**Contracts Officer –**

**Notes**

**Bruce Barbour**

**October 2020**

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This is document is based largely on my experience working in Victorian local government (Australia) so specific references to some practices, regulations and legislation may not be relevant to other environments. However generally what constitutes good tendering practice is standard across many different organisations and locations.

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# The role and duties of a Contracts Officer

The role of the Contracts Officer\* serves a number of purposes. The main ones are:

* to minimise the risks to the council associated with tendering, contract award and management by ensuring:
  + probity and good process before, during and after the tender period;
  + that tender documents are free of errors and clearly state all of the council’s requirements; and
  + that the contract agreements formed with the successful tenderer are legally sound;
* to endeavour to achieve value for money, often referred to in Victorian local government as best value, in the procurement of goods and services for the council, including changing procurement strategy to achieve efficiency gains and costs savings; and
* to provide procurement and tender process advice and support services to the council’s departments to assist them to achieve their aims.

\*Contracts Officers can also be called Procurement Partners, Senior Procurement Officers or Procurement Leads. I am sure other position names will also come into fashion over time. The works undertaken in a council under these different labels is often very similar to what is done as a Contracts Officer though there may be some expectations that they will provide additional or different services or provide different emphasis. In this document I will continue to use the term Contracts Officer. I also use the convention that Contracts Officers work in or with a team or department called Procurement responsible for oversight of Procurement processes in a council. It could of course be called something else. Some Contracts Officers may work independently in departments as part of a project team for that department.

More details and a greater range of duties of a Contracts Officer are provided in the table immediately below:

| **DUTIES** |
| --- |
| **Pre Award** |
| 1. Set up the council’s document management system for the tender and contract. |
| 1. Communicate with the Project manager to determine and/or advise which tender templates are to be used. Determine which documents the project manager has and which templates the project manager needs. For the documents from templates set up the documents. What this means will have to be determined. |
| (A) The Contracts Officers may just put the template document in the council’s document management system for the project manager to set up. |
| (B) Alternatively the Contracts Officer inserts the contract name and number into all documents plus selects some of the appropriate options in [Part 1 and in Part 2](#_Standard_parts_of) of the tender documents. |
| 1. A. Review and correct (or suggest corrections of) Specifications prepared by others.  B. Develop Specifications - from scratch or from other example specifications for similar services for a range of services and consultancies - but not some specialist contracts such as construction. This is usually not a routine part of a Contracts Officer’s duties. |
| 1. Prepare or check other documents in the tender document set - [Parts 1 to 3](#_Standard_parts_of) - to wrap around the Specification. |
| 1. When tender documents are received from a council department to be advertised, check all documents and communicate with the project manager any suggested improvements or required changes. |
| 1. After the changes are made and approved, load documents onto the council’s web based tendering platform, (if applicable), place advertisements in newspaper and the council’s website. Also onto the Industry Capability Network web site, if applicable for the council. Place records into the council’s document management system and advise the project manager, etc. - unless there is an administration officer to do this. |
| 1. Handle tenderer queries from the electronic tendering platform, forward to project manager for response. Review any resultant addenda and suggest changes if warranted. Issue the addenda, or provide a response on the electronic tendering platform forum. |
| 1. Attend site inspections, take notes/minutes, issue addenda, if required. |
| 1. Handle tender close on the electronic tendering platform and get tender submissions and the associated process record documents into the council’s document management system - unless there is an administration officer to do this. |
| 1. Set up the tender evaluation spreadsheets and distribute, summarise prices on the consensus spreadsheet, other works to assist the evaluators as necessary. The requirement for this depends on how the council organises their tendering evaluation processes. |
| 1. Attend all tender evaluation meetings including tenderer interviews/demonstrations. Role at meeting and during the rest of the tender evaluation period can depend on the requirement of the council. Responsibilities include one or more of the following: chair tender evaluation meeting(s); take minutes; act as a probity advisor and provide administration support. Can be a scoring member of tender evaluation panel or non scoring member of the tender evaluation panel – refer to the note below this table\*. |
| 1. Handle post tender questions to the tenderer, if required. |
| 1. Draft the council report, however Project manager is responsible for content. |
| 1. Prepare letters of award and unsuccessful. If a separate administration officer is available they would be able to prepare letters especially the letters that advising a tenderer that they have been unsuccessful. The Contracts Officer should either prepare the letter of award or thoroughly check the letter of award if prepared by an administration officer. |
| 1. Compile contract agreements. |
| 1. Send out contract agreements electronically - or paper if necessary - for signature. |
| 1. Update, maintain the contract management system database to award stage – set up ready for the department to use during contract management. |
| **Post Award** - Not usually part of a Contracts Officer’s duties – at least not in local government. Usually done only when requested by a client department. |
| 1. Provision of advice to the contract/project managers on contractual and process issues. |
| 1. Draft contract correspondence. |
| 1. Calculate the rise and fall adjustments on a contract schedule of rates. |
| 1. Drafting variations to Contracts. |
| 1. Contract management, either full end to end contract management - not usually part of a Contracts Officer’s duties - or specific parts such as processing contract payments, extensions of time, using and updating the contracts management system. |
| **Other** |
| 1. Establish of templates. |
| 1. Develop and document (1) tendering processes and (2) contract management processes. Review, modify and improve processes as required. |
| 1. Provide advice and training to council staff on (1) tendering including tendering evaluation and tender probity, (2) the use of the contract and tendering management systems, if applicable, and (3) contract management, especially for officers who are not routinely involved in contract management. |
| 1. Other duties within the range of the knowledge, skills and experience of the Contracts Officer. |

Often Contracts Officers are not required to carry out all of the tasks listed. It depends on how the council has setup their procurement activities. However Contracts Officers should know how to perform all of these tasks, if required. Other duties can sometimes also be required.

For quotations Procurement involvement is typically much less – this depends on the skill and knowledge of the department employees requesting the quotation process.

\*I have worked at councils where the Contracts Officer was a full scoring member of the evaluation panel and at other councils where the Contracts Officer acts as the panel chair and provides probity oversight and administrative services. There are arguments for and against both approaches.

The arguments for the Contracts Officer being a scoring member of the evaluation panel is that as the Contracts Officer have to read the tender submissions in detail to score the tender submissions they know whether the scoring provided by the other panel members is reasonable or not. The Contracts Officer is independent of the other departmental members of the panel. Because the Contracts Officer is scoring they become one of the three tender evaluation panel members, instead of an additional (fourth) member.

The arguments against the Contracts Officer being a scoring member of the panel are that (1) the Department remains totally responsible for the selection decision and can’t blame Procurement if the contract goes pear shape. (2) Doing a tender evaluation and scoring is very time intensive so there needs to be sufficient resources in Procurement. (3) Having to score interferes with the probity / process oversight function of the Contracts Officer. If the Contracts Officer is not scoring they still need to do a review of the tender submissions to ensure that the panel’s assessment is reasonable – so the time saving may not be that significant.

## Process and service improvement considerations

The Contracts Officer and the Procurement team do not just process the tenders but also consider improvements in the process of provision of services across the council. However there is always going to be a large percentage of the contracts that just have to be processed through the team – e.g. building, road and landscape construction projects. Services / annual supply contracts are where there are the most possibility of change and improvement. For this type of contract it is best to start thinking about improvements during the current contract rather than waiting for a contract to be near the end of term, ready for retender and then think about what can be done. Also the improvement may cross over contract boundaries, department boundaries and/or municipal boundaries so a holistic view needs to be taken.

Amalgamation of services used by different departments into the one contract is an obvious example of a potential improvement that should be in looked for in tenders for services. In this situation the Procurement team have an oversight role that looks outside the narrow confines of the department’s immediate concern which is to get a contract in place to provide the services they need, to consider what the whole council needs. One example is the provision of security services. The buildings maintenance department had the main responsibility for building security and had a contract for delivering overnight and weekend mobile security patrols. Other council departments were also using security services – the Governance department had a requirement for security guards at the council meetings and the Events department had a requirement for security at the various community events they organised during the year. They sourced these additional services on an ad hoc basis without an overall contract in place. These additional security service requirements were smaller than the requirements of building security services. The next time the buildings security services went to tender the additional council requirements was included into the one council tender / contract. An emergency response service for the council areas servicing the public, such as libraries and reception areas, could also have been included however the details of the requirement was not known early enough. The rationale behind services amalgamation is that putting more of the work into the one contract makes a larger contract and potentially attracts more competitive tenders. It should also decrease the total administrative effort across the council as it is easier to setup and manage one contract than multiple contracts.

Other potential areas for savings should also be kept in mind:

* Does the council need the quantity of services or materials being requested?
* Can the way that the work is done be changed so not as much is needed?
* Is there a better way to source the service? Is there a better way to provide the service? Is the service still needed?
* Does the council need the specified quality of services or materials to achieve its aims? Could it be better specified? Is it over specified? Why buy a Rolls Royce if a Holden Commodore will work just as well? Though on some occasions the Rolls Royce may be justified but don’t specify a Rolls Royce on a whim. It needs economic justification. And perhaps, on occasions, even though the council might have been buying Holden Commodores for the purpose for the last ten years, a better, more efficient, solution may be warranted. It should at least be considered instead of just doing exactly what has been done before; and
* Be aware of specification creep where the project manager will come up with an idea for an extra functionality, not considering that it will add extra cost to the contract and not bothering to do the work to determine whether this extra cost will improve work efficiency and make at least that level of saving. And preferably make savings many times the additional cost.

Because the Procurement team may not have the authority to enforce the implementation of a change, the Procurement team may have to mount a logical argument for it with the project manager and their department.

The other process for savings is to pay less for the works, services or materials. That is one of the main purposes for doing public tenders – to test the market to get the best price at the required quality. Because of Section 186 of the Local Government Act and common practice the council is restrained in the level of negotiation it can participate in. It cannot just go to a company, or even a couple of companies, and negotiate a price if the total cost of the goods or services is going to be over $150K or $200K for construction. After a tender the possibility for negotiation is also restrained.

This is a more comprehensive approach to procurement than simply being concerned with getting the tender process right, though in Council getting the tender process right, and the associated risks minimized, is still the most important function a Contracts Officer can perform.

## Group Purchasing

There are a number of alternatives that should be considered prior to initiating a direct public tendering process.

### Group Purchasing Schemes

Prior to tendering a Contracts Officer should consider whether the purchase of the goods or services could be made under a pre-existing group purchasing scheme. In Victoria the Municipal Association of Victoria has set up a scheme and a council can also access State Government group purchasing schemes. Other states may have similar arrangements. The organisers of these group purchasing schemes may have arranged for exemption from section 186 of the Local Government Act for council’s purchases under the scheme, check with the organisers of the scheme. Use of these schemes by council is not compulsory. The main benefits of using a group purchasing arrangement is the time and administrative cost saving in not having to run a full public tender process. It is hard to judge whether the cost savings achievable for the goods or services purchased from the group purchasing scheme is higher or lower than what could be achieved by going direct to the market through a public tender process.

On occasions a group purchasing organisation will run a tender on behalf of a number of councils for the purchase of a good or service. For example, the supply of electricity. To participate in these tenders the council would usually need to register with the group.

### Joint Tendering

Consideration should also be given to whether a joint tender/contract with one or more of the surrounding councils is possible. The idea is that the larger contract will lead to better prices for the works or services, and that there is less work to establish one contract as opposed to two or more.

Having a contract that is larger in financial value and geographical area may mean some local suppliers are not able to tender. This may be considered a reason for not doing a joint tender for some services, especially for rural councils.

## Direct public tendering

Regardless of the existence of group purchasing schemes and the possibility of joint tenders, council will still have to run many direct public tenders.

# Contracts

## What is a contract?

A contract is a legally enforceable agreement between two parties: in our case between the council and a contractor, service provider, supplier or consultant.

There are two basic types of contract or agreement which are used for the procurement of works and services and goods ­ “simple contracts” and “deeds”.

Most contract law is not written in legislation passed by parliament. Instead it is based on precedents developed over hundreds of years from legal cases that have been decided in courts of law. This is called common law. In many cases common law precedents go back to the English courts of the nineteenth century. For example, one famous case – [Carlill v Carbolic Smoke Ball Co (1892](https://en.wikipedia.org/wiki/Carlill_v_Carbolic_Smoke_Ball_Co)).

There are some types of contracts that are more extensively subject to legislation. Two examples of this are contracts for construction of domestic buildings (houses) and contracts of employment. These special contract types will not be dealt with here. Where there is statutory law it will always take precedence over common law.

## Simple contracts

For a simple contract to come into existence there are a number of requirements:

* There must be an **offer** to do work or supply materials or services from one party;
* The offer must also include what is called "**consideration**" - which is basically what the offering party wants from the other party in exchange for performance of the works or services. Consideration is usually a sum of money, although it could also be an exchange of works, services, or materials; and
* There must be **acceptance** from the second party.

There are other requirements as well – for example the subject of the proposed contract must be legal, the parties must have an intention to enter into a contract, the parties must be legally capable of entering into a contract. There are other requirements as well.

Simple contracts can be written or verbal, or a combination of both.

People enter into simple contracts every day. Shop purchases are examples of simple contracts. The council’s low value purchase orders are examples of simple contracts. Another example of a simple contract is, say, the purchase of a second hand television from a neighbour. The neighbour will say "The price of the television is $180". You say "OK". The television is handed over and the money is handed over.

In this example, the offer is "The price of the television is $180". The "consideration" is $180. Acceptance is when you agree to the offer by saying "OK". The contract has now been entered into and is legally enforceable. If either party were to renege, they could be sued for breach of contract. Exchange of the television and the money fulfils and discharges the contract.

In a simple contract such as that illustrated above, this is very straightforward. In more complex arrangements, however, ambiguity may arise.

Confusion can arise when negotiations are involved. Continuing our example above: Suppose, after receiving the offer of "the television for $180" you were to say, "No, I will pay $150 for the television". This becomes a counter offer. The original offer lapses because it has been rejected. This counter offer comes from you and is made to the neighbour. It is then up to the neighbour to decide whether he accepts or rejects this counter offer.

Consider the case, for a much larger contract than the sale of a TV, where there are a series of negotiations prior to agreement. These would begin with the original offer. But then there may be a series of counter offers or requests for clarification. There may be telephone conversations and meetings, as well as emails and letters. This can lead to confusion about what is being offered and what is being accepted. The two parties may have different expectations of the outcomes of the contract. To overcome these problems, for larger contracts the council enters into deeds of agreement.

## Deeds of agreement

The main differences between deeds and simple contracts is that for deeds all terms, conditions and other requirements of the contract must be expressed in writing in the deed documents, except those terms implied by or enforced by law which can't be excluded, and some referenced standard documents. If there is an issue with what is included in the agreement it is worth consulting a lawyer. Deeds also give both parties a longer time than simple contracts in which they can take legal action to seek redress for a perceived breach of the deed agreement.

With deeds any discussions or negotiations that occurred prior to the signing of the agreement are not important. As a general principle if it is not contained in the written text of the deed then it is not part of the agreement. The main exception to this that it is important for the council’s deed agreements are references to Australian Standards – there is no need to include a full copy of referenced Australian Standards for their requirements to be included in the deed. This may also be applicable for some other standard documents that are published by third parties and widely available.

One issue that I have noticed in some agreements prepared by some council officers was that they referenced sets of the council standard drawings stored on the council’s website, providing only a web site reference to the documents in the agreement. This is not acceptable for a deed agreement. Council drawings are not industry standards and besides the council could change its standard drawing during the contract term to include additional work. In some cases it may be unreasonable to expect the contractor to make this change without a price variation. All the specific drawings referenced in the Specification need to be included in the contract agreement.

Another difference to simple contracts is that deeds do not have to have “consideration” or what the second party has to provide to the first party under the deed, although it is usually present, especially for the council deeds for the purchase of works, services and goods.

A council often uses deeds for wide range of agreement values. Certainly everything that has been publicly tendered should result in a deed. Most quotation processes through the electronic tendering platform, value over $50,000, will result in a deed agreement. And, typically for consultancy agreements, I have seen deed agreements for works well below $50,000. It can be used for any work value, it is a matter of risk assessment versus the amount of work necessary to set up and sign the deed documents. The council also uses deeds for other agreements, not related to contracts and tendering.

The council uses the tender process to source the works or services required in order to get competitive prices that provide best value, to provide transparency of process and to meet the requirement for public tendering from the Local Government Act. However once that tender process is over and the deed is entered into – with all agreed terms and conditions and pricing included in the deed agreement - then what happened during the tender process should not impact - although there could be some legal comeback if deceptive and misleading conduct has occurred by either party in the tender and post tender period – consult a lawyer if this is an issue.

## The special nature of standing offer deeds

A council uses standing offer deeds of agreement for annual supply contracts, often for the supply of labour at hourly rate with materials paid for at cost plus a percentage oncost but could also be for material supply or other services at schedule of rates prices. These are contracts that typically run from three to five years, though could run longer.

The range of services that could be setup as standing offer deeds includes:

- Maintenance contracts of various types, for example:

* Electrical;
* Plumbing;
* Minor building maintenance;
* Pavement maintenance;
* Road line marking; and
* Ad hoc cleaning.

- Other services:

* Legal services; and
* Information services.

- Material supply:

* Crushed rock; and
* Stationery supply.

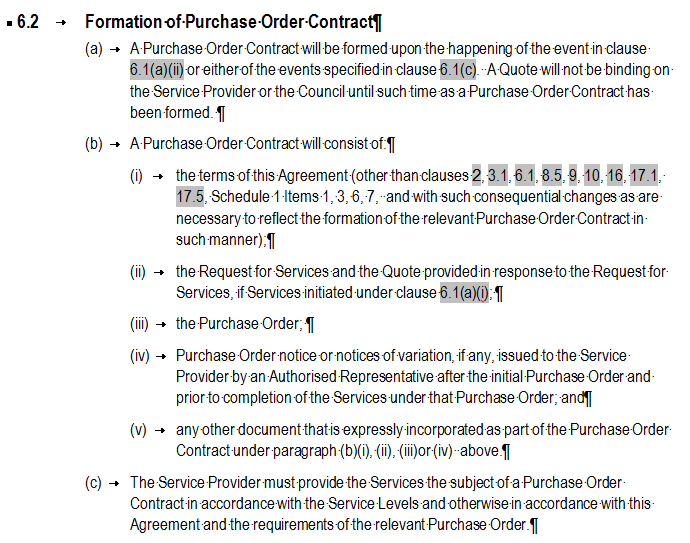
A standing offer deed agreement is a contractually locked in offer from the contractor to the council to perform any of the types of work anticipated under the agreement over the term of the contract, at the hourly rates and/or other schedule of rates, and in accordance with the contract terms that are contained in the agreement, and at the time requested by the council. What the standing offer deed agreement does not contain is what the actual work is. A typical work request under the standing offer agreement for electrical services might be to replace a defective light switch at the Council’s parks and gardens depot. At the time of entering the agreement the council did not know that this specific work would be required but did know that works of similar type would be required over the term of the contract.

As a consequence of this most of the actual work done on the various sites over the term of the contract is done under a series of simple contracts that are set up under the standing offer deed agreement and incorporating many of the terms contained within the standing offer, including, importantly, the hourly rates or schedule of rates. Refer to the diagram for [Option 1 in the section on Panels](#_Option_1:_). In terms of the deed agreement an example of how this is set up for one type of services general conditions of contract is provided in the next section.

A standing offer contract must be set up as a deed, regardless of the value of the works to be performed over the contract term, for the offered hourly rates or schedule of rates to be legally enforceable.

### How standing offer simple contracts may be set up under a Services Conditions of Contract

Different councils tend to use different services Conditions of Contract. The Provision of General Services Conditions of Contract, based on Victorian State Government services Conditions of Contract, is used by some councils. Under these Conditions of Contract simple contracts for the performance of the works are established by the issue of the council purchase orders, to establish simple contracts called in the contract conditions “Purchase Order Contracts”. As an example refer to clause 6.2 of those conditions, as reproduced below:



**Notes:** (1) In some councils I have worked the set up of the simple contracts for carrying out works or services under the standing offer contract has not been so explicitly laid out as in clause 6.2 of this Provision of General Services conditions. There did not seem to be any operational issues with this less explicit arrangement. There were no issues that triggered a legal test of the system.

(2) The use of “running orders” – that is the raising of a single purchase order that is then used for many works under the standing offer contract - may be problematic for this arrangement. If the council intends to use running orders clause 6.2 in the Provision of General Services may need to be modified to specifically allow this.

(3) AS4000 is for lump sum, one off works, typically engineering works, e.g. – build a kindergarten or construct a road. It is not suitable as a contract form for standing offer contracts and should not be used.

# Tendering

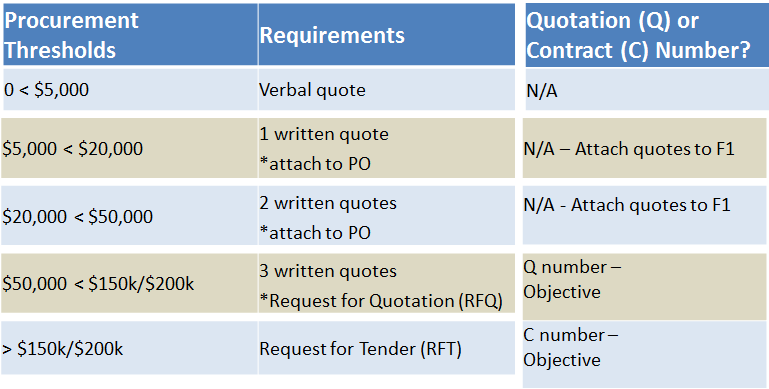
## Why conduct public tenders?

* To get best value;
* To show council is getting best value;
* To provide transparency of expenditure while spending ratepayers’ money;
* To show council is being fair to all parties;
* To encourage competition;
* To conform to Procurement Policy requirements; and
* To meet the requirements of Section 186 of the Local Government Act (LGA).

## Procurement Policy

A council’s Procurement Policy usually provides guidelines for whether a tender process is required and the minimum number of quotes that need to be obtained. Below is an example from one council – it does not necessarily reflect best practice. Other councils may do something different.

(F1 – a financial software system, PO – a Purchase Order.)



The thresholds referred to are probably out of date.

## Legislated requirements - Section 186 of LGA

Section 186 of the Victorian Local Government Act (LGA) requires councils to undertake a competitive process to test the market by giving public notice by advertising a public tender process prior to entering into a contract when the value of the contract is equal to or greater than:

* ***$150,000 (including GST)*** for contracts for the purchase of goods or services; or
* ***$200,000 (including GST)*** for contracts for the carrying out of works.

These values can be varied by State Government order.

For standing offer contracts that run over a number of years with options for extending the term of the contract, the estimated value of the contract must be calculated over the maximum possible term.

A contract must not be divided into separate parts solely for the purpose of avoiding the relevant procurement thresholds.

**Local Government Act**

<http://www.austlii.edu.au/au/legis/vic/consol_act/lga1989182/s186.html>

Please read this section of the Act.

What needs to be recognised is that the requirements of the LGA and Section 186 in particular are law. It is not an optional guideline that can be ignored if it is inconvenient. A Contracts Officer can’t approve an exemption and must not be advising council management to break the law. The CEO or a director also cannot approve an exemption under the LGA - though as senior management what they do is up to them – so long as they take responsibility for their decision.

There are some limited exemptions to the requirement for public advertisement in the Act:

* The local government minister can approve an exemption for exceptional circumstances though in my experience applying for an exemption can be time consuming and is often unsuccessful;
* If the contract work is deemed to be to tackle an ‘emergency’ then public advertising of the contract works can be exempted, with the proviso that the work must be a response to an actual emergency – and I take this to mean works to tackle a problem that is causing a risk to people or assets. The scope of the works can only be sufficient to remove the immediate risk, to make safe and also to secure the building, if relevant. For example, say there was a significant fire in a council building the council would be entitled to let a contract to undertake make-safe type works regardless of the value. It would not however be entitled to let a contract for works greater than $200K to fully rectify the building without public advertisement; and
* Another exemption from public advertising is for [novated](https://en.wikipedia.org/wiki/Novation) contracts. An example of where this may be applicable is if the company that the council is contracting with is bought out and the new owners want to shut down the company and have the contract works taken over by the purchasing company. The LGA allows this provided [due diligence](https://en.wikipedia.org/wiki/Due_diligence) is done on the new company prior to novation. See further discussion on novation [here](#_Novation).

A council contract set up in contradiction to Section 186 may be found to be void.

The LGA requires councils to report annually on any contract entered into with a value greater than nominated without public advertisement to the department responsible for local government.

On occasions a situation may arise where there is an opportunity that may potentially save the council money by directly entering a contract without a public tender process. However as this does not conform to the requirements of the Act it can’t be proceeded with - unless Ministerial exemption is granted. This can be very frustrating however the council should not knowingly break the law. Though I will say this – if the potential savings are large enough it may be worth getting a legal opinion on whether it can proceed. Lawyers, who are experienced in the operations of this section of the Act and are dealing with similar enquiries on a regular basis, may be able to offer a way where the process can proceed, even if in a modified form or offer advice on the risks and consequences of proceeding.

