# Procurement

## Investment Lifecycle and High Value High Risk Guidelines

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ISBN 978-1-925551-88-4
Published September 2023

If you would like to receive this publication in an accessible format please email information@dtf.vic.gov.au

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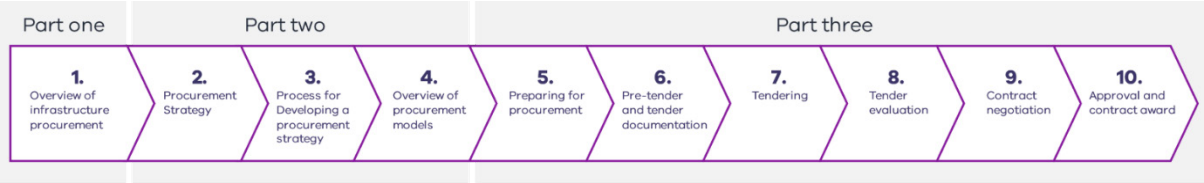
# Introduction

## Purpose

This document sets out requirements, processes and issues to consider throughout the stages of the investment lifecycle when procuring assets and infrastructure. This includes:

- detailing the principles, legislative and policy context and assurance requirements that underpin government infrastructure procurement (Part One)
- developing a procurement strategy that supports the optimal packaging, bundling and procurement approach for implementing a project and outlining the three procurement categories and the set of approved procurement models for use on Victorian Government infrastructure projects (Part Two)
- implementing the procurement strategy, which includes preparing for tender, developing documentation, conducting tenders, evaluating market responses and negotiating and awarding a contract (Part Three).

**Figure 1 – Document overview**




The guideline applies to all Victorian Government investments with a capital asset or information and communications technology component with a total estimated investment of $10 million or more. It also applies to investments which are completing a full business case in line with the Business Case Investment Lifecycle and High Value High Risk Guidelines (refer to the next section which explains the guideline suite).

The document applies to Victorian Government delivery agencies and portfolio departments. It can also be used by other industry practitioners, government stakeholders, tenderers and advisers who wish to understand government asset procurement.

The guideline is intended to be applied flexibly, depending on the size, risk, complexity and other characteristics of an investment.

The Ministerial Directions and Instructions for Public Construction Procurement (MDs), established under Part 4 of the *Project Development and Construction Management Act 1994* (Vic) establish mandatory requirements that agencies must comply with when they procure public construction works and services.

Mandatory requirements are highlighted throughout this document. Further guidance is accessible at: https://www.dtf.vic.gov.au/infrastructure-investment/public-construction-policy-and-resources

# Context

## The investment lifecycle

This procurement guide is one in a suite of guidance documents which makes up the Investment Lifecycle and High Value High Risk (HVHR) Guidelines (ILG). The investment lifecycle is the Victorian Government's process for planning, procuring and delivering asset investments, as set out in Figure 2.

**Figure 2 – The investment lifecycle**

| Business case | Procurement | Delivery |
|---|---|---|
| **Establishes need, defines benefits, explores interventions, estimates costs, identifies delivery process.** | **Explores delivery options, finalises delivery plan, engages the market, awards the contract.** | **Implements solution, transitions investment into normal business.** |
| What is the problem, issue or service need?<br>What are the benefits from addressing the problem?<br>Is there a compelling case for investing?<br>Can the project be delivered as planned? | What is the preferred method for packaging and procuring the investment?<br>Has a fair and transparent procurement process been undertaken and market responses evaluated rigorously?<br>Is there a clear, preferred tender response that addresses the investment need and optimises value-for-money outcomes? | Is the investment proceeding as planned?<br>Are the investment benefits being delivered?<br>Are changes to the investment needed? |

Gateway benefits realisation

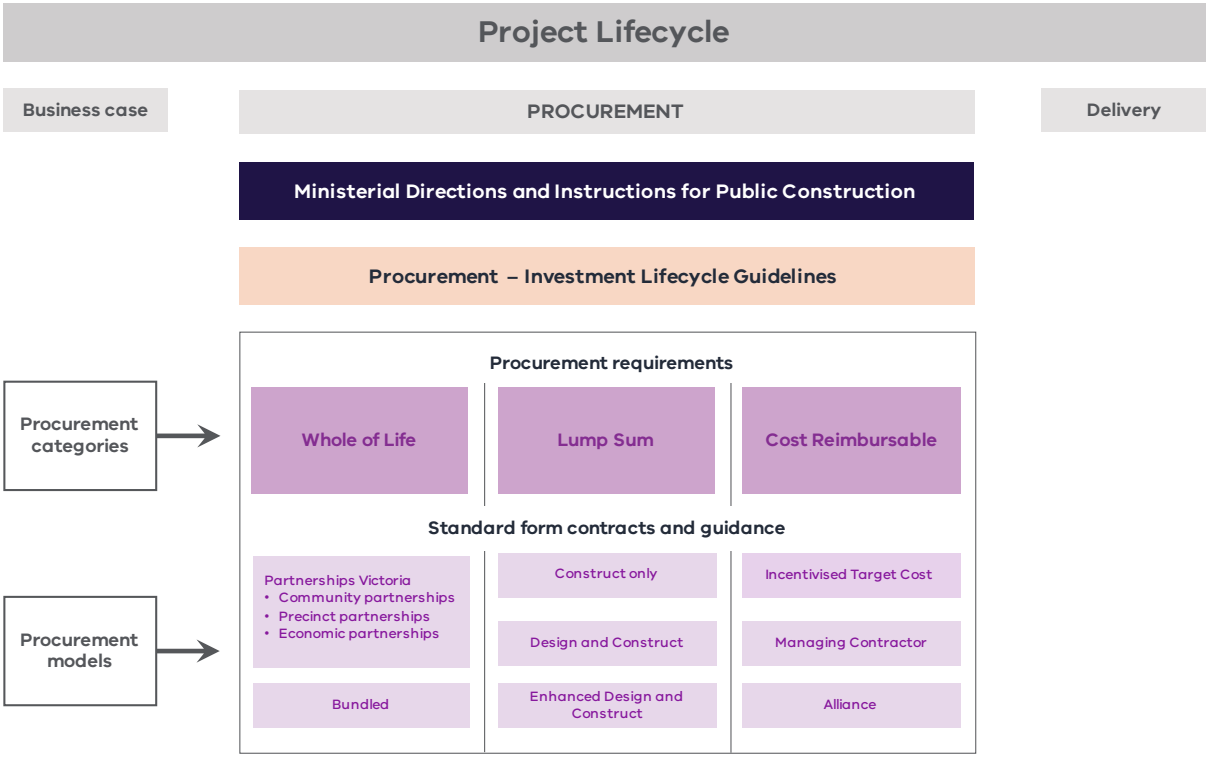
All documents within the ILG suite provide good practice guidance for delivery agencies to navigate each stage of the investment lifecycle and to successfully deliver an investment. The Procurement ILG considers processes and issues that apply to all infrastructure procurements, regardless of procurement model. Delivery agencies should read this guideline in conjunction with the following additional guidelines, templates and tools:

- the Business Case ILG (when developing a procurement strategy)
- ILG technical supplements including those relating to: ICT project procurement and delivery; project governance; project development and due diligence; risk, time, cost and contingency; sustainable investment and real options
- the procurement strategy template (a component of the business case template)
- the procurement options analysis tool.

## The infrastructure procurement framework

This Procurement ILG sits within the whole of government infrastructure procurement framework (Framework). This framework builds on the Procurement ILG by supporting the procurement and delivery of specific procurement models, as detailed in Figure 3 below.

**Figure 3 – Infrastructure procurement framework**




For each of the three categories of procurement – whole-of-life, lump sum and cost reimbursable – there is a procurement requirements document which clarifies government policy obligations and provides best practice guidance to support implementation.

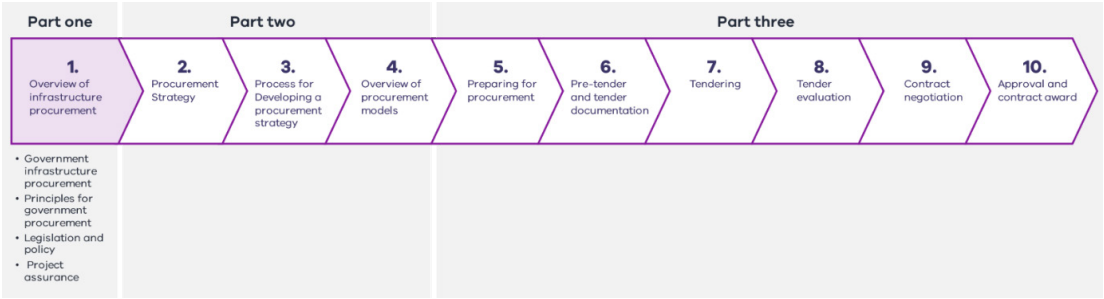
Under each procurement category there is a series of procurement models with standard form contracts (each with associated guidance) for HVHR projects supported by the Department of Treasury and Finance (DTF). Authorised contracts available for use under each procurement model are set out in Chapter 4.

Departments and delivery agencies seeking to use a procurement model outside of those outlined in this guide should consult with DTF.

# Part One: Understanding the infrastructure procurement environment

## 1. Overview of infrastructure procurement

**Figure 4 – Chapter 1 overview**




This section explains the core features of government infrastructure procurement. It outlines the principles that must be applied during procurement processes, summarises the policy and legislative context that regulate procurement activities and provides an overview of project assurance requirements.

Understanding the procurement environment is essential for selecting the optimal procurement strategy for an investment (Part 2) and effectively implementing that strategy (Part 3).

### 1.1 Government infrastructure procurement

Procurement is defined in the ILGs as the process of seeking market offers and engaging one or more respondents to deliver capital asset investments. These capital asset investments may include buildings, civil infrastructure and information and communications infrastructure.

Procurement is first considered in the business case. Here, the procuring agency establishes the procurement outcomes for a given investment and determines the optimal strategy for realising these outcomes while achieving value-for-money.

Implementation of the procurement strategy commences when government decides to invest in an initiative. The key stages are detailed in Part 3. It typically includes:

- preparing for procurement, including undertaking project development and due diligence activities to further scope and define a project's requirements, as well as any risks and constraints to their delivery
- developing pre-tender, tender and contract documentation
- engaging the market and seeking and receiving market offers to deliver the required scope of works
- rigorously evaluating offers to confirm the procurement can deliver the required outcomes and achieve value-for-money
- negotiating to confirm scope, risk allocation and cost with a preferred bidder
- awarding a contract to the successful respondent to undertake the require scope of works to deliver the asset.

Cost reimbursable models differ from other procurement models in confirming the decision for a contractor to proceed to construct an asset. They typically have two stages that are governed by different contractual arrangements.

- A development phase: here a bidder or bidders develop a project proposal for consideration by government. This will include collaboration with government and the contractor may perform early works.
- A delivery phase: here government decides to proceed with the proposal and the contractor deliver the asset.

Procurement is an iterative process. Agencies may need to revisit and reassess previous decisions and outcomes as they progress through the procurement process to account for new information as it arises.

## 1.2 Principles for government procurement

The Ministerial Directions and Instructions for Public Construction Procurement (MDs), established under Part 4 of the *Project Development and Construction Management Act 1994* (Vic), set out the principles that Victorian government departments and public bodies must follow when they procure public construction works and services.

These are accessible at: https://www.dtf.vic.gov.au/infrastructure-investment/public-construction-policy-and-resources

The principles seek to ensure the expenditure of public money is conducted lawfully, fairly and with integrity. They also balance the Government's accountabilities for responsible financial management of public resources with the need to be efficient in the way government interacts with industry. A summary of the principles for government procurement is provided in Table 1.

**Table 1 – Public construction procurement principles**

| Procurement principle | Intent |
|---|---|
| **Value-for-money (VfM)**  | VfM is an assessment of procurement outcomes that weighs the cost of procuring infrastructure against the **value** it provides.<br>Tender evaluation and selection considers:<br>• the total benefits and costs over the life of the goods, services or works procured (not the lowest upfront price)<br>• a range of attributes to define value, including service delivery outcomes and timeliness of benefit realisation, quality and suitability of the works, services and goods, financial benefits, risk exposure, policy alignment, convenience, resource use and social and environmental impacts. |
| **Accountability commensurate with appropriate levels of authority and responsibility**  | Procurements proceed with appropriate approval and authority in accordance with delegation and decision-making thresholds, to:<br>• align procurement needs with the agency's long-term strategic planning, service delivery requirements as well as legislation, government policies and priorities<br>• confirm approval to proceed with the procurement is provided by an officer with appropriate financial delegation and authority<br>• undertake appropriate procurement planning to confirm objectives are deliverable<br>• give the public confidence in government's expenditure of public resources, avoid waste, ensure resources are used in a proper manner and in the community's best interests and ensure benefits are maximised. |
| **Transparency and competition**  | Procurement processes are transparent, appropriately competitive and contestable and provide equal opportunity to all parties, to:<br>• ensure that competent contractors are not deterred by poor processes, lack of access or information, inadequate response times or cost of tendering<br>• encourage fair competition throughout the procurement process. |

| Procurement principle | Intent |
|---|---|
| **Probity**  | Proper and ethical standards and high levels of integrity are demonstrated in the conduct of all commercial transactions, including procurement processes and evaluations, ensuring defensibility of processes. Adherence to this principle involves:<br>• ensuring all tender participants are treated fairly and equally, by avoiding any practice that gives one party an improper advantage over another<br>• maintaining confidentiality throughout the procurement process<br>• managing all actual and perceived conflicts of interest<br>• respecting the intellectual property rights of all parties by not using intellectual property submitted with a tender to obtain prices from, or negotiate with, other tenderers for like or similar scope<br>• exhausting negotiations with the initial best value tenderer before negotiating with subsequent tenderers<br>• not negotiating with more than one tenderer at a time, unless the tender process has been designed to allow this, or trading off one tenderer's price against another, in an attempt to obtain a lower price.<br>For further information on applying probity to government procurements, including requirements for appointing a probity adviser and or auditor, see https://www.buyingfor.vic.gov.au/plan-probity. |
| **Scalability and efficiency**  | Tender processes are efficient, timely and reduce unnecessary burdens on all parties. In practice this involves employing appropriate procurement models and processes, taking into account of the complexity and value of the project and its market capability. |
| **Building skills and capability**  | Procurement is leveraged to foster capability development and intergenerational skills transfer in construction across both the public and private sectors. Key aspects of this principle include:<br>• identifying lessons learned from past projects to inform new project development and delivery approaches, better risk management practices and improved contractor management<br>• leveraging government procurement to identify and address skills gaps and support capability development by Victorian public sector and industry practitioners<br>• sizing and packaging works in a way that best considers market capacity across all tiers of industry. |
| **Continuous improvement**  | Adoption of innovative and modern methods of construction to drive continuous, incremental improvements to productivity in the construction sector. This will encourage appropriate innovation and responsiveness from the market. |

## 1.3 Procurement legislation and policy

State, Commonwealth and local government legislation, policies and frameworks establish accountabilities, mandatory requirements and expectations for both government and industry practitioners in the procurement of government infrastructure.

