Best Practice Government Procurement Guide

March 2016

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1. Introduction and Overview

1.1 About AIIA

The Australian Information Industry Association (AIIA) is the peak national body representing Australia's information and communications technology (ICT) industry. Since its establishment 36 years ago, the AIIA has pursued activities aimed to stimulate and grow the ICT industry, to create a favourable business environment for our members and to contribute to the economic imperatives of our nation. Our goal is to "create a world class information, communications and technology industry delivering productivity, innovation and leadership for Australia".

We represent over 400 member organisations nationally including hardware, software, telecommunications, ICT service and professional services companies. Our membership includes: global brands such as Apple, Avanade, EMC, Google, HP, IBM, Intel, Lenovo, Microsoft, PwC, Deloitte, Canon and Oracle; international companies including Telstra and Optus; national companies including, Data#3, SMS Management and Technology, Hills Limited, Technology One and Oakton Limited; and a large number of ICT SME's, which represent over 75% of our members.

1.2 The AIIA Legal Special Interest Group

This document is a result of an initiative by the AIIA Legal Special Interest Group (AIIA Legal SIG).

The members of the AIIA Legal Special Interest Group (AIIA Legal SIG) are drawn from many of the member organisations mentioned above. Collectively, the AIIA Legal SIG members have extensive government experience, having worked with or for all levels of government over decades and on numerous projects. Each member of the AIIA Legal SIG that contributed to this document is a highly experienced lawyer in their own right and has undertaken this project to provide a balanced view of government procurement.

1.3 Overview

This **Best Practice Procurement Guide** has been developed by the members of the AIIA Legal SIG, to promote a balanced working relationship for the government procurement of ICT products and services, mainly via negotiation over standard form procurement procedures and agreements.

It is provided as a reference document for government users, to assist in ensuring that procurement occurs in the most efficient and effective manner. In particular, this document promotes processes and positions intended to protect government interests on the one hand, and the risks of reduced competition, increased costs and of not achieving the best procurement outcome on the other.

2. Acknowledgements

The AIIA would like to give special thanks and acknowledgements to the following members of the Legal Special Interest Group that made significant contributions to the Best Practice Government Procurement Guide:

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3. Pre-Market Requirements

3.1 Skilled Procurement Professionals

Best Practice

1. **Use Skilled Experienced Professionals:** Skilled and experienced procurement professionals and technical staff should be involved in all parts of the procurement lifecycle. Training which covers the various IT procurement options is required to attain a sufficient level of competency.

2. **Attract, Develop and Retain Quality:** Government should implement and maintain policies that attract, develop and retain high quality procurement professionals with commercially current skills.

3. **Actively Support:** Procurement professionals should be actively supported and encouraged to update their knowledge through attendance and participation in formal training, trade shows, conferences, industry events, briefings or seminars.

4. **Brief Stakeholders:** Those professionals then need to brief their stakeholders and colleagues to create the best possible alignment of stakeholders, procurement professionals and industry.

Benefits:

- *Skilled procurement teams with current industry and technical knowledge will create a more efficient and effective procurement process, reduce costs and support better alignment between the procurer and industry.*

- *Openly discussing challenges and opportunities develops a shared understanding of those issues and engenders a consultative approach to problem solving.*

3.2 Appropriate Intent

Best Practice

1. **Statement of Requirements**: The relevant statement of the organisation's requirements issued to the market should accurately reflect the business need, including by avoiding unnecessary requirements or generic descriptions.

2. **Procedural Fairness**: Requirements must be objective and non-discriminatory. They must not impose unnecessary costs on suppliers or impose unreasonably short response times having regard to the amount of information or work required by industry to prepare a response.

3. **Managing Relationships**: All parties must seek to establish and maintain open and productive relationships. Relationships must be managed from the time they begin, as early into the procurement cycle as possible.

4. **Transparency, Probity and Compliance**: Anyone involved in the procurement process must behave ethically at all times. Openness and accountability gives suppliers confidence to participate. Procuring organisations must have and publish transparent processes that ensure appropriate probity and compliance (see Section 7 (Communications and Probity).

5. **Australian and SME content**: In accordance with government policy, consideration should be given to how procurement will encourage participation by SMEs and Australian entities.

> *Benefits:*
>
> - *Faithfully representing the requirements and including transparent and ethical processes will increase supplier participation and improve the quality of responses and outcomes as well as reduce the cost of procurement.*

4. Supplier Prequalification

4.1 Panel and Similar Arrangements

Best Practice

1. **Best Use of Panel Arrangements:** Panel and similar arrangements (such as 'registers') are appropriate and beneficial when:
    a. they cover related repeat requirements, not bespoke solutions;

    b. they are whole of government and apply consistently across agencies and departments;

    c. new suppliers can apply to participate at any time;

    d. participation is open to all suppliers that demonstrate the required capability;

    e. financial viability is not an unnecessarily onerous requirement, which may preclude participation by SMEs;

    f. a clear statement of which ICT products and services will be covered or not covered is provided, and the procurement mechanism to be used for each.

