 02-01](#)).

Planning should specifically consider:

- how value for money can be obtained and demonstrated through the tendering process. In most cases, value for money will be obtained by seeking both price and non-priced information in a tender. Non-priced information will, for

example, include the capability of the tenderer to complete the contract, or perhaps any innovative component of the consultant design. Value for money considerations may also require predicted life-cycle cost estimates in order to obtain a proper comparative analysis of offers;

- giving early notice to stakeholders, including potential tenderers, of planned procurement; the number of service providers required to undertake the work or services;
- the availability of service providers in the market with special skills sought;
- the availability of a list of suitable service providers both within the agency and in other agencies.
- the duration of the tender period needed to enable tenderers to properly price and prepare tenders;
- how the cost of the process to tenderers and the agency can be minimised;
- the sufficiency and expertise of agency personnel or procurement agents to respond to tender enquiries and to effectively evaluate tenders; and
- that the previous work experience of service providers with the procuring entity, or in NSW, or Australia should not be an evaluation requirement.

2.2 Tendering processes generally

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

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

This information must be provided regardless of the size and complexity of the procurement or the tendering process to be used. It

gives industry a basis on which to decide if it wants to submit a tender.

Selecting the most appropriate tender process requires consideration of the:

- advantages and disadvantages of each approach in relation to the proposed procurement; availability of prequalified or pre-registered tenderers;
- capabilities of the market;
- the approach adopted for managing risk and ensuring best value for money, process probity, fair dealing and effective competition; and
- risks identified and their implications.

In the *Guidelines* the following are referred to as ‘RFTs’ - an invitation or request for quotations, proposals, offers, Expressions of Interest or applications for pre-registration or prequalification and the like, whether a single invitation or a competitive one.

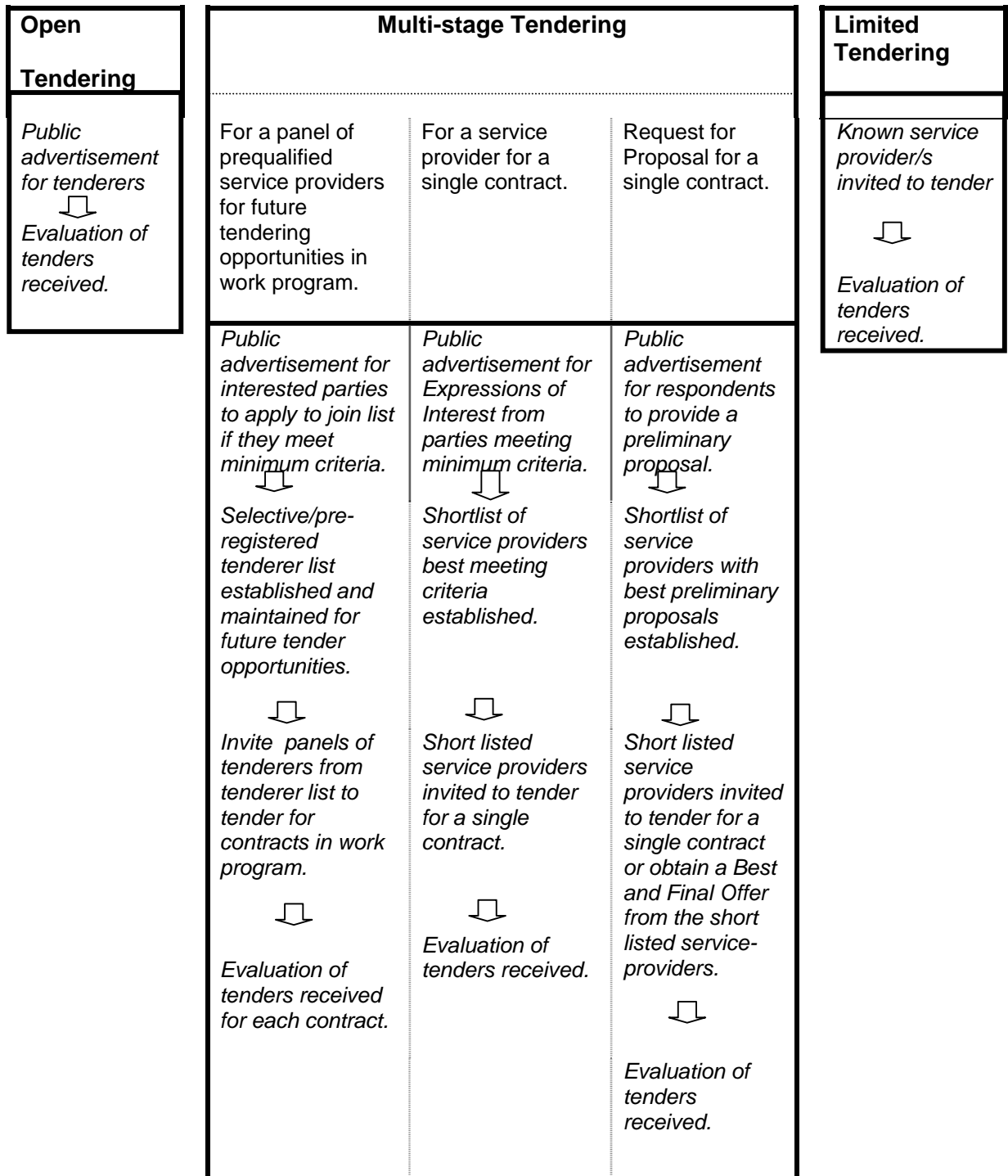
As far as is practical, except for very small contracts or in special cases, the aim should be to have at least three tenderers in order to provide reasonable competition. Panels should be sized to provide each tender with a reasonable opportunity of success.