MD 7.2.1 requires agencies to ensure public construction contracts comply with relevant legislative and policy requirements and mandates compliance with a selection of policies.

This section outlines key[1] legislation and policies which agencies may need to consider in the planning, implementation and outcomes of procurements. – Legislation and policy provides further detail on these, including the purpose of the legislation or policy and their impact on infrastructure procurement and delivery.

This section is not exhaustive. Legislation and government requirements evolve over time. Agencies should undertake their own due diligence at procurement commencement to identify any legislative or policy requirements they will need to address for a project.

### 1.3.1 Primary enabling legislation and policies for infrastructure procurement

For public money to be spent for any purpose, there must be lawful authority for an agency to spend it for that purpose. The following Acts are examples of primary legislation that governs how agencies can use that money for infrastructure investment and delivery. These include requirements for ministers to account to parliament to ensure financial resources are appropriately managed.

**Legislation that enables and regulates Government spending on infrastructure**

- ***Financial Management Act 1994***: Sets out requirements for the use of public money, including:
  - the Treasurer's and Assistant Treasurer's accountabilities for the Government's overall financial performance, including for the delivery of the State's capital program
  - principles and ministerial and agency accountabilities for infrastructure procurement.

[1] This guideline does not outline local government requirements for infrastructure delivery. Agencies are encouraged to identify and engage with any local councils that may impose requirements that need to be considered throughout the procurement process.

- **Annual Appropriations Bill**: Sets out the Government's infrastructure priorities and outlines the amount of public money appropriated to each Department to deliver the asset proposals approved in the annual State Budget.
- The ***Public Administration Act 2004*** and the ***Audit Act 1994***: Establish accountabilities for decision making and resource management and ensure the Government is held to account for the responsible and appropriate spending of public money.

**Legislation that facilitates infrastructure project procurement and delivery**

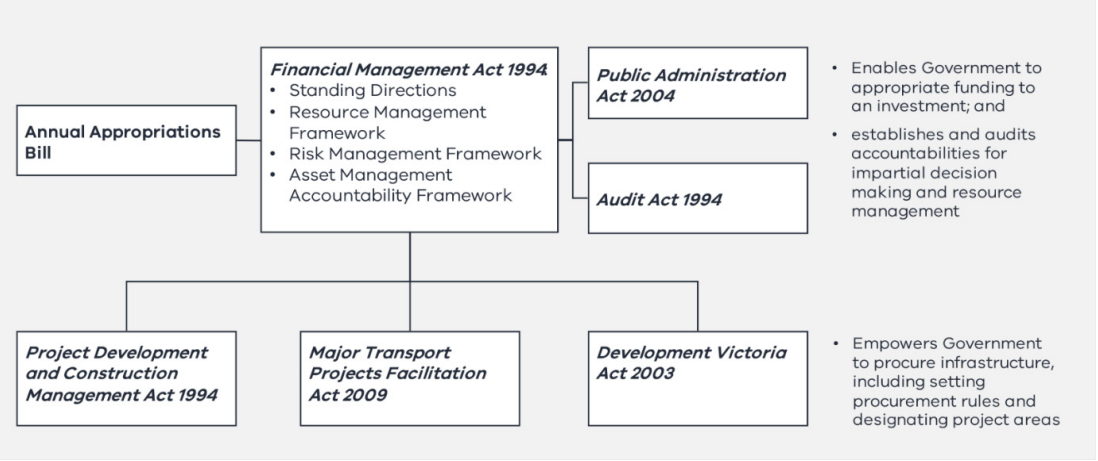
- ***Project Development and Construction Management Act 1994*** **(PDCM Act)** and associated Ministerial Directions for Public Construction Procurement: The primary legislation used by agencies to procure construction works and services. It sets out the framework, rules and requirements for procuring infrastructure, including:
  - competition and contestability requirements, including thresholds for limited, selective and open tendering
  - transparency requirements, including for communicating tender open times and evaluation criteria
  - probity requirements to ensure procurement processes are robust
  - requirements for compliance with subordinate legislation and policies, including International Agreements and State and Commonwealth policy requirements
  - contracting requirements.

The Ministerial Directions for Public Construction Procurement (MDs) apply to the procurement of construction works or services undertaken by, or on behalf of, a government agency.

All agencies are required to comply with the MDs, except for Excluded Entities such as school councils, cemeteries, some committees of management and certain emergency services bodies such as volunteer fire brigades.

- ***Major Transport Projects Facilitation Act 2009*** **(MTPF Act) and** ***Development Victoria Act 2003***: Provide alternative legislation to facilitate the delivery of major transport projects, property development and social and economic capital works projects, respectively. This legislation enables planning and environmental assessments and approvals to be sought efficiently.

**Figure 5 – Primary legislation for infrastructure procurement**




### 1.3.2 Secondary legislation and policy frameworks for infrastructure procurement

Secondary legislation and policy frameworks also need to be considered throughout infrastructure procurement. Table 2 below provides a high-level overview of legislation and policy that agencies commonly need to consider at each stage of the investment lifecycle and procurement process.

**Table 2 – Subordinate legislation and policy that governs infrastructure procurement**

| Legislation and policy that: | |
|---|---|
| Facilitates project development and due diligence to scope and cost project risks: | • *Building Act 1993*<br>• *Climate Change Act 2017* |
| Supports assessment and approvals of project risks and seeks to address stakeholder issues: | • *Planning and Environment Act 1987*<br>• *Environment Protection and Biodiversity Conservation Act 1999*<br>• *Environmental Effects Act 1978*<br>• *Aboriginal Heritage Act 2017*<br>• *Heritage Act 2017*<br>• *Victorian Civil and Administrative Tribunal Act 1999* |
| Facilitates site acquisition and readiness and early works: | • *Crown Land (Reserves) Act 1978*<br>• *Land Act 1958*<br>• *Sale of Land Act 1962*<br>• *Subdivision Act 1988*<br>• *Traditional Owners Settlement Act 2010*<br>• *Transfer of Land Act 1958* |

| Legislation and policy that: | |
|---|---|
| Sets rules and requirements for the conduct of government procurement: | • Ministerial Directions for Public Construction Procurement<br>• International agreements<br>• National Alliancing Policy and Guidelines<br>• National Public Private Partnerships Policy and Guidelines<br>• Victorian Government Procurement Board |
| Regulates construction practices to ensure work is undertaken safely by appropriately qualified practitioners: | • Australian Government Building and Construction OH&S Accreditation Scheme<br>• *Building Act 1993* and associated regulations<br>• National Building Code<br>• *Occupational Health and Safety Act 2004*<br>• *Professional Engineers Registration Act 2019*<br>• Prohibition of High-Risk External Wall Cladding Products Declaration |
| Addresses industrial relations issues to ensure fair work practices and payment is upheld: | • *Building and Construction Industry Security of Payments Act 2002*<br>• Fair Jobs Code<br>• Fair Payments Policy<br>• Tip Truck Policy<br>• *Trade Practices Act 1974* |
| Sets rules and requirements to optimise social, environmental and economic values in the outcomes of government procurement. | • Building Equality Policy<br>• DataVic Access Policy<br>• Digital Asset Policy<br>• *Gender Equity Act 2020*<br>• Local Jobs First Act<br>• Protective Data Security Standards<br>• Recycled First Policy<br>• Social Procurement framework<br>• Supplier Code of Conduct<br>• Value Creation and Capture Framework |

## 1.4 Project assurance

Project assurance is the independent monitoring of project delivery performance, against service delivery outcomes and cost and time parameters, to provide the Government with confidence that a project is ready to proceed to the next stage of the project lifecycle.

Agencies are required to apply a level of assurance to their projects commensurate with project cost and risk, as outlined in Table 3:

**Table 3 – Project assurance requirements by project value**

| **All projects <$10 million** | **Non-HVHR**<br>Low risk projects >$10 million and <$250 million | **HVHR**<br>Projects valued >$250 million or risk-based from $100 million |
|---|---|---|
| • Portfolio departments and/or agencies apply internal assurance processes | • Central agency oversight through the quarterly asset investment reporting process (QAIR) | • Central agency oversight through:<br>– DTF – the HVHR Framework<br>– Whole of Life Requirements (for projects delivered using the Partnerships Victoria procurement model)<br>– Cost Reimbursable Requirements (for projects delivered using cost reimbursable procurement models) |

### 1.4.1 Why does DTF undertake project assurance?

Under the *Financial Management Act 1994*, both the Treasurer and the Assistant Treasurer are accountable to parliament for the overall financial management performance of the State including the state's capital program. Central agency project assurance supports these ministers to discharge their legislative accountabilities. It is applied under authority of section 4.2 of the *Standing Directions 2018* issued under the *Financial Management Act 1994*.

### 1.4.2 High Value High Risk framework

The HVHR framework comprises a series of project assurance checks and processes that facilitate greater central agency scrutiny and ongoing Treasurer oversight and approval of those major infrastructure and ICT projects that are considered to have the highest risks. Assurance checks are independent and undertaken for the Government to inform decision -making.

The HVHR framework seeks to:

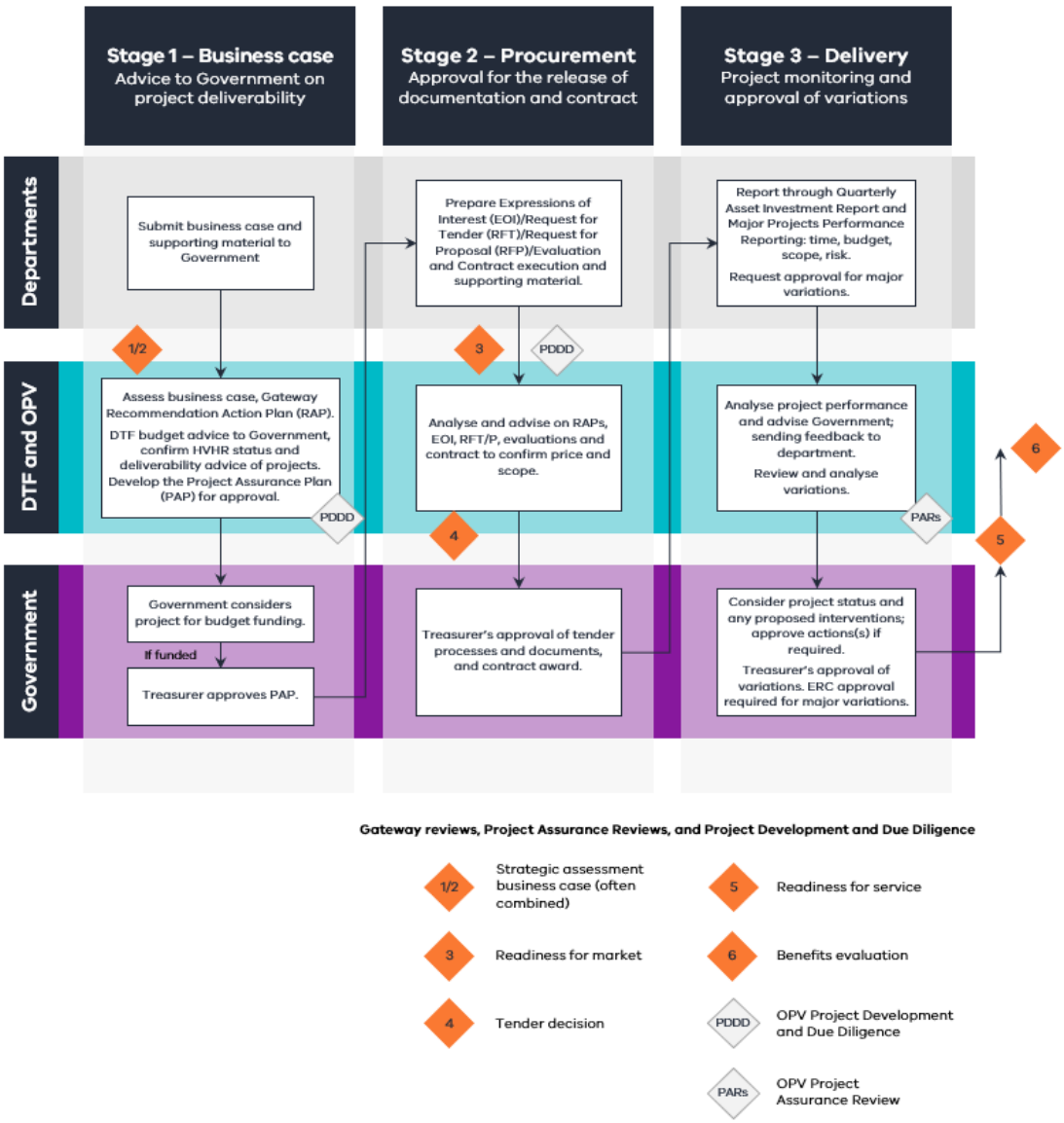
- verify that robust project planning and procurement processes have been undertaken and related documentation has been prepared to meet a high standard of quality
- provide impartial and informed advice to the Government on deliverability risks
- increase the likelihood that projects will be delivered successfully on time, to budget and with their stated outcomes and benefits.

The HVHR framework includes a range of project assurance checks as outlined in Table 4 and Figure 6.

**Table 4 – The HVHR framework**

| HVHR assurance checks | What each check involves |
|---|---|
| Treasurer's oversight and approval throughout the project lifecycle | • Treasurer approval at key milestones, including procurement documentation release, shortlisting, selection of preferred tenderer, contract award and major contract variations<br>• Closer Treasurer oversight of time, scope and budget reporting |
| DTF direct engagement in a project throughout the project lifecycle | • DTF participation in the project steering committee, project control groups, tender evaluation committees and other governance bodies and processes<br>• DTF review of draft business case and procurement documentation<br>• DTF assessment of projects at key milestones |
| Major project performance reporting undertaken quarterly throughout the project lifecycle | • Agency-led quarterly reporting to government on the performance of major projects, tracking cost, time scope and risk areas that includes:<br>– the entire capital portfolio view of risk<br>– commentary on individual project performance and actions being taken to address risks and issues |
| Independent gateway reviews undertaken at key 'gates' or project milestones throughout the project lifecycle | • Independent reviews that examine projects at six key decision points in their lifecycle and provide timely and confidential advice to the project team about progress and likelihood of delivery success<br>For more information see: https://www.dtf.vic.gov.au/infrastructure-investment/gateway-review-process |
| Independent project assurance reviews undertaken as required throughout the project lifecycle | • Independent reviews that complement the Gateway Review Process and provide advice on a project's current progress, its objectives, governance and readiness<br>For more information see: https://www.dtf.vic.gov.au/infrastructure-investment/gateway-review-process |

**Figure 6 – Project lifecycle and HVHR project assurance process**




DTF prepares and agrees a project assurance plan (PAP) for HVHR projects at project approval stage, prior to commencing procurement activities. The PAP determines which HVHR assurance processes will be applied to a given project. Projects may also be subject to technical assurance reviews. Further information on the HVHR framework can be found at: https://www.dtf.vic.gov.au/infrastructure-investment/high-value-high-risk-framework.