Another useful document on the interpretation of section 186 of the Local Government Act is the [Victorian Local Government Best Practice Procurement Guide](https://www.localgovernment.vic.gov.au/__data/assets/pdf_file/0023/48452/2013-Best-Practice-Guidelines-FINAL-web.pdf). Also see [here](https://www.localgovernment.vic.gov.au/strengthening-councils/procurement).

### New Local Government Act

The Victorian Local Government Act 1989 is in the process of being phased out and replaced with a new Act. Once phased out the restrictions of Section 186 of the current Act will not apply. Section 186 requirements still apply in 2020. Instead any requirements for public advertisement and tender will be contained in the council’s own procurement policy. I have no doubt there will still be a requirement for public tendering above a nominated threshold in the Council’s procurement policy. Additionally it is hoped that the Council procurement policy will contain more flexibility so that beneficial arrangements such as [pre-selected or Expression of Interest (EOI) panels](#_EOI_Panels_and) can be unambiguously utilised, and for specific instances where the contract value is over the threshold and it is known with certainty there is only one supplier a contract can be negotiated without public advertisement. Or the situation where an unsolicited offer for goods or service is received from a supplier that is demonstrably better than what has been achievable in the past becomes available the opportunity could be taken up.

### Budget

Prior to initiating a tender process the Contracts Officer must be satisfied that the requesting department has sufficient budgetary allowance for the tender. For lump sum tenders the department should have done or arranged to be done by a consultant a pre-tender estimate for the works, which must be covered by an appropriate allowance in the approved council budget.

## Minimising legal risks in the tender process

Although the tender process offers a number of advantages to the council, there are also some potential legal risks that need to be kept in mind and considered carefully during the tender process.

In terms of contract law, a tender is an offer from the tenderer to perform works or services or to supply materials. However, a tender differs from other offers in that the council requires the tendered offer to be:

* in the specific council format and on the forms provided by the council;
* include all of the requirements of the council’s specification;
* carried out in accordance with the requirements of the council’s conditions of contract; and
* submitted in accordance with the process detailed in the council's tender documents.

This is unlike other offers where the form and the conditions and terms of the offer are completely up to the person or organisation making the offer.

Because of this, the council's requirements for the submission of tenders can be interpreted legally as a process contract or a collateral contract. A court of law may determine that the council is making the following offer to the tenderers: "If you submit a tender in accordance with the requirements contained in the tender documents, in consideration the council will undertake to evaluate all tenders received fairly and in the manner stated in the tender documents". The offer is said to be accepted when the tenderer submits a tender.

If the council subsequently fails to follow the procedures in the tender document or to evaluate the tenders fairly, it could be deemed that the council is in breach of the process contract, and the potential exists for the council to be sued by the aggrieved tenderer for the costs of tender preparation, legal costs and any other the losses incurred by the tenderer – all of which can be significant. Such decisions have been made in Australian law courts.

For these reasons the tender process must be conducted in accordance with the procedures the council has set out in the Conditions of Tendering for receiving and evaluating tenders, and the administration of the process must also be seen to be fair and have a high level of probity.

# Probity

## What is probity?

A dictionary definition of probity refers to uprightness, honesty, proper and ethical conduct, and propriety in dealings. Within Government, the word "probity" is often used in a general sense to mean "good process".

A tender process which conforms to the expected standards of probity is one in which clear procedures, consistent with the council's policies and Government legislation and the legitimate interests of tenderers are understood and observed from the outset. All tenderers should be treated consistently and equitably in accordance with these procedures. Decisions should be made in a transparent manner which allows them to be understood and justified subsequently. The process must be such that the procedural fairness of the process is readily apparent.

A typical council procurement policy may state:

|  |
| --- |
| **2.1.2 Conduct of Councillors and Council Staff**  **2.1.2.1 General**  Councillors and Council staff shall at all times conduct themselves in ways that are ethical and of the highest integrity and will:   * treat potential and existing suppliers equally and fairly with equality and fairness; * not seek or receive personal gain; * present the highest standards of professionalism and probity; * deal with suppliers in an honest and impartial manner that does not allow conflicts of interest; * provide all suppliers and tenderers with the same information and equal opportunity; * avoid and disclose any actual or perceived conflict of interest; and * comply with all legislative obligations including those required by trade practices, safety and consumer affairs legislation.   These are sometimes referred to as the Probity Principles.  Council staff who are responsible for managing or supervising contracts are prohibited from performing any works under the contract they are supervising.  **2.1.3 Tender Processes**  All tender processes shall be conducted in accordance with the requirements of this policy and the Act.  Council will work within established principles and will conduct tender processes that are fair to all parties, and use its best endeavours to demonstrate that fairness to tenderers and potential tenderers. More specifically, it will:   * produce tender documents that clearly specify the required outcomes so that tenderers can bid for and price work accurately; * package work put out to tender in a manner which encourages competition and the best outcome for residents and ratepayers; * not participate in improper tendering practices such as collusion, misrepresentation, and disclosure of confidential information; * include in the tender documents, the evaluation criteria to be used to comparatively assess tenders; and * require any conflict of interest to be disclosed immediately.   Council staff and independent representatives taking part on a tender evaluation panel must complete a Conflict of Interest form prior to the tender being advertised. The staff member must excuse themselves from the tender evaluation panel if a conflict of interest exists.  **2.1.4 Conflict of Interest**  Councillors, Council staff and independent representatives shall at all times avoid situations in which private interest conflict, or might reasonably be thought to conflict, or have the potential to conflict, with their Council duties.  Councillors and Council staff shall not participate in any action or matter associated with the arrangement of a contract or any purchasing related activity (i.e. evaluation, negotiation, recommendation, or approval), where that person or any member of their immediate family has a significant interest, or holds a position of influence or power in a business undertaking tendering for the work.  Councillors and Council staff involved in the procurement process, in particular preparing tender documentation, including writing tender Specifications, tender opening, and tender evaluation panels, must: avoid conflicts, whether actual, potential or perceived, arising between their official duties and their private interests. Private interests include the financial and other interests of Councillors and Council Staff, plus their relatives and close associates. Declare that there is no conflict of interest. Where future conflicts or relevant private interest arise Council Staff must make their manager or the chairperson of the relevant tender assessment panel or board aware and allow them to decide whether the officer should continue to be involved in the specific procurement exercise. Observe prevailing Council and [Victorian Government Purchasing Guidelines](https://www.google.com.au/url?sa=t&rct=j&q=&esrc=s&source=web&cd=10&cad=rja&uact=8&ved=0ahUKEwiLisORiIDTAhUnqlQKHfMiDA0QFgg-MAk&url=http%3A%2F%2Fwww.dtpli.vic.gov.au%2F__data%2Fassets%2Fpdf_file%2F0005%2F224717%2F2013-Best-Practice-Guidelines-FINAL-web.pdf) on how to prevent or deal with conflict of interest situations; and not take advantage of any tender related information whether or not for personal gain. |

### Why is probity and procedural fairness important

Positive outcomes that should result from procedural fairness include:

* avoidance of corrupt practices;
* avoidance of conflicts with tenderers;
* minimisation of the potential for litigation over tendering processes;
* preserve the confidence of tenderers by demonstrating that the tender process and outcome are fair to each tenderer and can be trusted and that the expense of submitting a tender is warranted; and
* reassurance to the community that the council is achieving best value through its tendering and contracting processes.

### What does probity and procedural fairness mean practically

In practical terms, probity and procedural fairness means that tender processes are carried out in accordance with the processes outlined in the Conditions of Tendering and the council policy. Specifically that the process and the council officers carrying out or engaged in the process:

* do not favour one tenderer or tender over another in any aspect of the process, including for example;
  + If one tenderer asks a question about the tender process or tender documents, if the response would change or add to the information contained in the tender documents, then all tenderers must be notified of the question and provided with the response. This ensures that all tenderers have access to the same information when formulating their offers;
  + Close tenders in accordance with the procedures stated in the tender documents. No tenders shall be accepted after the tender box closes. The exception to this is if it can be shown that what caused the tenderer to be late was due to a breakdown of the council’s system(s) – for example if there was a fault with council’s electronic tendering system - or that the cause of the tenderer being late was completely outside the control of the tenderer. A fault in the tenderer’s computer system is not a sufficient excuse. This ensures that all tenderers benefit from the same conditions when submitting their offers;
  + evaluate the tenders against the evaluation criteria outlined in the tender document and in the manner described in the tender document. If, in the process of considering tenders, the council decides that new evaluation criteria should be used, the tender process may need to be conducted again or if early in the process an addendum issued, so that tenderers can be fully informed of the criteria used to evaluate their tenders. This ensures that all tenderers have the opportunity to develop their tenders with full knowledge of how their submission will be evaluated;
  + provide the same information to all tenderers to base their tender on;
* do not accept gifts from any tenderer or contractor; and
* follow procurement procedures to ensure that the evaluation processes are fair, transparent and defensible, and the evaluation process fully documented and that the tender evaluation panel members are accountable for their decisions.

These and other practical applications of procedural fairness are all intended to provide a level playing field for all prospective tenderers. Other aspects of the requirements for probity and procedural fairness will be provided throughout these notes.

# EOI or tender

Expressions of Interest (EOIs) can be used instead of going straight to public tender when:

* there are known to be a large number of contractors in the field with a range of experiences and skill levels. Examples of contracts where this might be relevant are consultancies and cleaning contracts. The EOI process can eliminate a number of the least-qualified contractors, leaving contractors who are pre-qualified;
* a council wishes to assess what is available in the market prior to actually formulating its detailed requirements. An example of this could be for IT programs and other non standard or innovative equipment and work approaches;
* tendering costs are likely to be high and the council seeks to ensure that companies incapable of supplying the requirement don’t incur unnecessary expense and to give confidence to the tendering companies that it is worth spending the costs of tendering as they will be competing against a limited number of experienced contractors/suppliers; or
* it is advantageous to pre-qualify contractors or suppliers of goods and services.

For the last dot point above - an example of where the expression of interest process can be used is where the council has a number of projects of a similar nature that they wish to engage contractors to perform. In this situation the EOI process can be used to prequalify a number of contractors - often forming an informal panel - who are then asked to provide quotes on the various works as required by the council. See the [section below on “Panels” for further discussion](#PreSelectedPanel).

EOIs have a number of benefits:

* the number of possible tenders received is decreased, making evaluation of the tenders more straight forward;
* the quality of the tenderers and their tenders may be better, making it less likely that the council would need to reject tenders on quality grounds; and
* because it is known to the contractor that there are a lesser number of tenderers, the contractor may be prepared to put in more time to preparing their tender, which could therefore be more competitive.

There are a number of potential disadvantages of EOIs to be aware of:

* It could add time to the total procurement process as the council goes through the two stage process, although this is partially offset by making the evaluation of the tenders received from the selected tenderers easier and quicker; and
* It is quite likely that the number of expressions of interest received would be greater than the number of tender submissions received for a straight tender process as there is less work in submitting an EOI than having to price a tender. This can increase the council’s evaluation time for the EOI phase. Again this is partially offset due to a decrease in evaluation time during the tender phase.

## EOIs and evaluation/selection criteria

The evaluation criteria for the **EOI** process, often called selection criteria, will focus on the general capability of the respondent including their historical performance / relevant experience as a company and the specific experience of the respondent’s personnel that would be available for a future contract. It might assess their access to resourcing in terms of personnel, equipment and systems. It would also assess their Occupational Health and Safety (OH&S) systems and performance and their financial capability. They might also be asked whether they have any issues with the Conditions of Contract that will be used for the final contract. Any significant issue that may lead to them not being shortlisted.

Often only a brief summary of the project or service to be tendered is included although on occasions a draft specification, if available, may be included. The EOIs are not evaluated on the basis of price. It is, usually, 100% all qualitative. I have seen EOIs where the respondent is asked to provide their standard hourly rates which are then included in the assessment as some indication of their likely cost. The usefulness of this is doubtful.

For the actual invitation to tender sent to the selected respondents, the evaluation criteria and their weighting will be different to the EOI and will most likely also be different to the evaluation criteria that would have been used if the tender had gone straight to public tender instead of via an EOI process. Because of the EOI process the selected respondents have effectively been prequalified for the work via the EOI process they have been assessed as having suitable experience to carry out the work. This does not need to be reassessed in the tender process. What they will be assessed on is their specific methodology, what actual resources and personnel that will use to carry out the work, their timeliness and their pricing. Their financial capability, OH&S and compliance/conformity would most likely be reassessed. Due to the prequalification under the EOI process it is likely that the weighting given to price will be higher than if the tender had gone straight to public tender.

# Panels

There are two ways to set up contractor panels. Each has different uses.

## Option 1: [Standing Offer Contract](#_The_Special_Nature)

Select a panel of contractors and **enter into standing offer contracts - deeds** with all panellists. Or can be a single contractor.

Advertise **tender** (usually for hourly or schedule of rates works)

Job 1 – at hourly rate from a selected panellist. Simple “Purchase Order” contract.

Job 2 – Lump sum quotes from one or a number of panellists. Evaluate and one awarded. Enter a simple contract.

Job 3 – at hourly rate from selected panellist.

Job 4 – etc.

The first way (Option 1) is where all panel members are signed up to a binding standing offer contract, a deed agreement. The process for putting this arrangement in place is:

* Advertise a tender. The tender requests hourly rate(s) and also has the Conditions of Contract which will be applicable, most likely the Provision of General Services or Services General Conditions;
* Evaluate tenders received based on hourly rates offered and the other evaluation criteria; and
* Formal deeds of agreements are entered into with each selected contractor/consultant.

These contracts lock the contractor/consultant into the tendered hourly rates or other schedule of rates, and the Conditions of Contract. However there will also be the option, at the council’s discretion, to request quotes from some or all panellists. For hourly rate standing offers it is usual to appoint a number of contractors to a panel. This helps to keep the contractors “honest” in that if they start to charge more hours than thought justified the council can award more work to other contractors on the panel. For other standing offer contracts, such as for material supply, this should not be an issue.

**Benefits of Option 1** – once set up it can be used with less work as individual contracts do not need to be set up.

**Dis-benefits:** - labour intensive in evaluating of the EOI responses and then the setting up all the contracts, especially if a large number of consultants or contractors respond to the EOI request and there is quite a few on the panel. So much so that I would suggest at least a three year contract – typically three plus two - if this option was chosen, to make the level of work worthwhile. Also it may be problematic if some consultants / contractors do not get any work out of the contract. If the council appoints a contractor or consultant to a panel it should be with an expectation that they will be required to provide some level of work or be given the opportunity to quote on a number of works if that is the requirement. I have seen instances where a project manager has appointed a number of contractors to a panel, some new and some “incumbents”, because that is what the tender evaluation scoring and process required. However it was never their intention to give the new panellists any or much work, preferring to allocate the bulk of the work to their preferred panellist – the incumbent from the earlier panel. This approach is not on.

## Option 2: EOI panel

Sometimes called a pre-selected panel or preferred supplier list. Can also be used to preselect contractors to tender on a single contract.

Job 1 – quotes from selected panellist**. Enter into formal contract** with successful panellist

Select a panel of contractors. (No formal contract with them.)

Advertise **EOI**

Job 2 – low value quotes from selected panellist**. Enter into simple contract** with the successful panellist

Job 3 – etc.

The way Option 2 is put in place is:

* A call for Expressions of Interest is advertised. This would contain details of the Conditions of Contract that future work would likely be under and a draft or a summary specification. It may request hourly rates or schedule of rates for the works; and
* The EOIs received are evaluated and the panel is selected and notified that they have been chosen. However no contract is entered into at this stage.

Under this arrangement the panellist is not contractually bound to provide services at the hourly rates or other schedule of rates\* offered in the EOI submission nor are they bound to the Conditions of Contract, which includes requirements for insurances and dispute settlement. For this reason a separate contract, which includes the Conditions of Contract, is entered into for each job they do for the council.

As the requirement for works come up quotes are obtained from some of the panellists or the entire panel. If quote will only be sought from some members of the panel for any particular quote/tender this must be clearly state in the EOI request documents and the process by which this will be done documented. The quotation request must contain the conditions of contact which the work will be performed and a specification and instructions on how to submit the quote and by what time. If it is large contract formal tender documents should be used and the tender invited and submitted through the electronic tendering platform. Evaluate and enter into a contract with successful panellist - a deed of agreement. For smaller works it could be a simple contract with acceptance by a letter of acceptance and/or a purchase order with purchase order Conditions of Contract.

\* It is possible to obtain hourly rate work from the panel. Select the panellist to do the work and send them a written request to carry out the work. This written request must state which or provide the Conditions of Contract will be applicable, the scope of the works to be done and also their hourly rates offered in the EOI submission are applicable. The request may also have a place where they can sign and return to the council to indicate acceptance. If it is anticipated that there will be a lot of hourly rate work Option 1 would be a better approach. While the contractor/consultant when selected onto the panel is not contractually bound to hold the hourly rate or other schedule of rates they probably will because if they don’t they risk exclusion from the informal panel and so not get further work.

**Benefits of Option 2:** Less work initially - no over arching contracts to set up.

**Dis-benefits:** - marginally more work to set up individual contracts each time work is required. So long as it is set up properly at start should not be significant. For minor works it may be a matter of issuing a purchase order under the contract. For more major works a formal deed may need to be set up.

Be aware that there are issues with using panels of contractors for contracts works over Section 186 thresholds for compulsory advertising. Seek legal advice if panels are to be used in this circumstance.

# Preparing and checking quotation and tender documents

This section is about both preparing a set of tender documents and checking tender documents that have been initially prepared by someone else. When putting together documents from scratch most of the points in this section can be thought of as pointers for putting together good tender documents and common mistakes that should be avoided. When checking tender documents most of the points in this section can be thought of as things to watch out for and to correct.

While some of the items suggested in this section may seem to be pedantic or unimportant, in some cases that is the nature of the work of a Contracts Officer – to check the detail, to implement detail, for the important and what some may consider the unimportant. In my opinion even the minor items are not unimportant. It is about risk mitigation. A contract is a legal document, sometimes for works or services worth multi-millions of dollars. If there was a contractual issue that went to arbitration or to court the council’s position would be weakened if the document was riddled with errors – it is certain the opposing side’s lawyers would notice - even if some seemed to be minor. There is an important rule of contract interpretation – if a contract clause is ambiguous it will be interpreted in the manner which favours the party that did not write the contract clause. As the council is usually the party that prepares the contract document this makes getting the clauses right, ensuring they are not ambiguous, very important.

Firstly a general overview of the tender document set.

## Standard parts of a tender document set

There are four parts to a typical tender document set. Those parts and their functions are:

* Part 1 Conditions of Tendering – **tells the tenderer how and when to submit the tender**, how the council will communicate with the tenderer and the basis on which the council will evaluate the tenders received – and various other requirements;
* Part 2 Tender Response Schedules – **these are the forms that the council requires the tenderer to complete and submit** as their tender, including the pricing schedule. This Part can also sometimes include an additional specific spreadsheet document for a breakdown of the tenderer’s pricing;
* Part 3 Conditions of Contract – **tells the contractor / supplier the various standard requirements that the council has to govern the management and supervision of the contract.** Includes such requirements as insurances, dispute resolution, communications during the contract and termination procedures; and
* Part 4 Specifications – **tells the contractor / supplier** **the details the works or services or goods/materials that the council wants the contractor to supply to the council.** This can sometimes consist of many documents, including drawings, geotechnical reports or other supporting documents.

Each part has its own function in the overall tender document set. The clauses, requirements and functions should not crossover between the different parts if it is possible to avoid. For example all procedures relating to the tendering process should be in Part 1. Part 2, Tender Response Schedules is where much of the information needed from the tenderer, to enable the assessment of the tender against the evaluation criteria, is collected. The Part 4 Specification is the part that contains the details of the specifics of what the council requires to be supplied or services supplied. It should not be used to request information from the tenderers, which should be in Part 2 – with a couple of notable exceptions that will be mentioned later. So when writing a new clause for any part keep in mind what is the function of that part and try not to crossover – except for good reason.

## Should the tender document set be one or four or more documents

Splitting the tender documents into four parts, with separate document(s) for each part, provides the greatest flexibility to the council when putting together tender documents for a large range of works – from construction to consultancy to services contracts. Part 1, Conditions of Tendering, is very similar for all contract types. Part 2 is the Tender Response Schedules and is usually provided to the tenderers separately as an editable MS Word document to allow the tenderer to fill it in on their computer. Part 3, the Conditions of Contract document will be different for different types of contract. Part 4 is the Specification. Often the Specification documents are prepared by consultants as a separate document. There is another practical reason - combining these documents into one MS Word document often creates formatting and indexing issues which can be very difficult and time consuming to solve, though this can be overcome by combining the documents as PDFs using Acrobat Pro or similar – but this creates more work for the Contracts Officer with little benefit that I can see.

I believe splitting the tender document set into separate document(s) for each part, as described, represents the most flexible and the best practice. This is not to say that a tender document with all of the parts combined into one document will not achieve the desired outcome.

## Templates

Templates are developed by an organisation to reflect what the organisation considers is best practice for tenders and contracts. Templates are also where the organisation catches and stores some of its learnings from earlier tenders, and also stores and implements the advice it has received from its lawyers and other experts.

When starting a new set of tender documents determine which templates are most applicable. Save a copy of each template document, with the appropriate names. Then use search and replace to change the contract number and name in all documents. For process efficiency also consider setting up the other documents will be needed during the tendering phase at this time – such as the conflict of interest form and tender evaluation and council reports and letters.

## Things to do or to look for in all parts

For all tender documents a good level of formatting is important. It is part of being professional and presenting a good image of the council to the tenderers and others who see the documents.

If a Contracts Officer is not reasonable proficient on formatting MS Word documents (or documents from another word processing program, if used), including how to use headers and footers, page and section breaks and their different uses, headings and styles - including multi-level numbering, clause cross referencing, tables, and to set up and update automatic index tables, it will be worthwhile doing an intermediate/advanced word processing course to acquire these skills.

Specific formatting items to check include:

* In the header and footer has the correct graphic been used, if applicable. Some councils use different graphics for the front page and the other pages of a tender document part. In particular check when the document pages change from portrait to landscape and back. Ensure the page numbering is correct;
* Paragraph spacing, indent, the font(s) used and paragraph alignment should be consistent though out the document for each Part, except for specific reasons; and
* Clause numbering sequential and correct.

When completing or checking a document always check the spelling using the spell check tool. Ensure that the contract name and number correct and consistent in all documents.

Make sure that any document index is updated so that all heading clauses are included and the page numbering is correct.

Check that the use of page breaks has not left inappropriate half blank or fully blank pages. When putting together tender documents the use of page breaks in a document should be minimised. Instead use “Keep with Next” paragraph formatting (if using MS Word) to keep headings with the appropriate text and lists together. This approach means that if additional clauses or text is added to a document inappropriate page breaks shouldn’t occur.

If templates have recently changed, ensure the most recent template is used or has been used.

Check that the tender closing dates are correct and the same(!) in each document. It can be listed multiple times in the Conditions of Tendering and the Tender Response Schedules, depending on the document templates.

Be on guard against mistakes due to lack of care or “silly mistakes”. This could be anything. Some examples include where a template includes a number of options, implying that some should be deleted leaving the desired option. But sometimes the unwanted options are not all deleted. Or there might be a suggested table to be filled in but there is no requirement for it in this tender but it has not been deleted. Templates are a useful productivity tool - it would be inefficient and lead to many more mistakes if no templates were used - but unthinking use of templates is an issue that needs to be guarded against.

One organisation I worked for had no universally recognised template documents, instead each department had their own or they simply brought up their last similar tender document set and worked from there. The issue with this is that over time the documents can change without control. Needless to say one of the first tasks I undertook after joining the organisation was to prepare a standard set of tender document templates to be used right across the organisation.

When checking the documents, if there are any obvious problems with the grammar point them out to the project manager.

If a requirement could be better worded to clarify the council’s requirements or to provide better protection to the council suggest it to the project manager. It is hard to advise how to do this. It is a matter of experience and judgement.

One last thing before I continue. Please recognise that there is often more than one way to achieve a desired outcome. Other ways may be equally good or nearly as good as your own idea. If it is nearly as good is it really important to change it? If the desired end will be achieved by another approach that has been set up by the project manager why change it for marginal improvement, if any. If you still want to change it make the suggestion to the project manager as a recommended but not mandatory change. Only insist on a change if what is in the document is wrong or will put the council at risk or if the suggested change will add significant value.

Now for things specific to the four parts of the tender document set.

## Part 1 Conditions of Tendering

How the Conditions of Tendering is put together from a template document is usually fairly self explanatory.

There will be a number of options that can be selected in this document – check that these are consistent and correct. Read the comments in a new template document, if any. They might provide some guidance on what changes need to be done. Remove comments when finished.

Changes usually involve insertion of a brief description of the work and the conditions under which the contract will be set up. If the tender is for a standing offer deed for a set term then it will usually include the details of the term plus any optional extensions. Also include whether it is intended that one or more contractors be appointed – for services contract. Lump sum contracts are typically single contractor only.