2.3 Tendering methods

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

The *Guidelines* identify three generic main categories, that is ‘**open tendering**’, ‘**multi-stage tendering**’ and ‘**limited tendering**’. The stages in these main categories are shown in Figure 2 (below) and are described below.

Figure 2. Depiction of tendering categories



2.3.1 Open tendering

An open tendering process is an invitation to tender by public advertisement with no restriction placed on who may submit a tender. Tenderers must however demonstrate in their tenders that they satisfy the evaluation criteria which may include the necessary skills, resources, experience and capacity to comply with the contract requirements and require that each tender meets the specific RFT requirements.

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

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

2.3.2 Multi-stage tendering

Multi-stage tendering may be used to cull a large number of respondents and identify the best service providers in a particular well-supplied market that are interested in providing the products, work or services. It also limits the number of tenderers to those that can demonstrate the requisite capability in the first stage.

The first stage in multi-stage tendering is an Expression of Interest (EOI) or Request for Proposals to invite interested service providers to register their interest against the evaluation criteria in the RFT document.

The Expression of Interest document must state what further processes are expected beyond the first stage of the tender process.

The agency would then short-list interested service providers with the ability to undertaking the particular contract or future work, product supply or services required. These prequalified tenderers would be asked to indicate their availability to tender in the second stage for either a specific contract or for several contracts in an ongoing work program.

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

(a) Panel of service providers

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

Selective tendering

The first stage of selective tendering is to establish a list of prequalified service providers capable of undertaking contracts for a particular program or category of works, products or services. The cost of establishment and maintenance of the list must be justified by the extent of the work program. Tenders would then be sought for a particular contract from a limited number of those prequalified, selected on merit or a rotational basis.

Prequalified tenderers should not be guaranteed tendering opportunities. Overall management of such a selective tendering system is designed to distribute opportunities over a period of time to those prequalified, which may take into account such factors as:

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

Pre-registered tendering

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

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

(b) Service provider for a single contract

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

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

(c) Request for Proposals

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

The second stage involves short-listed tenderers being invited to tender for the contract or, where a best solution is sought, negotiation with the preferred service provider on the final requirements and price (when this is allowed for in the RFT documents). Final negotiations should never be precluded and can be part of any tender process.

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

Best and Final Offers

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

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

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

2.3.3 Limited Tendering

Limited tendering includes invited tendering and direct negotiation.

Invited tendering

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

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

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

Invited tendering includes:

Quotations

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

Single invited tender

Only one service provider is requested to tender.

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

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

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

A single invited tender may be appropriate when the requirement can only be fulfilled by a particular service provider and no reasonable alternative or substitute works, product or services exist. It may apply for any of the following cases:

- The requirement is for works of art;
- For the protection of patents, copyrights, or other exclusive rights, or proprietary information;
- An absence of competition for demonstrable technical reasons;

- For additional deliveries of products or services by the original supplier or authorised representative that are either as replacement parts, minor extensions, or continuing services for existing equipment, minor software upgrades, services, or installations, where a change of service provider would deliver products or services that do not meet interchangeability or interoperability;
- When an agency procures work, products or services, without making any commitment for future supply, as a prototype intended for limited trial or as a development for research, experiment, study, or original development;
- In emergencies brought about by events not foreseen by the agency; and
- For purchases made under exceptionally advantageous conditions that only arise in the very short term, such as with unusual disposals, unsolicited innovative proposals, or liquidation, bankruptcy, or receivership sales - and not for routine purchases from regular service providers.