### 1.4.3 Projects not considered HVHR

**Projects valued at $10 million or greater** are required to undertake QAIR to report to government on project progress and delivery confidence every quarter.

**Projects valued less than $10 million** are not subject to central agency assurance. Practitioners should apply departmental assurance processes as appropriate.

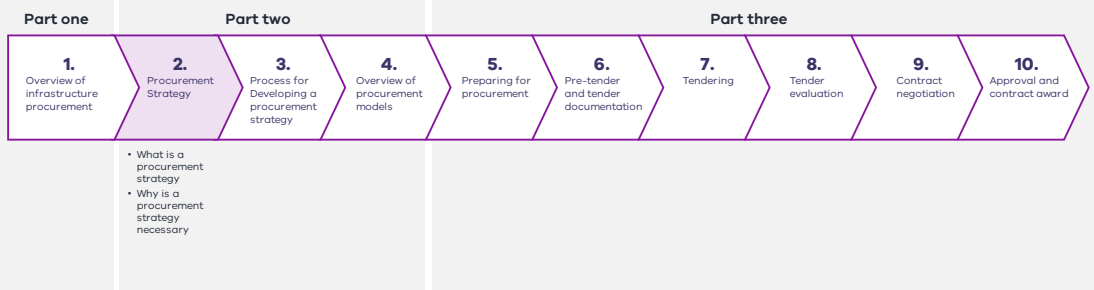
# Part Two: Developing the procurement strategy

This section outlines the approach to developing and documenting a procurement strategy. It includes undertaking analysis for project structuring, bundling and packaging strategies and procurement model selection. It identifies the decision points and recommendations to be made in each step, highlighting the key issues that underpin those decisions.

It also provides an overview of the different procurement models, their key features and when they are best used. It also lists the Government's standard form contracts available for use. The resulting strategy provides the road map for implementing the procurement (Part Three).

## 2. Procurement strategy

**Figure 7 – Chapter 2 overview**




### 2.1 What is a procurement strategy?

A procurement strategy establishes the procurement outcomes for a given project and sets out a high-level plan for optimising and achieving them. It documents (to the scale and complexity suitable for the project) the intended project structure, bundling and packaging approach, the consideration of the appropriate procurement model(s) and identifies the project characteristics and risks that are likely to have the greatest influence on successful procurement and delivery.

The procurement strategy then presents an assessment of the ability to achieve the procurement outcomes under different procurement models, having regard to the desired project structure and packaging approach as well as key risks and considerations. It makes a recommendation on the overall procurement approach that will maximise the service outcomes of an investment while delivering superior value-for-money.

The procurement strategy is a key component of a full business case, as the decision to fund a project includes a decision on the procurement methodology supported by robust analysis of all suitable procurement options. The full business case must demonstrate that the investment would be procured by the most appropriate method and provide an overview of the recommended procurement strategy.

## 2.2 Why is a robust procurement strategy necessary?

A robust procurement strategy ensures that a project's approval and funding decision is underpinned by a justifiable, evidence-based rationale for the recommended procurement approach. It provides decision-makers with confidence that the risks and issues likely to impact project procurement and delivery have been identified and analysed and will be appropriately managed. This improves the likelihood that a project can be delivered on time, on budget and to scope.

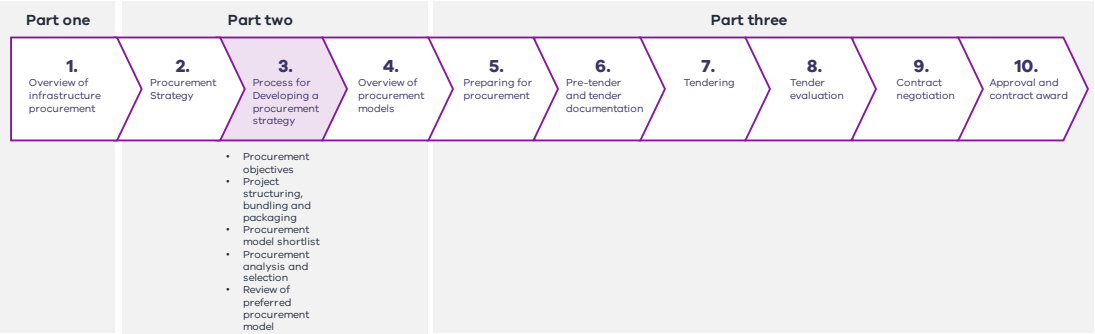
Depending on the selected procurement approach, project parties will have different accountabilities and responsibilities. There will be different implications for how project risks are allocated and treated, how cashflows are managed and for governance arrangements and stakeholder interactions. Selecting a suboptimal approach can have serious consequences for the success of the project's delivery and the realisation of the project's benefits, undermining the case for the investment.

The procurement strategy supports the justification that an investment can be procured in accordance with government legislation and policies.

The Government's decision to invest includes approval of the overall procurement approach at the business case stage. The recommended procurement approach will be retested and reconfirmed in the detailed development and procurement stages, as more detailed information on scope, risks and market feedback are obtained.

# 3. Process for developing procurement strategy

**Figure 8 – Chapter 3 overview**



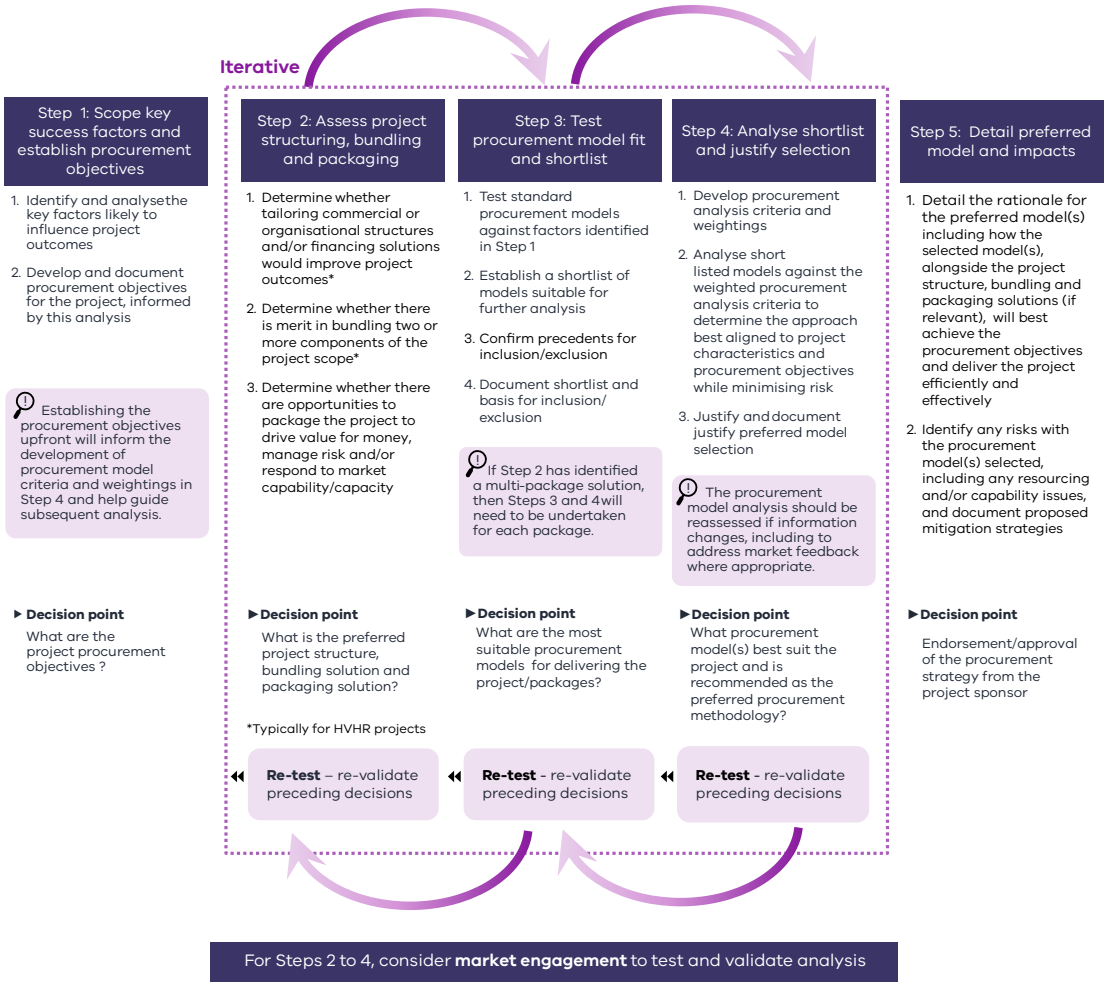

Developing and documenting the procurement strategy includes five steps:

- **Step 1**: Identify the key project characteristics, risks and other issues likely to influence the success of the project and establish procurement objectives.
- **Step 2**: Confirm project structuring (including the applicability of programmatic approaches), bundling, packaging strategies.
- **Step 3**: Test the procurement model fit and shortlist.
- **Step 4**: Undertake detailed procurement model analysis to identify which procurement option is likely to optimise project or program strategic objectives, address risks and deliver public value.
- **Step 5**: Detail the preferred procurement model(s), including addressing how any remaining risks and issues will be managed in the delivery phase confirming what controls (if any) are needed to realise the given procurement model.

These steps are set out in Figure 9 and are detailed in this section.

Project structuring, bundling and packaging decisions should be made up front with procurement model shortlisting, analysis and selection (Steps 3–5) undertaken for each identified bundle or package. However, the process is iterative and project structuring, bundling and packaging decisions may need to be revisited if after subsequent stages they are found to be suboptimal.

**Figure 9 – Process for developing a robust procurement strategy**



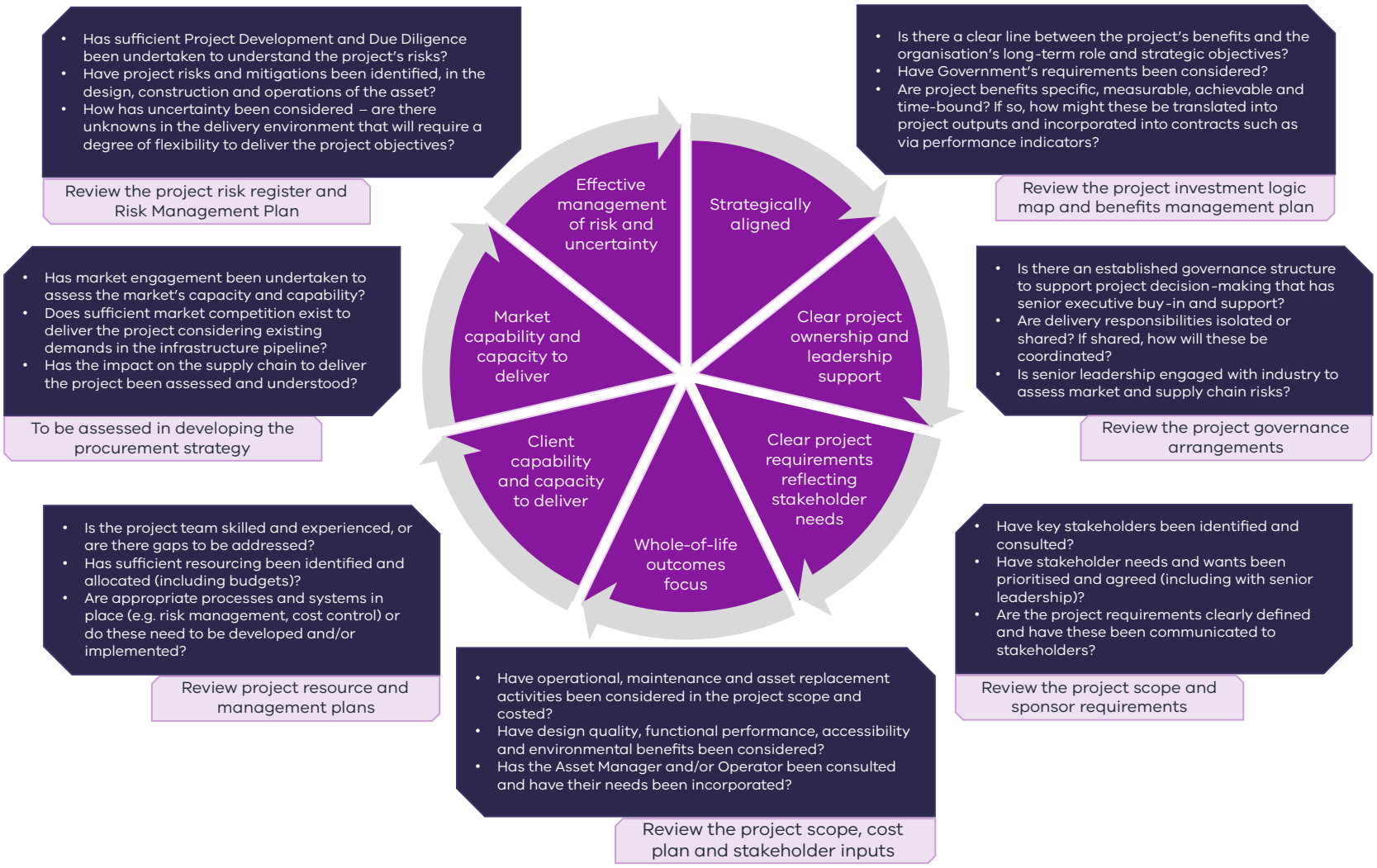

## 3.1 Step 1: Scope key project success factors and establish procurement objectives

The first step in developing a procurement strategy is to identify the key issues that may impact the successful delivery of the project outcomes and from this establish clear procurement objectives. This step will inform decisions on project structuring, packaging, bundling as well as the selection of criteria and associated weightings for procurement model options analysis (Step 4). By thoroughly understanding the project's requirements and delivery context and developing procurement objectives to suit, practitioners can ensure that the procurement strategy is aligned with the project goals and set-up for success.