> *Benefits:*
>
> - *Appropriate and unrestricted panel and register arrangements reduce procurement costs, encourage maximum participation (and therefore competition) and provide consistency and ease of use.*

4.2 Pre-Qualification requirements

Best Practice

1. **Only Have Necessary Pre-qualification Requirements:** Panel and similar arrangements should have pre-qualification requirements which are genuinely necessary and, as with all forms of procurement, non-discriminatory.

2. **Reducing Requirements to those which are Genuinely Necessary:** Any requirements likely to impose an additional cost or effort on suppliers, including effort involved in demonstrating compliance, should be avoided unless genuinely necessary for the work to be procured. Where a requirement will only be necessary on an exceptional or case-by-case basis, it should not form part of the general pre-qualification requirements or contract terms (if those terms are mandatory for pre-qualification).

3. **Non-discriminatory Requirements:** Requirements should be imposed equally on all participating suppliers, and should not unfairly disadvantage particular suppliers. The only exceptions are where it is government policy to encourage participation by a particular segment of industry (such as local industry) or otherwise genuinely necessary for the particular procurement.
    > *For example: Specifying high insurance levels or complex insurance arrangements can discriminate against SMEs who have insurances appropriate to the services they offer but cannot reasonably meet the requested threshold by Government.*

> *Benefits:*
>
> - *Removing unnecessary requirements and being aware of terms that may discriminate will improve outcomes by increasing the level of industry interest and participation, particularly SMEs, and avoiding unnecessary costs in supplier participation which may otherwise be passed on to the customer.*

4.3   Compliance Duplication

Best Practice

1. **Once Only Demonstration of Compliance:** A supplier should only be required to demonstrate their compliance with a requirement once (to the agency responsible for the panel / register), subject to changes of circumstance or requirement.

> *Benefits:*
>
> - *Demonstrating compliance only once reduces the cost and complexity of bids and increases efficiency for all parties.*

4.4   Panel or Register Coverage

Best Practice

1. **Clarity of Scope:** Each panel/register must be clear about the products, services and delivery models it covers (and does not cover), e.g. products purchased through resellers, cloud-based products, "standard" products which cannot be customised etc.

2. **Ability to Quickly Understand Purpose:** The coverage (and exclusions) of a panel/register arrangement should be described with sufficient clarity and detail that a procuring agency can quickly form a view as to the appropriateness of the panel/register for its purpose.

3. **Guidance where not Suitable:** There should be guidance on the appropriate procurement process for the agency to follow in the event that the panel/register is unsuitable for a particular type of procurement or where the procurement is particularly complex, risky or costly.

4. **Allow Possible Alternatives:** The existence of a panel/register should not preclude, and should not be used as a reason for precluding, a genuine conversation about alternative procurement arrangements where this is appropriate.

> *Benefits:*
>
> - *Panel/register arrangements make purchasing easier, but require clear scope, training and guidance. This will prevent inappropriate procurement arrangements and contract terms being put to market, which can reduce efficiency and industry participation.*
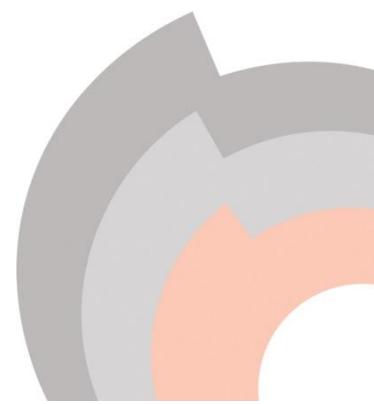
5. Go to Market

5.1   Early Engagement with Industry

Best Practice

1. **Publishing of Procurement Plans:** Procurement plans should:

   a. Be shared with the market as early as possible enabling maximum engagement and planning by suppliers;

   b. Be published from a central/single area;

   c. Provide accurate descriptions of the intended requirements; and

   d. Be updated regularly to reflect changes in government requirements and all versions should be clearly identified and changes be easily 'discoverable'.

Benefits:

- *The publication of "notices of planned procurement", such as the Australian Government's Annual Procurement Plans, or the NSW Local Government Procurement monthly newsletter, provides industry with a clear direction and promotes understanding of government's forward requirements, allowing suppliers to plan ahead.*

5.2   Procurement Principles

Best Practice

1. **Business Requirements**: Government must publish clear, well-articulated business requirements:

   a. Procurers should describe the business outcomes they seek to achieve.

   b. Avoid specifying particular technology solutions or approaches unless there are clear and articulable reasons as to why a specific solution or approach is required.

2. **Driving Innovation**: Government should tailor its procurement to encourage innovation, particularly the utilisation of emerging technologies that may not otherwise be visible to agencies.

3. **Threshold Limits**: Threshold limits for open tenders must be appropriate. Where threshold limits are too low, the process and cost to respond to the tender may be disproportionately high in comparison to the value of the contract to be awarded.