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

Except in the following cases, agencies must establish appropriate monetary limits for single invited tenders.

The value under which consultants can be asked for a single invited tender is set out in [Premier's Circular No. 04-17](#) (*Guidelines for the Engagement and Use of Consultants*).

[Schedule 1, Part 1 \(Public Service Department\) agencies](#) under the Public Sector Management (Goods and Services) Regulation 2000 are to use existing State Contracts Control Board whole-of-government standing offer contracts where available.

For goods and services not available under an SCCB contract, the SCCB has issued delegations for Schedule 1, Part 1 agencies for approaching the market. Information on the: General Purchasing Delegation; Consultancies Delegation; Printing Delegation; and Disposals Delegation are available at <http://www.dpws.nsw.gov.au/Government+Procurement/State+Contracts+Control+Board.htm>.

From 6 July 2006, under Premier's Memorandum 2006-11 NSW Procurement Reforms, all NSW Government agencies (not only Schedule 1, Part 1 agencies) must use SCCB whole-of-government standing offer contracts where they are available. State Owned Corporations are exempt from this requirement.

Direct negotiation

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

Generally, direct negotiations without preceding competitive tendering should be avoided, as there are very few circumstances in which this approach will achieve the best value for money. Direct negotiations can raise perceptions of improper behaviour, can appear to avoid scrutiny, and can be seen as involving preferential treatment and favoritism. Refer to www.icac.nsw.gov.au for further information.

Detailed written records of negotiations must be maintained.

2.4 Request for Tender documents

Documenting the requirements for the RFT fully and clearly is essential to ensure the tendering process achieves and demonstrates the best results.

Errors or uncertainties in the RFT document can mislead the tenderer in preparing a tender and cause problems in evaluation. Once a contract is awarded these errors and uncertainties may provide grounds for contractors' claims for additional payment, and extra time to complete the deliverables, and result in more disputes or incorrect work, products or services being provided.

The following suggestions can improve the readability of RFT documents:

- Use of plain and direct language;
- Define and use necessary common terms, symbols, abbreviations and acronyms; and
- Use a logical structure.

2.4.1 Components

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

- **conditions of tendering**
- **tender form** and/or **pricing schedule(s)** giving the basis for the tender price or prices/rates (specific to the RFT but using common form components);

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

When preparing RFT documents agencies must ensure they include:

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

2.4.2 RFT details

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

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

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

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

for the purpose of improving affordability or value for money for Government.

2.4.3 Specification

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

- functional specifications set the proposed function to be fulfilled by the product or other deliverables required (for example, provision of a sewerage treatment works that treats the specified input), or service to be provided (for example, the provision of event management services or the design of a product for a specified function);
- performance specifications set the performance standards to be met by the product or other deliverable, for example the reliability of a patient monitoring system, the strength and durability of concrete to be supplied or service quality or other performance attributes;
- detailed specifications define the product's/deliverables detailed technical and physical characteristics, including physical dimensions, detail design such as reinforcement details, plant power input and output, controls and instruments, materials to be used, and the like.

These types can be used singularly or in combination.

The technical or specialist product or service specification should:

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

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

An agency must not use technical specifications that require or refer to a particular trade name, patent, copyright, proprietary design,

origin, producer, or supplier, unless there is no other sufficient way of describing the procurement requirements and provided that words such as “or equivalent” qualifying the item are included in the RFT documentation.

2.4.4 Other matters during documentation

Industry forums or briefings

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

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

External involvement

Third party input may be sought, such as from expert advisors, to help define RFT documents. Generally, parties that are clearly potential tenderers for the RFT, and could be unfairly advantaged by this advisory involvement or where a conflict of interest could occur; should not be used.

Engaging expert advisers would generally make it necessary to preclude them from subsequent related tendering, and if so they should be informed of this risk prior to engagement.

Pre-tender estimate

Agencies must before inviting tenders prepare a pre-tender estimate to:

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

The pre-tender estimate must be based on the proposed contract requirements, expert advice (where needed) and consideration of current market conditions. This should allow for revenue grant components (directly for services to government or community), disposals, and also when there are exchanges, offsets or trade-offs.

For high risk construction projects or other construction projects greater than \$10M in value, a pre-tender estimate report for the first

on-site or material supply contract must be forwarded to the agency's Treasury Analyst prior to inviting tenders. Refer to the document *Treasury Appraisal/Monitoring Arrangements* at <http://www.treasury.nsw.gov.au/procurement/procure-intro.htm>.