Include whether there will be a pre-tender site meeting. Site inspections and pre-tender meetings should only be listed as mandatory if absolutely necessary. One instance where it could be considered mandatory would be if there are unusual occupational health and safety issues or other unusual issues on the site that need to be seen by the tenderer prior to tendering. If the inspection is mandatory the council may have to eliminate an otherwise acceptable and perhaps lower priced tender if they had not attended the meeting or inspection. If site inspection is listed as mandatory and a tenderer does not attend then this can be classed as a non-conformance and handled in accordance with the Conditions of Tendering clause on non-conforming tenders – so elimination may be at the discretion of the council depending on what the clause says – however the tenderer needs to be able to justify why they did not attend and it must not affect their ability to perform the works to Specification and address the specific site issues that the mandatory inspection was inspecting. For additional information refer to the notes provided in the section on [Pre-tender meetings and site inspections.](#_Pre-Tender_Meetings_and)

### Tender period

Check that the tender period is sufficient. Typically a council may use a tender period of 3 to 4 weeks as a default public tender period time. The last council I worked at had a default tender period of 3.5 weeks (25 days), which seemed adequate for many tenders. It gives sufficient time for the tenderers to find out that the tender is occurring, to download the documents, decide whether to tender and then prepare a tender – not a short job considering the amount of information that a council usually asks for. Preparation of a tender may involve getting subcontractor pricing – so sufficient time needs to be given for the tenderer to be able to do this. It may be possible to go for a shorter tender process, say 2.5 weeks, if it is for a procurement that is simple to price, does not require extensive subcontractor pricing and the tenderer is not required to obtain and submit extensive supporting information. One example of this might be the purchase of crushed rock delivered to a single location or another simple material. The council should not go below this time for a public tender. It would also be beneficial to give a longer tender period for complex and/or high value procurements – 5 or 6 weeks or longer.

Try to convince the project manager not to shorten the tender period to try to make up for lost time elsewhere in the project time line. It could end up costing the council money as it may dissuade a qualified tenderer from tendering or may force a tenderer to make pricing assumptions, with generous risk margins, to make up for pricing unknowns due to insufficient time to get firm subcontractor pricing.

### Tender evaluation criteria and weightings

#### Introduction

When checking tender documents, check whether the evaluation criteria and weightings seem to be reasonable.

When preparing tender documents from scratch getting the evaluation criteria right is of prime importance to achieving a good result for the council through the tender process. The following sections provide an overview of the items to be considered when determining the tender evaluation criteria and weightings for tender.

The evaluation criteria and their weightings are determined prior to issuing the tender documents. It is usually a council’s practice to list the evaluation criteria in the Conditions of Tendering. Some councils will also list the weighting given to each criterion within the Conditions of Tendering, though this is usually not mandatory, depending on council’s policy on the matter. Listing of the weightings could be considered disadvantageous to the council for tenders where price has been given a relatively low weighting. However a council may still elect to reveal the criteria weightings in this situation. If the evaluation criteria weightings are not listed in the Conditions of Tendering then the evaluation criteria weightings must be decided on and documented on file in the council’s document management system prior to advertising preferably, and certainly before the close of tenders.

Also refer the [Tender Evaluation Methodology](#_Evaluation_Methodology) section.

#### Evaluation systems

Many councils use a “[weighted price” process](#_Quantitative_Criteria) however some may use a “price per quality unit” approach or some other method. The weighted price approach is much more flexible, allowing the council to refine the weighting that is given to price factors compared to quality factors depending on the item or service that the council is requesting tenders. Although I can’t mathematically prove it the price per quality unit approach is roughly equivalent to a quality: price weighting ratio of 50:50 under a weighted price evaluation process. Price per quality unit is a “one size - hopefully - fits all” approach and is not preferred. I will primarily discuss the weighted price approach.

#### Tender evaluation criteria

The evaluation criteria used should relate to any of:

* Qualitative issues/ non price issues, including:
  + the quality of the tenderer/contractor, ability to complete;
  + the conformance / compliance of the tender submission;
  + the quality of the end product, services or works offered in the tender; and
  + conformance of the tenderer to the council’s policies, e.g. environmental requirements;
* Quantitative issues. Including:
  + tendered price;
  + other factors affecting the total cost of ownership to council;
  + factors relating to quantity of services/goods supplied; and
  + factors relating to quality of the goods or services that can be objectively quantified.

The essence of an item being assessed using a quantitative criterion, rather than a qualitative criterion, is that the evaluation score for the criterion can be determined by the use of a formula in the evaluation summary spreadsheet, rather than the subjective scoring determined by the evaluation panel members for a qualitative criterion.

Qualitative items can be assessed on the basis of either pass / fail or scored. Pass / fail means the tenderer is to be assessed as either qualified to provide the requirements of the tender or not qualified. If assessed as not qualified they are eliminated from further consideration. Scored means that the evaluation criteria is assessed and rated and given a score – often between 1 and 10, though I have also seen councils that use a range of 1 to 5. It is important to note that even though a criterion is scored, rather than nominated as pass/fail, if the tenderer’s score against a specific criterion is below a certain level and the criterion is deemed to be critical to the success of the contract, the tender can still be failed and not further considered. This needs to have been documented as part of a council’s usual evaluation process. For some criteria a low score does not lead to automatic disqualification.

Getting the evaluation criteria right is crucial to the success of the tender process and to achieve best value for the council. The evaluation criteria, their weighting and associated processes give the tender evaluation panel the ability to award the contract to the tenderer that has provided the council with the best value option, with an acceptably low risk level, rather than just the cheapest price.

When using the weighted price approach, what the ratio of price to quality is and what the specific quality criteria weightings are is the decision of the project manager and department but will vary from about (price : quality) 100:0, which is possible for the purchase of simple materials, to 30:70 for consultancy/advisory and IT systems tenders. I have seen tenders with a price weighting below 30% however there would have to be good reasons to go below this weighting. What the ratios for specific types of tenders are is a policy decision of the council so may vary from what I have listed in this section.

For some tenders it may be appropriate to select primarily on price. In these instances there is nothing wrong with making the quantitative criteria (that is price) high, even up to 100% - that is a price: quality ratio of 100:0. A price: quality rating of 100:0 does not mean that the product has no quality or that there are no quality criteria. It just means that all of the qualitative criteria are all pass/fail criteria rather than scored. If the product fails to meet the required quality standard they can be rejected as “failed” against the quality criterion and eliminated from further consideration. This might be considered for plant hire, or say the purchase of crushed rock where one of the criterion is “Conformance to the Specification”. In these cases the Specification must be comprehensive – so that provided the item conforms to the Specification it is acceptable, if not it is rejected as non-conforming. Similarly for capacity to deliver the required quantity in the required time – the tenderer either can comply and is acceptable or can’t and is not acceptable. If a delay of some period is acceptable given a good price then delivery time could be weighted appropriately to reflect this and the price weighting adjusted down from 100%. In this case the delivery time in the specification and/or conditions of tendering must not be stated as an absolute. To determine what the weightings should be a decision would need to be made – prior to advertising the tender - about what level of delay is acceptable for a specific saving. E.g. would the council be willing to accept a one week delay from the preferred delivery date for a 5% cost saving? Or a 10% saving? What about a 2 week delay? Try the scenarios in the evaluation spreadsheet. Set the weightings accordingly. My experience is that it is difficult to get a project manager to commit to an appropriate weighting.

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| A note on: “Quality” criteria weighting for construction tenders (Excluding full design and construct tenders.)  I have noticed that there has been a tendency for the weighting of the “Quality” criteria for construction projects to be higher than they use to be. I have seen councils that use a Quality:Price ratios for construction projects that I am more use to seeing for consultancy/advisory/IT systems tenders. (I will discuss consultancy/advisory/IT systems tenders later.) I question whether the high quality weighting represents best value to councils for routine construction projects, however this is not a decision a Contracts Officer should be making or even the Procurement team. It is a decision for the managers, based on decent analysis of potential costs and benefits.  In my opinion if the project managers and the engineers are proposing a high quality weighting for construction projects then their managers should be demanding full justification as to why this will provide council with best value. This justification should be on the basis of hard dollar figures on what adopting the higher quality score weighting could cost council and why this is warranted (see Note 1 below).  One of aspects that I don’t believe is fully understood by managers is that when used in the tender evaluation context for construction projects “Quality” does not necessarily mean a better quality build. If council has specified a Holden Commodore council is not going to get a Mercedes Benz if council awards the job to a tenderer that achieves a higher “Quality” score. Quality in the context of tender evaluation scoring for construction works relates to assessing the quality of the company – or really the capability of the company - are they suitably experienced, do they fully understand the requirements of the contract, do they have experienced staff and suitable equipment of sufficient number, have they proposed a good methodology for carrying out the work, do they have good occupational health and safety systems and environmental management systems and are they financially capable and stable. Hopefully if council awards to a “quality” company, the company will be able to deliver a build that is on time and meeting all specified requirements and to a build quality expected of a fully qualified, competent and experienced company. The issue is: what additional cost is council prepared to pay for the assurance offered by a higher scoring company? Does council need a superior quality company to deliver the build or is it likely that a smaller company that perhaps does not score quite as well, but still satisfactory, and offers a better price, could deliver the build just as well?  In my opinion, to make sure there is no confusion about what is being assessed and what is trying to be achieved in the tender assessment process, it would be better to not call it a Quality Score or a Qualitative Assessment but to call it what it is: - a company Capability Score and a Capability Assessment. However I have continued to use the terminology of “Quality” and “Qualitative” in this document as this is what is wide spread in the industry. “Quality” criteria weighting for Consultancy, Plant and Equipment and IT systems tenders The situation regarding the weighting of quality criteria is quite different for many (but not all) types of Consultancy, Plant and Equipment, IT systems and full Design and Construct tenders.  Consider a tender to deliver consultancy services. Council will want to engage a consultant that will provide Council with high quality advice on which to base their decisions and actions, and Council will be willing to pay a price premium in order to get that high quality advice. In this situation a higher quality weighting is justified because, unlike construction projects, it is thought that a higher quality and more capable (read more experienced, better personnel, larger) company will provide higher quality advice to Council.  Similarly for IT systems, plant and equipment and full design and construct tenders. Take as an example an IT system tender. Often the specification for this system will be a wish list of functions that that Council will like a system to do (hopefully based on an assessment of what is actually possible and available). When the tenders are assessed the tender evaluation panel will be assessing how well they meet that specification’s functional requirements. They will also assess the usability of the system, an aspect of the system directly related to the quality of the system. Usability is difficult to specify. (Council spec: “The system shall be user friendly and intuitive”. All tenderers’ responses: “Our system is user friendly and intuitive”. It doesn’t tell you much.) Usability can only be fully assessed through demonstration and trial. Council will be willing to pay more for a system that is more usable and has higher functionality because it is hoped that the system will provide a higher user and systems efficiency dividend.  Unlike construction contracts, for these types of tenders there can be a substantive difference in the quality of outcome between the tendered offers. The Qualitative Scoring process is used to assess this difference of outcome and to determine the best value offer for council. It is the reason why a higher qualitative score weighting is justified for these tenders.  **Note 1:** - A suggestion on an approach to get an idea of how much a Quality:Price weighting ratio could cost a council. In an evaluation spreadsheet put in the quality and price weighting council normally uses for a tender. Put in a nominal lowest priced tender “Tender A” with a price of $1 million and award that tender quality scores of 7 for all quality criteria. Put in another tender “Tender B” and award that tender quality scores of 8 for all quality criteria. Then either by trial and error or using the MS Excel “Goal Seek” function determine at what Tender B price the Total Assessment Scores of the two tenders become equal. According to this analysis at any tender price below that price the more expensive Tender B would be recommended for the contract. This gives an idea of the potential cost to Council of an additional average of one point to the quality scores against all qualitative evaluation criteria, and a start to the discussion on whether the chosen Quality:Price weighting ratio represents good value. |

#### Tender evaluation criteria (continued)

The tender evaluation criteria should be specific to the contract being tendered. However the typical council criteria for many tenders consist of both qualitative criteria and quantitative criteria.

#### Qualitative criteria

The following qualitative criteria (or variations on the same) are often used:

* Financial Capability;
* OH&S Systems;
* Ability to meet the council’s objectives through a substantively conforming tender or a non-conforming proposal which is acceptable to the council;
* Tender Compliance;
* Historical Performance/Relevant Experience;
* Capability (including Appropriate Resourcing – Personnel and Equipment - Methodology and Timeliness);
* Quality Systems; and/or
* Environmental Systems.

Additional criteria that might be used for specific type of tenders may include:

* Conformance to Specification, fit for purpose, usability - for plant and IT systems purchases;
* After sales support services and warranty - for plant and IT systems purchases; and / or
* Customer Service.

This list is not exhaustive. There are undoubtedly other criteria that will be relevant for specific tenders or specific councils. Be prepared to review the standard criteria and add new, delete redundant and adjust the criteria as is necessary to best fit the criteria to the tender to be evaluated.

All of these qualitative criteria can be either a pass/fail criteria or a weighted scored criteria, depending on what is to be purchased via the tender process and also the council policy and practice.

Some councils score OH&S and others don’t – there are arguments both for and against.

One criteria that I recommend is not used is “Reference Checks”. If this criteria is listed then it may oblige the tender evaluation panel to check the references of every single tenderer, which can be very time consuming and ultimately a waste of resources as it may become apparent quite early in the evaluation that some tenderers are not going to be shortlisted, either due to high price or significant qualitative defects. References checks are usually reserved for shortlisted tenderers as part of due diligence or possibly rescoring – see Shortlisting section.

#### Quantitative criteria

The primary quantitative criterion is often what is called the “Total Cost of Ownership” or similar. This includes the tendered price however can include other factors affecting the cost to the council of ownership of the works or services. Often these additional costs of ownership are the same for all tenderers and therefore the tenders are assessed on tendered price alone.

Types of tenders where the additional costs can come into play would be, say, for the purchase of plant such as trucks or dozers. In this case there may be differences in the costs of ownership of tendered plant due to the fuel use efficiency of the plant and productivity achievable and the trade-in value at the end of the plant’s life. These items could be included in the total cost of ownership quantitative evaluation. However caution needs to be exercised in the use of these factors. If fuel economy is to be used how is that fuel economy derived? If it is fuel economy from an Australian or other Standard test it could be used with confidence. If it is just a figure provided by the manufacturer there is no certainty that the figure is accurate and comparable to the economy figures provided by the other tenderers. Trade-in value can also be problematic. If the second hand / auction market is well developed it may be possible to estimate a trade-in value that is defensible. If there is a lack of this data then it could be problematic to nominate trade-in values for the plant that is defensible. Each tenderer is always going to argue that their plant has a high trade-in value, quite possibly higher than a market analysis might indicate. If these factors are being considered for use in the evaluation various disclaimers should be in the conditions of tendering saying that the council may determine these figures at its discretion and also may elect not to use the factor in the Total cost of Ownership comparison, again at its discretion.

Quantitative criteria can include factors other than price. A tender evaluation process can have one quantitative criterion that covers price / total cost of ownership and additional quantitative criteria that cover other factors that can be quantitatively assessed. An example of the use of dual quantitative criteria is for a tender for the supply of a second hand piece of plant. In that case price would be a quantitative criteria and also plant operating hours/kilometres – both very important in determining which plant offers best value for money. Another example could be in a cleaning contract where the tendered price and the labour resourcing level allocated by the tenderer to perform the work could be quantitatively assessed. The scoring model and formula to be used does not have to be linear but it does have to be determined and documented prior to tender.

Because these evaluation criteria are quantitative, usually the score that the tender is allocated against the criteria is determined by the application of a formula using the tendered quantities. The formulas are usually put into the tender evaluation spreadsheet. Whenever multiple quantitative criteria are used this must be disclosed and be clearly set out in the Conditions of Tendering document and the process fully decided prior to close of tenders.

## Part 2 Tender Response Schedules

The Tender Response Schedules are where the council seeks from the tenderer information that will allow the council to assess their tender submission. The purpose of the use of the Tender Response Schedules is to structure all tender submissions in a similar manner and to try to get information that addresses the tender evaluation criteria, thus enabling better comparison of the tender submissions and more efficient tender assessment. The alternative of submissions with random structure determined by each tenderer would greatly increase the difficulty of comparing the tendered offers and scoring against the tender evaluation criteria.

Typically there will be one or a number of schedules where questions are asked to get the information needed to assess the tender submission against the tender evaluation criteria. Prior to tender these schedules need to be checked to confirm whether the questions match the evaluation criteria. In the case of say a standard building contract this would not usually be an issue. The template for this type of contract should be standard, though could vary if, say, the council required a specialist building the tenderers might be asked specific questions about their experience with this type of building and the issues that could be confronted in the construction of this type of building. Where it does become an issue is for one off non-standard type contracts for specialised services. For example, legal services contracts have specialised requirements. A standard Tender Response Schedules template would usually not cover all the types of questions that need to be asked to enable collection of the correct information from the tenderer to allow us to assess and score the tender against the tender evaluation criteria. For example, one of a standard template questions could typically be “what is the location of the tenderer’s nearest depot?” This is meaningless for a legal services contract and should be deleted or rewritten to something more appropriate - e.g. What is the location of the office(s) from which the tenderer would provide most of the services under the contract?

When formulating the questions to ask in the Tender Response Schedules, the project managers should be asking themselves “Does this question assist us in making a selection? Does this question assist the tender evaluation to panel assess the tender against a particular evaluation criterion?” If not the question should be deleted or rewritten. Time should be spent on this to get it right. It will ultimately save much more time in the evaluation and contribute toward the council making the correct selection of the successful tenderer. A tender document checker does the same thing but as they are not necessarily expert in the field they may not know what to ask – though a lot of times it is common sense and taking time to consider the requirements of the contract, the issues and the evaluation criteria. A person tasked with checking the documents can only suggest questions to ask – the project manager is responsible to decide if they are relevant.

The aim of the questions is to extract information from the tenderer in as precise a form as possible, with as little extraneous words as possible. Even though the section assesses qualitative criteria the information sought should as much as possible be quantitative. As an example, a construction plant tender might have an evaluation criterion “After Sales Support and Service”. The first thing to do is to look at the evaluation criterion and consider – what information is needed to be able to assess the tender against that evaluation criterion? Then formulate the questions to extract that information from the tenderers. In the case of the plant after sales support the tenderer’s availability and preparedness to be able to provide service is important. An appropriate question might be “What is the location of the tenderer’s servicing depot nearest to Council?”, “How many other servicing depots does the tenderer have in Melbourne and their location?”, “What is the list of spare parts for the plant that the tenderer guarantees to keep in stock at the depot that will be responsible for servicing the plant?”, “For parts that are not in stock how quickly would the tenderer be able source the required parts and where would they come from? “How quickly does the tenderer guarantee to attend a Council site after having received a request for repair of the plant?” Often this response time will be specified but some tenderers might be able to do better, some may only be able to guarantee attendance in a greater time than specified, so are therefore non-conforming. Lots of questions may be asked and it may look like it a lot of work for the tenderer but not really. Hopefully each question can be answered by the tenderer very succinctly and efficiently with a few words or a sentence or two. If they choose to be more verbose than necessary that is their problem – and to an extent the tender evaluation panel’s as they have to read it all.

For comparison - what is not a good question. I suggest that a question like “How does the tenderer intend to provide after sales service for the plant?” is problematic. It is better than not asking any questions however it creates issues for the evaluation. For this type of question some of the required information may be provided but it will be inconsistent between tenderers. It will also be in inconsistent order, spread over multiple paragraphs - sometimes pages, making comparison of the tenders more difficult. It is possible most of the substantive information will be in the verbiage but it may be difficult to extract. The non specific question also provides the tenderer with more opportunity to launch into a sales pitch saying how good they are. It is not good to have to base evaluation scoring against a criterion on which tenderer has a better sales pitch. There is nothing some tenderers like more (other than winning!) than to be able to cut and paste information from a sales brochure or from a previous tender into the current tender submission. Many tend to equate bulk with quality when it is often the reverse. On many occasions bulk becomes prone to waffle and becomes difficult and time consuming for the tender evaluation panel members to read and assess. The preferred approach – multiple succinct questions - may not stop the sales pitch but hopefully it will limit it.

Do not be concerned about changing the standard questions and the form of the questions from the original questions on the template. For example if there is more or different information required on the contractor’s historical performance then add more columns to the standard tables that seeks this information. Or reformat the table or eliminate the tables all together and ask questions. Whatever is necessary to collect the required information.

For further information see [Tender and EOI Evaluation](#_Tender_(and_EOI)) Section.

Check whether the Price Schedules look reasonable. This requires knowledge of what is in the Specification. Sometimes there may be optional items that may be supplied by the contractor at an additional cost. Ensure that these are in the specification and marked as optional at the discretion of the council.

On the Price Schedule ensure that it refers to the correct documents – the correct Conditions of Contract - e.g. AS4000, AS4350, AS4122 or Provision of General Services or other. Either the Specification or the project brief. Make sure it is clear whether the prices submitted are to include or exclude GST.

If any of the schedules are not used in the tender just delete the contents of the schedule and write “This Schedule not used for this Tender” or similar. It is not recommended to delete the Schedule completely as this has flow on affects and further changes would need to be made in the Conditions of Tendering and possibly in other documents as well to fix the cross referencing issues.

Some councils restrict editing of the Tender Response Schedules to the spaces for the answers. If the council does this ensure that where council requests a response in the Part 2 Tender Response Schedules it actually contain an editable field (as used in MS Word).

If a council has provided the Tender Response Schedules as a MS Word or other word processor document it would expect that most Tenderers will fill in the Tender Response Schedules electronically, i.e. using MS Word, and not filled in by hand – though if it has not been specifically ruled out the possibility of a hand written tender submission should be considered when formatting the Tender Response Schedules. Consider whether the document will work satisfactorily for filling in electronically. Fix if the answer is no.

Also check that the areas for the provision of answers are OK for filling in within MS Word. E.g.

\_\_\_\_\_\_\_\_This is not great\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

This is OK (This is one of those niceties. It doesn’t impact on much except the professional appearance of the document.)

## Part 3 Conditions of Contract

The main types of Conditions of Contract used are:

* AS4000 – used for lump sum building and civil construction contracts;
* AS4350 or AS 4905 should be considered for smaller construction contracts;
* AS4122 is used for lump sum consultancy works;
* A Services General Conditions - or the Provision of General Services, possibly modified from a version of the Victorian State Government conditions – used for a large range of standing offer, hourly rate, schedule of rates, multi-year term contracts. Types of services contracts that it is used for are usually maintenance contracts but can also be used for services as diverse as legal services, IT services and other consultancies, internal audit and others; and
* The Government Information Technology Contracting (GITC) contract conditions, or a modified form of it, is sometimes used for IT software systems contracts – though I would suggest that the use of another Conditions of Contract, perhaps a Conditions of Contract specifically for IT software systems developed by a lawyer, be investigated.

Templates documents are usually available and may contain some guidance in how they are set up.

Choose the best Conditions of Contract or check to see whether the best Conditions of Contract has been chosen for the works or services. Usually the choice of the best Conditions of Contract for the tender is obvious but sometimes it not obvious and needs to be carefully considered. For further information refer to the section of the [Conditions of Contract Decision Tree](#_Draft_Conditions_of). (Note that this is an incomplete tool / guideline - still in draft form – needs to be completed in conjunction with Procurement team and others in the council and will depend on council policy and requirements.) Other specific Conditions of Contract may also be used. Sometimes the council may not have an appropriate standard Conditions of Contract document. In this case firstly check through the list of contracts the council has put out over the last few years to see if anything similar has been tendered and then review the conditions of contract from that contract to see if it is suitable. If a suitable conditions still can’t be found it may be necessary to go to a lawyer to get them to provide the appropriate conditions - at a cost - or (not preferred) amend one of the council’s standard Conditions of Contract. This last option contains an element of risk and should only be done for low value, low risk contracts and if you believe you have the skill to do it. If not, spend the money to get a Conditions of Contract document from a lawyer.

The main thing to check in the Conditions of Contract is the annexure and whether it has been completed correctly. The main text of the Conditions of Contract is standard and is rarely changed. If the conditions are changed it would usually be on legal advice. AS4000 has an annexure to place amendments if required. Annexures often have a number of options that can be selected. Check that the right option has been selected. Often the annexure in the template of the Conditions of Contract document also contains some council generated typical text for standard contracts. This can be changed on a needs basis so check to see whether the standard text is applicable to this contract. This is especially applicable in services contracts where the Conditions of Contract contain the requirements for submitting invoices and reporting and other items which would change on contract to contract basis.

For annual supply contracts look to see whether appropriate key performance indicators (KPIs) or service levels have been included in the service level agreement. Determining service levels can sometimes be very tricky. Service levels recognise that often contractors don't perform to the specified requirement on 100% of occasions - which would be ideal. It also recognises that in a situation where a contractor is supplying multiple goods or services over a longer term if the contractor fails once on a particular order council will not want to terminate the contract - and contractually would probably not be able to anyway. So there has to be a certain level of non-conformance that is measurable and recordable and which if exceeded will then give the council the right to terminate the contract if the council wants to. This is what the service levels try to set up. The service level / key performance indicators need to be able to be measured and recorded and there needs to be a process to enable the indicator data to be collected. That will take resources and time which needs to be made available. So the service level indicators need to be selected to minimise the resources required for measuring and recording the service levels.