### 3.1.1 Key factors in project delivery performance

To effectively initiate procurement strategy development, it is crucial to assess the key elements of successful project delivery and evaluate the current state of development as documented in the business case and related materials. This assessment supports an outcomes-focused procurement approach that maximises public value. Figure 10 below outlines the key success factors and considerations for project delivery performance which may already be addressed in the business case and related documentation. Each element is integral to the development of a robust procurement strategy.

**Figure 10 – Key factors in project delivery performance**



### 3.1.2 Identify key issues influencing project performance and success

> ***Decision point:*** *What aspects of a project (including objectives, characteristics, risks and controls), its delivery and operational environment will have the greatest influence on project success?*

To develop a successful procurement strategy, it is crucial to thoroughly understand the project at the outset. This involves identifying the key issues, risks and opportunities facing a project and how these impact on the successful delivery of its objectives.

This understanding is typically achieved in a workshop setting with the project team and relevant subject matter experts. Subsequent steps in developing the strategy rely on this information. Therefore, it is essential to invest sufficient effort upfront in understanding and scoping the project to the greatest degree possible.

Many of these issues will already be documented in other sections of the business case and these issues should be distilled rather than reconsidered in full. However, issues not documented or considered in other sections of the business case will require substantiation in the procurement strategy.

Common factors impacting project delivery success are listed in Table 5, prompting questions to assist in identifying key issues, risks and opportunities listed in Appendix B. The extent to which these issues need to be explored will depend on the scope and scale of the project, with HVHR projects requiring in-depth assessment across all areas.

The procurement strategy should briefly explain the implications of these issues for procurement and how or why they are likely to inform the procurement strategy.

**Table 5 – Types of issues influencing project delivery performance and success**

| |
|---|
| **Project objectives** |
| 🔎 Assess the project to outline the client's objectives for social, economic, environmental, cultural, security, safety or operational outcomes, as well as any desired legacy benefits. |
| **Project characteristics** |
| 🔎 Assess the project's scope, scale, location and value, site characteristics, construction complexity, commercial opportunities and key challenges. |
| **Operational requirements** |
| 🔎 Assess the performance level of core and non-core services, including what aspects Government should retain to ensure core service delivery. |
| **Delivery constraints/opportunities** |
| 🔎 Assess the project's delivery issues including site status, planning and approval requirements and related network impacts. |

| Time constraints |
| --- |
| Assess the degree of flexibility in delivery timelines, drivers for target dates and consequences of not achieving them. |
| **Budget constraints** |
| Assess the need for strict budget and price certainty and maturity of the cost estimate. |
| **Design requirements** |
| Assess the project's design maturity and needs, including design features, quality standards and the need to maintain control over the design and the need for innovation or change during the design and construction phases. |
| **Project risks and opportunities** |
| Assess all major opportunities and risks outlined in the project's risk register, such as those relating to site issues, permits, design, materials and constructability, market conditions and capacity, public interest and stakeholder issues and any project externalities that would change the project's risk profile if they were to materialise. Risk allocation and management has significant bearing on procurement and project delivery and is considered further in Step 4 below. |
| **Client capacity and capability** |
| Assess client capability and capacity against the needs and complexity of project delivery requirements to determine whether current project delivery skills and resources are aligned to the project's needs, the delivery environment and the client's long-term role in the project outcomes. |
| **Market capacity and capability** |
| Assess the capability and capacity of contractors and suppliers to deliver the project including any weaknesses or risks in the market. This assessment is often critical to assessing packaging options. |

### 3.1.3 Establish procurement objectives

***Decision point:*** *What are the procurement objectives of this investment?*

Now with a clear understanding of your project's characteristics and its delivery and operational environment, practitioners should agree on a clear set of procurement objectives to guide development of the procurement strategy. It is important to note that procurement objectives differ from project objectives, which are established early in the business case and outline the project's intended outcomes, such as social and economic benefits.

*If the project objectives are about **what** the project delivers, the procurement objectives are about **how** those outcomes are achieved.*

This guide provides a set of procurement objectives that generally apply to all public infrastructure investments in Victoria. However, practitioners should adapt these common objectives to reflect the unique characteristics and delivery contexts of their projects.

Procurement decisions often involve trade-offs, so it is important that objectives are suited to the individual project needs and circumstances. Notwithstanding, procurement decisions should have a central focus on whole-of-life quality and cost outcomes and the effective management of risk and uncertainty over the project lifecycle as these combinations drive public value.

Delivery agencies should avoid pursuing policy objectives that are addressed through other policy levers or policy objectives that are already covered in whole-of-government procurement policies (such as the Victorian Social Procurement Framework). Delivery agencies should also refrain from setting objectives that do not support VfM outcomes. Depending on specific project circumstances, an example of this might be meeting project commencement milestones rather than considering project completion milestones.

Developing procurement objectives is often undertaken in a workshop setting with the project team and relevant subject matter experts. DTF is available to assist project teams in developing procurement objectives, especially if objectives vary from those outlined in Table 6 below. While variation from common objectives set out below can be considered by project teams, sufficient justification must be provided to explain how they deliver public value. Project teams should take care not to confuse procurement objectives (which provide overarching guidance, aiding in project structuring, bundling and packaging consideration) with procurement model selection criteria, which are used to differentiate the suitability of shortlisted procurement models at a later stage in the development of the procurement strategy.

**Table 6 – Common procurement objectives and how they can apply in developing the procurement strategy**

| | | Key value driver | | | |
|---|---|---|---|---|---|
| **Objective** | **Description** | **Structuring** | **Bundling** | **Packaging** | **Model selection** |
| Whole-of-life cost effectiveness | Enhance whole-of-life cost outcomes by achieving cost effectiveness during construction and operations | | | | |
| Quality outcomes | Enhance whole-of-life benefits of the asset such as its functionality, environmental benefits and the performance of the asset to the end users/operators/asset managers | | | | |
| Market participation and competition | Promote market participation, capability, competition, innovation and continuous improvement to drive value-for-money given current market and supply chain dynamics | | | | |
| Timely delivery | Deliver the service outputs in required timeframes | | | | |
| Effective management of risk and uncertainty | Achieve efficient risk pricing by retaining, sharing or allocating risks and incorporating flexibility where required to manage uncertainty, to deliver the project outcomes given the project's delivery and operational context | | | | |

## 3.2 Step 2: Project structuring, bundling and packaging

Building on the foundation established in Step 1, practitioners should now utilise their procurement objectives and comprehensive understanding of their project's characteristics to guide consideration of the most suitable project structure, bundling and packaging approach. The requirements of this step will vary depending on the project's scale and complexity. For HVHR or mega projects[2], practitioners should consider project structuring and bundling opportunities to deliver the project efficiently and add value. At a minimum, a project packaging analysis should be undertaken in all circumstances, regardless of the size of the project. It is important to complete this step before moving on to procurement model shortlisting and analysis for each project bundle or package (Steps 3–5). The structuring, bunding and packaging approach may need to be reworked as additional market and project detail comes to light through subsequent stages of the procurement analysis.

Practitioners should also consider the benefits of market engagement to inform project development and due diligence (PDDD) when it comes to structuring, bundling and packaging determinations.

[2] Megaprojects are valued at $2 billion or more.

### 3.2.1 Project structuring

Some projects (such as HVHR or megaprojects) may warrant consideration of the supporting commercial structures, financing solutions and organisational delivery structures to address project delivery issues or optimise government investment.

> ***Decision point:*** *Is there a need to consider commercial and organisational structuring for the project or alternative funding streams? If so, what is the optimal project structure?*

Structuring requirements will generally be present where either (or both) of the following factors are in play:

- there is a need to manage a large and complex project or program of work, and this may require adapting organisational design or client capability and capacity to deliver the works
- there are material commercial or financial opportunities associated with a project that may open alternative delivery arrangements that can support other government priorities.

**Project structuring checklist**

Consider the following questions. If 'Yes' or 'Maybe' is your response to any of these questions, you should engage DTF early to assess potential structuring options.

- Is there a need to significantly augment organisational capability and capacity to manage complex system and broader network integration, supply chain management and project interfaces during delivery that may warrant the establishment of a dedicated departmental delivery function or separate delivery agency?
- Is there a need to manage competition requirements or supply chain constraints, particularly at a portfolio or programmatic level?
- Is there a significant pipeline of similar works expected over an extended period (for example, 5–10 years) that may merit a programmatic approach?
- Are there opportunities to optimise the project's scope or commercial character to appeal to potential project partners such as community groups, financiers or equity investors (for example, enabling creation of separable commercial revenue streams)?
- Is there a need for government involvement in, or an opportunity to deliver improved outcomes through, otherwise private sector-led projects (for example, joint venture arrangements with private partners)?
- Is there is need to deliver a project as part of a broader commercial enterprise or opportunity (for example, public non-financial corporations delivering or owning and maintaining built assets, not including routine arrangements)?
- Are there opportunities to mitigate the Government's funding requirements or balance sheet exposure to the project through, for example, new revenue generation, cost offsets or third-party financing?

When evaluating project structure options, it is important to consider the broader operating context and whether alternative structuring could better manage risk, enhance project outcomes or provide more opportunities to drive value-for-money.

#### 3.2.1.1 Addressing complexity and governance

This assessment should consider the size and complexity of the project and the client's current capacity and capability to deliver. Considerations can include:

- the optimal organisational structure (including form, capacity and capability) for delivering the project
- the roles of sponsoring agencies, existing delivery agencies and other key stakeholders
- the need for establishing specific project entities and optimal project governance arrangements
- the need for maintaining design control.

**An integrated delivery partner can augment client capability and capacity**

Consider an integrated delivery partner (IDP) for complex projects that require significant system integration, supply chain management, program-wide delivery integration, owner capabilities and development, increased front end project development and external due diligence activities. IDP arrangements vary from consultancy engagements to highly-integrated project teams where internal project management is supplemented or fully supplied by the delivery partner for the project's duration. An IDP service offering can range from business case and procurement support through to implementation (including construction management services).

An IDP can identify effective packaging and support delivery of a broader range of procurement models and packaging options that may not be feasible relying on internal capability. This option may be particularly relevant for agencies where project delivery is not a core function. An IDP can also provide existing systems, expertise and resources to support project delivery. It can allow for phasing of design and construction as well as disaggregating supply and delivery contracts, such as long lead items and owner-supplied materials.

An IDP model could be suitable for:

- large scale projects or programs of work with challenging interfaces, network and program constraints
- high complexity or specialised project scope, for example, requiring tailored supply chain management strategies.

IDP fees may include:

- a fixed fee for management functions
- the reimbursement of actual costs on open book basis
- performance incentives in the form of gainshare/painshare regimes and for on time completion.

#### 3.2.1.2 Programs and time-based contracting

Structuring may also be driven by the need to manage a pipeline of similar projects to be delivered over an extended period (for example, 5–10 years or more). Therefore, it is important to establish how the project aligns with other related projects, initiatives, programs or proposals, having regard to:

- the need to integrate into a broader program of work
- the extent to which procurement decisions will impact related projects (including timing)
- opportunities to leverage supplier expertise or competencies
- the ability to phase design and construction and identify opportunities to overlap and fast-track schedules, avoid abortive works or leverage other programs of work.

Projects aggregated to enable a program approach are typically stand-alone work packages that are relatively similar with known scopes of programmed works and to be carried out over an extended period (5–10 years or more). A major advantage to programs when implemented effectively is achieving sustained levels of efficiency in a pipeline of work over the medium to long term.

A common feature of a program approach is that it is 'time bound', meaning that contractors are engaged for an initial period, works package or both, with an opportunity for further work subject to performance and a robust approvals process. This helps drive strategic, long-term partnerships with industry, in turn encouraging greater investment in capability and capacity (including skills, plant, technology and materials).

The benefits of program and other time-based contracting approaches include:

- supporting contractors' proactive planning and mobilisation of resources, avoiding 'stop-start' procurement and delivery
- securing volume discounts and reductions based on greater certainty of workload
- leveraging existing relationships with key stakeholders, including local councils, operators and utilities providers
- incentivising contractors to invest in continuous improvement and innovation from project-to-project
- facilitating cross-program information sharing and opportunities for whole-of-sector efficiencies such as design standardisation and the adoption of new technologies, materials and processes
- incentivising contractor performance by rewarding performance with additional works in the pipeline or setting efficiency requirements to be achieved over time
- expanding the market or supply chain, with a particular focus on cost and risk allocation and overall affordability of infrastructure development, by providing certainty in a pipeline of work.

Effective programs can also streamline the tendering process and reduce tender costs by establishing a framework upfront with a relatively small number of participants (less than 10 grouped by experience and capability) through a competitive process. Individual project procurements can then be fast-tracked as standard prequalification and expression of interest (EOI) processes are replaced with these agreements, which establish a pre-agreed contractual and commercial framework for the procurement of future works.

Projects and programs procured in this way must still build in 'competitive tension' including by benchmarking and other mechanisms that seek to validate, quality and performance to ensure work allocations demonstrate VfM. This is particularly critical where work is directly allocated, rather than awarded through smaller competitions of select panel suppliers. These programs also require effective planning, management and governance to deliver efficiencies in design and construction.

The selection of a procurement model under a program or other time-based contracting approach will depend on the nature of the individual projects to be delivered as well as the outcomes and benefits that the program is aiming to deliver. The procurement strategy must demonstrate the preferred procurement model(s) are best suited on an individual project basis and collectively as part of the program.

**Program alliances**

A program alliance is a procurement model that combines multiple similar projects to be undertaken under an alliance contract model. The specific number, scope, duration and budgets of these projects may be unknown and potentially the same participants will be responsible for delivering all projects. These are often established to deliver a long-term pipeline of capital works, typically lasting 5-10 years.

Once formed, program alliances can also serve effectively as prequalified panels of potential alliancing parties. This assists agencies to efficiently select prequalified parties for an alliance for a specific project or package of related works.

While program alliances provide a range of benefits there are some risks. Successfully navigating these risks involves:

- managing the allocation of work carefully, given that this can occur via allocation criteria rather than scope and price competition at contract award
- ensuring that there is a sophisticated, active and informed client that can prepare appropriate cost benchmarks to negotiate with the contractor
- making sure that barriers to entry are not too high for new entrants
- ensuring that the 'no fault, no blame; approach to alliance risk allocation is appropriate relative to the program's characteristics.

#### 3.2.1.3 Commercial opportunities

Structuring opportunities also often involve commercial opportunities for alternative funding and financing streams. These can include the creation of secondary opportunities, such as revenue generation, third-party funding and cost offsets or partnership opportunities which may inform the optimal project structure.

If these are relevant considerations for your project, DTF should be consulted early in the development process to assist in developing such delivery structure options.