Procurement process maps

When preparing RFT documents agencies should refer to the procurement process maps in the Treasury website www.treasury.nsw.gov.au for further information about the matters to consider.

Electronic tendering

The NSW *Electronic Transactions Act 2000* provides for tendering with most types of procurement without hard copy documents, using electronic tendering.

The *eTendering* system available through <https://tenders.nsw.gov.au/> can allow agencies to:

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

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

Under Premier's Memorandum 2006-11 NSW Procurement Reforms, all NSW Government agencies, other than State Owned Corporations, are to make Requests for Tender documentation available and tenders able to be lodged through the NSW Government eTendering system (<https://tenders.nsw.gov.au>) by June 2007.

2.5 Tender Evaluation Plan

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

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

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

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

The TEP may cover the following management and technical elements –

Management elements:

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

Technical elements:

- information sources that will assist in the evaluation criteria;
- weighting of evaluation criteria for price and non-price components;

- a scoring and ranking system required;
- a method for assessing the costs of departures, and qualifications, and any sensitivity analysis requirements;
- arrangements for checking tenderers' credentials and referees;
- arrangements for presentations and meetings with tenderers;
and
- methods for assessing best value for money using the above.

The TEP may also:

- note record keeping procedures and responsibilities;
- describe the conduct required of the evaluation team, including provisions for any conflict of interest and confidentiality;
- note security procedures, including document handling, storage and long term management;
- detail the reports that the evaluation team must make to reviewing and approving authorities;
- be co-ordinated with or include any probity plan;
- indicate when and how the Treasury reporting requirements prior to award of contract will be met for high risk construction projects and other construction projects with a value equal to or greater than \$50M see *Treasury Appraisal/Monitoring Arrangements* at <http://www.treasury.nsw.gov.au/procurement/pdf/monitor.pdf> ; and
- make provision for a Tender Evaluation Gateway Review if required by the agency. Refer to [Gateway Review](#) details on the Treasury website.

When developing a TEP it is appropriate for agencies to refer to the *Policy Statement on the Application of Competitive Neutrality* ([Treasury Circular TC 02-01](#) refers). Consideration should be given to the inclusion of a member of another agency in the tender evaluation process when an in-house bid is received.

Sample Tender Evaluation Plans for some complex tendering processes:

[Sample TEP No. 1](#) – Construction RFT (with price and non-price criteria)

Sample TEP No. 2 – **Consultant RFT** (using a two-envelope system)

The samples are .pdf files, and are part of the NSW Department of Commerce Tendering Manual. Access is provided for information only.

3. Tendering Process

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

3.1 Request for Tenders

Prior to issue

Before the RFT documents are issued, approval must be obtained for the RFT documents, the pre-tender estimate and to commence the tender process.

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

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

In the case of the first on-site or material supply contract of a construction project valued over \$10m, a copy of the pre-tender estimate must be provided to Treasury prior to tender invitation. Where the pre-tender project estimate exceeds the estimates previously provided to Treasury, the agency must include a report on the sources of, and reasons for the variation. Refer to *Treasury Appraisal/Monitoring Arrangements* which is available at: <http://www.treasury.nsw.gov.au/procurement/procure-intro.htm>.

Advertisements or invitations

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

They should be made on the Internet, such as using an electronic tendering system, and where necessary, may be supported by brief advertisements or information in printed or other publications.

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

Reference should be made to:

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

In addition, if projects are funded, or partly funded, by the Commonwealth, the funding agreement may require the application of the [National Code of Practice for the Construction Industry and the Australian Government's Implementation Guidelines for the Code](#). The Implementation Guidelines contain the thresholds above which the Code and Guidelines apply. Where applicable, the following must be included in tender advertisements: "The National Code of Practice for the Construction Industry and the Australian Government Implementation Guidelines for the National Code of Practice for the Construction Industry, revised September 2005, apply to this project."

Where it is necessary for RFT to be advertised in printed form the NSW Guidelines for Government Advertising (available from [Government Advertising](#)), based on Premiers Memorandum 92-05 (*Government Advertising Policy*) and 2005-6 (*Review of Government Advertising*), apply. These are available at <http://www.premiers.nsw.gov.au/>. Only very limited information about the RFT should be provided such as title and description,

reference or number, enquiry contact phone, fax or email, and the address of the tendering web site where the further information on the RFT may be found.

Where the RFT is publicised in other ways, such as billboards, information web sites, flyers, articles in publications, it is important to ensure that all these forms are coordinated and only include information that is consistent with the main tendering advertisement or invitation.