In the Service General Conditions / Provision of General Services Conditions of Contract ensure that the requirements for invoicing and reporting have been made specific to the contract service. If the Conditions of Contract do not mention these aspects then the requirements can be put into the Specification or as an amendment to the Conditions of Contract – though as previously stated it is usual to avoid amending the Conditions of Contract.

Check insurance levels are in line with the council’s procurement policy guidelines.

Price review mechanism is often used for schedule of rates contracts that have multi year terms. Lump sum contracts - e.g. construction and consultancy - rarely have price review mechanisms, unless they are really large and have a long construction period, or possibly for imported goods to be incorporated into the contract works where currency fluctuations could impact on price. Check that the price review mechanism is appropriate. For further information refer to the section on the [Price Review Mechanism](#_Price_Review_Mechanism).

| Draft Conditions of Contract Decision Tree – to be finalised by a council’s Procurement team Note that this is an incomplete tool / guideline. Each organisation must make their own assessment. Other specific Conditions of Contract may also be used. | | | | |
| --- | --- | --- | --- | --- |
|  | **Type** |  | **Values – to be determined** | **Suggested Conditions of Contract (some suggested are *not standards*)** |
| **Lump Sum - possibly with some Schedule of Rates** | **Construction** | Design and Construct | Major Projects – Above $XXXK | AS 4300/AS4902 or *Special Conditions based on AS4300/AS4902* |
|  |  |  | Above $XXXK | AS4300/ AS4902 |
|  |  |  | Below $XXXK |  |
|  |  | Construction | Major Projects - value to be determined | AS4000 or *Special Conditions based on AS4000* |
|  |  |  | Above $XXXK | AS4000 |
|  |  |  | $XXK to $XXXK | AS4905 |
|  |  |  | Below $XXK | *Quotation Conditions* |
|  | **Consultancy  - including advisory services** |  | Above $XXK | AS 4122 |
|  |  | Below $XXK | *Quotation Conditions -so long as it covers Professional Indemnity Insurance* |
|  | **Information Technology** |  | Above $XXK? | Conditions of Contract IT (GITC Conditions) - Procurement should consider getting a better IT conditions of contract for IT works from the council's lawyers or use AS4122 for consultant / advisory services |
|  |  | Below $XXK | *Quotation Conditions* or AS4122 |
|  | **Plant and Equipment** | Purchase | Above $XXXK | XX |
|  |  | Below $XXXK | XX |
|  | **Service** - Fixed rate, Fixed Quantity |  | Above $XXXK | *Provision of General Services* - not really suitable for lump sum but better than say AS4000 |
|  |  |  | Below $XXXK | *Conditions of Contract Minor Services*  -not really suitable for lump sum but better than say AS4305 |
|  | **Materials** |  |  | XX - *General Conditions of Contract Supply* |
| **Standing Offer - Hourly Rate or Schedule of Rates**  These type of contracts often involve entering into contracts with two or more contractors who are placed onto a panel to provide the service to the council when required at contracted hourly or other schedule of rates.. | **Services Contract - Term Contract / Annual Supply** | Building Maintenance, Open Space and Roads Maintenance - Panel or Single Contractor | Above $XXXK | *Services General Conditions / Provision of General Services* |
| Below $XXXK | *Conditions of Contract Minor Services - Also called "Minor Services Agreement (Standing Offer)"* |
| Consultancy Services - advisory, legal or other - Panel or Single Contractor, IT Support Services. | Above $XXXK | *Services General Conditions / Provision of General Services* |
| Below $XXXK | *Conditions of Contract Minor Services - Also called "Minor Services Agreement (Standing Offer)"* |
| **Plant and Equipment** | Hire - Ongoing - Panel or Single Contractor | All Values | *Plant Hire Agreement* |
| Hire - One Off | All Values | XXX - often the council will use the *supplier’s conditions* if these are suitable |
| **Materials - e.g. Crushed Rock** |  |  | XX - *General Conditions of Contract Supply* |

## Part 4 Specifications

Also called the Project Brief for consultancies.

Contracts Officers would not usually be expected to write a Specification from scratch but may on occasions get called upon to do so for some types of tender documents, e.g. service contracts. For some positions the job description may require this service. Checking of Specifications is a function that Contracts Officers routinely get called on to do.

The Specification is the most important of the tender documents. It describes what the council wants to have done. If it is incomplete or has errors or contradictions it will adversely affect the outcome of the process and cost the council money in contract variations to fix the issues found.

Various template documents are available however for some services a suitable template will not be available and the Specification will have to be prepared from scratch or from other sources. When retendering for existing contract services the usual approach is to get the previous Specification and to review and modify it in conjunction with the project manager. Remember that a Contracts Officer should be on the lookout for [potential improvements and savings](#_Process_and_service). When preparing a Specification for a service that the council has not sought previously a good start is to see if other councils or organisations have tendered these services and see if they are willing to provide a copy to use as a base document – to be modified to suit the council’s particular requirements. Check that copyright is not an issue – e.g. it is not a consultant’s intellectual property. If they are willing to provide the Specification also ask for the associated Tender Response Schedules, including the price schedule. The price schedule, if it has been correctly put together, should reflect the requirements of the Specification.

Other sources for the Specification are from consultants or on-staff professionals or other people who have expertise in the field. This is typically for civil works and buildings but could be for virtually any other Specification. However just because the Specification is from a consultant or other professional does not mean that the Specification will be without error or can’t be improved or doesn’t need work to bring it into line with the council’s standards and other requirements, be that formatting or something more substantive.

Specification structure

Specification clauses need to be put together in a logical order. For example a **construction Specification** would usually have three sections within the document:

* **Preliminaries** – usually an overview of contract requirements and then items that should be done before the commencement of the construction onsite. Often these are largely standardised for all construction contracts of similar type but may require to be “tweaked” for specific tenders. Larger tenders will often have more preliminary requirements than smaller tenders.
* **Specific Construction Requirements** – This is the details of what is actually needed to be built under this contract. Often the clauses are placed in accordance with the order that the work is likely to be done on the ground – that is chronologically. E.g. Foundations would come before walls which would come before the roof. This is for ease of reading, understanding and logic rather than being an absolute requirement. Sometimes the construction requirements are broken down in “trade packages” – for example, there could be a section for plumbing trades, one for the electrical trades, one for the cabinet making and so on. On large construction contracts these individual trade packages can be separate documents each prepared by consultants who specialise in that field. The trade packages Specifications may be chronologically ordered as to where they sit in the overall Specification. Internally the trade package should also be ordered chronologically.
* **Other Non Time Dependent Requirements** - For example there may be clauses that cover requirements for occupational health and safety or contract reporting or meetings. These types of clauses are placed together usually at the rear of the Specification but could be part of the preliminaries. Often these are largely standardised for all construction contracts of similar type but may require to be “tweaked” for specific tenders.

For both construction and services contracts - the clauses should be appropriately grouped. Generally all the clauses dealing with a certain aspect of the work would be grouped together, perhaps under a heading with some subheadings.

### Notes on checking of Specifications

How much is done when checking Specifications depends on how much time is available. Some of the large construction specs could take many days to check if they have to be read from front to back – and the type of errors that would be picked up may not be that crucial and a Contracts Officer may not pick it up anyway, as Contracts Officers do not typically have expertise in the works or services – so a judgement needs to be made on how much checking is worthwhile – or else be directed how much is to be done. The project manager is ultimately responsible for the correctness and completeness of the specification.

The Specification points / issues to check listed can apply to other tender documents as well (Parts 1 to 3) but are predominantly found in the Specification.

The Specifications can include multiple documents, including, for example, drawings. Contracts Officers would typically not check drawings, except that they may check that the name, drawing number and version of the drawing referred to in the Specification is consistent with the drawing document provided. Checking of drawings remains totally the responsibility of the project manager.

In many cases, especially for building construction contracts, the Specification may have been prepared by a consultant. This can sometimes create issues as the consultant may not like their documents being changed – even if they are wrong.

There is one issue to be on the lookout for, but may be difficult for a Contracts Officer to pick up. Sometimes suppliers have their own Specification documents. While it is acceptable for the Specification developer to look at these documents during the period of the council’s Specification preparation, especially if they are looking at Specifications from multiple suppliers to get an idea of what is available in the market, it is totally inappropriate to use the Specification from one supplier as the sole basis of the council’s Specification. I have even seen instances where the supplier has written the Specification in the form that might be seen in tender Specification in the anticipation that an organisation will simply use this in their public tender document. This is not acceptable. And if it did sneak through and was used and if the competitors become aware of it they will probably complain about it. Often this issue can be picked up if the Specification requirements seem too specific – for example the weight of a piece of plant needs to be a minimum of 32 tonnes – why 32 and not 30 – perhaps there is a reason – but it might also be because the weight of the plant that is the council currently uses and likes is 32 tonnes. With the internet these days most of the supplier Specifications are readily available so can be checked.

Another high level issue that should be checked - for annual services and materials supply contracts often these are instigated by a particular department. So naturally they are primarily concerned with their requirements. But often other departments might also have a need for this service or a very similar one and their requirements could be included into the requirements for this contract, so that the other department also might gain the advantages of the contract, or at least avoid the additional work involved in having to do an additional tender process for their requirement. It would also mean a bigger contract and perhaps a tenderer may be willing to give a better price to get that work.

### Good Specification writing practice and things to look for when checking Specifications

Here are the issues that should be kept in mind or looked for when writing or check Specifications. Many of the issues mentioned also apply to the other tender document parts but are primarily found in the Specification.

#### Overview of proposed work process

A Contracts Officer can have input into how the work is specified. From the Contracts Officer’s experience if the Contracts Officer can see a better way to perform the work then this should be suggested to the Project manager.

#### Incompleteness

The Specification must list all the requirements for works or services under the contract. Anything that is overlooked will most likely result in a variation to the contract. The works performed as a contract variation will almost always cost more than if the works had been included as part of the original tender. While Contracts Officers are usually not technical experts if things are picked up as missing or not covered they should be brought up with the project manager – it is their call as to whether it is an issue. It is their responsibility if something is missed.

Also there might be some standard clauses that the council has in most contracts - e.g. for construction contracts, Occupational Health and Safety (OH&S) - or clauses covering site clean-up or hours of work, or licensing of the Contractor’s employees. For a multi-year term, schedule of rates contract, has a rise and fall arrangement been considered? Or are the rates firm for the total contract duration or varied by negotiation. This might be covered in the Conditions of Contract or even in the Part 2 Tender Response Schedules – Price Schedule. These aspects should be included or if picked up as missing it should be taken up with the project manager. These standard requirements are the reason that a council has templates for Part 4, Specification. The templates include suggestions about the standard clauses covering these issues that could or should be included – though there may be valid reasons for the project manager to modify, delete or add to these clauses for specific contracts. Many are not mandatory and a completely different document could be used. It is up to the council project manager to decide what to include – but Contracts Officers can always ask the question.

#### Policy Conformance

Check that the requirements of the specification and other tender documents conform to the council purchasing policy. This may include some of the items mentioned in the section labelled “Incompleteness” above but also includes aspects such as whether the levels of insurance required are in accordance with Council policy.

#### Inconsistency:

It is crucial to use terms consistently in tender and contract documents. Common areas where inconsistencies can arise are:

* in terminology - E.g. as examples of poor practice - in a food production contract "Premium Meal" used when what was meant was "Gourmet Meal"; "Special diet" was used interchangeably with "special meal". In the Specification, and for all tender documents, choose one term for the item, define it, often in a Definitions clause near the start of the Specification, and then use it consistently;
* between the Specification and the Conditions of Contract and the other tender documents. For example, if the Conditions of Contract use the term "Supervisor" for the main Principal/council employee or consultant supervisor who manages the contract works, do not use "Superintendent", or "the Engineer" or even a council position name. e.g. "Coordinator, Maintenance", except if they are doing different work to the main supervisor, in the Specification. The Conditions of Contract give various powers and duties to the Supervisor under the contract. The powers and duties of these other people are less certain. Another area of inconsistency is the incorrect use of and naming of terms out of the Conditions of Contract. As an example of this AS4000 requires the issue of a “Certificate of Practical Completion”. The Specification should not then write about the “Notice of Practical Completion”, unless the Notice has a different purpose to the Certificate of Practical Completion such as being a notice from the Contractor to the Superintendent stating that they believe they have reached Practical Completion. Terms that are defined in the Conditions of Contract should, if needed, be used in the Specification; and
* between the Specification and the Tender Response Schedules, including uncertainty about what is to be included in the schedule of rates or schedule of prices. Continuing the first dot point example, this becomes problematic if the tender Price Schedule asks for a price for a Premium Meal but the Specification primarily defines the requirements for a Gourmet Meal, which is not mentioned on the Price Schedule.

It is a good idea to double-check the use of terms in each of these areas, to ensure consistency throughout the tender documents. Often it is a good idea to have the Conditions of Contract open when writing or checking the Specification to enable ready checking of terminology to ensure consistency. And to cross check with the Price Schedule.

#### Grouping and order

Are all the clauses that deal with a certain aspect of the work grouped together? Is the order and the grouping logical? For example all clauses related to OH&S should be in the same part of the Specification, preferably grouped under a main heading of Occupational Health and Safety with appropriate subheadings. Grouping makes the Specification easier to read and understand and also makes it easier for the council to check to ensure the clauses do not repeat the same requirement or, worse, contradict the requirements of another clause.

#### Contractual obligations of the Principal

Contracts put obligations on both parties, not just on the contractor. Don't say that the Principal or Supervisor will do something unless it is necessary for the satisfactory performance of the contract. The Principal could be inadvertently obliged to meet unintended costs or be put in breach of contract if the Principal / Supervisor does not carry out the actions specified in the contract at the specified time.

#### Confusing the Principal and the Supervisor / Superintendent

The terms Principal or Council and Supervisor or Superintendent should not be used interchangeably. The Conditions of Contract give different powers and duties to the Principal and the Supervisor/Superintendent.

#### Cross referencing

Ensure that cross references to other clauses in the Specification and to clauses in the Conditions of Contract are correct – it is very easy for them to no longer point to the right clause if additional clauses have been added. Use the MS Word cross referencing tool but remember to update the cross reference fields in the document as they do not update automatically.

When referencing tabulated information (or graphs or photographs) in the specification don’t refer to it as “the table below”. The issue with this is that it is not specific enough. If there are multiple tables in the specification this reference could be taken to mean to any of the tables that are included below that point in the specification, not just the table immediately below the reference, which is probably the table intended to be referenced. It is better to give the table a reference number – e.g. Table 1 (or 2 or 3 etc.) or Table 3.6.1, where the number 3.6 refers to the clause number in which the table is located and the “.1” indicates that it is the first table in that clause. Also provide a short descriptive name to the table. Then the tabulated information can be referred to as, for example, “Table 3.6.1” with no ambiguity. Alternatively it could be referred to as the table in clause 3.6, assuming that there is only one table in that clause.

Check that clause numbering is sequential if the original author of the Specification has not used numbered heading styles that update automatically. Also check the numbering of appendices and other attachments – sometimes one can be deleted and the others not renumbered. It may be better not to delete an attachment or appendix that is not required, instead delete the contents of the page and insert “This attachment (appendix) is not required in this contract.” This saves fixing cross references.

Ensure references to other documents are correct. This includes references to tender drawings. I have found that some people are remarkably sloppy in referencing tender drawings – getting the names incorrect, or the drawing numbers or the version number. References to Australian Standards are another area – standards change all the time – sometimes being replaced completely by a new Australian Standard or an updated version issued with the year issued changing. For standards ensure that the year is also included. E.g. Not just AS 4000 but AS 4000-1997. Also legislation and regulations sometimes change, often it is just the date but sometimes the whole Act or regulation is not used anymore and a new Act or Regulation put in its place. This can be an issue, especially for tenders that are being retendered for a new term. The internet is a marvellous resource for checking all of this.

Also ensure that there are no “orphan” documents. These are documents that have been included for issue with the tender documents however they are not referred to in the Specification or any other tender document so their status could be unclear to the tenderer.

#### Terms that are not defined

It is very important to define all terms used in the Specification. Defining terms avoids potential confusion and a dispute with the contractor later on.

One example of poorly-defined terms that I came across was the use of the term "Spring Cleaning" in a cleaning Specification. There was no definition in the Specification or elsewhere of what this term meant. While I am sure the writer knew exactly what he or she meant by the term "Spring Cleaning", to the contractor or tenderer this could mean anything from a light dusting to removing all furniture from the room and scrubbing the furniture and the room with warm soapy water. If this term was left in the contract document undefined the contractor may be entitled to interpret this in a manner which is favourable to itself, i.e. "a light dusting". It could result in a dispute and possibly more cost to the Principal if this was not what the Principal meant. It may also mean that tenderers are not pricing on the same scope of works.

#### Use of acronyms and abbreviations

Abbreviations and acronyms must be defined in the document. Even if the acronym is thought to be well known it is good practice to ensure that the acronym is defined in the document. The usual approach is that on the first use of the name write it out in full and put the acronym in brackets after the name. From then on it is OK to use the acronym in the rest of the document. So for example if referring to NATO, on the first use of the name of that organisation in the Specification write “the North Atlantic Treaty Organisation (NATO)”. From that point forward in the document it would be OK to just use “NATO” to describe the organisation.

Another approach would be to define the acronym in the Definitions clause.

#### Capitalisation

In general, capitalisation of the first letter of a word should be used only for items that have been defined in the contract documents - usually in the definitions section of the Specification or in the Conditions of Contract - or for names of companies or people that would normally be capitalised in other correspondence. For this reason, "Contractor" or “Service Provider” should always be capitalised when the term refers to the party with whom the “Principal” or “Council” has contracted, because the term is explicitly defined in the contract documents. If, however, the contract documents need to refer to a different contractor, the word "contractor" would in this case begin with a lower case "c".

Another issue is inconsistency of capitalisation. For example “Supervisor” is used in one clause and “supervisor” is used in another clause – or even in another sentence of the same paragraph. It should either be capitalised or not capitalised – not a mix.

#### Incorrect use of the apostrophe

Correct use please! Or risk the ire of pedants everywhere. For example - it is KPIs, not KPI’s, EOIs not EOI’s - plural not possessive!

#### Use of the word "Tenderer" in the Specification

The tenderer is the person or organisation that submits a tender to perform works or services or to supply materials. The Contractor or Service Provider or Consultant or Supplier is the person or organisation with whom the Principal enters into a contract to provide the works or services under the contract. Once the contract is awarded to the successful tenderer, the contract document take precedence and there is no "tenderer" any more, only the Contractor, Principal/Council and Supervisor, so to give instructions to the “tenderer” or even the "successful tenderer" for contract works in the Specification or elsewhere in the contract document is not sustainable. And the council does not want to have to adjust the Specification between the tender issue and the contract issue – changing references from “the tenderer” to “the Contractor”.

See also the next point for the other use of the word “tenderer” in the Specification.

Also avoid the use of the term “successful Contractor” or the “successful Consultant” etc. in the Specification. It is redundant. “Contractor” or “Consultant” or “Service Provider” by itself will do fine.

#### Requests for tender information in the Specification

As good practice the Specification should not contain requests for information from the tenderer that must be supplied with the tender. If information is required from the tenderer for the evaluation of their tender it is usually preferable to ask for this information in a schedule in Part 2, Tender Response Schedules. There are a number of exceptions to this – see next paragraph.

There are some instances where questions to the tenderer in the Specification are regularly used. This is usually in situations where the Specification is not specific about exactly what the Principal/Council requires, or the council is open to variation from its Specification, and therefore requests information from the tenderer about what the tenderer can provide or how their product conforms to specified requirements. An example of where this can often occur is with information technology / computer software / systems tenders, where the individual software packages available on the market have different functionalities and system requirements. Another example is for the purchase of plant and equipment. In these cases the Specification may be set up as a schedule, often in table form with columns for the tenderer to indicate conformance or otherwise to the council’s nominal requirement and if the tendered offer doesn’t conform, then in what way the tendered offer doesn’t conform. If this approach is used it may be necessary to modify the Specification to incorporate the tenderer's tender responses and any post tender negotiations between the parties, as accepted by the Principal/Council, into the final contract Specification that details exactly what is going to be supplied under the contract.

However with these exceptions aside, it is best practice to request the tenderer to supply specific information in the appropriate schedule of the Tender Response Schedules document.

#### Repeating or contradicting aspects of the Conditions of Contract or other tender docs

Avoid repeating contract conditions in the Specification that are already covered in the Conditions of Contract - or worse, contradicting the requirements of the Conditions of Contract. The requirements of the Conditions of Contract can be changed - preferably in an annexure to the Conditions of Contract -e.g. as per AS4000 – 1997 or a separate document that amends the Conditions of Contract. While not best practice the Conditions of Contract can be amended in the Specification, but it must be clearly spelt out, with reference to the specific Conditions of Contract clause that it is overwriting, that this is the intent.

The appropriate Conditions of Contract clause should be referenced whenever invoking in the Specification the powers contained within the Conditions of Contract.

Often when documents are prepared by consultants they may have their own standard tender documents which they include in the documents provided to the project manager. These can often include clauses that are already covered in the council’s standard Conditions of Tendering – not ideal.

#### Use of names other than "Contractor" or “Service Provider” or “Consultant”

The Specification should not normally imply that the works are to be performed by sub-contractors. Even if it is expected that a sub-contractor will be used, the Specification should generally refer to "the Contractor", because the Contractor is the entity that signs the contract and is directly bound by it. The Contractor is then responsible for ensuring that any sub-contractors they choose to engage perform the work to Specification. The Contractor may have all the required trades on their staff so the council should not assume that they will necessarily be using subcontractors.

In other words, even though it is likely that a Contractor will use an electrical sub-contractor for electrical works, still continue to use the terminology "the Contractor shall x" rather than "the Electrician shall x". Principal/Council does not have a contract with the "Electrician", only with the Contractor. An alternative is to put in a definition in the Definitions clause that makes it clear all these trades are the responsibility of the Contractor or, more messily, say “the Contractor’s electrician”.

Exceptions to this rule include "Nominated or Selected Sub-contractors" as used in AS4000-1997, who should be referred to in the contract as the "Nominated Subcontractor" or "Selected Contractor", as appropriate, where this option has been detailed in the Conditions of Contract. Use of Nominated or Selected Contractors should be avoided unless there is a specific situation where the use of these contractors would be of benefit to Principal/Council.

#### Gender

The Specification should not infer that the Contractor is either male or female. Usually the Contractor is neither male nor female, being a company, except in the case of sole traders or small partnerships. Regardless of their company structure the Contractor should not be referred to as “he”. Instead of using “he” reuse the term “the Contractor”. The sentence may not read as grammatically pure but from a contractual perspective it is still preferred. Sometimes the sentence can be rewritten to remove the multiple references to the Contractor.

I have seen the non-gender specific plural “they” used instead of “he” and while this is an improvement I still believe it is better to reuse the term “the Contractor”.

#### The use of "will" or "will be required to"

Avoid the use of the terms "will" or "will be required to", as in "The Contractor will be required to submit x" when directing the Contractor to perform works. “Will” is a statement of future fact, e.g. the sun will rise in the morning, not a direction to perform works. "Will be required to" could be interpreted to imply that the Supervisor/Superintendent must do something additional during the Contract to instruct the Contractor to perform the works. Use "shall" or "must" most times when directing the Contractor to perform works under the Contract. It may be permissible to use the term "the Principal will" for obligations of the Principal. Or use “shall if directed by the Supervisor” for optional works.

#### Specifying makes and models

Avoid specifying the make and model number of equipment or materials to be incorporated into the works by make, except where absolutely necessary for compatibility with the Principal's existing systems, or where there is some other valid reason. Make and model specifications can unnecessarily exclude otherwise qualified contractors who have chosen a different make or model of equipment to achieve equivalent results.

#### Formatting dot point lists

The correct formatting of dot point lists in my opinion is:

* colon (:) at the end of the line before the start of the dot point list;
* semi colon (;) at the end of each list item, except the second last and last dot points;
* semi colon (;) and “and” - or “or” at the end of the second last dot point\*; and
* full stop at the end of the last dot point - unless there is further description that applies all items in the list in which case use a comma and on the next line continue as if continuing a sentence.

\* The correct use of “and” or “or” at the end of the second last dot point is vital. Use of “and” means all dot points in the list applies. Use of “or” means only one of the dot points in the list applies. In some legal documents lawyers put “; and” or “; or” after the end of each dot point – for the complete avoidance of doubt. Not having “and” or “or” at the end of the second last dot point leaves a doubt about which was meant – so use one or the other.

#### The use of etcetera

Placing “etcetera” or “etc.” at the end of list should not be used or if used should be used only after every single requirement has been fully listed. To use etcetera is laziness. As stated, all requirements need to be listed. It would be a difficult argument in a court of law to stand up and argue that the Contractor should have done something because the Contractor should have known what additional work was included in the “etc.” requirements. Sometimes contracts have a clause stating that the Contractor shall do all things necessary to meet the intent of the contract even if not listed in the contract or shown on the drawings. That is a better fallback position but it is even better to remove all doubt and list all works in the Specification or show all works on the drawings.

#### Etcetera

There may be other types of errors and mistakes in the documents – so keep on the lookout for things that don’t seem quite right.

# Requirements for advertisements

In Victorian local government public advertisement of tenders has two purposes:

* to meet the requirement of section 186 of the Local Government Act or when the new LGA is enacted the requirements of the council’s Procurement Policy; and
* to attract the right organisations to download the tender document, and, if qualified, submit a tender.