### 3.2.2 Bundling determination

Bundling is most likely to be relevant to larger, HVHR projects. It involves consolidating management and responsibility for multiple components of the project scope under one party. This can include development services, construction and commissioning services, maintenance, operations and facilities management services.

Bundling can generate efficiencies, allocate risks optimally, increase opportunities for innovation and improve asset utilisation which leads to better whole-of-life cost and quality outcomes.

> ***Decision point:*** *Is there a case for bundling two or more components of the project scope to deliver efficiencies and drive optimal public value? If so, what is the approach for the project?*

Assessing the merit of bundling is important because procurement models can be broadly categorised as bundled and unbundled. Bundling opportunities are likely to be present when:

- the operations or maintenance contracts or both are relatively large as compared to the design and construction contracts
- the operation or maintenance services or both are not already being efficiently delivered at scale elsewhere
- there is not a strategic need for direct control over the design or operations and maintenance of the project.

In deciding whether to bundle, it is important to consider whether the benefits outweigh the additional costs, such as more complex procurement and contract management.

**Key factors to consider when determining if bundling is right for your project**

- The extent to which services, including design, construction, operations and maintenance services, can be grouped as part of the project.
- The expected efficiencies and potential for innovation compared with other service delivery opportunities, such as a strong interface between construction and maintenance or operating activities.
- The constraints, risks and opportunities that may affect bundling.
- The level and nature of services that could be delivered by non-government parties versus delivered solely by government, noting that core government services are often excluded from bundling.
- Whether the service need, or a part thereof, can be contracted out over the longer term with a high degree of certainty.
- The merits of bundling capital delivery and ongoing maintenance responsibilities.
- Whether there is likely to be sufficient market capability and interest (approximately four or five parties) to deliver the bundled project while ensuring a competitive process.

DTF can provide support to delivery agencies in assessing the merits of bundling and developing an appropriate bundling strategy. The potential incorporation of private finance into the bundling models is covered in more detail in section 4.4 Whole-of-life.

### 3.2.3 Packaging determination

Packaging works or a program of works should be considered for all projects (not just HVHR projects).

Packaging refers to how the size of a procurement activity, typically of works, can be tailored to form smaller or larger contract packages. By doing so, it is possible to select procurement models that are better suited to specific project components. It is important to develop a packaging strategy before analysing procurement models so that separate analyses can be conducted for each package.

***Decision point:*** *What is the packaging strategy for the project, considering the project's characteristics, the capabilities of the client and the market and the capacity to deliver optimal public value?*

To undertake packaging analysis, it is important to first understand:

- project data and characteristics, including size, scale, complexity, interfaces, specialisation, location, timeframes, staging and sequencing
- market capacity issues, including the upcoming pipeline of comparable projects in planning and procurement in Victoria and other jurisdictions
- contractor capacity and capability
- client capabilities, capacity and ambitions (including people and systems)
- project integration capabilities and approach
- the role and influence of key stakeholders
- whole-of-government considerations, such as aggregate risk exposure to commonly used contractors.

Utilising this project data, agencies should determine whether packaging would deliver any benefit to the project by reducing risk, seizing opportunities, responding to market capability and capacity or improving market participation and competition.

**Key factors to consider when determining if packaging is right for your project**

- The number of phases or activities of which the project is comprised.
- Elements which may be undertaken independently, simultaneously or in sequence.
- Whether there would be any efficiencies (or risk reductions) in supply, construction, integration and interface management or scheduling gained from grouping together certain works.
- Whether there be any efficiencies (or risk reductions) gained from breaking up certain works.
- The key interdependencies between stages or activities.
- Options for early or enabling works.

DTF can assist project teams to undertake this analysis.

Table 7 outlines two general packaging strategies that practitioners should consider and some of the value drivers behind these approaches.

**Table 7 – Packaging strategies**

| Packaging strategy | |
|---|---|
| Into smaller contracts | Disaggregation: The division of a single project into multiple (smaller) discrete packages each with a separate contract. The procurement model for each package may differ depending on the characteristics of the package. Packaging into smaller contracts can facilitate:<br>• increased market capacity and competition by providing the opportunity for work to be spread across a broader range of contractors<br>• 'ring-fencing' of issues that arise within a single package, avoiding individual package risks having a project- or program-wide impact<br>• risk distribution and diversification (including across contractors)<br>• development of contractor capacity<br>• bringing forward and separating early works from the main work package(s), such as a preparatory or demolition package<br>• delaying specific works, such as holding off on public realm landscaping packaging until other packages are completed.<br>Disaggregation often occurs to align the package size with the contractor or client's capacity to deliver. |
| **Into larger contracts** | Aggregation: The grouping together of procurement requirements of a similar category with the purpose of acquiring them under a single contract. Packaging of smaller works into a larger contract can facilitate:<br>• cost and schedule efficiencies associated with scale or geography, or both<br>• procurement efficiencies associated with managing fewer contracts<br>• access to skills, expertise and approaches that can only be provided by large multinational firms<br>• a reduction in the number of complex interfaces across many contracts which can result in better management of the liabilities that result from the various interfaces in construction and commissioning.<br>Aggregation is often used to bring together works of the same nature or technical requirements and disciplines or in the same geographic location. |

### 3.2.4 Market engagement

Market engagement is important for all projects (not just HVHR projects). Market engagement can improve the likelihood of project success through a process of increasingly detailed stakeholder engagement. The process provides government with an understanding of the market's appetite, capability, capacity, trends and the potential impact of its intended procurement approach. Simultaneously, industry can prepare to respond to government's requirements as they are outlined.

Market engagement prior to funding approval and development of the procurement plan (see sections 5.2 and 5.5) is typically limited without specific government approval. However, early market engagement can provide benefits, particularly for high-value and/or complex projects. Appropriate activities during procurement strategy development depend on the project's scale and complexity, confidentiality requirements and the maturity of information available. These activities can include identifying project precedents, analysing similar projects and conducting market soundings to gather feedback on preliminary project structuring, bundling and packaging approaches as well as procurement model options, key risks and timelines.

Agencies considering direct market engagement during business case development should contact DTF for advice on how to manage the process and obtain necessary government approvals before engaging the market.

More information on common approaches to market engagement is available in section 5.2.

## 3.3 Step 3: Test procurement model fit and shortlist

The goal of the shortlisting process is to identify those procurement models best aligned with the project's characteristics and to eliminate those least likely to effectively manage risk and deliver value (quality and cost outcomes). If Step 2 identifies a multipackage strategy, then shortlisting and detailed procurement analysis must be done for each package.

A particular model's strategic fit must be informed by a comprehensive analysis of the project's key characteristics and the delivery issues identified in Steps 1 and 2. This approach is necessary to avoid potential bias in evaluating procurement model fit. If project details are not fully known, shortlisting should be based on the best available information and practitioners should identify the information needed to make a definitive decision.

> ***Decision point:*** *Which procurement models are the most suitable for delivering the project in the most effective and efficient way (given the project's characteristics and delivery environment) and should be shortlisted for further analysis?*

Chapter 4 of the guide provides detailed descriptions of each procurement model set. Table 8 also provides a high-level overview of indicative procurement model fit against certain project characteristics.

Shortlisting should be supported and validated where possible by assessing successful precedents and conducting market engagement.

Successful precedents may include similar projects, with similar objectives, characteristics and risk profiles (including projects delivered in other Australian jurisdictions). Any lessons learned in these successful precedents should be documented and included in the evaluation. Precedent delivery is not sufficient itself to justify use of a particular procurement model without further analysis but may justify its inclusion in a shortlist.

Market engagement can aid in understanding current market risk appetite, capability and capacity. The outputs from this engagement should be documented and used to update the shortlist (as required) (Step 3) or to inform the detailed procurement model analysis (Step 4).

Both the shortlisting (Step 3) and detailed procurement options analysis (Step 4) should be undertaken collaboratively with a broad range of project team members and key stakeholders. Typically, this would be done in a workshop setting.

The outcomes of the shortlist development should be documented. This documentation will include responses and considerations to the shortlisting categories and the key reasons for including or excluding any given procurement model stated. A shortlist of between three and five models should be taken forward for detailed analysis (Step 4).

See the procurement options analysis (POA) tool on the DTF ILG website for further guidance. A more detailed shortlisting questionnaire is available to generate a suggested shortlist and provide an assessment template.

**Table 8 – Indicative procurement model alignment to project characteristics** [3]

| Categories | Lump sum | | | Cost reimbursable | | | Whole-of-life | |
|---|---|---|---|---|---|---|---|---|
| **Project characteristics** | **Construct only** | **Design and construct (D&C)** | **Enhanced D&C** | **Managing contractor** | **Incentivised target cost** | **Alliance** | **Bundled** | **Partnerships Victoria (PV)** |
| **Scope and outputs** | | | | | | | | |
| Design or outputs can be clearly defined before tendering | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ |
| The scope or solution is likely to change significantly before project completion due to uncertainty in the environment or ongoing input and collaboration from key stakeholders | – | – | ✓ | ✓ | ✓ | ✓ | – | – |
| The client needs (and has the capability and capacity) to actively take part in design and/or delivery | ✓ | – | – | ✓ | ✓ | ✓ | – | – |
| **Whole-of-life opportunities** | | | | | | | | |
| There are significant maintenance, operations or service activities that are suited to long-term private sector delivery | – | – | – | – | – | – | ✓ | ✓ |
| **Risks** | | | | | | | | |
| There are significant areas of undefinable or uncertain residual risks that cannot be resolved before tendering | – | – | ✓ | ✓ | ✓ | ✓ | – | – |
| Risks can be effectively priced before tendering and are able to be allocated to the contractor as the party best able to manage those risks | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ |

✓ **Good fit with this procurement model** ✓ **Possible fit with this procurement model** ✓ **Conditional fit with this procurement model** **– Blank – not applicable for this model**

[3] The table should serve as a general guide to test procurement model fit against specific project characteristics for shortlisting purposes. This includes differentiating between the typical benefits and limitations of each of these models. Individual questions within the table are not intended to be definitive but align to the most likely scenario. For example, the level of input required from the rail operator for brownfield rail projects supports an alliance model in which the operator is a participant.

## 3.4 Step 4: Analyse shortlist and justify procurement model selection

Step 4 should provide a transparent account of the reasoning applied to select the preferred procurement model(s) from the options shortlisted in Step 3. The POA method is the recommended approach. This method involves establishing selection criteria and weightings to differentiate the suitability of shortlisted models for the project. A guide to how this method can be used in practice, including how the criteria and weightings are established, is provided in the section below.

> ***Decision point:*** *What procurement model best suits the project and is therefore recommended as the preferred procurement methodology?*

Successful application of POA is dependent on:

- objective and rigorous analysis of the project's characteristics, risks, market dynamics, delivery environment and other success factors and sound project structuring, bundling and packaging determinations as outlined in Steps 1 and 2
- knowledge of the characteristics, benefits and trade-offs that come with different procurement models, including agency capacity (refer to Chapter 4).

**The detailed procurement analysis process must identify how successfully each shortlisted procurement model can optimise quality and cost outcomes**

This will be evident in how the model:

- facilitates achievement or enhancement of the project outcomes, ensuring quality and cost outcomes are optimised
- best suits the characteristics of the project, considering factors like complexity, scope and stakeholders
- delivers the intended benefits while presenting value-for-money and balancing this cost efficiency with quality to deliver optimal outcomes.

**The detailed procurement analysis process must identify how successfully each shortlisted procurement model can effectively manage risk and uncertainty**

This will be evident in how the model:

- strategically treats risks in line with the risk treatment strategy, project objectives and organisational goals
- allocates risks to the party best equipped to manage them, maximising the ability to mitigate and control potential issues
- aligns key project risks with suitable procurement models to optimise risk management opportunities, leveraging their inherent characteristics
- achieves the risk management objectives for both the organisation and the project, ensuring that risks are adequately identified, assessed, monitored and controlled.

### 3.4.1 Establish the procurement model selection criteria and weightings

The project team should work with key stakeholders to set selection criteria that align with the project's priority outcomes and procurement objectives shaped and set in Step 1 and 2. A percentage weighting should then be assigned to each criterion based on its relative importance to achieving the objectives. Justification for the selected criteria and weighting should be documented. If procurement model selection criteria are being considered that vary from those listed in Table 9, DTF should be consulted early in the development process.

Table 9 describes standard procurement model selection criteria derived from the common procurement objectives outlined in Step 1. There is no minimum or maximum number of criteria to consider in detail, however, a selection of five or six should provide coverage of the key outcomes relevant to the project. Ultimately, the selection of the most suitable contractual model depends on a comprehensive assessment of project objectives, complexities, risks, its delivery and operating environment, financing needs and the involvement of relevant stakeholders.