Other considerations

Agencies should be moving towards a greater use of electronic medium to allow service providers to readily access RFT advertisements, obtain the RFT documents and any addenda, and to submit their tenders. Agencies may use the Government's *eTendering* system managed by the Department of Commerce, which is located at <https://tenders.nsw.gov.au/>

Under Premier's Memorandum 2006-11 NSW Procurement Reforms, all NSW Government agencies, other than State Owned Corporations, are to make Requests for Tender documentation available and tenders able to be lodged through the NSW Government eTendering system (<https://tenders.nsw.gov.au>) by June 2007.

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

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

3.2 Tender period

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

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

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

A normal tender period for an RFT of value \$500,000 or over is no less than 30 calendar days. However, for open tenders this may be reduced to 25 calendar days where the agency advertises the RFT by electronic means and provides, to the extent practical, the RFT documentation by an electronic medium.

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

- where the agency procures commercial readily available goods, commodities or services;
- where there is a need or urgency substantiated by the agency;
- where the agency published a separate notice, including a notice of planned procurement at least 30 days and not more than 12 months in advance, and the separate notice contains a description of the procurement, the time limit for lodging tenders or, where appropriate, applications for participation in a procurement, and the address from which documents relating to the procurement can be obtained; and
- in the case of the publication of the notices for procurement of a recurring nature a second or subsequent time.

3.3 Enquiries and meetings

Contact person

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

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

Information

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

confidential tender proposal. Such information should not be passed on to other tenderers unless they have a similar request.

Meetings

Attendance at pre-tender meetings involving inspections, demonstrations or briefings, may be made mandatory or optional for tenderers depending on the nature of the meetings. Meetings should only be mandatory if they are considered essential to assist tenderers' understanding of the tendering process and contract requirements.

A tenderer's non-attendance at mandatory meetings would result in its tender not being eligible for consideration, unless the conditions of tendering allow for non-attendance under certain circumstances that are accepted by the agency.

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

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

3.4 Amendments to RFT documents

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

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

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

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

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

3.5 Submission, receipt and opening of tenders

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

Tenders received by agencies must be secured and treated in confidence, using procedures that ensure the confidentiality of the tenders. Tender boxes, whether physical, facsimile equipment or electronic, and subsequent tender handling processes must ensure that confidentially is protected before and after close of tenders.

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

They must record the receipt of each tender, including the date of opening, the apparent legal entity of the tenderer and, where appropriate, prices. Preferably, the TOC must mark any non-electronic tenders with an official stamp and sign the stamp. The TOC must also ensure that the record is signed before tenders are released for evaluation. Agencies must disclose the names of the tenderers within the seven days of tenders closing, on a website or notice board known to the tenderers.

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

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

Agencies should disclose the names of tenderers for all tenders received.

4. Tender Evaluation

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

4.1 Evaluation objective

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

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

Tender evaluation must comply with the following principles:

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

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

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

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

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

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

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

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

4.2 Evaluation methodology

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

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

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

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

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

Alternative tenders would also be considered in determining which tenders are in contention during the evaluation after comparing reasonably conforming tenders.

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

If a tenderer fails to comply with the mandatory or essential requirements, such as key aspects of the [NSW Government Code of](#)

[Practice for Procurement](#), this failure would result in its tender being passed over.

4.3 Probity requirements

Specific considerations relating to probity during tender evaluation include:

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

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

4.4 Outline of the evaluation process

Evaluation usually involves the following stages:

Stage 1: Initial Examination and Assessment

All tenders must initially be examined to:

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

- decide whether a late tender should be considered further in the evaluation.

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

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

Stage 2: Detailed evaluation

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

At this stage:

- the evaluation team must raise any questions with tenderers in contention or only the preferred tender, if possible, to clarify them and confirm the removal of unacceptable departures and qualifications allowing enough time for responses;
- presentations and demonstrations, where required, should be closely managed to make sure all the tenderers involved are treated equally using a common and detailed agenda and/or scenario with explicit time limits, ensuring the required content is communicated and producing a written record;
- reference checks, not necessarily limited to the tenderer's nominated references, should be obtained and considered;
- consideration of contractor and consultant performance information obtained from other agencies may occur. Refer to Section 8 of the Procurement Process Maps for guide documents used to assess construction and, goods and services, service providers. These are located at <http://www.treasury.nsw.gov.au/procurement/procure-intro.htm> .