The current Victorian Local Government Act requires the council to “give public notice of the purpose of the contract”. To do this the council has to place an advertisement in a newspaper that is available state wide. Also note that the act says a council needs to give notice of the **purpose** of the contract. While the contract name usually gives some idea as to the contract’s intent, to fully meet the requirement to give notice of the purpose the advert should provide some additional, though admittedly limited, information on the purpose, including the scope, of the contract.

Newspaper space is relatively expensive, though if dealing with a $10 million tender it is less important than for a $150,000 tender.

In addition to meeting the requirements of the Local Government Act the aim of the advertisement is to attract the right contractors to download the documents to further investigate whether they are interested in tendering. I always think that ideally after reading an advertisement a contractor should be able to decide whether the work is the type of work that they are interested in and, for a lump sum contract, they should be able to roughly estimate the tender price to, say, plus or minus 25%. Building / civil contractors usually see their expertise as being in a certain type of construction and within a certain price range. So if they usually work in the range of job values of $5 million to $15 million they probably are not going to be interested in a tender that is worth $1 million or a job that is worth $50 million, although the decision to tender or not is completely up to them.

If the tender was for the construction of a kindergarten or a road the newspaper advertisements might look something like this:

**INVITATION TO TENDER**

**CONTRACT NO. C1235/20**

**Construction of Arcadia Road**

320m of dual carriageway, including associated kerb and channel, drainage, footpaths, street lighting and landscaping.

Tenders close etc.

**INVITATION TO TENDER**

**CONTRACT NO. C1234/20**

**Construction of the Arcadia Kindergarten**

The kindergarten will have a floor area of 205 sqm and be constructed as primarily brick veneer, slab on ground with a metal roof. Landscaping works included.

Tenders close etc.

For lump sum contracts endeavour to give an idea of size or quantity of the contract works in the advert. Information that is contained in contract name does not have to be repeated, nor is it necessary to put in some verbiage to the effect that “Council invites tenders from suitably qualified and experienced organisations or individuals for the construction of the Arcadia Kindergarten.” This has already been said in the heading.

For a services type standing offer tender it is more difficult to give an idea of the size contract but as a minimum the advertisement should include an idea of the type of work to be undertaken and the maximum term of the contract. E.g.:

**INVITATION TO TENDER**

**CONTRACT NO. C1236/19**

**Annual Supply of Electrical Services**

Ad hoc electrical maintenance and repair, minor alterations and improvements for buildings and other facilities. Also includes portable equipment testing and tagging and communications cabling. Term up to 5 years.

Tenders close etc.

The advertisement in the electronic tendering platform online and on the council’s own website can provide more details if thought warranted as the additional space costs the council nothing extra.

# Tender period – tenderer communications

## Handling tenderer questions through the electronic tendering platform forum

It is usually a requirement of the Conditions of Tendering that the tenderer directs all questions to regarding the tender documents and process through the electronic tendering platform forum set up for tender. A member of the procurement team, usually a Contracts Officer, is responsible for receiving and reading the questions from the tenderers posted on the forum. Prohibit tenderers phoning in questions about the tender to a contact person – especially not the project manager. The tender document should not contain telephone contact details of any Council personnel.

The Contract Officer does not provide/write the technical response to the submitted questions - see the exception below. On receipt of the tenderer question the Contract Officer will forward the question to the project manager. The project manager will provide a response to the question, asking the consultant designer if necessary, and return it to the Contract Officer – usually in the form of a draft addendum, utilising the appropriate template, or just as text if the project manager believes the question can be responded to on the forum – also see below. The Contract Officer will review the response provided and may suggest changes if warranted, including review of whether the response should be put onto the forum if that has been suggested by the project manager or should be issued as an addendum. Changes suggested by the Contract Officer could include modifications to the text to improve grammar or be clearer or contractually more correct or if it is a change in the specification that it references the appropriate clauses of the specification. The issues checked listed in the “” section may apply – on a much smaller scale. Any suggestion by the Contract Officer should go back to the project manager for ratification or further amendment prior to issue by the Contract Officer.

Exception: If the question is solely related to the **tender process** then the Contract Officer may draft the response for approval of the project manager. For any addendum the Contract Officer may set up the formal addendum document, with the questions and space for the project manager’s response, if the Contract Officer is feeling generous or the project manager is very busy – as part of the Contract Officer’s administrative support services.

There are three usual ways to respond to tenderer questions:

* Via the issue of an addendum to all tenderers issued through the electronic tendering platform; or
* Via the electronic tendering platform forum – the question submission and response section - for the tender, either:
  + as a general forum response available to all tenderer; or
  + as a specific response only visible to the tenderer that asked the question.

The Contracts Officer will also track the questions to ensure responses are given in a timely manner. This is particularly important for large and complex tenders which typically have a significant number of tenderer questions, some or all of which may have to be referred to the consultant that prepared the Specification.

The electronic tendering platform forum question received could be regarding the tender process or relating to the technical requirements of the supply. When the answer to the question would:

1. provide new information that was not in the issued tender document;
2. clarifies information in the tender documents; or
3. corrects information in the tender document,

the answer is issued as a written addendum through the electronic tendering platform.

Strictly speaking new information issued is an addendum – it adds to the provided information. Corrections to information contained in the tender documents are corrigenda. However both types tend to be issued under the label of an addendum.

For very simple questions, the answer of which does not add any information which is new or changes any information contained in the tender documents, these questions can be responded to via the electronic tendering platform forum. Information of a trivial nature or that just confirms what is in the tender document may be provided via the forum. For example if the tenderer asked what the closing date of the tender is this information can be provided via the forum, preferably by directing the tenderer to the relevant clause in the tender document. The tenderer may ask a question about a topic that is sufficiently dealt with in the tender document - in long and complex Specification it is quite possible for a tenderer to miss some aspect or not remember it sufficiently. In this case direct the tenderer to the relevant clause in the tender document via the forum. Also consider why the tenderer missed it and, if there is any chance of the tender document not being clear, an addendum response to all tenderers may be called for. If there is any doubt about whether the answer amends the tender documents adopt the precautionary principle and issue it as an addendum. Do not rely on all tenderers necessarily seeing a response issued on the Tender forum. I understand that some electronic tendering platforms may not send notifications of each council forum responses but may send notification of forum activity towards the time of close of tenders. This would vary depending on the electronic tendering platform used.

Also note that it is acceptable – and sometimes absolutely required – to edit the forum question asked prior to it being included in an issued addendum. There are a couple of situations where this is required. Firstly to remove any information that would identify the tenderer that asked the question. Another reason is to remove information in the question that might reveal the tenderer’s approach to or any other detail of their potential tender submission. Sometimes it is just to make the question more succinct and easy to understand. The question used in the addendum needs to reflect the core of the tenderer questioner’s concern. This also applies if it is decided to answer the question on the electronic tendering forum in a answer that is received by all tenderers.

Answers to forum questions, whether in an addendum or on the forum itself, should be as succinct as possible. If a question can be answered satisfactorily with a single word - e.g. yes or no - it should be, rather than a more rambling response that doesn’t add anything extra.

Forum responses are not typically included as part of the formal contract agreement and if not included cannot be relied on or be enforced under the contract by the council. There is also the issue that the tenderer will not have acknowledged the forum question and response on the tender schedule for the acknowledgement of addendums received. Therefore as state previously if a response to a question amends the requirements of the contract or the tender process it should be issued as a formal addendum.

Addenda can also be issued without being initiated by a tenderer question. The project manager might discover an issue with the tender documents, perhaps a contradiction between two clauses or simply information that has been not included in the original tender document release or any other error. An addendum can be issued to fix the problem. On occasions I have issued the addendum in the form of a question and a response where I have written both the question and the response. Whatever is necessary to make the requirements of the tender/contract clear to all tenderers and to be fair to all tenderers.

The addendum issued should be in accordance with the electronic tendering platform processes and also in accordance with the timeline in the Conditions of Tendering. If it is late in the tender period and the additional information provided in the addendum document involves significant additional work for the tenderer, for example the tenderers having to go back to the subcontractors for amended pricing, then an extension of closing time should be considered.

All of the electronic tendering platform forum questions, forum answers and addenda issued should be stored in the council’s document management system. The electronic tendering platform forum questions and answers should be printed out as a PDF after the close of the tender and stored in the council’s document management system. The reason for this is that, depending on the system, the electronic tendering platform may only maintain the tender details, including the forum questions and responses, for a set period of time after the close of tenders. After that all information held by the electronic tendering platform, including forum questions and responses, may be deleted and no longer available – depending on the platform used - unless a copy has been stored in the council’s document management system. Regardless of whether it will be deleted it is best to store on the council’s document management system.

## Requirements for writing addenda

In tenders what are the Tender Documents is highly important – it is what the tenderers base their price on. This certainty must be maintained over the whole tender period, even as changes are made to the documents.

If a new tender document is to be issued – that is not replacing another earlier issued Tender document – the addendum should state the name of the new Tender Document – probably the electronic file name if being issued over an online tendering platform or the name of the document on its front page if being issued as hard copy.

If providing an updated tender document it is necessary to firstly withdraw the original document and to then issue the new document in its place.

A suggestion for the form of the addenda is:

“The following amendments are made to the Tender Documents:

1. A new Tender Document - FileName.docx – is issued for the tender. Tenderers should fully read and understand the new document and include its requirements in the Tender Submission This document contains <<provide a brief summary of what the document is for>> (not absolutely necessary but can be of assistance to the tenderers).

2. The document – Filename2.docx - is withdrawn and an amended document – Filename2-Ver-2.docx - is issued for inclusion in the Tender Documents. Tenderers should fully read and understand the new document and include its requirements in the Tender Submission. Some of the changes include:

* provide a brief summary of what changes from the previous document is in the new document (again not absolutely necessary but can be of assistance to the tenderers).”

This form should also be used with the release of amended drawings – the addendum should state that the originally issued drawing is withdrawn from the Tender Documents and the new Drawing issued.

Where an addenda changes a specific clause in the Specification or Conditions of Contract the correct way to amend the clause is to state in the addendum that the affected clause, or part of the clause – e.g. the second paragraph of the clause, is deleted and the new clause with the same clause number is inserted, or the new second paragraph of the specified clause is inserted, with the amended text.

Where the addendum is an addition to the tender document the addendum could be written as a new clause inserted into the Specification or Conditions of Contract at the appropriate place. This is the most correct way. However sometimes the response just given in the addenda and not provided with a new clause number. If the response amends the contents of a clause then for the avoidance of doubt the formal approach of the first paragraph of this section should be taken.

New, including corrected, information for the tender should be issued early to the tenderers to allow them as much time as possible to consider the changes and adjust their tender if necessary. However it is also best to limit the number of addenda issued during a tender process. It is a trade off between issuing early, with less issues addressed per addendum, and combining as many issues and questions into each addendum issued, to limit the total number of addenda issued. They certainly should not be saved up and issued as a single mega addendum, say a week before close of tenders. This would be unfair to tenderers and would probably require an extension to the tender closing date to give the tenderers a chance to consider the new information.

## Communications not through the electronic tendering platform

There are a number of instances where some communications with tenderers during the tender period is not through the electronic tendering platform and via the issue of addenda:

1. If a tenderer submits a written technical question through the electronic tendering platform forum about the work or service required during the tender period which is not clear or ambiguous to the Contracts Officer or the project manager then the best way forward may be for the Contracts Officer to speak with the tenderer over the telephone in an effort to clarify the question. Contracts Officers are usually not technical experts so may not understand all responses provided. If the question is still not clear to the Contracts Officer it may be necessary to have the council project manager or the council’s technical expert speak with the tenderer directly so they can get to the core of the issue that concerns the tenderer. In all of these conversations the flow of information should be one way – from the tenderer to the Contracts Officer or the project manager/technical expert. It is about clarification of the tenderer’s question. The answer to the question being asked by the tenderer should not be provided to the tenderer over the phone – unless the answer would not result in an addendum. If the project manager, technical expert or other council officer speaks to the tenderer they need to be aware of the requirements for the probity of the tender process, as listed in this document, and be bound by the same principles and procedures as detailed for the Contracts Officer.

The Contracts Officer and the project manager / technical expert should document everything that was said on the file. Issue the addendum through the electronic tendering platform addressing the question. If this communications has clarified the substance of the question received it is also permissible to rewrite the question that is to be issued in the addendum to remove whatever non-clarity that was in the original question – the important thing is to provide clarification so all tenderers know what they are tendering on.

A question may also be rewritten / modified for inclusion in the addendum to remove information that may identify the tenderer that posted the question or to remove information that could be thought to be commercial in confidence or the intellectual property of the tenderer;

1. During on-site inspections and pre-tender meetings. In these circumstances the project manager, the Contracts Officer and potentially other council officers or council employed consultants may be present. Further information provided below; and
2. Regardless of what is said in the Conditions of Tendering, question(s) from the tenderer might sometimes be received over the telephone. This is usually a breach of the Conditions of Tendering and could lead to their tender being declared non-conforming and eliminated from consideration - and would have to be unless the Conditions of Tendering contained a clause allowing flexibility for non-conformances -however this would usually be considered too harsh for a one off instance that was a mistake. A council should not be so lenient if it was thought that the tenderer was trying to gain favour though the telephone call or it was an intentional breach rather than a misunderstanding. The council’s approach should usually be to not respond to the question and the tenderer told to submit the question(s) in writing through the electronic tendering platform forum as per the Conditions of Tendering. Other council officers involved in the contract, including Managers and Directors, must also be aware that this is the only permitted response to the tenderer over the telephone. No information about the tender must be provided by any council officer over the telephone or in person. Document the call, confirming that no information was provided.

If any information is inadvertently provided to the tenderer over the telephone which could possibly be seen to amend tender requirements or provide information that is in addition to what is in the tender document, the information provided must be noted in writing and then issued to all tenderers as an addendum as soon as possible.

## Pre-tender meetings and site inspections

As mentioned previously (dot point 2 in section above) for pre-tender meetings, the introduction, all questions asked and responses given should be documented, and after the meeting it must be decided what information needs to be issued as a written addendum to all tenderers, as well as the information that may be promised to tenderers during the pre-tender meeting. If the information provided to a tenderer verbally at a site inspection is different or adds to what is provided to all tenderers in the tender documents then issue the information as an addendum.

Individual site inspections must only be allowed if all potential tenderers have been given this opportunity. This is not preferred but if it is to be allowed it would be notified in the Conditions of Tendering, though could be through an addendum. I have had instances where a tenderer that has attended a group site inspection asks to have another look at the site to check something specific they overlooked at the site inspection. In that instance it was allowed, without specifically writing to all tenderers to invite them to also come and have a second look.

What is issued as an addendum after a site inspection, or a pre-tender meeting, is a judgement call. It would be expected that a tenderer who attends a site inspection would be getting information in addition to that which is in the tender document, if not there would be no need to have a site inspection. For example, during a site inspection a tenderer may ask to look at the electricity meter box. If this is granted then no addendum needs to be issued because all tenderers have this opportunity to inspect the meter box in their site inspection. If however the tenderer were to ask if they could relocate the meter box as part of contract works, and the answer was yes, then this might be considered additional information if that possibility had not been allowed in the tender document.

Tenderers must not be allowed to provide a demonstration or unsolicited samples\* or give a presentation to council officers or have private meetings with council officers, including the Contact Officer, Contracts Officer, members of the tender evaluation panel or any other council officers including managers, directors, CEO or elected councillors prior to the close of tenders.

\*Samples may have been required as part of the tender submission. As the tender submission would probably be through an electronic tendering platform it may be permissible to receive samples to council offices – handed to or addressed to the Contracts Officer/Contact Officer - prior to tender close – or after tender close if this has been allowed or required in the tender documents. The samples should not be substantively assessed or accessed by the evaluation panel prior to tender close.

# Tender and EOI evaluation process

## Overview

The aim of the tender evaluation process is to select a tender that offers the best value to the council while ensuring that all respondents are treated in a fair, equitable and impartial manner.

The question is: How is this achieved? The first step is the appointment of the tender evaluation panel.

## Tender evaluation panel

Tenders will be assessed by the tender evaluation panel established by the council. The tender evaluation panel is usually determined prior to advertisement of the tender, though later changes to the composition of the panel may be forced due to changes in staff availability.

In councils for publicly advertised tenders - tenders for goods and services over $150,000 or $200,000 for construction contracts - the tender evaluation panel usually consists of a minimum of three people, depending on council policy, including:

1. the council contract manager/project manager;
2. another council officer, possibly a Contracts Officer from Procurement; and
3. another council officer or an independent representative - internal/external.

The chair of the panel is usually the project manager or a person from Procurement if they are on the panel.

For contracts under say $2 million (*actual figure to depend on the council policy*) the second and third tender evaluation panel member will usually be someone from the Department that is purchasing the goods and services, though, if it is council policy or otherwise decided to be desirable, an independent representative from another Department could be appointed for one of the positions.

**This is suggested as good practice. Some councils may not see this as being necessary.**

For contracts over say $2 million (*actual figure to depend on the council policy*) the third tender evaluation panel member could be an independent representative from another Department.

For contracts over say $5 million (*actual figure to depend on the council policy*) the second tender evaluation panel member could be the Department Manager from the Department that is purchasing the goods and services. The third tender evaluation panel member would usually be an independent representative from another Department.

For contracts over $15 million (*actual figure to depend on the council policy*) the second council officer could be the Director in charge of the Department that is purchasing the goods and services or their nominated representative. The independent representative could be a person from the Finance or Procurement Department or a person with expertise in the goods or service being purchased who is external to the council. Consider the inclusion of a fourth panel member.

A member of the Procurement team may also be involved in tender evaluations, either as a person that evaluates the tenders or as a probity officer/advisor or as the chair and / or for administrative assistance to the panel.

Additional members of the tender evaluation panel, internal or external, may be considered for tenders:

* that are of high value;
* that are highly sensitive or contentious;
* that are of high complexity or multi-faceted, where it is useful to have additional particular expertise on the panel; and / or
* where the procurement is for goods or services to be used across multiple Departments and those Departments want a high level of involvement in the procurement process.

If the contract is considered to be politically sensitive or contentious, or the risk and complexity of the procurement process is considered high or of high value (say > $15 million depending on council policy), the council may also appoint an independent external probity advisor. The probity advisor would not be a scoring member of the tender evaluation panel but would provide advice to the tender evaluation panel and oversee the tender evaluation process. A probity auditor may also be appointed to review the tender process after the process is complete.

Any decision to use consultants or another party external to the council for a tender evaluation must be approved as per council policy. Note that in accordance with local government legislation/regulation a council cannot outsource the decision to award a tender to a particular tenderer, however can consider information impacting on a contract award decision received or derived from an external party.

Try to avoid panels larger than, say, five members as the panel can become unwieldy and may not be good use of the council resources, as being on a tender evaluation panel takes a significant amount of a the council officer’s time. Sometimes, for various reasons as listed, this is not possible.

For quotations up to $150/200K issued through the electronic tendering platform, the evaluation panel should be comprised of at least two members, depending on council policy.

On occasions the tender evaluation panel may be assisted by an advisory panel that assesses some aspects of the tendered offer. For example for a software system that is going to be utilised by most departments across the council a panel may be set up to assess the functionality and useability of the software as demonstrated by the tenderers. The advisory panel may sit in on the demonstrations and have input into the scoring of those aspects. The scoring from the advisory panel would then be included in the overall assessment. If this process is to be used it should be notified to the tenderers in the Conditions of Tendering.

## Evaluation methodology

**The evaluation of tenders must be undertaken on a systematic basis using evaluation criteria and the processes identified in the tender documentation – the Conditions of Tendering.**

For a successful evaluation process each member of the evaluation panel and the evaluation panel as a whole must remember that their assessments and recommendations **must be defensible** **and transparent.** Or more correctly – capable of being defended and transparent – as the evaluation by the evaluation panel is done in camera. Individual members and the panel overall must be **accountable.**

Defensibility means that the decision of the tender evaluation panel is able to be justified to senior management and also to the losing tenderers, if necessary. The justification must be in terms of the probity of evaluation process – including adherence to the processes listed in the Conditions of Tendering and council’s usual evaluation processes, the reasonableness and consistency of the scoring of the tenders against the evaluation criteria and that the decision represents best value for the council.

Transparency means that each step of the process that the tender evaluation panel used to arrive at their decision must be capable of being ascertained by an external party if they view all the documentation produced by the tender evaluation panel throughout the evaluation process. This should be quite detailed. For example if during a tender evaluation panel meeting a panel member wants to change their scoring of a tenderer against a criterion this change needs to be shown clearly in the minutes – what their original score was, the new score and the reason they changed, e.g. they have overlooked some aspect of the tender submission which became apparent to them in the evaluation meeting. The change must not be hidden.

Accountability means that each member of the tender evaluation panel must be prepared to accept responsibility for their decisions and the process undertaken.

In detail **getting to a defensible and transparent position involves** a number of aspects:

1. Probity and process;
2. Consistency;
3. Documentation and record keeping; and
4. Reasoned Argument.

### Probity and process

There are a couple of probity issues for the evaluation process.

#### Conflict of interest

There must be no significant conflicts of interest of any of the panel members with any of the tenderers.

All members of the tender evaluation panel shall sign conflict of interest declarations and shall notify the chair and / or their immediate supervisor if any perceived conflicts of interest become apparent during the tender evaluation process. This includes external consultants who may have been appointed to the panel. The existence of a conflict of interest shall be determined by the chair or the supervisor, seeking advice from Procurement or others if necessary. The initial report of the potential conflict of interest and the resultant decision should be documented onto file. If a conflict is found to exist the panel member would usually be replaced. However, depending on the nature of the conflict of interest and if the affected member has special expertise, he or she might be kept on in an advisory capacity – though this would have to be done with great care and any advice offered assessed for bias. The council’s response to an actual or perceived conflict of interest has to be assessed on a case by case basis. All decisions and reasons documented on file.

While the tender evaluation panel members sign a conflict of interest prior to reviewing the tender submissions a conflict of interest may only become apparent to a panel member during the evaluation process. While going through the tenders an evaluation panel member may suddenly realise that they own shares in one of the companies or a family member works for one of the tenderer or one of the various other reasons for conflicts of interest. For this reason the first question that should be asked in the first tender evaluation panel meeting is if any of the panel members want to declare a conflict of interest or other association with a tenderer. Document the responses, negative or positive, in the minutes.

#### People outside the Tender evaluation panel who should sign a conflict of interest form

Other people who should sign a conflict of interest and confidentiality declaration are any people who have been involved in the preparation of the content of tender documents, in particular the Specification and any people who gain access to significant tendered information during the tender evaluation process – e.g. in the course of the tender evaluation panel seeking advice as per the [Confidentiality section](#_Confidentiality) exceptions listed.

#### Confidentiality

The evaluation panel evaluates the tenders received independently and privately and makes its decision independently. That means that the members of the panel should not discuss the tenders received and their evaluation with people outside the panel, except as detailed below.

The council may have a policy of publishing a list of the names of the tenders received, either on a notice board or on its web site after the close of tenders. This is a choice of a council and not mandatory. I prefer that they not be published. If the names are published it should be stated in the conditions of tendering to notify potential tenderers that their name may be revealed in this manner.

While the panel should contain members that have expertise in the subject matter of the contract they may not necessarily be expert in all aspects of the items that are evaluated as part of the tender evaluation process. Therefore the panel may seek the expert advice of others from within the council or outside the council if necessary on certain specific aspects. Typically this could be on aspects such as financial capability (e.g. obtaining a Corporate Scorecard, Dun and Bradstreet or other financial capability report), OH&S, environmental, legal issues and probity if necessary. On occasions advice from management may need to be sought if the tender throws up an option or methodology that is not anticipated or if the financial capacity report is in some way marginal management will need to decide on the level of risk it is willing to accept. In all cases only divulge the information necessary to obtain the information sought.

Once the tender is awarded the obligation to maintain confidentiality of the tenders received and the evaluation process remains, except for the limited information contained in the tender evaluation report.

#### No prejudgement or bias

What the evaluation process must not be is pre-judged or biased. The evaluation panel and its members must not go into the tender evaluation process with an idea in mind about who will win the tender, and worse – set their scores based on their prejudgement, to get a desired outcome. That is the antithesis of probity and good process. The recommendation for the successful tenderer must come solely out of the evaluation process, from the objective assessment of the tendered information and other information collected as part of the evaluation process.

For further information on Probity refer to the [Section on probity](#_Probity).

#### Fairness

In the evaluation process, as with other phases of the tender process, all tenderers must be treated fairly. One tenderer must not be given an advantage, or indeed a disadvantage, compared to the other tenderers - refer to the [Section on probity](#_Probity).

#### Process

The second requirement is for good process during the tender evaluation phase.

Tenders received must be evaluated in accordance with the process contained in the Conditions of Tendering provided to the tenderers. This should be backed up by a council evaluation process document(s) that provides further detail on the process but must not in any way contradict what is contained in the Conditions of Tendering.