**Table 9 – Standard procurement model selection criteria (SC)**

| **Optimise quality and cost outcomes** | |
|---|---|
| **SC1. Whole-of-life cost effectiveness and accountability** | |
| How important is it that there is a strong incentive to minimise whole-of-life cost outcomes and is there a single point of accountability to achieve this? | Considering whole-of-life cost effectiveness and accountability is important in procurement models that include an operations and maintenance component.<br><br>This should consider the project's size, complexity, risk profile, level of service specification, its delivery and operating environment, market structure and depth.<br><br>* **NOTE**: all project development should consider whole-of-life cost effectiveness, this criterion is relevant where it has been determined that bundling (e.g. construction with maintenance, operations or facilities management) may be beneficial to project outcomes. |

| Optimise quality and cost outcomes | |
|---|---|
| **SC2. Contractor innovation** | |
| How important is it that the contractor is incentivised to deliver new approaches in design and construction to support improved outcomes? | This may include new solutions to address constructability, value engineering, improved functionality of the asset to end users/direct operators, and/or designing for maintenance, replacement and refurbishment. Often these solutions will require a single point to assume responsibility for design and construction (and operations and maintenance where relevant) to encourage innovation.<br><br>This should consider the willingness of the market to accept design risk and the relationship between the design, construction, operations and maintenance phases of the project to deliver improved outcomes.<br><br>* **NOTE**: Client input into project design and development and collaboration with the contractor should be considered in SC3 if client control over design is required. Consider SC9 if collaboration with the contractor is necessary to resolve unavoidable uncertainty in the project scope or design stage supply chain integration is necessary to resolve complex technical issues. |
| **SC3. Client control** | |
| How important is it that the client control the design brief and what level of control is needed to ensure compliance or address stakeholder requirements? | Clients may require greater control over the project's design, including through collaboration with the contractor, to ensure compliance.<br><br>This criterion assesses the need and level of control required. This may be driven by specific stakeholder requirements such as third-party approvals and/or the level of specialisation or uniqueness. It should also consider the clients ability to retain design risk and its ability to clearly define its requirements to the market.<br><br>**NOTE:** Adjusting design or project requirements during a procurement process is not recommended as this typically results in higher project costs and should be limited to situations where it is unavoidable. |
| **SC4. Delivery speed** | |
| How important is the speed of project delivery to project success? | This criterion assesses the degree of urgency to complete the works and the effect this has on commencing procurement and construction.<br><br>This criterion should only be included if there is a non-negotiable operational commencement date or event (such as school building works required by the start of the school year) or if there is a significant and quantifiable benefit to earlier completion. |

| Effectively manage risk and uncertainty | |
|---|---|
| **SC5. Risk allocation** | |
| How important is it that the client transfers or retains specific risks across the project's lifecycle? | This criterion refers to the client's preferences for risk allocation, including whether to allocate risks to the party best able to manage them or if there are alternative risk preferences.<br><br>This should consider whether risks have been adequately defined and are well understood. It should consider the project's risk profile across design, construction, operations and maintenance (including any risks that would exceed client tolerance levels if retained) and the client's ability to retain, share and manage risks. This should take account of the proposed building and packaging strategies (such as early works) as risk treatment strategies. |
| **SC6. Market appetite and competition** | |
| Will the procurement model and risk allocation attract sufficient market interest, competition and optimise market capability and capacity? | This criterion refers to the market's preferences for risk allocation and the suitability of the model to attract sufficient market participation and competition to promote competitive pricing.<br><br>This should consider current market and supply chain dynamics, the project's risk profile and allocation and the capacity of the contractor market and supply chain to deliver the project under the various models. It should also consider any project risks that may exceed the market's tolerance level or would result in unacceptable tender price premiums if allocated. |
| **SC7. Price certainty** | |
| How important is it that the client can confidently predict its financial contribution to the project at contract award? | This criterion refers to the importance of having an assurance or guarantee of a fixed or predictable price at the point of contracting.<br><br>Price certainty can reduce the risk of cost overruns or budget variations and help improve project management and stakeholder confidence by having a strong incentive for the contractor to deliver within the agreed budget. This assessment should consider the project's scope, complexity, design maturity, risk profile and allocation, market conditions and the risk of costly variations if project requirements changed.<br><br>To increase the likelihood of achieving price certainty, sufficient PDDD needs to have occurred as well as a robust evaluation process that filters for underbidding. |

| Effectively manage risk and uncertainty | |
|---|---|
| **SC8. Time certainty** | |
| How important is it that the client can confidently predict that the project will be completed by the agreed target date? | This criterion refers to the importance of having an assurance or guarantee of a fixed or predictable timeline at the point of contracting.<br><br>Time certainty aims to provide clarity and minimise uncertainties associated with the project schedule by having a strong incentive for the contactor to deliver within the agreed timeline. This assessment should consider the drivers of target dates and the consequences for not achieving them. |
| **SC9. Scope certainty** | |
| How important is that the scope is defined before tendering and to what extent is the scope undefinable before going to market? | This criterion refers to the level of uncertainty in the project scope that cannot be adequately defined before going to the market. A high level of scope uncertainty can increase project risks, potentially leading to costly variations and time overruns, if not effectively managed through the procurement method.<br><br>This assessment should consider the project's characteristics in the light of possibly requiring design stage integration with the supply chain to resolve complex technical issues or encourage innovation. It also considers the project's delivery and operating environment, stakeholder requirements, the level and nature of project risks and the ability to mitigate risks before tendering. It assesses the client's ability to define its requirements and progress design maturity before tendering. This is distinct from underdeveloped business cases or a desire to truncate pre-tender timelines. |
| **SC10. Flexibility to change** | |
| How important is it that the client can effectively change or control the management of the procurement method to respond to uncertainty? | This criterion refers to the need for flexibility in delivery and operations to change or manage the procurement method to respond to uncertainties and unavoidable changes in the project requirements.<br><br>This should consider the stability of the delivery and operating environment, including risks that the project requirements may change during delivery or operations due to technological changes or other uncontrollable/unknown factors or opportunities. This may also include taking account of any specialised elements that require stakeholder approval, which cannot be resolved or mitigated early or the need for the collaborative management of complex interfaces. It should also consider the client's ability manage change and control, which requires more sophisticated client capability and resourcing to implement.<br><br>*** NOTE:** adjusting design or project requirements during a delivery or operation is not recommended as this typically results in higher project costs and should be limited to situations where it is unavoidable. |

### 3.4.2 Evaluating procurement models

Evaluation of the shortlisted delivery model against the selection criteria is best undertaken in a workshop. To gain a variety of independent views allow individuals to score first before a wider group discussion to agree and document reasoning for consensus scores. This should address how the inherent features of the shortlisted procurement models match to the characteristics of the project for each criterion.

Each procurement model should be scored on their ability to fulfil the selection criteria. Regardless of the mode of assessment, it is important to document the reasoning behind key decisions and considerations, including scoring and criteria discussions, identified risks and issues, potential trade-offs and the logic behind the selection of the preferred model.

### 3.4.3 Considering risk in procurement analysis and model selection

How procurement models impact on other project delivery strategies, create opportunities to manage risk or exacerbate risk is an important part of procurement strategy development and procurement model selection.

Matching the procurement model and project characteristics to ensure an equitable distribution of risk is crucial for the efficient and timely delivery of projects. Allocating risk to contractors can drive efficiency and innovation, but it must be done carefully to avoid increased bid premiums, disputes and reduced quality. A key principle is to allocate risk to the party that can best manage it, but this must take account of each parties ability to control, foresee and bear the risk based on an understanding of the project and the market's insights.

When selecting a procurement model, consider the following:

- Choose the model that optimises the procurement objectives, not just the one that minimises risk to the client, noting residual risks must be managed.
- Consider the risk treatment, ownership and allocation under each model. Evaluate whether the private sector can reasonably take responsibility for specific risks. Risk allocation varies under different procurement models but also depends on the contract details.
- Stress-test the procurement model by assessing its sensitivity to the consequences of identified risks materialising. This may identify if an alternative model would result in more effective risk management. For example, an enhanced design and construct approach may be a more effective than a regular design and construct approach where high consequence risks are identified but cannot be efficiently priced and allocated at contract award (such as risk of unforeseen soil and groundwater contamination).
- If unusually high risks are identified or if likely consequences exceed the client's risk tolerance and risk mitigation options are limited or unlikely to be cost-effective, consider an alternative procurement model.

If new risks are discovered during procurement analysis, they should be incorporated into the overall risk management plan for the project. This process may reveal opportunities for modifying a specific procurement model to manage risk more effectively. Consultation with DTF should be undertaken to confirm the acceptability of potential modifications and how they will interface with DTF's standard contracts.

For additional information on risk management in procurement see 5.3 Risk management.

Alternative techniques to traditional POA for undertaking procurement analysis have emerged in recent years. These techniques provide practitioners with a supporting toolkit to identify optimal delivery arrangements for projects based on their unique characteristics and strategic priorities. Where there is a strong case (for example, in complex or unique projects, or those with limited delivery track records) practitioners should consider these techniques to inform the development of their procurement strategy or validate the outputs of POA approaches.

**Queensland University of Technology procurement strategy tool**

Researchers at the Queensland University of Technology (QUT) have developed a comprehensive tool to develop project procurement strategies taking account of client priorities, project characteristics and the level and nature of microeconomic risk associated with the given project.

The tool involves five steps to ultimately identify how a project (by looking at its components) should be procured to manage specific risks and deliver VfM outcomes while meeting the strategic priorities of the client.

The tool has been tested on Australian projects in collaboration with Infrastructure Australia and internationally in collaboration with the Organization for Economic Co-operation and Development (OECD) and shows promising results in its ability to provide a robust and structured approach to developing project procurement strategies.

The following resources provide an overview of the tool and example applications of the tool to some existing interjurisdictional projects.

- Procurement decision tool: draft user guide. [ ver. 1.0 ed.] | QUT ePrints
- Procurement Decision Tool: A Case Study of the Toowoomba Second Range Crossing - AP-R624-20 | Austroads

## 3.5 Step 5: Detail the preferred procurement model and feed impacts through the business case

After identifying the preferred procurement model, it is essential to document all its key conditions in the procurement strategy. This decision will define the client's resourcing requirements, risk management approach, contract type and contract management requirements.

> ***Decision point:*** *Have all the key conditions to successfully implement the procurement strategy (including the preferred procurement model(s)) been identified and documented for project sponsor endorsement?*

The procurement strategy documentation should include the following:

- Plans for managing residual procurement risks and issues during the delivery and operational phases, including necessary controls. This should support a detailed risk assessment, incorporating the preferred procurement model once it is outlined.
- Identification of necessary skills, resources and potential gaps, along with strategies to manage them. Any additional resources or skills needed to implement the procurement model should be factored into the project design and costing as well as documented in the business case.
- Consideration of how the procurement model decision fits into the overall project structure, bundling and packaging strategies (if applicable).

The business case schedule, project resourcing strategy and costs plan, alongside the project risk register should be cross checked to ensure alignment with the preferred procurement model and procurement strategy.

As important as it is, selecting the best procurement model is just one step in delivering the project. Tendering for the project is also a critical step to ensure that project objectives are achieved. Refer to Delivery ILG for more information.

### 3.5.1 Minimum documentation requirements

The level of detail in the procurement strategy should be appropriate to the scale and complexity of the investment. However, it should include at a minimum:

- a statement of procurement objectives to best achieve the project objectives and outcomes detailed in the problem and benefits definition sections of the business case
- a review of market capacity, capability and risk appetite to deliver the project in the planned timeframes
- a review of the department's (and the delivery agency's) existing capability and capacity to procure the asset and deliver the service outcomes, including any gaps and mitigations

- an outline of any commercial and organisational structuring and financing required to effectively deliver the project. This may include delivery agency and key stakeholders, third-party funding and revenue generation opportunities and market impacts (likely only required for HVHR projects)
- identification and evaluation of how whole-of-life outcomes will be delivered, including documentation of how opportunities for bundling elements across design, construction, maintenance and operations have been explored
- determination of the optimal project packaging strategy to respond to project and delivery risks (it is essential that this is undertaken prior to POA)
- outputs of the procurement model shortlisting process including the rationale for inclusion and exclusion in the shortlist as well as any precedents used to validate the analysis
- a detailed evaluation of the benefits, costs and risks associated with the shortlisted procurement models considering the procurement objectives, the project's characteristics and its delivery and service environment against an agreed set of selection criteria
- justification for the recommended procurement model(s), documenting any outstanding risks, limitations or assumptions.

Overall, the procurement strategy must demonstrate:

- that a **clear and transparent process has been undertaken for understanding** the project objectives, its characteristics and requirements and how these will be managed to ensure successful project delivery
- that a **robust process has been undertaken to consider procurement options and develop detailed analysis** to select the recommended procurement strategy. The process should include evidence of participation or endorsement by the project sponsor
- **that all suitable procurement options have been considered**
- that the proposed procurement strategy is an **effective and efficient way to deliver public value**, with procurement risk strategy assessment undertaken and risk treatments documented
- that the **project team has established appropriate capacity, capability and processes to support the procurement strategy** and timelines (with supporting evidence)
- an assessment of the **adequacy, behaviour and capabilities of the market** to respond to the preferred procurement method.

A summary of the procurement options and assessment should be included in the body of the business case with any supporting materials and evidence included in appendices.

The recommended content requirements and structure are outlined in the procurement strategy section within the full business case template.

### 3.5.2 Approval requirements and processes

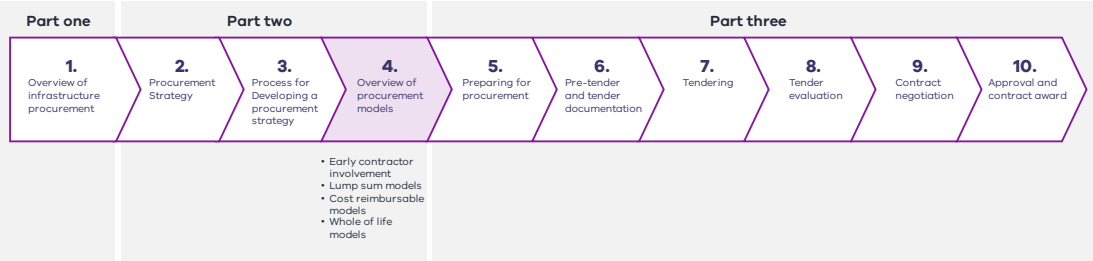
The procurement strategy document should contain evidence of participation in the evaluation process and endorsement of the recommended procurement model by the project steering committee and senior responsible owner, along with any conditions of that approval.

### 3.5.3 Tools and other supports available

DTF has developed a range of tools and templates to support effective development of a procurement strategy. These are available at DTF's Procurement ILG webpoge. It is not mandatory to use these tools and templates, however, they do provide a comprehensive and structured approach to developing a procurement strategy consistent with this guide.

# 4. Overview of procurement models

**Figure 11 – Chapter 4 overview**




This section describes in detail the standard procurement models used for public construction to assist with procurement model selection. This is particularly relevant to Step 3: Test procurement model fit and shortlist, and the process for developing of a procurement strategy described in Chapter 3.

There are three categories of procurement:

- whole-of-life
- lump sum
- cost reimbursable.

Where applicable, this guide highlights typical variants within each procurement model. Alternatives to the procurement models presented in this section may be considered on a case-by-case basis in consultation with DTF.

## 4.1 Early contractor involvement

While early contractor involvement (ECI) is often presented as a procurement model, additional contracting beyond the earlier engagement is necessary to move into the delivery or construction phase. The progression from ECI to construction and the associated form of procurement varies from project-to-project. On this basis DTF does not present ECI as a form of procurement, but rather considers it as early project activities which can **precede** any form of procurement model.

ECI typically involves early appointment of a contractor in an advisory capacity. This can assist the project team to determine packaging and to consider project buildability. It can help to optimise design/preliminary design, scheduling and planning and to provide input regarding specialist construction issues.

ECI is useful for large, complex or high-risk projects to help the project team gain an early and better understanding of the project requirements. This can help to facilitate robust risk management, identify scope for innovation and investigate packaging strategies. It can also be used to identify and potentially execute early works which may further derisk a project or provide time savings.

ECI agreements also create challenges. These include the transfer or carry through of liability from the initial engagement to the construction contract. ECI can also create an incumbency advantage should the appointed contractor be part of the tender for the main construction contract.

## 4.2 Lump sum procurement models

Lump sum procurement models include:

- construct only
- design and construct
- enhanced design and construct.