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

A contract has been established with a service provider to enable NSW government agencies to obtain financial assessments of tenderers, particularly for construction or goods & services procurement. Refer to:

<http://www.construction.nsw.gov.au/cppm/cppm-6-4.html>.

Other independent capability assessments may be used when appropriate.

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

When short listing has occurred, or tenderers are otherwise assessed as clearly out of contention, early advice to those not in contention should be provided to reduce the cost to those tenderers.

Stage 3: Completion

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

4.5 Eligibility of tenderers

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

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

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

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

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

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

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

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

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

A business name is not a suitable identification, but a partnership or individual may use a name "trading as (the business name)". If there is a name such as "(business name) Constructions" and nothing more, then further enquiries should be made about whether the business is a company, partnership or a sole trader. A company would have a registered name and an Australian Business Number (ABN). If acceptable, a partnership would be identified by the names and addresses of all the partners. When the tenderer is an unknown partnership the tenderer should be asked to give a letter signed by each partner confirming that the tender is their tender.

Tenders must be authorised:

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

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

4.6 Qualifications, non-conformities and departures

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

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

4.7 Late tenders

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

Late tenders must not be considered, except when the agency is satisfied and can demonstrate it is certain that the integrity and competitiveness of the tendering process would not be compromised.

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

- exceptional circumstances, such as the tender being the only tender or a natural disaster affecting all tenders equally, that ensure the integrity and competitiveness of the tendering process would not be compromised by considering the late tender;
- the tender left the control of the tenderer prior to close of tenders and confidentiality of the tender was maintained before it was opened;
- control of the confidentiality of tenders before the scheduling of tenders guarantees no enhancement to the late tender occurred using knowledge of the other tenders;

- there has been mishandling by the agency delaying lodgement, but no change to the late tender was possible after close of tenders; and
- the RFT documents stipulate that lateness is not a bar to consideration.

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

4.8 Clarification of a tenderer's information

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

- do not divulge confidential tender information provided by a tenderer to any other tenderer;
- do not advise or imply the status of any tender, such as the tender being 'lowest tender', 'under special consideration', 'not under consideration' or 'rejected' to any tenderer except where it is clear they are not in contention and this is authorised appropriately, where this should be advised and no further clarification sought from them;
- frame requests for clarification so they do not result in the tenderer gaining any advantage over other tenderers;
- do not accept amendments to an RFT requirement or the tender price or rates after the closing of tenders, unless this is justified in addressing a qualification in the tender or a change made by the agency; and
- meetings should normally only be arranged with the preferred tenderer and should not normally be scheduled until all the matters requiring clarification have been identified, and a detailed written agenda can be provided to the tenderer.

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

- prepare a detailed agenda for the meeting, and provide it to the tenderer in a reasonable time before the meeting;
- make it clear at the meeting what further advice and information is needed from the tenderer, and set a date for the written submission of the further advice and information;

- confirm all matters that will form part of a contract in writing with the tenderer;
- keep minutes of the meeting; and
- resolve all matters at one meeting, where possible.

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

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

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

4.9 Tender negotiation

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

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

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

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

4.10 Recommendation, review and approval

Recommendation

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

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

Review

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

Approval

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

For high risk construction projects or construction projects of value in excess of \$50 million, Treasury must concur in the award of the project's major contract prior to the announcing of the tender result. Refer to the document *Treasury Appraisal/Monitoring Arrangements* at <http://www.treasury.nsw.gov.au/procurement/procure-intro.htm>.

5. Outcome of Tendering

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

5.1 Announcing tendering process results

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

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

This should be done whether a contract is awarded or not, however, the names of successful multi-stage tenderers would be published as they are identified as part of the applicable stage of the process.

In addition, agencies are to disclose the information required by the [Freedom of Information \(Open Government – Disclosure of Contracts\) Act 2006](#). The Act commenced 2 January 2007.

The website <https://tenders.nsw.gov.au> is to be used to disclose information on contracts awarded.

Disclosure about privately funded public infrastructure contracts must also comply with the [Guidelines for Private Sector Participation in the Provision of Public Infrastructure](#) (revised December 2006). See [Treasury Circular TC06/25](#).

The [Freedom of Information Act 1989](#) governs responses to any requests for other information.

Outcomes from the tendering process that do not involve a contract award may be disclosed. For instance, when no award is made or the

tendering process involves no award of a contract the outcome of the process may be disclosed so that tenderers and the public are made aware.

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

5.2 Contract award

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

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

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

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

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

A notification of acceptance or letter of award should:

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

- include a reference to, or a listing of, any post-tender correspondence between the agency and the tenderer and other documents that form part of the contract documents.