> *Benefits:*
>
> - *Encouraging innovation optimises the outcome for government, and reduces the risk that innovative solutions (which may offer more effective, less costly or less risky outcomes) are inadvertently excluded.*

5.3   Procurement Strategy

Best Practice

1. **Choose the Right Tender Process:** The method of approaching the market e.g. RFQ, RFI, RFO, RFP, RFT will depend on the complexity of the requirements, the market for the requirements and costs/risks envisaged by the procurer.

2. **Two Envelope Tendering**: Procurers using this method should consider assessing the technical proposals in round 1 and the cost proposals in round 2.

3. **Select the Appropriate Agreement**: The use of an appropriate agreement is paramount. Initially, procurers should consider if existing contracts, including with minor amendments, can be used. If that is not appropriate a new bespoke document should be used. This means that "whole of Government" agreements need to be carefully considered to confirm they are appropriate in all cases. This is particularly so where the solution may be taken up by other agencies. Inappropriate agreements may not protect the parties appropriately from procurement risks but will substantially increase the negotiation time and cost for both parties.

4. **Minimise Complexity**: Government can minimise complexity by doing the following when communicating with the market or individual suppliers:

   a. Be clear and concise, with appropriate guides to explain the documentation;

   b. Information should be complete and accurate. If relevant information is not available at the time of issuing the tender, clearly state this, with guidance on when such information will be available;

   c. Clearly state the objectives to be achieved, and provide all information that will be required to develop a business solution;

   d. Reduce the level of detailed technical questioning (which necessarily leads to prescriptive technical solutions); and

   e. Increase opportunities to discuss the proposal with government to ensure that the requirements and obligations are understood and best achieved.

> *Benefits*:
>
> - *The procurement method selected informs potential suppliers about the expectations and requirements.*
> - *Two envelope tendering will result in a better technical solution.*
> - *Using an appropriate agreement is paramount.*
> - *Clear, accurate and thorough documentation will obtain a better result more efficiently.*
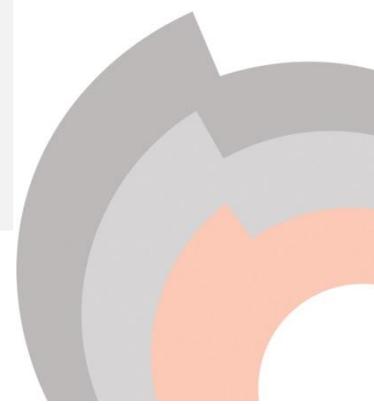
6. Tender Invitations

6.1 Efficient Tendering

Best practice

1. **Tender Value and Competition Parameters**: Procurers should consider the value of each new procurement to a prospective supplier and ensure the amount of work that industry must invest to respond is reasonable and proportionate.

2. **Procurement Framework:** This method of procurement should utilise existing, open procurement/tender frameworks.

3. **Notice of Incumbent:** Procuring organisations should advise from the outset if an incumbent supplier is providing the goods or services sought in the tender, particularly if the current contract has a considerable length of time to run and where suppliers may be required to work alongside each other.

4. **Impact on Tenderers (*Cost of Tendering*):** Most suppliers are open to engaging with procurers during the procurement cycle but are wary of providing 'free consulting' or participating in 'fishing expeditions'. It is therefore important that procuring organisations must secure support and funding before going to market or be prepared to fund any needs assessment.

5. **Financial Standing:** Where the financial standing/suitability of the supplier is important, it should disclose how this will be measured and how suppliers can demonstrate compliance.

6.2 Tender Response Timing and Format

Best practice

1. **Reasonable Timing:** Procurers should consider the complexity and strategic nature of the request when setting tender timeframes. The following minimum timeframes should apply unless a genuine urgency renders those time limits impracticable:

    a. For simple and low value procurements (those involving off the shelf products and/or simple services purchased through an existing panel or register), approximately 20 business days to prepare and lodge a tender unless it is an electronic tender where a reduced period of no less than 10 business days is acceptable.

    b. For large and complex purchases, including where the solution is complex, substantial modifications are required to the panel arrangements or purchases of a substantial value, e.g. the value is greater than $2,000,000, procuring organisations should allow at least 30 business days.

    c. Where a 'Best and Final Offer' process is envisaged that may necessitate changes to technical specifications, service level management approaches and partners, the level of the further work required will dictate what is a reasonable time to allow. The same principles in a. and b. above should be used.

    d. Tenders released over the end of year holiday period require a commensurate extension in the timeframes, applying from mid-late January each year.

e. For non-routine or complex ICT procurements, it may be better to issue a draft document (e.g. EOI) to industry to obtain supplier feedback to improve the process.

2. **Tender Response Schedules:** Procuring organisations should not issue tenders in a rigid format, with only 2 options to respond: 'complies' or 'does not comply.' This causes risk-friendly suppliers to respond 'complies' and deal with the consequences later (often SMEs) and risk-averse suppliers to respond 'does not comply' and risk not making the shortlist, or not bid at all.