Lump sum procurement models typically feature:

- a fixed price contract with a schedule of unit rates for pricing variations
- regular payments to the contractor for work completed up to the lump sum (adjusted for agreed variations)
- an agreed date for practical completion and commencement of liquidated damages
- clear delineation of contractual responsibilities and allocation of risks
- a competitive tender process to select a suitable contractor based on non-price criteria and a fixed price to deliver the full, or vast majority of, scope
- a principal representative appointed by the delivery agency performing contract certification, including progress and final certificates
- contract administration arrangements that are clear and well understood.

Lump sum contracting recognises risks are most efficiently addressed when allocated to the party best able to manage them. Lump sum models can also incorporate targeted flexibility to address a limited number of complex risks which cannot effectively be priced or programmed prior to contract award, such as contamination, geotechnical data or utilities risk.

Lump sum procurement models are well suited to projects where the delivery agency, in consultation with stakeholders, can clearly articulate the project scope. In most cases, this means:

- there will be very few scope or design changes during construction
- the risks are well known
- the project is relatively straightforward, without complex interfaces or a significant number of unknown risks.

### 4.2.1 Construct only

#### 4.2.1.1 Key features

The construct only procurement model is based on sequential design and construction. Design is the responsibility of the delivery agency and subsequent construction is the responsibility of the contractor.

The delivery agency prepares the design and tender documentation either in-house or by sourcing a consultant. The project is then competitively tendered and the contract awarded on a lump sum basis with an agreed date for practical completion.

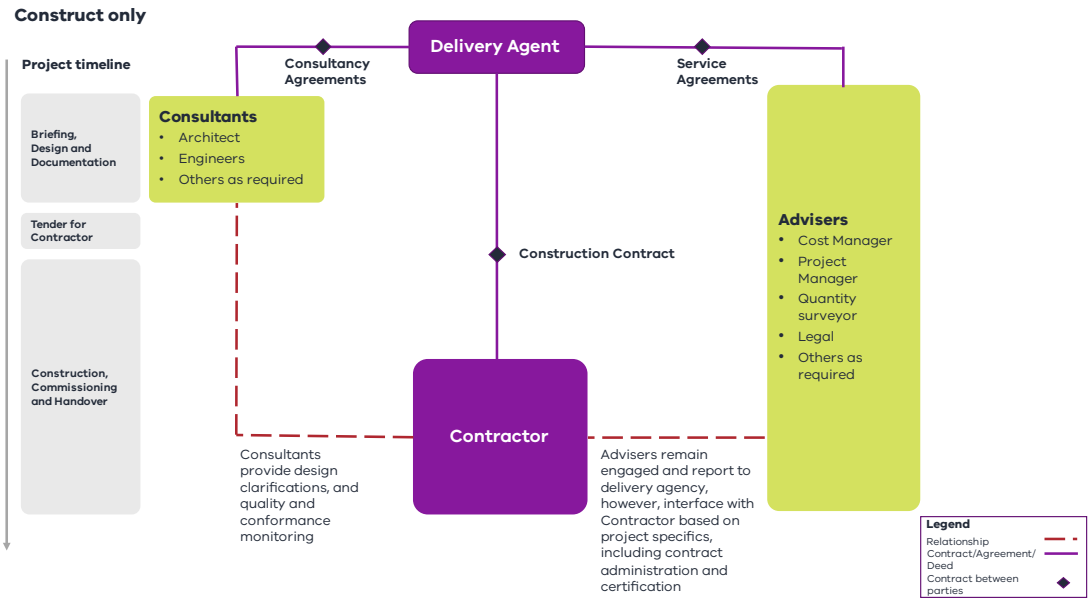
The delivery agency:

- pays a fixed cost for project delivery, usually through regular progress payments to the contractor for work completed up to the lump sum (adjusted for agreed variations)
- manages stakeholder input and interfaces as part of the design phase and takes responsibility for design risk.

The contractor:

- takes responsibility for construction, schedule and cost risks with penalties to incentivise performance
- takes 100 per cent of cost overrun risk.

**Figure 12 – Construct only structure**




### 4.2.1.2 Model variants

There are noted model variants of the construct only procurement model.

#### Model variant 1: Design, novate or finalisation and construct

- Tender occurs before documentation is fully completed (typically at 90 per cent). The successful contractor assumes responsibility for completing contract documentation, through either novation of the design team or hiring their own design consultants. This shifts some of the design risk to the contractor and potentially provides for final checks on buildability prior to construction.

#### Model variant 2: Schedule of rates

- A schedule of rates is tendered based on the completed design. This is often applied where there is uncertainty in quantities. An alternative is an agreed lump sum tendered design and an agreed schedule of rates for variations.

### 4.2.1.3 When to use construct only

Construct only is the standard procurement model for routine and well-defined works of small to medium size. The following elements favour construct only procurement.

#### Project value

- Typically below $100 million, as larger projects tend to have duration and complexity that benefit from contractor input.

**Scope, complexity and output certainty**

- Scope or design are relatively standard and well defined, unlikely to change during construction and there is limited scope for contractor design innovation.
- There is a priority on a high degree of cost certainty at the time of contract award.

**Risk allocation**

- Projects where risks (including site conditions) are well defined, understood and easily allocated.
- The delivery agency is willing to retain all the design risk.

**Role of delivery agency**

- The delivery agency prioritises design and has the time and skills to manage the design process, including identification and documentation of site conditions/utilities and the briefing and preparation of construction-ready contract documentation.

#### 4.2.1.4 Benefits

The construct only procurement model offers benefits to the delivery agency including:

- a high degree of price certainty at the time of contract award, provided the design is substantially complete and properly reflects the project brief
- the potential for stronger competition at tender by attracting contractors that do not have design management, design resources expertise or are unable to take on associated design risks
- less complexity when assessing tenders compared with many other procurement models
- relatively straightforward and reliable contract administration principles and procedures.

#### 4.2.1.5 Points to consider

A long lead time is needed prior to tender and contract award to enable design and contract documentation to be fully developed by the delivery agency.

Completeness and accuracy of the design documentation is the responsibility of the delivery agency. The delivery agency must have (or engage and manage) the relevant expertise to confidently develop a design and prepare comprehensive contract documentation.

Successful delivery requires the contract and design information to be free of any errors, inconsistencies, omissions or other inadequacies which would lead to variations and extra cost to the delivery agency.

The delivery agency's capability is essential as:

- separation of design and construction reduces opportunities for constructability optimisation
- whole-of-life costs need adequate consideration in design decisions
- the delivery agency retains design risk, including design constructability, coordination and fitness for purpose and usually latent (or 'subsurface') conditions risks.

#### 4.2.1.6 Authorised contracts[4]

DTF standard form for contracts:

- Australian Standard (AS) 2124-1992 with VPS Special Conditions
- VPS Medium Works Contract
- VPS Minor Works Contract

#### 4.2.1.7 Supporting resources

- DTF's Lum Sum Procurement Category webpage
- Practitioners Toolkit - Document library | Department of Treasury and Finance Victoria

### 4.2.2 Design and construct

#### 4.2.2.1 Key features

In the design and construct (D&C) model, the design and construction phases overlap. The delivery agency engages consultants to prepare a detailed project brief or principals performance requirements which defines the scope, quality and functionality requirements. A preliminary design at either concept or schematic level is also typically prepared for competitive tender. The contract is awarded on a fixed price basis with an agreed date for practical completion. The contractor then completes the design, prepares construction documentation and constructs the project.

The delivery agency:

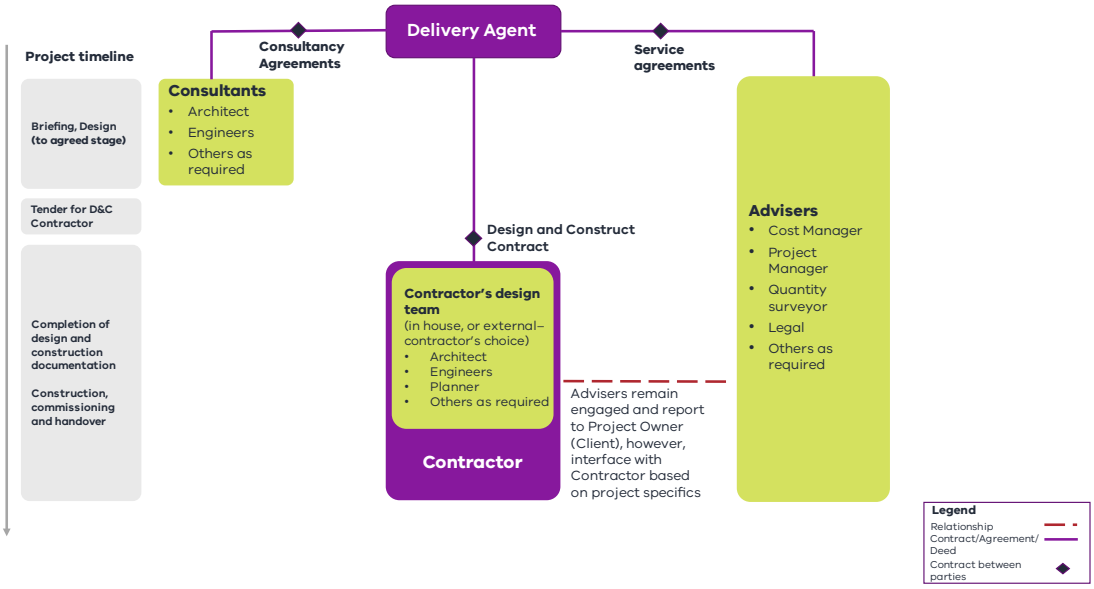
- pays a fixed cost for project delivery, usually through regular progress payments to the contractor for work completed up to the lump sum (adjusted for agreed variations).

[4] There may be departmental specific standard form contracts endorsed under the Ministerial Directions for Public Construction, which are not intended to be impacted by this Guideline.

The contractor:

- bids a price based on the delivery agency's specifications and therefore has significant ability to influence the design and buildability of the project
- takes between 50–100 per cent of cost overrun risk depending on the size and risk profile of the project, subject to approved variations
- manages stakeholder input and interfaces as part of the design phase
- takes responsibility for design, documentation, construction, schedule and cost risks with consequences to incentivise performance.

**Figure 13 – Design and construct structure**




### 4.2.2.2 Model variants

#### Novated design and construction

The delivery agency engages design consultants to prepare the design and construction documentation to an agreed point, typically between 70–90 per cent complete. The contract is awarded as a lump sum or a guaranteed maximum price (GMP). The design consultants are novated to the successful contractor who is responsible for both completing the balance of construction documentation and construction.

If a GMP contract is used, typically trade packages are retendered following completion (or further development) of the construction documentation. Any savings are shared between the delivery agency and the contractor on a predetermined basis.

#### 4.2.2.3 When to use design and construct

D&C is suitable for many medium to large projects providing a single point of accountability. The following elements favour D&C procurement:

**Project value**

- Of any value.

**Scope, complexity and output certainty**

- Scope and outputs are unlikely to change during construction and can be defined by the delivery agency prior to tendering in a detailed project brief or principal's performance requirements defining the scope, quality and functionality requirements.
- There is a strong relationship between design solution or constructability and design.
- There is potential for the contractor to apply alternatives in the design or construction method.
- There is a priority on schedule and price certainty and efficiency over the highest possible design quality.

**Risk allocation**

- Any project, greenfield or brownfield, where risks can be identified, cost effectively assessed and priced.
- The contractor is best placed to manage design risk.

**Delivery agency role**

- The delivery agency requires the capability and expertise to capture project requirements in contractual documentation and seeks to transfer design risk.

#### 4.2.2.4 Benefits

D&C transfers design and construction risks to the contractor as the single point of accountability. This provides:

- potential for earlier commencement of construction after contract award while the design packages are progressively finalised
- commercial alignment between design and constructability as the final design is owned by the contractor
- potential value-for-money as the contractor is incentivised to include constructability advice into the design to manage costs and protect margin, which also can generate innovation and construction efficiencies
- a fitness for purpose warranty from the contractor.

#### 4.2.2.5 Points to consider

The success of D&C depends significantly on the accuracy and completeness of the project brief, including the quality, function and performance requirements. The delivery agency also needs to incorporate stakeholder input and other dependencies into the contract documents to minimise changes to project scope after the contract has been awarded. This capability within the delivery agency is integral given:

- it is generally difficult for the delivery agency to exert any significant level of control over the design process as the design consultant's duty is to the contractor
- variations to project scope may give rise to extensions of time and cost claims from the contractor
- The need for careful consideration during tendering to ensure output specification is accurate and contractor prices are appropriate. This is to ensure the contractor does not underbid or accept an unsustainable level of risk that may result in the contractor pursing unreasonable claims.
- the contractor is typically focused on delivery not whole-of-life cost. The delivery agency may wish to implement contractual incentives to encourage better whole-of-life and environmentally sustainable design outcomes.

It is possible and reasonable for the delivery agency to seek an independent design review at key project milestones to ensure that the design and construct contractor has met all aspects of the project brief.

#### 4.2.2.6 Authorised contracts[5]

Standard form contracts:

- AS 4300-1995 with VPS Special Conditions

#### 4.2.2.7 Supporting resources

- DTF's Lum Sum Procurement Category webpage
- Practitioners Toolkit - Document library | Department of Treasury and Finance Victoria

### 4.2.3 Enhanced design and construct

#### 4.2.3.1 Key features

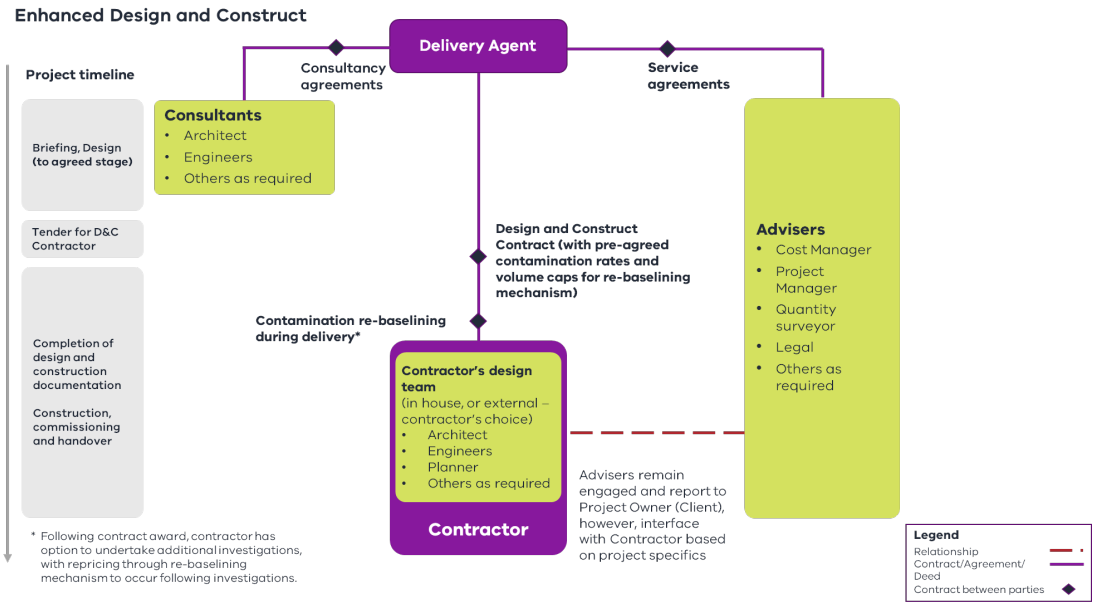
The enhanced D&C model provides a modern approach to lump sum contracting with the addition of targeted risk sharing elements to respond to specific high-value risks and challenges, such as contamination, which are not always appropriately managed under the traditional D&C risk allocation.