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

5.3 Debriefings

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

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

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

5.4 Tenderer complaints

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

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

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

5.5 Lessons from the tender process

Agencies should review the outcomes of each tendering process and ensure lessons learnt are disseminated and take into account in improving future tender processes and related actions.

For assistance in evaluating any learning from tender processes refer to the [*TAM04-11 Sept 2004 - Post Implementation Review Guidelines*](#).

6. Glossary of Terms

Agency	New South Wales Government Department or Declared Authority within the meaning of the <i>NSW Public Sector Employment and Management Act 2002</i> , or an entity established by a separate Act of the New South Wales Parliament, whether or not that entity is expressed to represent the Crown, except for State-owned Corporations within the meaning of the <i>NSW State Owned Corporations Act 1989</i> .
Alternative tenders	Alternative tenders are those that do not fully meet the conditions of tendering but purport to provide a better value for money solution. The alternative tender may be a solution (be it work, service, technology, etc) that is consistent with the scope of the outcome sought by the RFT but is not the solution anticipated in the RFT. For example, it may have a different lifecycle cost or offer different benefits to users, but would have a certain price and be sufficiently detailed to be able to be assessed.
Best and Final Offer (BAFO)	A process to improve the quality of tenders that are potentially acceptable but have some deficiencies. Short listed tenderers are asked to revise their proposals in specific areas, which then become their best and final offer and the basis for further evaluation.
Bid Shopping	The practice of trading off one tenderer's prices against another's in order to obtain lower prices. This practice is prohibited by the <i>NSW Government Code of Practice for Procurement</i> . It involves divulging a tenderer's price or rates proposal or requiring a tenderer to divulge its price or rates to another tenderer before the award of a contract or subcontract in order to secure a lower price or rate.
Conditions of Tendering	The rules governing the content and submission of tenders and the conduct of the tendering process. General conditions are the generic rules that apply to most requirements such as tender lodgement details, conditions applying to the treatment of late tenders. Special conditions are

specific to the RFT such as how RFT documents will be obtained, tenders will be prepared, received and assessed/evaluated. Conditions of Tendering provide the basic framework upon which the tendering process is built.

Collusive tendering

Tendering can be considered collusive where it involves such practices as:

Agreements between tenderers or their agents as to who should be the successful tenderer;

Any exchange of information between tenderers or their agents prior to the submission of their tenders designed to reduce the tender process competitiveness that may disadvantage the party receiving the tenders; and

Agreements between tenderers to fix prices.

Conflict of interest

A situation occurring when an official's private interests may benefit from his or her public actions. Conflicts of interest, either at a personal or agency level, can arise where there is a reasonable expectation of direct or indirect benefit or loss for an individual employee (or agent of the agency) with a particular personal interest that could be influenced, or appear to be influenced, in favour of that interest, in the performance of their duties. The benefit or loss may be financial or non-financial.

Contract

An agreement between two or more parties to do something that is legally enforceable. The agreement may be written, oral or inferred by conduct.

Departures [tendering]

A tender not in accordance with the RFT.

eProcurement

The use of electronic methods at any stage of the procurement process from identification of requirement through to any to contract management and possibly procured asset management. Electronic tendering is the undertaking of the tendering process stage by electronic methods.

eTendering

A NSW Government Internet based electronic tendering system (developed and used by the NSW Department of Commerce and other

agencies in NSW and the Commonwealth), that provides the facility to electronically invite or advertise RFTs, distribute RFT documents, securely receive, and open, tenders, and provide various notices. This facility is available through <https://tenders.nsw.gov.au/>,

eAuctions	Electronic reverse auctions (eAuctions) are an innovative procurement technique that use secured Internet-based technology. The sense of competition is heightened as suppliers compete in real time by bidding lower as the auction unfolds. eAuctions offer efficient, open and fair negotiations as part of a full procurement process. This means that the time needed to carry out competitive negotiations are reduced as it starts at or near the market price. eAuctions may either be structured around lowest price or most economically advantageous tender. They have proved particularly successful when used with requirements that have clearly defined specifications and where there is a vibrant market. Initial price proposals are needed.
Expression of Interest (EOI)	This is the process of seeking the interest of service providers capable of undertaking specific agency works or services to provide information on that capability or a detailed proposal to undertake work. It is usually the first stage of a multi-stage tender process.
Fair	Being unbiased, reasonable and even-handed. Being fair does not mean satisfying everyone or not reasonably pursuing one's legitimate interests. A fair decision may still adversely affect parties.
Australia – United States Free Trade Agreement (AUSFTA)	<p>The Government Procurement Chapter of the Australia – United States Free Trade Agreement applying from 1 January 2005 to the procurement of goods and services and construction projects valued above stated monetary thresholds by some agencies.</p> <p>Refer to the agreement for the scope, coverage, exemptions and the monetary thresholds at www.fta.gov.au .</p>