3. **Pro Forma Responses:** Response pro forma documents, such as those requested in Excel formats, must be assessed in terms of the ease with which the format allows the supplier to respond in a complete and appropriate way. For complex arrangements, an Excel limit row height of 409 points (or approximately 200 words) per tender requirement is usually not adequate to respond to ICT tenders.

Benefits:

- *Well-defined requirements and selection criteria allow suppliers to produce a response that is appropriately aligned with the requirements and the value of the contract.*

- *Allowing an appropriate timeframe for responses elicits higher quality responses and provides a better outcome. Longer time is needed for complex tenders and when the tender period spans the end of year break.*

- *Using a format that allows suppliers to include more intricate details of their bid will improve the evaluation and selection process.*

7. Communications and Probity

7.1 Communication

Best Practice

1. **Clarifications on Request:** Procuring entities must anticipate and build into the tender process a facility to allow interaction with suppliers in a manner that accords with the probity requirements and does not discourage communication.

2. **One-to-one Contact and Collective Contact:** Some communication should be conducted openly and involve all suppliers simultaneously. However, it is essential that probity principles are not used to avoid one-to-one communications with suppliers which, are essential to a productive procurement process.

3. **Industry Briefings** are an efficient tool for sharing general information with all suppliers but should not be an alternative to appropriate communication with individual suppliers during the tender process.

4. **Publication of Responses:** Only the following need to be published to all tenders:
    a. Significant clarifications;
    b. General questions and answers in regard to the tender;
    c. Error corrections; and
    d. Changes to the scope or specifications.

5. **Commercial Information:** De-identifying the origin of communication and query is often not sufficient to ensure fairness. Care must also be taken to avoid sharing a supplier's competitive advantage, innovation, solution or know-how.

7.2 Probity

Best Practice

1. **Appropriate Information Provision, Clarification and Engagement:** Probity in procurement refers to the adoption of processes which are ethical, fair and contestable. Probity facilitates the discussion with suppliers. Its application depends on the circumstances and it does not preclude the exchange of information with potential or existing suppliers.

2. **Probity Information for Government:** Government agencies should ensure personnel advising on probity are trained, have access to constructive probity advice and can easily provide prepared information in response to enquiries. If a query or discussion is complex or difficult, or raises a possible probity issue, best practice is to suspend or take the question on notice while advice is obtained. This does not, however, mean that an independent probity advisor or auditor needs to be appointed for each procurement.

Benefits:

- *Ensuring appropriate information exchange increases suppliers' understanding of the requirements and enhances the quality of supplier proposals.*

8. Contract types

8.1 Short Form Contracts

Best Practice

1. **Short-form Contracts** should be used for low value, low risk and quick turnaround procurements.

2. **Lower Barriers to Entry:** The combination of appropriate tender thresholds and short form contracts lower the barrier to entry for SMEs to engage in business with government.

3. **Balance Reward & Risk:** These contracts should balance the reward and risk for both parties.

8.2 Standard Form/Published Frameworks.

Best Practice

1. **Using Standard Contracts:** Standard contracts are suitable for most purchases.

    a. Use and understanding of standard frameworks (e.g. Procure IT, GITC, Source IT, SA Government ICT contracts, etc.) should be encouraged. There must be a clear understanding of what products and delivery methods are covered or not covered by these arrangements in order to ensure only an appropriate contract is proposed. All standard agreements should be developed in conjunction with industry bodies.

    b. Appropriate changes should be considered to the contract form as there are risks and rewards that may require a deviation from the standard position.

    c. Where custom contracts are used they should be based on the relevant standard government contract form and changes should be noted and explained.

    d. Where the standard form is not suitable, or it is not practicable (for reasons such as urgency or cost) to negotiate amendments, the procurer should consider the supplier's standard contract. This is most likely to occur for 'off the shelf' items, products which are specific to the supplier (e.g. cloud or managed services products) or 3rd party items where the supplier is a reseller.

8.3 Master Service Agreements (term agreements, panel arrangements)

Best Practice

1. **Using Master Service Agreements:** Where multiple engagements are contemplated, Master Service Agreements should be used.

    a. The term of these arrangements should not be so long as to preclude new entrants to the market. This must be balanced, however, to ensure they are sufficiently long to justify the investment of suppliers and for the customer to realise the benefits of an appointment.

    b. At the end of a panel, the customer should reassess the market. Panel arrangements should not be rolled over without proper communication of the basis of that decision to the market.

c. Price lists/rate cards should be flexible to adjust to changes in products, costs and foreign exchange rates to ensure risk is shared appropriately. Adjustments should only be within the scope of the original procurement.

d. Procurers should not appoint suppliers to panels if they do not reasonably expect to utilise them during the term, unless the panel is clearly designated as a prequalification list of suppliers meeting only minimum standards.