The Conditions of Tendering usually provide the tender evaluation criterion and weighting, and an overview of the council’s normal processes of evaluation. If, for example, someone suddenly decides after the tenders have closed that they want to also assess the tenders against a criterion that was not included in the tender document it can’t be done. If it was really important the current tender process may need to be cancelled and a new tender re-advertised and new tenders received and assessed again. Quickly retendering a project in itself has probity issues associated with it so should be avoided if at all possible. If retendering was necessary it would be preferable to delay the new tender process for a considerable period or extensively modify the specification.

It is important that the council adheres to the processes advised to the tenderers and to good probity practices in general. Failure to do so could result in legal action against the council if a tenderer believes they have been unfairly treated - refer to the section on [minimising the legal risk in tendering](#_Minimising_legal_risks_1).

### Consistency

While some [guidance on the meaning of scoring levels](#_Weighted_Criteria) has been suggested the scoring for many of the weighted criteria is to varying degrees subjective. For this reason and for defensibility the scoring each panel member and the panel overall must be **consistent** between tenders. For example if two tenderers have a similar level of relevant experience / historical performance their score against the Historical Performance criterion should be the same.

### Documentation and record keeping

All aspects of the tender evaluation process must be documented and stored in the council’s document management system:

* Each panel member in carrying out the initial evaluation and allocating scores to each of the tenderers against the evaluation criteria should list an explanation for the scoring on their individual evaluation spreadsheet. This can be short or long depending on the tender, the tenderer and the panel member;
* All tender evaluation panel meetings should be minuted or in other ways documented;
* Post tender questions to tenderers and their responses must both be in writing;
* If reference checks are done details of the checks must be documented;
* Any external expert advice requested and received by the panel, such as the financial assessment report, OH&S assessment or other consultant report and advice from internal council sources, if sought, should be documented and stored;
* If there are post tender meetings or demonstrations with the tenderers these must be minuted and if any significant response is provided by a tenderer verbally, as well as being minuted, should be confirmed by the tenderer in writing; and
* If there are inspections – say of plant – this must also be documented.

Finally there is one more requirement:

### Reasoned argument

Reasoned argument and logic should be present in all phases on the evaluation. There should be reason and logic behind each panel member’s scoring decisions for each tenderer against each criterion. There should also be reasoned argument behind the overall decision of the panel. At the end of the process, as well as the panel’s scores, the tender evaluation panel should be able to point to one or a couple of good reasons to back up the panel’s decision on the recommended tenderer - to express why this decision represents best value.

## Tender evaluation in detail

### Preliminary

Tenders will be assessed by the tender evaluation panel established by the council. The Contracts Officer, if they are on or assisting the panel, usually prepares a tender evaluation spreadsheet but it can be done by any of the panel members. The spreadsheet is based on a council template document. The spreadsheet is prepared by inserting the contract name and number, the list of the tenderers, the evaluation criteria and weightings into the spreadsheet. Eliminate excess rows and columns on the various sheets. The pricing sheet is prepared to align with the format of the pricing schedule in the tender document. A named copy of this spreadsheet is provided to the all members of the evaluation panel.

Tender evaluation is usually undertaken in two distinct stages:

1. prior to shortlisting; and
2. after shortlisting.

### Scoring

The evaluation criteria are assessed on the basis of either:

* Pass / Fail; or
* Scored.

### Evaluation prior to shortlisting

Each member of the tender evaluation panel must independently assess each tender prior to the first tender evaluation panel meeting, using their tender evaluation spreadsheet to record their scoring and some reasons for the score awarded. The panel members’ individual evaluation sheets containing their assessment should be stored in the council’s document management system prior to the first tender evaluation panel meeting.

The first round individual assessment and scoring by the tender evaluation panel members prior to the first tender evaluation panel meeting should be done utilising the information sources indicated in the next section.

### Information sources for evaluation prior to shortlisting

#### Tender submission

The tender submission is the primary source of information for the initial assessment and shortlisting and throughout the whole assessment. It is important for the probity of the tender process that additional information that may be received from the tenderer post tender is not included in the evaluation unless all tenderers are given the opportunity to provide the additional information. However there are exceptions to this, as will be noted in the sections below.

#### Post tender questions

Occasionally additional information can be introduced by post tender questions and answers however only specific types of post tender questions and answers can be included in the initial assessment prior to shortlisting.

While going through the tender submissions the tender evaluation panel members should note anything that is unclear in the submissions and what questions should or could be asked to the tenderers to clear up any ambiguity in the submissions.

There are three types of questions that may be made prior to shortlisting:

1. Questions relevant to all tenderers;
2. Questions relevant to a specific tenderer related to arithmetic and “administrative” errors; and
3. Questions relevant to specific tenderers – not “administrative” or arithmetic.

(1) If the question is relevant to all tenderers then it is probably due to the council failing to ask the question in the issued Tender Response Schedules tender document. If the question is sent to all tenderers post tender then the evaluation of responses received can be included in the first and subsequent round tender evaluation panel scoring for all tenderers, depending on when received.

(2) If allowed by the Conditions of Tendering a tenderer can be asked to correct an arithmetic and / or “administrative” error in their tender submission. An example of an arithmetic error is where there is a schedule of prices, a breakdown of the lump sum tender price, and the total on the schedule of prices does not add up to the total provided by the tenderer on the main tender form. An example of an “administrative” error could be the failure of the tenderer to sign one of the schedules. In this case it would be permissible to get them to submit a signed schedule, provided they don’t make any other changes to that schedule. What is classed as an “administrative” error is often a judgement call by the evaluation panel. Correction of an administrative error must not add additional information.

(3) The handling of other questions relevant to specific tenderers - not arithmetic or administrative - should be considered at the two stages in the evaluation process – questions that can be asked - prior to shortlisting and after shortlisting. Further questions may be asked after being nominated by the tender evaluation panel as the preferred tenderer or as one of the preferred tenderers for standing offer panels. Only questions that can be asked prior to shortlisting will be dealt with here. [Post-shortlisting questions will be dealt with latter](#_Short_listing_and).

If a tenderer has failed to provide information in their tender submission that has been clearly requested in the tender document they should not be given an opportunity to submit this information, at least not for consideration in the evaluation scoring. (The missing information might be sought post shortlisting if necessary for due diligence purpose.) Consequently their tender submission could be marked down in first round scoring, depending on how significant the missing information is – as determined by the tender evaluation panel. It would be possible to qualitatively fail the tender for non compliance if they haven’t answered a question, though I would tend to only do that where it is obvious that the tenderer is completely disregarding the council’s tender requirements and process - perhaps a case of treating the council’s tender process with contempt - by failing to address a number of questions or failing to complete whole Tender Response Schedules.

Note that if the Conditions of Tendering does not have a clause that would allow the council to accept a non-conforming / non complying tender the evaluation panel would be obliged to eliminate the tender if they have failed to answer even one tender question.

If the tenderer has attempted to answer the question but there is an ambiguity, or a lack of clarity, in a tenderer’s response to a request for information in the tender document then it is OK to ask the tenderer what was meant by their response. The clarification, provided it only clarifies and does not provide new information, can then be used by the tender evaluation panel in their scoring. If new information was provided it would need to be disregarded for evaluation scoring purposes.

Another area where a specific tenderer might be questioned is that if it is considered that their tendered price is lower than the council’s estimate for the work and/or significantly less than other tenderers. Or in the case where they have provided a tender price breakdown where one or more items are significantly above or below the council’s estimate. In this case it would be OK to ask the tenderer to provide some justification that they have sufficiently understood the council’s specified requirements and have made sufficient allowance for the work overall or specific aspects of it. This can be asked at anytime during the evaluation process. Just because a tenderer has a low price for an aspect of the work or the whole does not, prima facie, mean that they can’t do the work – they may have a new methodology or have access to special conditions that will allow them to achieve specified requirements for their tendered price. Or they may have simply included the cost of part of the work in another schedule item. The council can give them the opportunity to explain and justify their pricing decision, but not to adjust it upwards or downwards.

If they determine that they have made a mistake they have only two courses open to them – to request to withdraw their tender or to stand by the price. A council is not obliged to accept their withdrawal - if the Conditions of Tendering usually require them to maintain their offer for 60 to 90 days. However that said for a significant underpricing allowing withdrawal may be the better approach to avoid the situation of managing a contract where there is a possibility that the tenderer could go into liquidation, and even if they don’t they may be continually searching for ways to make up any shortfall, through taking shortcuts or over-priced variation requests. If they do stand by the price it is then up to the council to decide if this is in the best interest of the council or whether there is sufficient grounds to fail the tender against a Financial Capability criterion, if used. To do this the tender would have to be significantly under priced, and the council would need to have unambiguous evidence of this, otherwise they could be accused by the tenderer of being unfair in not accepting their very well priced tender. If the tenderer after having been warned that their price may be low still wants to continue and if the [company financial assessment](#FinCapacity) and reference checks of the tenderer are good then it is difficult to reject the tender. If the financial assessment or reference checks are poor this might give greater grounds for rejection.

#### Consultant’s reports

For some tender types, a consultant’s report may be requested on the technical merit of each tender submission. This would only usually occur where insufficient subject matter expertise exists on the tender evaluation panel. It must be known prior to the tender advertisement that a consultant’s report is going to be used as part of the assessment process. For example, on a complex and large information and communications technology project a consultant may have been engaged to prepare the specification for the project. After the close of tenders the consultants may be required to assess each tender submission and provide a written report on how well each tender has met the specification and any other issues that could arise in the implementation of the contract by each tenderer. Typically the report would feed into the scores associated with one or two of the evaluation criteria. It is important to note that in Victorian local government a council cannot outsource the decision making in relation to the award of a contract to any external party, including consultants, so it is important that the consideration of a consultant’s report is only part of the information included in the tender evaluation panel’s assessment process, along with the other sources of information available to the panel and the other evaluation criteria. The tender evaluation panel must make the decision on which tenderer to recommend for contract award.

### Evaluation against the quality criteria

On receipt of the tenders each member of the tender evaluation panel shall evaluate each tender against the qualitative criteria – providing a pass / fail or a score out of ten (or 5, depending on process adopted) as appropriate.

#### Pass / fail criteria

Pass fail criteria can be evaluated and re-evaluated at any stage during the evaluation process. For the pass / fail criteria the evaluation panel members may nominate a provisional pass rating if there is insufficient information to provide a final assessment and it is known that further information may be sourced during the evaluation. This may be the situation for Financial Capability where the final evaluation, usually involving a third party expert assessment, may only be done for the shortlisted tenderers or the preferred tenderer, towards the end of the tender evaluation process. See below for further discussion.

If a tender is assessed by the tender evaluation panel as having failed against a pass/fail criteria the tender is eliminated from further consideration.

**Financial Capability** – The Financial Capability of a tenderer is the council’s assessment of tenderer’s ability to complete the contract works or services without financial failure or significant distress that affects the efficacy of the delivery of the contract works or services.

Depending on the tender response schedule questions asked tenderers provide a varying level of information to address this criterion with their tender. Because it is known that council will be seeking an external third party assessment of the financial capability of the preferred tenderer the tenderer may only be asked to provide a statement that they have been trading profitably for the last three years. However some may still provide complete audited accounts. Provided they give this assurance and there are no glaring issues evident it is often the practice to give the tenderers a preliminary pass for this criterion while continuing with evaluation of other criteria in the knowledge that any financial issues will be picked up in the financial capacity check after shortlisting or after being nominated as the preferred tenderer.

**OH&S systems** – Some councils treat this as a weighted criteria. This criteria is assessed by evaluating the answers provided by the tenderers on the OH&S questionnaire Tender Response Schedule. Council should have guidelines as to what acceptable answers are for a pass and provided these are met then the tenderer may be given a provisional pass until after shortlisting. This is another criterion where final assessment against the criterion may only be done on shortlisted or preferred tenderers.

Training in OH&S and what is required to be provided as proof of a satisfactory OH&S system should be provided to Contracts Officers and others on the evaluation panel and those involved in the supervision of the contract, especially in the construction and maintenance areas.

**Tender compliance and conformity** –sometimes split into 2 criteria - Compliance and Conformity.

A tender **compliance** failure has occurred if the tenderer has failed to fully complete the Tender Response Schedules. As a consequence of this the tender evaluation panel may, but does not have to, fail the tenderer against this criterion – provided the option of acceptance of non-conformance(s) has been allowed in the conditions of tendering.

A **non-conformance** has occurred if the tendered offer differs from what the council requested in the Specification or the tenderer indicate that they don’t accept all of the conditions of contract. As a consequence of this the evaluation panel may, but does not have to, fail the tenderer against this criterion – provided the option of acceptance of non-conformance(s) has been allowed in the conditions of tendering. Unless the tenderer has stated it on the non-conformance tender response schedule, many non-conformances only become apparent as the tender evaluation panel gets into the process of evaluating the tenders.

As stated, the conditions of tendering may allow the council to accept or reject a non-conforming tender. The issue with this is - has the value of the non-conformance given the tenderer a significant advantage over the other conforming tenderers, has the non-conformance sufficiently changed the scope of the works that if the other tenderers were given the opportunity to tender on the same basis they would also provide significantly better prices. If it has it would be risky to proceed to acceptance of the non-conforming tender. Generally for a non conformance to be accepted it would have to be a small variance to the specification and the tendered offer should fully meet the intent of the tender. A similar assessment needs to be made for conditions of contract non conformances.

I have heard it argued that if the council has given itself the ability to accept a non-conforming tender in the conditions of tender this means that it can accept any non- conformance, even significant ones. It is argued that because of this clause all tenderers have had the opportunity to submit a significantly non-conforming tender if they chose to take it. This is an overreach. The intention of the non-conformance clause in the conditions of tendering is to provide council with some flexibility to consider tenders with minor non-conformances that could lead to the rejection of an otherwise good tender offer, to the detriment of council and the tenderer. The nature of these minor non-conformances is that they don’t provide the tenderer with any significant advantage compared to a conforming tender. If the conditions of tender clause was interpreted as the ability to accept significant non-conformances effectively all tenders would become like a design and construct tender, with tenderers able to offer what they want. An “apples for apples” comparison of the tenders may be difficult – the evaluation criteria would have to be set up in a similar manner as a design and construct tender. That is not the intention of the non-conformance conditions of tendering clause.

As is often the case, it is generally accepted that there is an exception to this. If the tenderer wants to submit a significantly non-conforming proposal they need to also submit a conforming proposal and the evaluation proceeds on the basis of the conforming proposal. If the tenderer’s conforming proposal is rated the highest then the non-conforming proposal can be considered.

I will say one more thing about this. If the tenderer really wants to submit a significantly non-conforming tender then the option is available to them to post a question about whether what they want to offer is acceptable on the tender forum explaining why they want to propose. If they ask the question council can then make a decision about whether this is appropriate and advantageous to council and if it is then council could issue an addendum to all tenderers that amends the specification to accommodate the suggested change. Care would have to be taken that the type of change requested would not favour solely the tenderer that suggested it rather than something the whole tendering cohort can equally price. If the tenderer fails to make the request and then still submits a significantly non-conforming tender they only have themselves to blame when rejected.

For all tenders one of the first things that should be checked is the non-conformance declaration schedule, if used. If there is any listed non-conformance that looks significant, this should be investigated first up. Note that I have seen some items listed by tenderers on this schedule which when investigated are not non-conformances, rather merely misunderstandings.

#### Weighted criteria

For specific tenders it may be appropriate that a criterion that is usually weighted would be assessed as a pass fail criterion. This is a judgement call on a case by case basis.

Weighted criteria are given a weighting that relates to their relative importance. While these criteria are weighted, if the tenderer scores very low against a criterion the tender evaluation panel may fail the tenderer against that criterion regardless of how well the tenderer may have scored against other criteria. Scores of three and below – depending on council policy and guidelines - may be grounds for failure against the criterion and rejection of the tender from further evaluation, if criterion is critical and / or required for successful completion of the contract. For some criteria a low score may not be a significant issue and would not necessarily lead to rejection on its own.

Weighted criteria can be reassessed by the tender evaluation panel at any time during the tender evaluation process in the light of the discovery of substantive further information such as might be found during reference checking and tenderer interviews in the post-shortlisting evaluation.

As stated earlier the scoring of most qualitative criteria is often largely subjective, however that does not mean that the scoring is arbitrary – there should be sound reasoning behind the score allocated and the scoring must be consistent between the tenderers. There are some suggestions as to what the scoring could mean below. It is up to the council to determine what scoring guidelines are appropriate for their situation. This suggestion uses a 1 to 10 scale. Some councils use a 1 to 5 scale, which is also fine.

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| **0 - 1** | **2 - 3** | **4 - 6** | **7 - 9** | **10** |
| Non – Compliant. Fails to satisfy specified requirements. | Marginal. Does not satisfy all requirements. Concerns regarding ability to successfully fulfil the requirements. If criterion is critical and or required successful completion may be uncertain and therefore may be grounds for rejection. | Acceptable and mainly compliant, generally meets the requirements except for minor aspects and shortcomings. Successful completion likely. | Good to very good. Negligible risk of failure. Satisfies the criterion in all respects. Competent to highly competent. | Superior, beyond expectations. Offers an excellent level of performance that exceeds notional requirements. Represents industry best practice. |

Weighted evaluation criteria can include a number of criteria, which can vary depending on the type of goods or services being purchased. Examples of the criteria may include:

**Historical performance** – this is primarily an assessment of (1) the tenderer’s relevant experience – have they performed works of a similar type and size in the past and (2) has the tenderer’s performance of that work been satisfactory – which may give the tender evaluation panel confidence that they can carry out the works or services required by the council.

The initial assessment of their relevant experience is from the information provided by the tenderer in the Tender Schedules. For an unknown tenderer because there is no information at this stage to the contrary, they are scored on the basis that they performed the work listed satisfactorily. The criterion also includes how well the tenderer has performed in doing these works in the past. This can only be assessed by the checking of the tenderer’s references, except if the council has firsthand knowledge of the tenderer’s work. The tenderer’s references are usually only checked for shortlisted tenderers or the preferred tenderer.

There is an issue to be aware of here. I have heard an argument that experience with the council should be scored higher than comparable experience with another council. This was justified on the basis that there is a higher element of risk to the council awarding a contract to an unknown contractor compared to the known contractor. This approach can’t be justified. The criterion is about an assessment of their actual “Historical Performance”. If the tenderer prima facie indicate a similar level of relevant experience then the tenderer should be given a similar level of scoring against the criterion in the first round of tender assessment regardless of whether the work is for the council or for another council. To do otherwise is just guessing that their experience and performance with the other council is worse than the known tenderer with the evaluating council. It can’t be justified without further investigation. Whether an unknown tenderer’s actual performance is better or worse will have to be determined in the due diligence reference checking process, if they are short listed. If their references fail to stack up it may result in a rescoring and subsequent down grading.

**Capability, including appropriate resourcing – personnel and equipment - methodology and timeliness** – note that some of these sub-criteria can be used as separate stand-alone criteria – depending on the contract works required.

**Quality System** – this is assessed from the information provided in Tender Response Schedules, and the supporting documents provided by the tenderer. Some tenders and some councils may require tenderers to be certified as quality assured and if they are not the tenderer would be qualitatively failed. However for some tenders and some councils quality certification is not mandatory and being certified quality assured would mean the tenderer is awarded a higher qualitative score and not being certified but still having some quality systems in place would result in a lower score.

There are usually other qualitative criteria as well.

## The first tender evaluation panel meeting

Prior to the first tender evaluation panel meeting all tender evaluation panel members must have completed their individual assessments against all qualitative criteria\* and have allocated scores and have inserted the scores and whatever note necessary to support their scores into their copy of the tender evaluation spreadsheet. These individual evaluation spreadsheets should be stored in the document management system.

\* It may be decided that all or some unweighted criteria can be initially assessed by one person or delayed until later in the tender period.

The initial scores of each of the tender evaluation panel members are inserted into the Consensus Score sheet in the panel’s consensus evaluation spreadsheet. This can be done by the chair or another nominated panel member prior to the first panel meeting. The tender evaluation panel then meets to determine the qualitative consensus scoring for each tenderer. In the first instance consensus score sheet defaults the consensus score to the average score – and often this average is accepted by the panel as the consensus score if the scoring of the panel members is close against each criterion. If however the scoring of panel members against a particular criterion is significantly apart, say some panel members have scored the tenderer an 8 or 9 however another panel member has scored 6 then this needs to be discussed in the tender evaluation panel meeting. The members that have scored high should explain why they scored high and the members that have scored low should explain why they have scored low. Often it will be the case that the some of the panel members missed some aspect of the tender while carrying out their individual assessments and in the light of that previously unconsidered information be prepared to reconsider their scoring. The chair of the panel must not allow the majority high scorers effectively bully the individual panel member to adjust their score to match the majority. The minority must be convinced by the arguments of the majority OR vice versa – the majority convinced by the minority – based on reasoned argument. The reasoning for adjustment away from the original average must be documented in the minutes of the tender evaluation panel meeting. After hearing the arguments all panel members may decide to stand by their original score – document this decision and the reason(s) why. If this happens then averaging can be used to overcome an impasse.

I have heard it argued that adjustment of individual panel members scoring should not be allowed and the consensus score should be the average of the individual scores determined prior to the first meeting. If this was the case the only purpose for having the tender evaluation panel meeting would be to decide how many to shortlist or to just accept the tender of the highest total evaluation score as the recommended tenderer. It would ignore any possibility of addressing the sometimes significant variances in individual scores against specific criteria. In my opinion this could leave the evaluation open to challenge if an award decision was questioned.

The total qualitative score is the total of these consensus scores for each of the qualitative criteria.

Some organisations carry out a process of what they call “normalisation” of the qualitative score by which they adjust the all the raw total qualitative scores by a factor so that the tenderer with the highest total qualitative score gets a qualitative score equal to the qualitative weighting for the tender. For example if the tender is being assessed with weighting of 60% for price and 40% for quality then the highest raw quality score would be adjusted so that their “normalised” quality score would be 40. If the top tenderer raw quality score was, for example, 34 out of 40 their score would be adjusted by a factor of 40/34. All other tenderer raw quality scores would also be adjusted by the same factor. The reasoning for this is that because the price scoring formula – see below - provides the lowest priced qualified tenderer with a score equivalent to the price weighting – in our example 60 – then to properly realise the 60:40 weighting for price: quality, the top score for the total qualitative score should also be equivalent to the quality weighting – in our example 40.

Most councils that I have worked for do not adopt this approach and use the raw total qualitative scores in the assessment. However the argument for normalisation is attractive and would be easy to achieve in using a spreadsheet to normalise all scores. If normalised scoring was to be used it would have to be disclosed to the tenderers in the Conditions of Tendering and the evaluation spreadsheet set up to make this “normalisation” calculation.

#### Quantitative criteria

The quantitative criteria – usually the tendered price or the total cost of ownership – should only be considered by the tender evaluation panel towards the end of the first tender evaluation panel meeting after the evaluation panel has come to a consensus qualitative score or in a subsequent meeting if the panel did not arrive at a consensus qualitative score during the first tender evaluation panel meeting.

The Quantitative criteria is usually primarily the tender price but may also include consideration of “The Total Cost of Ownership”, which is the tender price plus any additional costs to the council arising from the purchase and operation of the offered good (or service). This is typically only used if there is a difference in the council’s costs between tenderers for the use of a good or service. An example of this might be for the purchase of a truck. One truck offered might require servicing every six months, the other truck offered might only require service every 12 months – less operational cost to the council for the second truck. Generally, for the majority of tenders, tendered price is used for comparison of the tenders.

The Price Score is often calculated using the following formula:

**PS(TUC) = W x PLQT  
 P(TUC)**

Where: PS(TUC) = Price Score for Tender under consideration;

W = The percentage weighting of tendered price in the tender evaluation;

PLQT = Tendered Price, or Total Cost of Ownership, from the lowest qualified\* tenderer; and

P(TUC) = Tendered Price, or Total Cost of Ownership, for tender under consideration.

This formula is used in the Weighted Price sheet of the tender evaluation spreadsheet and the consensus tender evaluation sheet.

\*If the tenderer with the lowest price has been disqualified against a Pass/Fail criteria or a Weighted criteria their tendered price would not be utilised as the PLQT in the Price Score formula. The next lowest price from a qualified tenderer would be utilised.

Note that there are other formulas for calculating the price score. The formula to be used must be decided prior to tendering.

Also note that [additional quantitative criteria](#AddQuantCrit) can be used to assess additional factors that can be quantified other than price.