In-house bids	Tender from a unit within a purchasing agency. The handling of in-house bids must comply with the application of competitive neutrality. Refer to the <i>Policy Statement on the Application of Competitive Neutrality</i> (Treasury Circular TC 02-01).
Intellectual property	Material that has intellectual value, usually under copyright, patent right, registered design, trade mark or name or other protected right, and may also be commercially sensitive.
Late tender	A tender received after the required closing date and time.
Pre-tender estimate (PTE)	An estimate of the cost of, or an estimate of the income generated through a proposed contract prepared before the RFT documents are issued and updated as necessary before tenders close.
Probity	<p>Integrity; uprightness; honesty.</p> <p>There are a number of essential requirements to promote probity. Agencies should consider these essential requirements throughout all stages of the process. These requirements are:</p> <ul style="list-style-type: none"> • fairness and impartiality; • use of a competitive process; • consistency and fairness of process; • tender security and confidentiality; and • identification and resolution of conflicts of interest.
Procurement	<p>All activities involved in acquiring goods or services either outright or by lease (including disposal and lease termination).</p> <p>Includes acquiring consumables, capital equipment, real property, infrastructure, and professional services, facilities management services and construction.</p>

Process contract	This is a contract arising in relation to the tendering process before acceptance of a tender by the party inviting tenders. Refer to the <i>Hughes Aircraft case - Hughes Aircraft Systems International v Airservices Australia</i> (1997) 146 ALR 1.
Qualifications [tender]	Conditions set by a tenderer, as part of its tender (offer).
Request for Tender (RFT)	The issuing of an invitation, by advertisement or directly, to respond to tender requirements by lodging a tender. It covers all forms of tendering, including an invitation or request for quotations (RFQ), offers, EOI, for pre-registration RFQ, and RFP. Other terms commonly used include ‘call tenders’, ‘invite tenders’, ‘call for detailed proposals’, ‘let tenders’ etc.
Request for Tender (RFT) documents	The set of documents, prepared by the party seeking tenders and provided to tenderers, outlining the invitation or request for tenders and the requirements involved, including the conditions of tendering and proposed contract conditions.
Risk management	The systematic application of management policies, procedures and practices to the identifying, analysing, assessing, treating and controlling risks, and monitoring the outcomes. Risk management is used to ensure that project objectives and goals are achieved. See the <i>Total Asset Management Risk Management Guidelines</i> (TAM 04-12) available on the Treasury website homepage at www.treasury.nsw.gov.au .
State Contracts Control Board (SCCB)	The board established under the Public Sector Employment and Management Act 2002 which develops, reviews and implements procedures covering the provision and disposal of goods and services for the NSW Public Service.
Service providers	Includes contractors (including suppliers), subcontractors, consultants (including agencies advising others) and sub-consultants, and their service providers, that contract to carry out construction, or provide other products (including goods) and/or services.

Technical specification	A detailed description in the RFT documents setting forth the functional, performance, material and other specific technical requirements for a proposed building contract, engineering work, IT system, or good or service, or other work or product.
Tender	Includes a price, bid, offer, quotation, consultant proposal or expression of interest, or the like, lodged in response to a Request for Tender.
Tender Closing Office	The office nominated in the RFT documents as the location where tenders are to be lodged in associated tender box(es).
Tender box	Location, physical or virtual, that receives tenders lodged by service providers, and maintains them secure and confidential until close of tenders, and the tender opening process occurs.
Tenderer	Entity submitting a tender in response to an RFT.
Tender Opening Committee	A quorum of people who convene to open and process tenders prior to evaluation in accordance with agency procedures.
Tender period	The period between the common initial issue date or date of availability of the RFT documents and the closing date and time of tenders.
Value for Money	<p>The benefits compared to the whole-of-life costs.</p> <p>Relative value for money may be determined with tenders by considering their benefits taking into account all factors relevant to the contract outcome such as:</p> <ul style="list-style-type: none"> • price with whole-of-life costs; • experience; • quality; • reliability; • timeliness; • delivery; • innovation;

- product servicing;
- fitness for purpose; and
- value adding components such as meeting the government's economic, social and environmental objectives where relevant.