8.4   Bespoke Agreements

Best Practice

1. **Bespoke Agreements** are appropriate for large, complex and high cost purchases.

2. **Ensure Balance and Fairness:** When developing a bespoke agreement, procurers should take great care to ensure balance and fairness. Too often, bespoke agreements show a lack of context and do not represent the existing relationship terms.

Benefits:

- *Using the appropriate agreement ensures appropriate contract terms are proposed and allows the agreement to be completed in the most efficient and cost effective manner.*

9. Contract conditions

9.1 Terms and Conditions

Best Practice

1. **Principles Across Multiple Jurisdictions:** The many different types of goods and services purchased and multiple government jurisdictions may potentially result in a large variance in contract terms. Regardless, most ICT purchases can be made within a similar framework. The principles for that framework are explained below. This framework is nonetheless at a point that is uncomfortable for suppliers and outside their standard terms, because it is accepted that many such terms are necessary when supplying to government.

9.2 Risk Allocation

Best Practice

1. **Consider Risk Distribution:** The liability for risk should, as a general principle, be allocated to the party who is best able to manage the risks, the likelihood of occurrence and severity of the risk. For example, requesting general indemnities for all contractual loss is not a commercially acceptable position. Such requests do not reflect the fact that users of government services may have limited recourse to damages and increase the supplier's liability to more than the general law allows. A more reasonable position is to ask for an uncapped indemnity for personal injury/death, tangible property loss or damage, breach of confidence and third-party IP claims as Supplier's policies do not allow them to agree to general indemnities.

2. **Warranties Should be Limited:** The warranties included should be concise and not create overarching obligations of performance greater than that set out in the specifications. Also, the warranties should be based on information within the supplier's knowledge.

3. **Vendor/Manufacture Terms Should Suffice:** When purchasing products from a reseller, the supplier should not generally be required to accept risks, give warranties or comply with requirements which the vendor/manufacturer of the product does not accept, give or agree to comply with. This is particularly relevant when it comes to scope and intellectual property.

4. **Keep Insurance Simple:** Standard insurances are usually sufficient. It is generally not appropriate to include onerous or specific requirements such as for procurers to be a co-insured or named beneficiary, or even noted on the policy for professional indemnity insurance.

5. **Default Insurance Positions:** The default insurance position should be:
    a. no more than public liability of $10M in respect of each claim;
    b. if products are involved, product liability of no more than $10M in aggregate for the period of cover;
    c. where advice is provided, professional indemnity of no more than $1M in aggregate for the period of the cover; and
    d. workers compensation insurance in accordance with the applicable law.

6. **Justifiable Insurance Levels:** The level of insurance required should be justified by a risk assessment by the customer.

9.3   Limitation of Liability & Indemnities

Best Practice

1. **Liability Must be Well Defined:** All projects should have a well-defined liability regime that includes a limit of liability, indemnities and exclusions. Below are principles that should suffice for most purchases.

2. **Standard Liability Terms:** For most purchases the following liability terms should suffice:
    a. A limitation of liability on the supplier in the aggregate for all claims based on:
        i. for non-recurring purchases such as goods and one-off services, the value of the fees payable under the agreement; or
        ii. for recurring purchases such as maintenance or monitoring services greater than 12 months, the value of the fees paid or payable each year of the agreement (i.e. an annual limit).
    b. Exclusions to the cap on liability for claims due to personal injury, property damage, IPR infringement, moral rights infringement and breach of confidentiality;
    c. Liability of a party is to be reduced to the extent the loss was caused or contributed to by the other party;
    d. Each party has a duty to mitigate against damage and loss;
    e. Indemnities for third party claims only and uncapped only for the same items listed in paragraph ii., above;
    f. Each party excludes claims for consequential loss defined as including indirect or consequential loss, loss of profit, revenue, goodwill, data, business opportunity and damage to reputation.

Benefits:

- *Suppliers will offer contractual terms to governments that are better than the terms they offer to non-government clients.*

- *Governments should not seek terms that are not appropriate.*

- *This general liability and indemnity framework that should suffice for most ICT agreements will reduce cost for all parties.*

10. Intellectual Property

10.1 Intellectual property:

Best Practice

1. **Commercially Appropriate Positions:** Procurers should ensure they adopt commercially appropriate positions in relation to the ownership and licensing of intellectual property, from the RFX stage through to the contract terms and conditions.

2. **Licensing Agreements:** A licence to use products and services is more likely to meet the procurer's needs in almost every case, with ownership of pre-existing and developed material retained by the supplier. Such a licensing regime is commercially reasonable and consistent with industry practice for licences of this type. Approaches such as source code escrow may be more suitable to protect the interests of the procurer than ownership of the supplier's intellectual property. Even where a supplier agrees to procurers owning intellectual property, such an approach is almost always likely to come at an increased cost to the procurer. It will never be appropriate for the procurer to own the intellectual property in a supplier's existing licensed software products.