#### Total Assessment Score

The Total Assessment Score is determined by adding the consensus Qualitative Score to the Quantitative Score (Price Score).

|  |
| --- |
| Putting Tenders Aside Qualitative assessment of tenders is time and resource consuming especially if there is a large number of tenders and considering that the evaluation panel consists of three or more council personnel. It is also my experience that generally the winning tender will come from one of the three lowest priced tenderers – though with higher qualitative weighting used these days this might be changing. This raises the question - could the process be streamlined by not having to do a full qualitative evaluation on some of the higher priced tenders? I have seen some councils “set aside” tenders that are high priced or over their budgetary allowance. But is there a better way than nominating an arbitrary cut off price to ensure that any tender that is “put aside” would have had no realistic chance of overcoming their higher price due a potentially superior quality assessment?  The process that I propose here I have not used personally nor seen others use:   * Provide the tender evaluation panel with the top three (or perhaps 4 but say 3 for this example) lowest priced tenders in no particular order. * They evaluate them and come up with consensus scoring for each. The scores are placed in the evaluation spreadsheet, as per normal. * Procurement would then carry out an assessment to determine whether any of the remaining tenders could realistically get a better total assessment score than the highest score already achieved. The process of doing this would be to use the price of the 4th lowest priced, qualified, tender and place it in the evaluation spreadsheet. It would be under a name that indicates it is not a real assessment but is being used for the purposes of assessing tenders to determine whether they can be put aside – perhaps “Put Aside Assessment”. Then allocate to that dummy tender very high qualitative scores against all qualitative criteria. It could be 9s or 9.5s – I would say 9.5s to be on the safe side. (Yes 10s – if the council prefers -but that would be very conservative as I have never allocated a tender straight 10s. If other council’s experience is that straight 10s can be awarded then 10s would have to be used.) If the score achieved by this dummy tender is below the best total assessment score achieved by the best of the three tenders already assessed then it can be safely concluded that the 4th lowest priced tender, if taken into full assessment by the tender evaluation panel, would not win and therefore can be safely put aside, along with all the other higher priced tenders. If the score achieved by this dummy tender is above the highest total assessment score achieved by the three already assessed tenders then the fourth tender is still possibly in contention. It must be included for full evaluation by the tender evaluation panel. The prices of 5th and possibly the 6th etc. would also then also be evaluated in this manner to determine whether they should also be included. * The higher the qualitative score weighting, the more likely the successful tender will come from outside the three lowest priced tenders, so it may be decided that more than three tenders should be initially assessed for these tenders. * If the third and fourth tenders are close in price perhaps they both should be included in the initial panel assessment. * That tenders could be set aside like this would have to be notified to the tenderers as being part of the tender assessment process in the conditions of tendering. * This type of process would need to be used with greater care in the assessment of consultancies/ advisory tenders or design and construct, or plant and equipment tenders (Type 2 tenders – see Shortlisting section below) as qualitative scoring of shortlisted companies can change during post shortlisting evaluation and also the typically higher quality score weighting for these tenders. More would have to be included into the initial full assessment.   Provided for consideration as an efficiency measure. It is better to spend more time doing a thorough assessment of the tenders that have a realistic chance of winning than to spend a lot of time doing qualitative assessments on the additional tenders that have no chance of winning.  This process does not allow for completely price blind qualitative assessment which may be an issue for some councils and their standard evaluation processes.  Its anticipated efficacy of the approach could be assessed by carrying out the assessment on recently completed full tender evaluations.  The process does not allow assessment of solicited or unsolicited value-add options that a higher priced tenderer might offer. These may be non conformances anyway and perhaps can’t included in the assessment unless specifically allowed under the conditions of tendering. Whether the process can be adopted might need to be assessed on a tender by tender basis. |

## Shortlisting and post-shortlisting evaluation

### Shortlisting

The tenderers are shortlisted based on the tenderer or tenderers with higher Total Assessment Scores. If the intention is to shortlist multiple tenderers then the total number to be shortlisted needs to have some flexibility. For example if the original intention was to shortlist three tenderers however the difference in the Total Assessment Scores between the 3rd and 4th ranked tenderer is relatively small then it may be necessary to shortlist the 4th tenderer as well.

The reasons for shortlisting include limiting the number of tenderers on which to:

* conduct further due diligence;
* perform further evaluation on and possibly additional scoring or adjustment of tender evaluation scoring; and/or
* confirm details and carry out negotiations (on occasions).

Shortlisting is a process efficiency measure. It eliminates tenders from further evaluation that the tender evaluation panel through the evaluation process thus far has, prima facie, determined to have no chance of becoming the recommended tender. Elimination means that the evaluation panel will no longer consider the tender and therefore will not have to do the additional work, as listed above, on those tenders. However it should be remembered that it is possible to elevate a tender to shortlisting after initial non-shortlisting if faults are found in one or more of the tenders that were originally shortlisted.

The numbers of tenderers to be shortlisted depends on the type of tender and what is trying to be achieved from the shortlisting. For convenience I have called them Type 1 and Type 2.

#### Type 1 tenders

For Type 1 tenders it is usual to shortlist to one tenderer – the highest ranked tenderer, or to the number of contractors required for the panel\*. The types of tenders I class as Type 1 are:

* Lump sum contracts for construction and other works where the initial evaluation has identified a preferred contractor;
* Schedule of rates contracts for:
  + the provision of building maintenance services under a standing offer contract; and
  + material supply contracts.

\* For example, for a schedule of rates Electrical Services contract council may require three contractors on the panel and therefore may elect to only short list to three tenderers. The evaluation panel may short list to more than the required number where the total assessment scores are close.

Sources of information for Type 1 tender assessment includes:

* Post tender interviews;
* Tenderer supplied answers to post tender questions;
* reference checks – usually with third parties but can also be with other council officers that have used the tenderer;
* Financial reference checks, external financial report; and
* OH&S checks.

**For Type 1 tenders the post shortlisting evaluation is primarily for due diligence.** That is to confirm that the tenderer has sufficiently understood the scope of the works or services required and is capable of providing them, technically, managerially and financially.

If there is a defect found in either their offer or in their capability this may result in a reassessment of their tender against one or a number of the pass/ fail criteria and scored criteria.

For pass/fail criteria the assessment could be amended by the evaluation panel from pass to fail. This would be applicable to assessment against the Financial Capacity criterion where council receives a third party report indicating significant issues with the tenderer.

For the scored criteria if their scoring is adjusted downwards it would often be to a score that means that the tenderer fails against the criteria. For example, a tender has a qualitative score against the Historical Performance criterion of say 8 when they are shortlisted. After shortlisting their references are checked as part of the due diligence checking and this reveals significant issues in the performance on earlier contracts, confirmed by a couple of referees. The tender evaluation panel decides to reassess the score given to them. The panel could readjust their score to say 5 which would result in them not having the highest total assessment score. However it would be more common for the tenderer to be assessed as failed against the criteria and eliminated from consideration.

For Type 1 tenders having due diligence checks, except as referred to in the Exception paragraphs of this section, there is no possibility for adjusting the scores upward.

If the tender is failed against a criterion this will mean that the previously second ranked tenderer would be elevated to the short list and have due diligence conducted on them.

**Exception:** If the top ranked two (or three) tenderers have very close total assessment scores (or the third and fourth have very close total assessment score when selecting a maintenance panel of three) then the additional tenderer may be shortlisted and the post tender interview and the reference checking used to determine which tenderer is to become the recommended tender. This may involve the rescoring against some of the evaluation criteria to maintain conformity the conditions of tendering methodology. For example one tenderer may have glowing references and the other average, which may prompt a rescoring and re-ranking for the close tenderers.

The reason for this exception is that qualitative scoring is a subjective process and therefore imprecise. It cannot reliably differentiate between two tenderers that have close scores and determine with 100% certainty that the top scoring tenderer represents better value for Council than the second ranked tenderer. For example one tenderer might have scored 87 and the other 85 (out of 100). The two point score difference cannot be relied upon as a definitive pointer to the best value supplier. It could be due to one evaluator’s low or high score against one criterion only. So in this case further comparison is made in the assessment of the information collected post tender.

One council that I worked at had the policy that if the two top ranked tenderers were within 4 points of each other (out of 100) their assessment was that both tenderers were within the margin of error of the qualitative assessment process and as both were clearly qualified to carry out the work then the contract would be awarded to the tenderer with the lowest tender price regardless of whether they are ranked one or two at the end of the earlier stage of scoring.

Whatever approach is used it should be well understood, documented and followed.

#### Type 2 tenders

For Type 2 tenders it is usual to shortlist to multiple tenderers. The types of tenders I class as Type 2 are:

* Lump sum contracts (which may have schedule of rates components) for:
  + design and construct contracts;
  + information and communications technology systems and databases;
  + plant and equipment; and
  + consultancies;
* Schedule of rates contracts for:
  + panels of contractors/consultants to provide professional advisory and/or consultancy services under standing offer contracts.   
    The tender evaluation panel may shortlist to more than the number of contractors/consultants required for the final panel.

Note that it is also possible that all tenderers will be taken through to the next stage of evaluation.

Sources of information for Type 2 post shortlisting evaluation includes the sources used for Type 1 (interviews, post tender question, reference and OH&S checks) and:

* Demonstrations conducted by the tenderer – usually only for plant and equipment, and information and communications technology systems and databases tenders; and
* Site visits to other councils or companies that have purchased from the tenderer - usually only for plant and equipment, and information and communications technology systems and databases tenders. Not always required.

For **Type 2** tenders, as for Type 1, **the information collected is used for due diligence** of the tenders and tenderers, to ensure that the tenderer has sufficiently understood the scope of the works or services required and is capable of providing them, technically, managerially and financially. In addition to due diligence some of **the information collected is also used for further evaluation and scoring or possible rescoring** against some of the qualitative criteria and consequent adjustment the overall total assessment score.

In all cases for these type two tenders it is understood by all parties that the evaluation process is in two stages. In the first stage, prior to shortlisting, the assessment and scoring based primarily tendered information and other sources, [as previously listed](#_Information_sources_for). All tenderers understand that they have to succeed in this stage and be shortlisted to be further considered. All tenderers understand that if they are shortlisted that further assessment and scoring of information collected post tender through interviews, post tender questions and answers, reference checking and, in the case of information technology and plant and equipment, through demonstrations.

Unlike Type 1 tenders in the case of Type 2 tenders scoring against criteria can be increased or decreased. If there is rescoring it will usually only result in adjustment to one or two of the evaluation criteria rather than the wholesale rescoring of everything. Which evaluation criteria will depend on the work, service or goods being tendered. This will be discussed in the next sections.

For Type 2 tenders the weighting on the qualitative criteria is usually higher than for a Type 1 tender.

With many Type 2 tenders, where the tenderer is providing Council with professional advisory services, the performance of the key personnel and the advisory firm as a whole is critical to the selection process. The organisation would have provided information on their professional expertise in their tender submission and this would have been assessed as sufficiently good for them to have been shortlisted. However more information is required, information that can only be obtained from interview and reference checking, for the final selection to be made. These tenders are somewhat like a job application process – the successful applicant will not be finally selected based sole on their résumé – council will want the opportunity to probe the expertise directly through interview and reference checking. An interview provides the tenderer an opportunity to articulate and show in their presentation their expertise and professionalism, and their understanding and vision for proposed contract works, and provides council an opportunity to assess this. Through referencing checking the evaluation panel can verify – or refute – the information provided by the tenderer in the tender. This consequently impacts on the tender evaluation panel’s assessment of the tender and tenderer and the scoring allocated to the tender.

Similarly for information and communications technology systems and plant and equipment tenders a demonstration of plant or systems offered is an important aspect of the evaluation. The evaluation criteria for this type of tender may include “Conformance to the specification”. While this can be assessed to a point from the tender submission it would not be prudent to rely solely on what the tenderer says in their submission. Let them show it in the demonstration. Similarly there might be a criterion called “Useability”. While the tenderer will undoubtedly say in their tender submission how usable and intuitive their system is, a tender evaluation panel cannot base their final score solely on this assurance. The panel may elect not to score a “Useability” criterion at all in the pre-shortlisting evaluation because a realistic score can only be allocated once the system has been demonstrated.

With Type 2 tenders the possibility of a larger adjustment to the qualitative score must be considered when shortlisting. If it is thought that a tenderer may be able to overcome a lower total assessment score by doing exceptionally well in the post shortlisting evaluation they need to be shortlisted. This is a judgement call by the panel.

### Post shortlisting evaluation

Unlike evaluation prior to shortlisting it is usual for the tender evaluation panel to undertake post shortlisting evaluation with a greater level of consultation between the members. For example if there has been further post tender questioning the responses received will be sent to each member of the tender evaluation panel for review and will then be discussed with all members of the panel in a tender evaluation panel meeting. If an adjustment to the scoring or a change from pass to fail is thought necessary it will be done on a consensus basis.

### Post tender interviews

There are some possible exceptions to doing post tender interviews on shortlisted tenderers:

* annual supply type contracts where the incumbent contractor is the sole shortlisted tenderer and the tender evaluation panel is sure that the tenderer is capable of delivering the service. Though council may still elect to interview as it is a good time to have a discussion about the provision of the service going forward;
* certain goods / material supply contracts although supply and testing of samples may be warranted; or
* where the tenderer is providing a demonstration - which typically includes aspects of interview.

The tenderer may be asked to clarify aspect(s) of their tender, including being required to confirm these clarifications, or provide the clarification (if unable to provide the information verbally in the meeting) in writing after the interview. There is potential for limited negotiation on aspects of the tender, see [Negotiations](#_Negotiations) section below.

For both situations where one tenderer is short listed or multiple tenderers are short listed, as part of the interview process the tender evaluation panel will develop a series of questions for the shortlisted tenderer(s). For processes involving interviewing multiple tenderers most questions will preferably be standard for all interviewees. It may be beneficial for some of the questions to be sent to the tenderer(s) prior to the meeting so they can consider them and bring along additional information to the interview. In general, the questions asked should be related to the Evaluation Criteria so that consideration of the responses received can be included in any rescoring process, if applicable, for Type 2 tenders.

Responses should be obtained in writing from the tenderer post interview if the response provides clarification or additional information.

### Demonstrations

Typically for Type 2 tenders such as IT software and possibly hardware systems, and plant tenders the shortlisted tenderers will be asked to provide the tender evaluation panel, and possible a wider panel of the council personnel that will be affected by the implementation of the new system, a demonstration of the offered system. Typically for IT systems tenders, the tenderer will be asked to demonstrate their system by performing a number of specified tasks that the council wants the system to provide. The tenderers would usually, though not always, be sent this list of tasks they will be required to demonstrate prior to the demonstration to allow them to prepare. Their performance in doing these tasks will be assessed and scored by the tender evaluation panel and the wider council panel if used against specific evaluation criteria that cover functionality, useability and conformance to the specification. This assessment will be included in the overall Total Assessment Score, adjusting it from their pre-shortlisting score.

For plant and equipment the tender evaluation panel would probably want to inspect the plant or the equipment and have the tenderer demonstrate its features. These inspections should be scored by the panel during the inspection against a prepared checklist that is used for each plant or equipment demonstration. The panel may want one or two of the council’s operators to test drive the plant and get their opinion on the plant. Again they should be working off a checklist. Additional care needs to be taken if the plant operators’ opinions are considered in the evaluation. Their opinions are important, of course, however care must be taken to judge whether they are biased or not. For example, they may always have used Brand X equipment in the past and want to continue to use it so their comments may be biased to that outcome rather than an objective assessment of the useability and functionality of the plant.

Whatever process is used it must be clearly outlined in the Conditions of Tendering. The evaluation criteria could include criteria for Useability and another for Functionality, the scores for which will be either completely dependent on the outcome of the demonstration for Useability or subject to review for Functionality.

Because the results of the demonstration impact of the overall score the tender evaluation panel need to be cognisant of this and consequently may have to shortlist more tenderers if there is a possibility that their useability and functionality scores, adjusted after demonstrations, could lift them into consideration.

### Reference checks

There may be some exceptions to carrying out reference checks, including:

* lump sum contracts where council had had recent satisfactory experience with the tenderer and the scope and size of works is not significantly different to previous works performed for council;
* annual supply type contracts where the incumbent is the a shortlisted tenderer and the tender evaluation panel is sure that the tenderer is capable of delivering the service; and
* material supply contracts - possibly.

If using reference checks for due diligence only, usually for Type 1 tenders but possibly for some Type 2 tenders as well, the tender evaluation panel may elect to only check references for the preferred tenderer.

In my opinion the council’s experience with a contractor is the best reference to the contractor’s future performance. Some people say for the sake of fairness to other tenderers this should be discounted and only external references used. The issue with this is what would be done if a poor reference was received from an external referee but the council’s own experience with the contractor was good? Would the tenderer that the council had had satisfactory experience with really be failed based on the external reference? I think the tenderer would be rightly peeved by this. However this said just because they have worked for the council in the past does not mean that the score that they get for providing good work should be higher than what another unfamiliar tenderer that has good references from a third party source gets. A good reference from a third party should be given as much importance as a good reference from the council. The reverse of this is, of course, if the council’s experience with the contractor is poor (and sufficient documentation and proof of the poor performance is available and stored in the council’s document management system and the contractor is has been informed of the deficiencies in their past performance) but external references (if sought) are fine, is council going to ignore its own experience and still hire the contractor? I think not.

Another aspect to keep in mind for poor council experience is, is the judgement by the council’s project manager justified? Has there been a clash of personalities or has the council been unreasonable in what it has expected of the contractor, perhaps trying to force the contractor to provide works or additional services at no cost that could not reasonably be interpreted as being required in the contract.

Reference checks are usually conducted over the telephone with the referees. The usual way of doing this is to develop a pro-forma to collect the detail of the reference check. The pro-forma will contain details of the tendering company, the referee company and the name of the referee, the date and the standard questions that will be put to all referees and a space for the referee’s responses to the questions asked. The answer provided by the referees should be written on this form and the form dated and signed or initialled by the person checking the references. The reference check must be made available to the entire evaluation panel. Try to record at least part of the actual words used by the referee in response to each question. A minimum of two to three reference checks are carried out, though if one of those reference checks is marginal or poor then additional reference checks would need to be done to determine whether the marginal reference check is an aberration or indicative of a larger problem with the tenderer. For high value or high risk tenders additional reference checks may also be undertaken.

One question that comes up on occasions is whether the panel can check references with referees that have not been listed in the tenderer’s tender? If the council’s Conditions of Tendering indicate that the council may utilise information from sources additional to the tender submission at the sole discretion of the council, which it should, it should be permissible. The tenderer should be advised that additional referees are being sought, but not what the referee says, so the tenderer can put their side of the case if they think that they may get a poor reference from that referee.

Note that I would never willingly tell a tenderer what a referee has said about them, except for general indications if the reference is good. However it is possible that a freedom of information request, or court proceedings, could force the information to be revealed. It should be recognised that a referee is taking a risk when they provide a reference that may not be good. They may therefore use language very carefully or may refuse to answer some questions. Be careful in recording what is said by the referees. Always thank them for their information. It is their prerogative to provide the reference or not, or to not answer any particular question. A failure to provide a reference cannot prima facie be taken as a negative reference, but could lead to the seeking of further references. It is up to the tenderer to provide a sufficient number of referees that are willing to provide a reference and if that can’t be done that is a non-conformance.

One question that is always informative to ask a referee is: “Would you be willing to use the contractor for future works?”

### Checks that may only be undertaken on the preferred tenderer

#### Financial reports

Usually Financial Capability is a pass / fail criteria. (It could be a scored criteria but that would mean having to purchase third party finance reports on a more tenderers, possibly even all tenderers.) While the shortlisted tenderers will have received a preliminary pass for the Financial Capability criteria in order to be shortlisted this preliminary pass may have been based on limited information provided by the tenderer. In order to check further check their financial capability it is usual that prior to final recommendation a third party financial capability check will be sought for the preferred tenderer or they can be sought for all shortlisted tenderers.

If the financial capability assessment indicates that their capability is good then the tenderer can be given a pass rating against the Financial Capability criteria. However even when a third party financial assessment received is not 100% (or even 60%) satisfactory this does not mean that the council necessarily has to fail the contractor against the Financial Capability criterion. Whether to fail the tenderer against this criterion depends on the level of risk that the council is willing to take, the importance of the contract to the council, the consequences of failure of the contractor and whether the risk can be mitigated sufficiently. The tenderer has to be sufficiently financially capable, not necessarily perfectly financially capable. For example if the contractor is to be appointed to a panel of suppliers for an annual supply contract the risk to the council of failure of the contractor may be less than if the tenderer was being considered for the construction of a multimillion dollar building. Other ways of mitigating the council’s risk could include obtaining directors’ guarantees or increased bank guarantees. If these options are to be available to a council suitable reference to the possibility needs to have been included in the Conditions of Tendering.

Council should also exercise increased vigilance during the contract management phase. During the contract management phase payment should be made promptly, perhaps even before the contractually obliged timeline, but never pay for work in advance of its completion unless it is a contractual requirement. The council should not just depend on the contractor’s valuation of the value of work completed - most contractors will try to bring forward payments as much as possible - but fully assess it for themself. For large scale work it may be worth getting a building quantity surveyor/estimator involved. A payment schedule if included in the tender should be assessed during tender evaluation to see whether it is fair and does not require early payment under the contract. The council should get the contractor to provide statements from their main subcontractors that the subcontractors have been paid prior to paying the main contractor’s claim.

One type of tender that should ring warning bells is if the tenderer gets a marginal financial assessment and their tender price is below the project budget estimate and other tenders by a significant amount – this is a potential disaster waiting to happen.

Ultimately the level of risk of contractor failure that the council is willing to take is a judgement call by the relevant manager, director or CEO, depending on value. The tender evaluation panel may need to seek advice from other council officers on this.

#### Occupational Health and Safety

If there is doubt about the adequacy of the tenderer’s OH&S systems obtain an opinion from the council’s health and safety officers. The OH&S system of the shortlisted tenderers should be further assessed during the post tender interviews by getting the tenderers to provide additional documentation to show that they have an operational OH&S system, if this hasn’t been provided with their tender submission. This could include copies of training matrices, incident reporting and investigation, etc. that have been filled in by the contractor during recent works.

Consideration should be given to having the council’s OH&S Department routinely assess the OH&S system of the preferred tenderer prior to award. Or, if the OH&S department lacks the resources to do this, engaging external experts to evaluate the OH&S system of the shortlisted tenderer should be considered. This would be similar to what a council does for the Financial Capability criterion where a council may engages financial assessment company such as Corporate Scorecard or a similar to carry out an assessment prior to award. Another approach to this would be to require tenderers to be prequalified with a third party OH&S certification organisation. Evaluation panel members and Contracts Officers may not be experts in the requirements of OH&S systems\* and this is such a vital area of risk and risk minimisation of the council.

\*Training needs to be provided by council to all council officers involved in assessment or tenders and/or management of contracts for works and services.

#### Legal structure check

Legal structure check should be undertaken on the preferred tenderer to ensure that council knows the legal status of the entity that it is investigating to enter into a contract with and there are no (or limited known) issues with the entity and its directors. This is usually done by getting an Australian Securities and Investments Commission (ASIC) report from a company that provides these reports. I have found that it is quite common that the company officers submitting the tender are not aware of the detail of their own company structure. This information will also used to determine the appropriate contract signing clause for the recommended tenderer.

#### Rechecking pass / fail criteria

The tender evaluation panel should check that the preferred tenderer passes any pass / fail criteria that has not been previously or finally assessed. For example get insurance policy certificates of currency, if not already provided.

#### Additional information from the preferred tenderer

Once the preferred tenderer to be recommended is known there may be additional information to be collected for inclusion in the final contract document. For example for a construction contract the panel could request additional works programming details or a revised program with the actual dates of works commencement and completion, for inclusion in the final contract document, though this might be done after acceptance and prior to finalising the contract document to be signed by the parties, provided the total contract duration is locked into the contract.

### Negotiations and post tender price adjustment

Limited negotiations can be undertaken with the preferred tenderer which can affect both non price aspects of the work and price.

#### Non price negotiations

Non price areas that the council may negotiate with the highest ranked tenderer could include changes to the works program or reporting processes or the payment schedule, changing the timing of payments rather than the total quantum of payments. Other areas could also be included depending on the contract.

#### Price

It is my experience that it is not usually a council’s practice to routinely negotiate with the tenderers on price. But as usual there are exceptions which I will go into after I have explained the issues with negotiations on price.

If the council were to adopt an approach of routine price negotiation for all tenders then the tenderers could become use to this and may adopt a policy of adding a percent or two onto their initial tender price so that they can then drop it off during the negotiation. If this becomes the case then nothing has been saved. However if the council then fails to negotiate effectively, for whatever reason, the council could end up paying more than what would have been achieved with a straight tender process without price negotiation.

Negotiation could also leave the council, and in particular the tender evaluation panel, open to accusation that they have let information slip about the highest ranked tenderer’s position if they were to be displaced from their top ranked position due to the negotiation process.

Significant price negotiations after the close of tender undermines the purity of the tender process, a process that gives all tenderers the same single chance to provide an offer price for undertaking the works, based on the exact same information provided by the council. From this process the tenderer has to put in their best price from the outset to give their tender the best chance of being selected.

After having said all this, here are the exceptions where price negotiation / adjustment may occur:

* if the tenders have come in over budget;
* a best and final offer process is utilised; or
* price adjustments due to a tenderer suggested change or adding an item that should have been included in the original Specification.

**If the tenders have come in over budget** then negotiation could occur with the highest ranked tenderer to see if the tendered price can be brought back to within budget. This negotiation can include minor changes in scope of the work or the use of different materials or methods to achieve the same outcome. It could be a request to provide a better price, while keeping the original scope of work and Specification. Depending on how significant changes to the scope of works is consideration may have to be given to allowing additional tenderers to also price these changes – though it would raise issues if a second ranked tenderer gave a massive price decrease for the change in scope – higher than a quantity surveyor / estimator might consider reasonable - in an attempt to leap the highest ranked tendered to the lead position. This would be unfair if accepted. Negotiations could occur with the second ranked tenderer if the negotiation with the first ranked tenderer fails to achieve the savings to bring the project back into budget. If the negotiations fail to achieve the desired savings then either more money needs to be found or the tender process cancelled and perhaps re-scoped and a new tender process undertaken.