3. **IP Ownership:** Procurers should therefore carefully consider if it is necessary to own (either solely or jointly) the intellectual property in work developed during the contract. Ownership will not usually be appropriate or necessary, especially where the party that has developed the intellectual property is the supplier. This is likely to be so even if the supplier is giving effect to functionality or customisations required by the procurer. If code is developed that reflects a special and specific business process it may be appropriate to own that code only. An alternative is that copyright vest in the procurer and all other intellectual property to vest in the supplier. Most deliverables are the product of the supplier's experience and skill and the intellectual property cannot be easily isolated and sold. It may also incorporate licensed third party materials.

4. **Standard Form Contracts:** Standard form contracts should reflect the above as the default position.

5. **Commercial Terms:** Where the procurer does expressly wish to engage in a transaction involving the shared development and commercialisation of intellectual property, consideration must be given to development of reasonable commercial terms.

6. **RFX Terms:** During the RFX stage, the procurer's terms should properly acknowledge that:
   a. ownership of the supplier's response document by the procurer will not affect ownership of the supplier's intellectual property contained in that document;
   b. the procurer's use of the supplier's response will be limited to the assessment of the response as part of the RFX process;
   c. confidentiality will be maintained by the procurer, even for a certain period of time beyond the RFX process.

   These requirements should be contained in the procurer's standard RFX terms.

Benefits:

- *Unlike the ICT industry, public sector procurers are not in the business of commercialising intellectual property.*

- *Despite this, procurers often seek to obtain rights to suppliers' intellectual property in excess of the procurer's needs. This can lead to increased costs to procurers, prolonged negotiation periods, and reduction in the range of suppliers (particularly SME suppliers who may not be positioned to dispute procurer's standard terms).*

- *The approach proposed in this section is more likely to meet both parties' needs and the reality that suppliers will re-use their IP and know-how in subsequent engagements.*

- *It also encourages innovation by acknowledging that suppliers should continue to build on and commercialise the IP they create.*

11. Lodging Tenders

11.1   Electronic Tendering

Best Practice

1. **E-Tendering Systems:** All levels of Government should offer an e-tendering system that allows suppliers to both access and respond to tenders, or if unable to offer one, consider joining an existing State/Federal e-tendering system.

2. **E-Tendering Cost:** There should be no charge to register or to download or to submit tenders electronically.

3. **E-Tendering Access Terms:** Suppliers should be able to comment on the e-tendering access terms in addition to the actual tender terms.

11.2   Tender Closing Date and Time

Best Practice

1. **Closing Date:** The closing date must be specified clearly and consistently.

2. **Closing Times:** Closing times should be during business hours, on a business day (and not be on a public holiday in any Australian state).

3. **Calendar Considerations:** The closing time should not be during or soon after a recognised holiday period such as Easter or Christmas, and thought should be given to major school holiday breaks.

11.3   Requirements for tender lodgement process

Best Practice

1. **Technical Requirements:** All technical requirements of the tender should be clearly set out, including the method of lodgement, if there is a need to pre-register, the file formats, naming conventions and sizes for lodgement of e-tenders.

2. **Functionality and System Issues:** The system should:
   a.   include the facility to register, identify, validate and enable automatic notifications of tenderers;
   b.   allow submission of tenders without hard copy documents;
   c.   avoid duplication of authentication mechanisms;
   d.   be tested for high load and account for issues arising from potential network congestion; and
   e.   be easy to use, supported by clear guidance and provide proof of lodgement.

3. **Late Tender Responses:** Clear guidance regarding the management of late tender responses must be provided.

Benefits:

- *E-tendering provides substantial efficiency benefits including:*
    - *increased consistency and efficiency in process;*
    - *reduced timeframes and costs particularly for high volume, low cost tenders; and*
    - *allows potential vendors to register for notifications and more easily search for relevant tenders.*

- *A tender closing date and time that avoids holiday periods will result in a higher number and quality of tender responses.*

- *Ensuring clear and detailed Tender Lodgement instructions reduces the opportunity for challenges and probity issues during or after the tender process and ensures transparency for all tenderers.*

12. Confidentiality

12.1 Mutual Confidentiality to be maintained

Best Practice

1. **Confidential Information Disclosure:** Procurers and suppliers are both required to disclose confidential information during tender processes, negotiations and projects. While the type of confidential information disclosed will be different, parties should agree appropriate terms to protect the confidentiality of one another.

2. **Sensitive Information** of either party should not be requested unless genuinely required in the context of the engagement. Where such information is requested, it must be kept confidential. Confidentiality undertakings should cover information which is by its nature confidential and specifically designated as confidential or sensitive by a supplier.

3. **Commercial Consequences:** Procurers should be aware of the serious commercial consequences which may flow to suppliers where suppliers' confidential information is not handled appropriately.

4. **Confidentiality Agreements:** Requesting personnel of a supplier to sign individual confidentiality agreements is in most cases, unnecessary. This requirement should only be used where the information is extremely sensitive or damaging to the point that its disclosure will significantly affect the agency and/or there is likely to be significant public embarrassment, and the request is to a supplier's key personnel only.

12.2 Exceptions

Best Practice

1. **Disclosure Requirements:** Mandatory and specific disclosure requirements should form a set of narrow exceptions to general confidentiality protections. These should not be used as a reason to avoid confidentiality obligations.

2. **Agency-specific exceptions:** Suppliers understand that there are agency-specific exceptions to general confidentiality requirements including:
    a. the need to disclose information to Ministers, the Auditor-General and Parliament (including Parliamentary Committees);
    b. annual and financial reporting obligations (which should be supported with a clear statement about which information will be published);
    c. Freedom of Information (FOI) / Right to Information (RTI) and court processes, accompanied by assurances that the supplier will be notified and given an opportunity to comment or object to the disclosure.

> *Benefits:*
>
> * *Supplier and government confidential information is highly sensitive although different in nature. Protection of confidential information by both parties is essential to a productive relationship.*

13. Tender Evaluation

13.1 Evaluation Plans

Best Practice

1. **An Evaluation Plan** should be developed early in the tender process. Elements of the plan typically include:
    a. The objectives of the procurement and a description of the requirement and deliverables
    b. Evaluation criteria, methodology, weightings and scoring
    c. Governance arrangements for decision making
    d. Roles and responsibilities for managing the evaluation process. For higher risk and complex procurements this includes: details of the evaluation panel structure, any specialist subcommittee structures, any individual specialist inputs, and the capability/expertise of identified persons, etc.
    e. Communication management, including processes and timelines for communicating with suppliers about their submissions
    f. Management of submissions (security and confidentiality considerations)
    g. Conflict of interest management
    h. Record management and reporting arrangements, and
    i. Managing variations to scope in alignment with probity requirements.

13.2 Disclosure of weighted evaluation criteria

Best Practice

1. **Weighted Evaluation Criteria:** Procuring entities should provide suppliers with clear evaluation criteria, including weighting of criteria where this is relevant such as:
    a. Criteria with the highest numerical weighting / importance should be described as 'Mandatory';
    b. Requirements that, while important, are not critical should be described as 'Highly Desirable';
    c. Requirements that provide an enhanced outcome but are not necessary to achieve the tender objectives should be described as 'Desirable'.

13.3 Reasonable Evaluation Timeframes

Best Practice

1. **Tender Evaluations** should be conducted within a reasonable timeframe and not impose additional cost on suppliers. To achieve this agencies should:
    a. Allocate internal resources to the tender process – with roles and responsibilities documented in the Tender Evaluation Plan;
    b. Use external resources as required, for example for legal support, risk and financial assessments and project management purposes;
    c. Use Advanced Tender Notices or similar mechanisms to provide businesses with the time to build their tender team in advance; and

    d.   Use effective tender briefings, to prevent ongoing clarification and to help streamline negotiation processes.

13.4 Value for money outcomes

Best Practice

1. **Value for Money** does not equate to lowest price. Value for money balances the non-financial elements of the tender response (i.e. the evaluation criteria) against cost. These criteria include:

    a.   Compliance with the Specifications;
    b.   Capability;
    c.   Staff and resources;
    d.   Quality management systems;
    e.   Customer Service;
    f.   Financial Viability;
    g.   Compliance with Contract;
    h.   Risk and insurance; and
    i.   Innovation.

2. **Value for Money Index:** One method of determining value for money is to divide the non-financial score (of the evaluation criteria) by the tendered cost, as shown in the equation below:

    VFM Index = Non-financial Score / Cost

The higher the VFM Index, the greater VFM offered to Government. This approach ensures that the tender evaluation includes a quantitative and qualitative assessment of all non-financial criteria.

Benefits:

- *Clear evaluation guidelines communicate to suppliers what is important and helps them decide whether to respond and if responding, respond appropriately. It also provides a clear basis for evaluation and assists in debriefing unsuccessful tenders.*

- *Lowest cost does not always equate to the best value. Value can be determined by balancing the non-financial elements.*

14. Outcomes and Debriefing

14.1 Publish Tender Results

Best Practice

1. **Tender Result Publishing:** Procuring entities should publish tender results in an open and timely manner. This information should include:
   a. The customer's name;
   b. A short description of the nature and quantity of the goods or services;
   c. The name of the successful supplier; and
   d. The value of the contract (where possible).

2. **Contract details** should be published within 2 months of contract signing. The level of contract disclosure must be mindful of the confidentiality requirements of the procurer and supplier. Procuring entities can be guided by the criteria established in the relevant Freedom of Information (FOI) / Right to Information (RTI) legislation in identifying these elements.