On occasions on high value and complex contracts the council may conduct a **best and final offer process**. My experience is that this is infrequently used by council. In this process short-listed tenderers are given the opportunity post tender to come in to meet the council officers to discuss their tender, to clarify any issues on what the council wants or to suggest changes to the Specification which would result in savings to the council but still meet the intent of the contract. A decision would need to be made as to whether some additional tenderers or all tenderers should be given the opportunity to price on the basis of the change. This could be problematic if the tenderer considers that their suggestion is their intellectual property. The tenderers are then given the opportunity to submit a revised tender. This process needs to be clearly stated in the Conditions of Tendering and then carried out with the need to be fair to all tenderers in mind at all stages.

There are **further situations where price adjustment could occur**:

* If the highest ranked tenderer during interview makes a change suggestion, or includes an unsolicited option in their tender submission, which would result in savings, greater efficiency, useability or safety to the council;
* The tenderer suggests an addition to the scope of works which they claim would improve the outcome with an additional price; or
* the council may recognise that something that would be beneficial to the contract and the council has been left out of the Specification scope of works and requests the tenderer(s) to provide a price for this change.

These are more price adjustments than negotiations. How these price adjustments are handled and indeed whether they can be considered at all depends on the quantum of the change in scope and price. If the change is significant then consideration needs to be given as to whether all tenderers or shortlisted tenderers are given the opportunity to tender on the proposed change. If the change is relatively small, compared to the total tender price, it could be that only the highest ranked tenderer would be requested to price the change.

An example may clarify what is meant. Consider a tender for a hydraulic excavator. During interview with the top ranked tenderer, or perhaps they included it as an unsolicited option in their tender submission, they suggest the inclusion of a rear proximity warning system which would aid safe operations of the machine – it would beep when a person or a machine is too close to the rear of the excavator, warning the operator and the person. This had been overlooked in the original Specification. The cost of this is an additional $1000. The original tender price was $515K and their assessment score is sufficiently more than the second ranked tenderer. If this had been included in the original Specification the judgement can be safely made that it would not have affected the outcome of the tender. Similarly going back to the other tenderers to also price this inclusion – which is an option, especially for more significant changes - would not affect the outcome, and would waste their time. This change can therefore be accepted safely. If, of course, the prices and the scoring was really close, and $500 might make a difference to the outcome, then perhaps this assessment could not be made and it would be necessary to also get pricing from other closely ranked tenderers.

These minor price and scope adjustments are a bit like variations, but approved prior to award when the council has more leverage in negotiation. It is better to get this sorted out prior to contract, and include them in the formal contract, than to do them as variations post award. Note that when preparing the evaluation report the Total Assessment Score and recommendation would still be based on the original tender price. The accepted minor change would need to be noted in the evaluation report for approval of the council or the delegate as an additional inclusion into the final contract and contract sum.

What if the value of the suggested change is significant? Say $50K over the original $515K. There are numerous issues with this. The change in scope may be such that it represents a change that is beyond what the advertised tender could safely incorporate. To proceed may go against good tendering practice and section 186 of the Local Government Act or the Council’s Procurement Policy. In which case the tender would have to be re-advertised to include the change or the change not accepted for inclusion in the original tender process. If it could be accommodated in the advertised tender then it would probably require going back to all tenderers to get them to price the change. This is not a negotiation but repricing process.

## Finalise report to the council or delegate

The tender evaluation panel then prepare the report to the council, or to the council’s delegate for contracts depending on delegation levels, for their consideration. If the Contracts Officer is on the panel the job of preparing or drafting the evaluation report may fall to them. Guidance as to the required format and content of the report may be provided in a template document. Further guidance can be obtained by looking at the way earlier reports for similar contracts were written.

## Learnings

After the evaluation has been finalised it is a good opportunity to review the tender process and to capture any aspect from the tender and evaluation process that could be improved the next time this or another similar tender is called by the council. This is especially useful for tenders that come up infrequently. For example, could the evaluation criteria and/or weightings for the next tender be better if modified from that adopted for the recent tender. Or if the questions asked in the Part 2, Tender Response Schedules could be improved to better to get the information required for the evaluation process. This should be documented and let the project manager and the rest of Procurement knows so when a similar tender comes up the suggestions can be included in the new tender documents. Perhaps there are areas where the tender templates could be improved. Suggest this to the coordinator or senior Contracts Officer or in team meetings.

It’s about continuous improvement.

# Award

## Letters of award

Note: There are legal issues with the letter of award for contract formation. Legal advice should be sought on the form and wording of the letter of award, and when and how the letter should be sent – prior to or with the contract agreement document to be signed by the parties. The legal advice should be distilled into the letter of award templates and normal procedures. This section is general information only and is subject to council’s legal advice and council’s practices.

Once the council or the delegate makes their decision, prepare letters of award and unsuccessful letter using the appropriate templates. The letters can usually be signed by the manager or coordinator as the letter of award is simply advising the tenderers of the decision of the council or its delegate. The final contract agreement will be signed by the appropriate council delegate in accordance with the instrument of delegation or signed under seal in accordance with the council meeting minutes and council practices.

The letter of award should inform the contractor of acceptance of their tender and, if appropriate, what parts of their tender has been accepted if the tender contained options that the council could accept or rejected. If there has been any post tender negotiation/correspondence that has modified the original tendered offer that is to be accepted this should be specifically referred to - e.g. “ABC Pty Ltd letter dated 23 March 2020”. There should be no confusion or doubt after the letter is received about what is being accepted and the amount the council is to pay for the works or services.

The letter of award should be prepared by the Contracts Officer or another member of the evaluation panel that has been involved in the entire tender evaluation process, as they have detailed knowledge of what is being accepted. Letters of rejection can be prepared by an administration officer, if one is available, based on the appropriate template.

## Putting together contract agreements

Putting together contract agreement documents for signing is a task that requires skill and knowledge. Preferably it should be done by a Contracts Officer, if they have been involved in the evaluation, if not then the project manager / contracts manager who has been on the panel and is experienced and trained in putting together contract agreements. It should not be given to an administration officer who is not trained adequately and has not been involved in the tender evaluation process. If it is given to an administration officer that officer should be adequately trained and skilled in this task and the Contracts Officer, or the panel as a whole, should review the final contract document before it is sent out for signature and must remain totally responsible for the accuracy of the document.

### Inclusion of addenda

Addenda are included in the final contract agreement, except if they relate solely to the tender process, e.g. a change of the tender closing date.

There are two way of including the amended requirements of the addendum into the final contract document:

1. by updating the text of the Specification issued for tender purposes with the changed requirements from the issued addendum(s). If this approach is adopted then often the section of Specification text that is amended or added is highlighted with a text box comment in the margin indicating the change is due to say “Addendum 1”, as per the example in the adjacent margin, or whatever the addendum number is. This is done for transparency reasons – the council as the party that prepares the contract document for signing must clearly show why a change has been made from tender issue to contract issue Specification – so the council cannot be accused of trying to “sneak” changes into the document without cause, which would be unconscionable conduct. If the other party is happy to not have the text boxes then that is fine; or

From Addendum 1

1. by including the issued addendum document into the final contract agreement document. If using this method it has to be clear that the addendum takes precedence over the Specification. The addendum would be placed in front for the Specification in the contract agreement.

The first method is arguably the best way. The second method is the easiest and quickest. My experience is that a council typically just includes the original addendum documents into the final contract agreement - method 2.

### Inclusion of tender submission

There are different trains of thought about whether the tender document submitted by the tenderer should be included in the final contract document. Some argue to include all of the tender submission and some argue to include as little as possible. I tend to adopt an approach of including some parts of the tender submission but excluding other parts.

Including everything is certainly the easiest way but there are a couple of issues with the approach. It tends to lead to a bulky tender document with many pages that are superfluous to the actual performance of the contract. For example the receipt of addenda and non-collusion statutory declaration schedule, if the tender document set contains these documents.

The tenderer may have also submitted a lot of supporting documentation, either solicited or non-solicited. For example tenderers might have included parts or all of their quality assurance documentation or their occupational health and safety manual. It is really not necessary to include these documents in the final contract document. Statutory regulations and law and the contract itself would require them to have appropriate occupational health and safety systems. The conditions of contract and specification may also express further requirements. During the tender process council seeks the occupational health and safety documents as part of its due diligence check that the contractor is conforming to the laws and regulations. If included in the contract document it could create issues if it was subsequently determined that the occupational health and safety documentation was somehow deficient.

The tenderer’s tender supporting documentation could contradict the specification or conditions of contract in some way that may not have been picked up in the tender evaluation process, creating uncertainty about what is to be provided under the contract. This uncertainty would be interpreted in favour of the contractor.

Not including the submitted tender document also has issues to be aware of. In their tender the tenderer may have included an offer that beneficially exceeds the express requirements stated in the specification. Council would want to contractually lock the contractor in to supplying this benefit. This has to be included in some way. As with the treatment of addenda the best way is to make appropriate amendments to the specification. However often for expediency the council may just include the part of the tender submission that includes this additional benefit offered.

Similarly often the tenderer would be asked to provide details of their methodology and personnel resourcing to be used for carrying out the work. I would argue that this detail from the tender submission should also be included if the council wants to be able to force the contractor to conform to the offered methodology using the offered personnel. If it was not included the tenderer could adopt a different methodology and personnel resourcing, possible not as acceptable to council. The only come back for council in this case would be arguments of misleading and deceptive conduct by the contractor in their tender submission rather than being a breach of contract which invokes the powers of enforcement under the contract.

Aspects offered in the tender submission must be included in the final contract document: price, of course, and the timing of payments. Depending on the contract other aspects could include commencement and completion dates and other programming details. Also if tender submission has been included with a stated or unstated non conformance which has been accepted by council in the evaluation process this must be included.

So it is a matter of picking a choosing what sections of the tender submission to include and what to leave out. And also whether it is better to be included by amendment to the specification / conditions of contract or whether it can be included by including part of the tender submission.

### Post tender negotiations

The results of post tender negotiations must also be included. Again like addenda they can be included by amending the specification / conditions of contract or by inclusion of post tender correspondence.

### Contract signatories

The Contractor signatories of the contract for incorporated companies are obtained from an ASIC report or a report from another organisation that provides the information.

It may be necessary to phone or email the company the council intends to contract with to find out who they get to sign the contracts, especially for electronic signing, and whether they still sign under seal (unlikely). For electronic signing it is necessary to obtain the signatories direct email address, a general company email address is not sufficient. Who signs for the company will be in accordance with the articles of association of the company. Typically a council always require the director(s) and / or secretary to sign on behalf of the company. However on occasions, for large companies the directors / secretary may be unavailable, in which case the council may approve the contract being signed on behalf of the company by an attorney under a Power of Attorney or a delegate under an instrument of delegation, provided the company provides a copy, preferably a certified copy, of the Power of Attorney or instrument of delegation.

Sole traders and partners each sign the agreement if the organisation is set up like that. Partnerships with a large number of partners – such as may be found with legal practices - may also have an instrument of delegation for contract signing so all of the partners do not have to sign.

### Draft review

The draft contract document needs to be provided to the preferred tenderer so they can review and argue for any amendment they consider warranted, prior to signature by the parties.

# Post award

## Price review mechanism - rise and fall

### General

Sometimes Contracts Officers are asked to determine the rise and fall adjustment for term contracts that are awarded and running. For annual supply contracts this is usually done annually, though it could be done only when the contract is extended, depending on the contract conditions. This is beyond award of a contract which is where the main duties for a Contracts Officer often ends. However if the Contracts Officer can help they should. And it is important to know about price review mechanisms for putting together tender documents.

Schedule of Rates Services Contracts (Deed) typically have terms for a number of years – often up to five years. In these cases it is often the case that the contract includes a “price review mechanism” that requires the council to adjust the schedule of rates in force at the commencement of the contract to be increased to allow for changes in costs due to inflation. This is not always the case. Sometimes, especially for contracts of shorter terms – up to three years – the tenderer may have been required to provide firm prices – prices that are the same in the third year of the contract as in the first year or to provide the different rates to apply in each of the three years of the contract at tender time. In times of low and stable inflation this is quite possible. A firm price for the three years of the contract effectively means that the contractor when submitting their tendered prices will have adjusted their prices submitted for the complete term to allow for their anticipated cost increases by the end of the contract. It can’t just be assumed that the contract has a price review mechanism or that the price review mechanism is a standard simple formula for price increase due to changes in the Consumer Price Index (CPI). Search for the price review mechanism, if any, in the contract document.

By the way - the price is referred to as being “firm” if it is not subject to a price adjustment mechanism (rise and fall). The term “fixed” is not correct for this usage. Fixed can mean the price is fixed to a moving index, such as the Consumer Price Index.

### Standard price review mechanism

If the contract does use the standard price review mechanism it will use the Australian Bureau of Statistics (ABS) CPI index (Melbourne All groups). The CPI data is found on the ABS website: <http://www.abs.gov.au>. The following clause, or similar, should be in the contract document:

|  |
| --- |
| The Schedule of Rates shall not be subject to any rise or fall during the Contract Term except on each anniversary of the Commencement Date\*. Council’s method of review is based on movements in the Consumer Price Index (CPI) ABS\* Catalogue 6401.0, All Groups Index Table 1 Melbourne. The formula used is as follows:  **Pnew = Pold x (1 + CPI/100)**  where: Pnew = new Schedule of Rates price  Pold  old Schedule of Rates price  CPI = the percentage movement in the Consumer Price Index (CPI) ABS Catalogue 6401.0, All Groups Index Table 1 Melbourne for the previous twelve (12) month period |

\* Ensure that the Commencement Date and ABS is defined in the document.

The formula must be very specific about which index is used for the price review. The ABS publishes a large number of different indexes. There are also indexes from organisations other than the ABS that could be used for the price review mechanism for specific contracts. Without specifying which there could be some uncertainty about what is used and the contractor may argue that a different index was intended to be used – one which more favours the contractor.

CPI data used in the formula is calculated by the ABS quarterly – for the quarters ending March, June, September and December. ABS typically publishes the data on their website the following month – typically 3 to 4 weeks into the next month after the end of the quarter. The data that council typically uses is called Catalogue 6401, All Groups Index Table 1 Melbourne.

Go to the ABS website: <http://www.abs.gov.au>. In the search box – search for “6401.0 - Consumer Price Index”.

Hopefully the first item on the search results should be the required link. It should say “Consumer Price Index, Australia” and then the last month of the most recent quarter published – the quarter just past. For example, if searching in the month of February the most recent quarter will be from December. Click on the link.

Then click in the “downloads” tab. Download the main PDF opposite - 6401.0 - Consumer Price Index, Australia

Go to Table 1. This provides “All groups CPI, index numbers”. This will probably be around page 18 – but may be different.

For example: to calculate the percentage increase in the CPI from December 2015 to December 2016.

Look in the Melbourne column and go to near the bottom of the table.

Opposite Dec 2015 – 108.3

Opposite Dec 2016 – 109.9

So the percent increase is (109.9 – 108.3)/108.3 = 0.0148 (or 1.48%)

Table 2 on the next page of the PDF in the table called – “PERCENTAGE CHANGE (from corresponding quarter of previous year)” - provides the percentage change already calculated – but only to one decimal point.

To get the new rates that will apply in the next year of the contract multiply the current rates by (1 + the percentage change/100).

### Alternative price review mechanisms

The contract may use an alternative price review mechanisms. This could be an alternative proposed by the council in the tender document or perhaps by the tenderer if this possibility is allowed under the Conditions of Tendering.

There are a number of reasons why an alternative formula may be proposed and used. For example – under a contract for road sealing the cost to the contractor of providing the service may be very dependent on the world- price of oil rather than Melbourne’s CPI increase. In this case the rise and fall formula could be a combination of an index reflecting changes in the world oil price and part the Melbourne CPI change. Another reason for a tenderer to propose an alternative price adjustment formula could be if they have a signed enterprise bargaining agreement that locks them into certain wages price increase per year which could be above the base CPI increase. The price review mechanism could also use a different ABS index instead of “Melbourne All Groups”. See the ABS website for the alternatives available.

## Variations

A Contracts Officer may be called on to formalise a contract variation. There are a few issues to be aware of when doing this. It is most likely that the contract to be varied will be in the form of a [deed of agreement](#_Deeds_of_Agreement). As previously discussed all the terms of a deed of agreement are meant to be contained within the deed itself. By definition the specific details of a variation is not contained in the original deed of agreement, however the possibility of variations being required is (usually) foreseen in the terms of the agreement. As a consequence of this when writing a variation it is necessary to reference the specific term of the contract agreement clause relating to variations and also to state that the variation work is to done in accordance with the terms of the original contract agreement deed, except those that have been specifically excluded. A variation issued in such a manner would legally be simple contract associated with the main deed contract – much like the purchase order contract formed under a [standing offer deed](#_The_Special_Nature).

Some organisations require that variations be signed by both parties as deed agreement. If this is required it is necessary to ensure that again the contractor is bound by the terms of the original contract deed - otherwise it could be seen a completely separate agreement deed only incorporating whatever is contained in the variation deed. This variation deed would be a separate deed contract to the main deed contract – so has much has been gained by setting it up as a deed? Especially if it is a small variation. If a deed is required I suggest that a template set up by and approved by the council’s lawyers be used – and its operations fully understood. I will not comment on whether a deed is a better or worse than setting up a simple variation form in accordance with the first paragraph of this section. It is a policy choice of the organisation.

## Novation

On occasions an existing contractor company may be sold to a new entity, a new contractor. The new contractor may then want to take on the rights and responsibilities of the existing contract under the new contractor’s name, rather than keeping the original company going. To achieve this, a new contract needs to be entered into with the new contractor as well as the termination of original contract with the original contractor. This process is called novation, which literally means to make new. The deed of novation is a deed agreement between the three parties: Council, the original contractor, and the new contractor.

Novation of the existing contract to the new contract can be done if the council department wants to maintain the services. There is no compulsion on the council to agree to this if there is some reason that the council doesn’t want to. If it was acceptable to the council, Section 186 of Local Government Act, and good practice, requires that due diligence be done on the new company – so Procurement and/or the client department, should get a financial report by an external organisation, such as Corporate Scorecard or Dun and Bradstreet, check their references, get proof of required insurances and interview the appropriate people in the new company, if thought necessary. The new contractor must be willing to enter into the contract on the same terms as the original contract and also willing to pay any costs associated with the novation. This is usually the legal costs and the cost of the financial report, but could include other council costs, such as the cost of writing council reports. Council may waive this and other internal council costs –– but that is up to the council.

Setting up a deed of novation is a specialist task that is required infrequently. For that reason the council would usually engage a lawyer to draw up the documents. It would not usually be done by the Contracts Officer or the new or old contractor. Council would contact a lawyer and get a quote for the novation documentation and if acceptable to all parties engage them to do the work. Alternately the deed of novation could be drawn up by the council in house legal people, if the skills exist in the council – however the costs should still be passed onto the new contractor.

The deed of novation would have to be signed by the council in accordance with the council’s instrument of delegation – so if the value of the remaining contract works is over the amount where the council officers can award a contract it would have to go to a council meeting for a resolution to sign the deed of novation under seal. For other contract values it would go to the appropriate delegate for approval and signing. A short report would need to be done outlining the reason for the novation and the due diligence done.

The new Local Government Act may have different requirements or indeed be silent on the requirements for novation. If the Act is silent then the possibility of novation should be allowed for in the council’s Procurement Policy, with similar requirements for the performance of due diligence prior to novation.

## Contract management

Contract management is not routinely required as part of the Contract Officer’s duties. However for some positions they may be required to perform contract management and / or provide training on contracts management. The subject of contracts management is large and is generally beyond the scope of these Notes, however I will provide a few brief comments.

The basic requirements of contract management are to ensure that the contractor provides the works or services detailed in the Specification to the quality\*, within the time and at the contract price contained in the contract.

\* For quality of works there may be some implied conditions that are not spelt out in the contract such as: unless a higher specification is specified, the works shall be fit for purpose, and will be to the quality that would be expected to be provided by a competent tradesperson / contractor.

The Conditions of Contract lay out the powers and duties of both parties. The Specification will provide further powers and duties but start with the Conditions of Contract. The powers and duties vary depending on the Conditions of Contract and the Conditions of Contract should have been selected by the council to provide the appropriate level of powers and duties depending on the complexity, risk and value of the contract. A complex high value contract should have a more comprehensive set of powers and duties compared to a lower value, lower complexity, lower risk contract.

Depending on the Conditions of Contract used the conditions may contain clauses covering processes for:

* contract payments including requirements for invoicing and timing of payments;
* contracts variations;
* the required contract completion date and processes for extensions of time;
* reporting and meetings;
* giving and receiving notices / communications under the contract;
* insurances – what type and level of cover is required to be provided by the parties;
* use of subcontractors – whether they are allowed and whether the council needs to be informed of, and approve, their use;
* party representatives, e.g. the superintendent or contract supervisor, for communications and the exercise of powers and performance of duties;
* programming of works and services; and
* dispute management and settlement, including processes for managing a contract breach by a party and processes contract termination.

The Conditions of Contract may not contain all these clauses but could contain many more – depending on contract complexity etc. The Specification may contain further conditions or provide further detail on the requirements. For example the Specification may provide further details on what is to be reported on and when.

Any formal written communications with the contractor must be in accordance with the Conditions of Contract and should reference the appropriate clause number(s) to indicate the power which is being invoked. The correct person for the party must sign or send the communication and it must be sent in the manner proscribed in the conditions, if any. For example if the contract supervisor has the power under the Conditions of Contract then the contract supervisor must sign / send the notice, not one of the supervisor’s subordinates that may have been assisting in the supervision of the contract, though a subordinate may prepare the communication for signature of the supervisor.

Formal meetings must be minuted and the minutes agreed to by both parties. Any informal communications should be noted in a diary or in the document management system and a decision made on whether the subject of the communications needs to be formalised by a written notice under the contract. For example a potential variation to the works might have been discussed onsite. This may need to be formalised into a variation quotation request, and variation offer from the contractor and a variation acceptance, or rejection, from council.

Payments need to be made on time and in accordance with the Conditions of Contract, otherwise council will be in breach of contract – and possibly in breach of statutory law as there is legislation governing contractor payments on construction contracts. If the payment claim is not correct the Conditions of Contract may indicate the procedure, including the timeline, that needs to be adhered to for advising the contractor of the issue. If the timeline is not adhered to the council may be required under the contract to pay the claimed amount, up to the contract sum, regardless of council’s concerns regarding the error in the claim, though any over payment would be sorted out in any subsequent payments made.

The Conditions of Contract define how the contract is to be managed and must be adhered to. If, for example, a notice is not given in accordance with the method stipulated in the Conditions of Contract, in the event of a dispute, the contractor would be able to argue that the notice had not been given at all.

## Training

Contracts Officers would routinely be expected to guide the tender evaluation panel through the tender evaluation process, especially if the tender evaluation panel is inexperienced. They may also be called upon to provide this training in a more formal setting, such as training a group of officers who are going to be involved in the tender evaluation. The information to be impressed upon these officers is contained in these Notes, primarily in the [evaluation section](#_Conflict_of_Interest).

Contracts Officers may also be required to provide training to council officers on the use of tendering and contract management web based or software based systems.

## Other duties

Contracts Officers may also be required to:

* draft contract correspondence, including contract extensions;
* provide advice on other contractual matters, including contract clause interpretation and dispute processes; and
* other duties within the officer’s competence, as directed.

# Other stuff that I don’t know where else to put in this document

## Team meetings

It is not the responsibility of a Contracts Officer to set up team meetings. These should be set up by the Senior Contracts Officer or the Coordinator. However if they are set up I provide some ideas about what the meetings should cover and aim to achieve.

One of the requirements is for the procurement processes and the standard/template documents of the procurement team to be continually improved. One way to encourage this is to have regular team meetings. Standard meeting agenda items should be used to encourage team members to:

* Suggest any change to the templates and any additional templates that should be developed;
* Suggest any change / improvement to other process and any additional process that should be written; and
* Suggest any additional training that procurement could provide directly or organise, and any additional training that procurement team members should receive as new information or refresher information.

Other items that should be included:

* Coordinator / team leader report on issues that may impact the team or happening across the council;
* Each team member to provided a progress report on their contracts and other works, and also bring up any issues that they have encountered on their contracts and elsewhere; and
* Bring up any OH&S issues – as a standing item in the meeting agenda.

These meetings should be minuted. However in addition to minutes or as an adjunct to the minutes, an issues document, either a Word table or Excel spreadsheet, should be set up where all these process improvements and changes and any other issue can be captured, responsibility to implement or investigate allocated, and progress recorded against the item in subsequent meetings until finalised and implemented or a decision is made to abandon the proposed improvement or change.

## Contracts and tendering oversight group

Suggest the establishment of an oversight group in council consisting of representative council officers from key groups in council that frequently require tender processes and are responsible for the management of contracts. The purpose of this group would be to suggest process and template changes and provide feedback on changes proposed by Procurement. It would also provide a forum where grievances can be aired and resolved.

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October 2020

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