14.2 Notice to unsuccessful suppliers

Best Practice

1. **Fair Notice:** While procuring entities are sometimes concerned that they may lose some negotiating leverage by notifying unsuccessful suppliers too early in the procurement process, this should be balanced with respecting the business needs of unsuccessful suppliers that need to budget and plan internal operations.

2. **Unsuccessful suppliers** should be advised of the result in a sensitive and timely manner. There are three types of unsuccessful bidders during a tender process:

   a. *Type 1: A non-compliant or non-conforming tender assessed during the initial compliance and conformance check.*

   These tenderers should be informed as soon as practical after completion of the assessment of compliance/conformance, early in the tender process. It is inappropriate to reintroduce these suppliers into the assessment process.

   b. *Type 2: A supplier that was not shortlisted following the initial assessment of their bid.*

   In most instances the initial assessment is conducted against a series of non-financial, weighted evaluation criteria such as experience, capability, resources, methodology and compliance with the specifications. Generally, if a supplier is not shortlisted against these criteria they have not demonstrated an ability to deliver against the requirements. Suppliers that have a score close to the cut off score could be held on the reserve list.

   c. *Type 3: A supplier that was shortlisted after the initial assessment, but unsuccessful.*

   Generally, these suppliers have demonstrated a strong ability to deliver against the requirements. These suppliers could be put

on the 'reserve' list as they have demonstrated that they could deliver against the procuring entity's requirements.

3. **Template letters** for each type of unsuccessful bidder should be developed by the procurer. Letters to Type 3 unsuccessful suppliers should maintain the right of the procuring entity to re-introduce an unsuccessful bidder at any time during the remaining evaluation process.

14.3 Offer De-briefing

Best Practice

1. **Debriefing:** Procuring entities should offer debriefings as part of the procurement process. These should include a clear discussion of responses against the evaluation criteria to assist unsuccessful suppliers understand why they were not successful.

2. Debrief supplier feedback includes:
    a. Providing suppliers with feedback on their offers;
    b. Suppliers providing feedback to the procuring entity on a procurement process; and
    c. The procuring entity and the successful supplier having a two-way debrief at the conclusion of the procurement contract.

3. **Timeliness of Debriefing:** Debriefing should be undertaken within 14 days of the supplier's request, meeting contents documented and placed on file.

4. **Exceptions:** There are some instances where debriefing should not be undertaken until after the contract is executed. In these cases advice should be sought from a probity expert.

5. **Non-Shortlisted Supplier Debriefings:** Where a multi-stage procurement process is undertaken, non-shortlisted suppliers from the preliminary stage of the procurement (Type 1 or 2 unsuccessful suppliers) must also be given the opportunity for a debriefing. This should be undertaken after the contract is awarded.

6. **Feedback from Successful Supplier:** Debriefing is not typically offered to the successful supplier however, their feedback may also be relevant to improving the procurement process.

7. **Improvement:** Any issues or information that may help improve the performance of the procurement processes should be passed onto the organisation's Chief Procurement Officer (CPO) or equivalent with recommended actions. Implementation of these actions should be monitored and, if applicable, benefits measured.

Benefits:

- *Disclosure of tender and contract outcomes including disclosure of variations, ensures high standards of probity and transparency in procurement processes.*

- *Publishing tender results provides essential information to the market to support capability building and better targeted engagements with the procuring entity.*
- *Undertaking supplier feedback is beneficial to both parties. For the supplier, feedback can:*
  - *improve their competitiveness by helping their understanding of the requirements of the procuring entity*
  - *provide assurance that an open, fair and transparent process has been undertaken, and*
  - *help suppliers plan and compete for the next procurement opportunity.*

- *For the procuring entity, feedback can improve:*
  - *procurement process and practices*
  - *the market's understanding of the client's needs*
  - *contribute to intelligence gathering about the market and demonstrate commitment to good practice, openness and transparency.*

15. Lodging Tenders & Complaints

15.1 Effective Complaints Management Process

Best Practice

1. **Procuring entities** require an effective complaints or protest management process which should be notified in the RFX documentation. Preferably, this should be conducted by a party other than the procuring entity.

2. **Protests** should not unnecessarily delay final award however, in some cases, the resolution of a complaint is necessary before a tender is awarded.

15.2 Online complaints form and content

Best Practice

1. **The process for handling complaints** and an appropriate Complaints Form should be available online. The content of the form should include, as a minimum
   a. The complainant's details;
   b. The tender details; and
   c. Full details of the complaint.

15.3 Handling Complaints

Best Practice

1. **Complaints** should be handled quickly, independently and strictly in accordance with the designated process.

2. **The escalation of complaints** should be outlined in the RFX documentation and supported by appropriate procedures (although it is not necessary to disclose the escalation path in the RFX documents).

Benefits:

- *Complaints processes give tenderers confidence that the process is comprehensive. Transparent and speedy resolution of complaints reduces uncertainty, time and cost to all parties.*

- *Clear notification of complaints policies and processes will reduce further escalation or prolonging of complaints.*

To provide comments or feedback on this document, please contact:

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