[5] There may be departmental specific standard form contracts endorsed under the Ministerial Directions for Public Construction, which are not intended to be impacted by this Guideline.

Key features can include:

- a fixed price for the performance of the delivery activities which allocates certain risks to the contractor that they are best placed to manage and are willing to accept
- a bespoke contamination regime for agreed types of contamination. This includes a re-baselining mechanism with volume caps which allows for price adjustments after contract award (including options for the re-baselining mechanism to be on a fixed price or target outturn cost (TOC) basis depending on project characteristics)
- a non-binding behavioural framework to support collaboration and incentivise proactive principal engagement
- a bespoke issue resolution process, which provides for a commitment by the parties to early identification and collaborative resolution of issues. This contains a provision for developing a resolution process tailored to the project and the establishment of an issue resolution team
- a risk sharing regime for principal geotechnical data where the contractor is entitled to time and cost (as a modification) for unknown inaccurate principal geotechnical data and an option for a geotechnical baseline regime
- bespoke utilities risk sharing regime that can be adopted as an option by the State depending on the utilities risk. It provides the contractor time and cost relief (as a variation) for unknown utilities and in circumstances where utilities betterment is required during delivery. If selected it can also cover time and delay costs for critical non-contestable utilities delay with a further option to treat any critical non-contestable utilities work as a provisional sum.

**Figure 14 – Enhanced design and construct structure**



#### 4.2.3.2 When to use enhanced design and construct

The enhanced D&C model combines the benefits of lump sum and cost reimbursable models, facilitating competition at contract award and providing new opportunities to take advantage of lump sum pricing by isolating cost reimbursable components to the most significant risks.

The following elements favour enhanced D&C procurement:

**Project value**

- Typically exceeds $100 million, to provide sufficient scale to cover the relatively high costs of governance and administration of the re-baselining regime.

**Scope, complexity and output certainty**

- Scope and outputs are unlikely to change during construction and can be defined by the delivery agency prior to tendering in a detailed project brief or principal's performance requirements defining the scope, quality and functionality requirements.
- More time is required after contract award to explore and cost specified key risks, including contamination and site conditions.

**Risk allocation**

- Any project where risk sharing mechanisms targeted to key risks would enable competitive lump sum tendering, such as addressing utilities, contamination or geotechnical risks.

**Delivery agency role**

- The delivery agency requires the capability and expertise to capture project requirements in contractual documentation and the resourcing and capability to administer the re-baselining regime.

#### 4.2.3.3 Benefits

The enhanced D&C model seeks to harness competitive pricing for most of the contract scope at contract award, balanced with appropriate risk allocation and performance incentives, with a more collaborative style of contracting. This involves a staged approach to scoping, design and pricing risk, while providing cost transparency.

The enhanced D&C model also offers a robust alternative to cost reimbursable contracting models such as project alliances or incentivised target cost (ITC) models where a significant portion of project risks are retained by the State.

Key anticipated benefits include:

- a greater and earlier focus on scoping, design, costing and risk assessment
- a staged procurement approach that enables more time to explore and cost specified key risks (such as contamination).

#### 4.2.3.4 Points to consider

The enhanced D&C is similar to the D&C, but with the addition of requiring a sophisticated client capable of ensuring VfM outcomes, as they may have to manage a TOC process for the contamination regime.

#### 4.2.3.5 Authorised contracts[6]

Standard form contracts:

- DTF Enhanced Design and Construct Deed (available on DTF's Lum Sum Procurement Category webpage)

#### 4.2.3.6 Supporting resources

Lump Sum Procurement Requirements

- DTF Enhanced Design and Construct Deed – Commercial Principles
- DTF Enhanced Design and Construct Guidance Notes (available on DTF's Lum Sum Procurement Category webpage).

## 4.3 Cost reimbursable models

Cost reimbursable procurement models include:

- managing contractor
- incentivised target cost (ITC)
- alliance.

Cost reimbursable procurement models typically feature:

- payment by reimbursable cost (in part or in full)
- payment of fixed or percentage-based margin for contractor overheads and profit
- commercial frameworks between the delivery agency and contractor to share risks and opportunities in project delivery
- incentive based performance regimes for selected key performance criteria
- a competitive tender process to select a suitable contractor based on non-price criteria, fixed or percentage-based contractor corporate overheads and profit and a competitive TOC development process (where appropriate)
- elements of greater cost transparency and use of open book arrangements.

Cost reimbursable contracting recognises and addresses that there are certain risks which cannot be effectively priced or programmed on a fixed basis and therefore should not be fully allocated to the contractor. For risks that remain, these can still be effectively allocated to the party best able to manage them.

[6] There may be departmental specific standard form contracts endorsed under the Ministerial Directions for Public Construction, which are not intended to be impacted by this Guideline.

Cost reimbursable procurement models are well suited to projects where:

- there are scope and outputs that cannot be reasonably and adequately defined in the business case or during subsequent work before tendering
- there is a need for flexibility, for example in scheduling or programming
- delivery agencies have, or can access necessary expertise and resources to effectively manage and deliver these projects
- increased input and collaboration of key stakeholders is required throughout the project.

### 4.3.1 Managing contractor[7]

#### 4.3.1.1 Key features

With the managing contractor procurement model the delivery agency engages a managing contractor (MC) who is responsible for all aspects of project delivery, including managing the completion of design and construction documentation and tendering and awarding trade packages.

Prior to engaging the MC, the delivery agency develops a project brief, preliminary design, target construction cost (TCC) and target date(s) for completion. The project is then competitively tendered, with the MC appointed based on relevant experience, key project team members, management fees, overhead and profit and, in some instances, risk pricing.

The MC is typically responsible for procuring subcontractors to facilitate project works on a guaranteed construction sum (GCS) basis with an agreed date for practical completion. The two stages are:

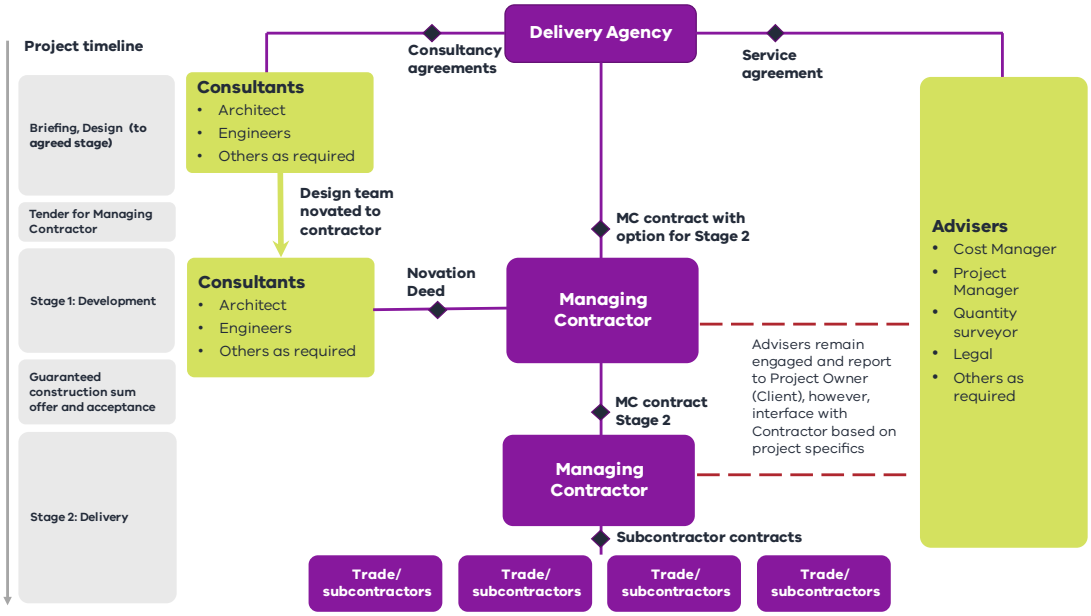
- **Development phase (Stage One)** which involves the MC progressing design (with design team novated from the delivery agency), preparing construction documentation, identifying and commencing early works and submitting an offer to the State for construction of the works. The offer typically includes a schedule with completion dates and a GCS, being the estimated cost of delivering the works.
- **Delivery phase (Stage Two)**, where subject to acceptance of the GCS and program by the State, the contractor proceeds to managing the delivery of the works including control, coordination, administration and direction of all activities on site through to completion as well as handover, including defect liability work/rectification and commissioning on behalf of the project owner.

[7] The managing contractor model has taken various forms across delivery agencies in Victoria, this section outlines DTF's preferred approach.

Key features include:

- reimbursement for actual costs on an open book basis plus fixed fees or a percentage amount for preliminaries, overheads and profit. They may also receive additional incentivised payments though contract mechanisms that reward performance or achievement of specific key results areas (KRAs), for example, cost savings or innovation
- management of design and construction risks, including program, by the MC, while their financial exposure is limited to the fee. The State's financial exposure is uncapped due to the cost reimbursable nature of the model. However, once the GCS is agreed, a fixed price for most scope items can be confirmed. Contractor liability caps can vary from project-to-project
- provision for liquidated damages to apply if the contractor fails to meet the agreed completion date(s)
- authority to approve subcontractor tenderers is retained by the delivery agency. This ensures a level of consultation and provides reasonable control over the design process and construction, where appropriate.

**Figure 15 – Managing contractor structure**




### 4.3.1.2 Model variants

The managing contractor procurement model is increasingly used for public construction in Victoria. However, it has taken various forms across different Victorian delivery agencies. DTF's preferred two-stage managing contractor approach is outlined in Appendix C.

#### 4.3.1.3 When to use managing contractor

The following elements favour managing contractor procurement:

**Project value**

- Typically exceeds $100 million to provide sufficient scale to cover the higher costs of establishment, governance and administration.

**Scope, complexity and output certainty**

- The project would benefit from the expertise of contractors, and possibly key subcontractors, during the early phase of a project, for cost management, buildability input and whole-of-life considerations.
- Scope and outputs are not fully defined.
- The project is evolving and cannot be reasonably and adequately defined before tendering. For example, with complex brownfield sites where it is difficult to define the project scope or interface with operational services.[8]
- The delivery agency requires design flexibility to continue to develop, refine or resolve their requirements including scope, such as to incorporate rapidly changing technology.
- The delivery agency requires flexibility to deliver early works, such as utilities works, while project scope continues to be refined.

**Risk allocation**

- Suited to when site risks and operational requirements are difficult to enumerate (due to their changing nature) and ongoing coordination is required between the delivery agency and the operational environment.

**Delivery agency role**

- The delivery agency is there to work closely with the contractor to drive performance against budget and program and requires capability to actively interrogate costs.
- The delivery agency or stakeholders have specialist operational or technical knowledge integral to project delivery, for example, if delivery agency or stakeholder input is necessary for specification of requirements and selection of specialist subcontractor.

[8] Distinct from underdeveloped business cases or truncated pre-tender timelines.

#### 4.3.1.4 Benefits

- Delivery agency can retain a higher degree of control over choice of subcontractors, while design, documentation and construction risks, including fitness for purpose, rest with a single party.
- Design development can be integrated with construction planning at the earliest possible stage of the project.
- It provides an opportunity to undertake early works (such as utilities works) and more thorough site investigations during Stage One to help derisk the project.
- The delivery agency has greater transparency of subcontractor prices and earlier identification of trade price risks.
- Greater delivery agency input into areas that have key quality requirements.

#### 4.3.1.5 Points to consider

The managing contractor procurement model requires a high level of skill, resources and sophistication from all parties to work effectively. The delivery agency team needs to be well resourced to review the open book pricing, including variations and ultimately agree with the award of subcontracts.

For the managing contractor procurement model to provide value-for-money it is important to consider the following points:

- The delivery agency TCC estimate sets the benchmark for the MC's GCS offer but is based on limited design documentation.
- The level of design completed in Stage One will impact the extent of risk premium included in the GCS offer.
- GCS is negotiated at the end of Stage One, without competition. This incumbency status and impact on the project timeline associated with retendering work may make it difficult for the delivery agency to not exercise the Stage Two option.
- Self-performance of construction work by the MC eliminates competitive tendering and subcontracting. Accordingly, limits to or exclusion of self-performance should be considered.
- There can be a lack of focus on lifecycle costs and considerations, similar to fixed price forms of procurement.
- Negotiation of GCS based on developed design can be protracted. This can lead to the possibility of project delays or disagreement about the extent of scope that is actually delivered.
- Obligations on the MC to undertake extensive consultation to verify the cost and program in Stage One may incentivise additional work that adds to cost and duration.
- The delivery agency assumes time and cost risk until the GCS is agreed.

#### 4.3.1.6 Authorised contracts[9]

Currently there is no DTF standard form managing contractor contract.

Development Victoria use an agency approved form of contract under Ministerial Direction 7.1.

The Victorian Health Building Authority use bespoke contracts similar to Queensland's managing contractor two-stage design and construction management contract (negotiated GCS).

#### 4.3.1.7 Supporting resources

- Cost Reimbursable Procurement Requirements

### 4.3.2 Incentivised target cost

#### 4.3.2.1 Key features

In ITC procurement the delivery agency develops a preliminary design and defines the scope, quality and functionality requirements. The contractor completes the project design, prepares construction documentation and constructs the project on a TOC basis with an agreed date for practical completion.

The ITC model allows for risks to be shared, while allocating some risks (such as time and quality risks) to the contractor as the party best able to manage those risks.

The contractor:

- manages design and construction risks, including program, but their financial exposure is capped. The State's financial exposure is uncapped due to the cost reimbursable nature of the model
- is commercially incentivised under a cost painshare/gainshare regime, where costs below and above the TOC are shared between the parties using a pre-agreed percentage split and also a performance regime which includes reward payments for achieving specific KRA/KPI metrics.

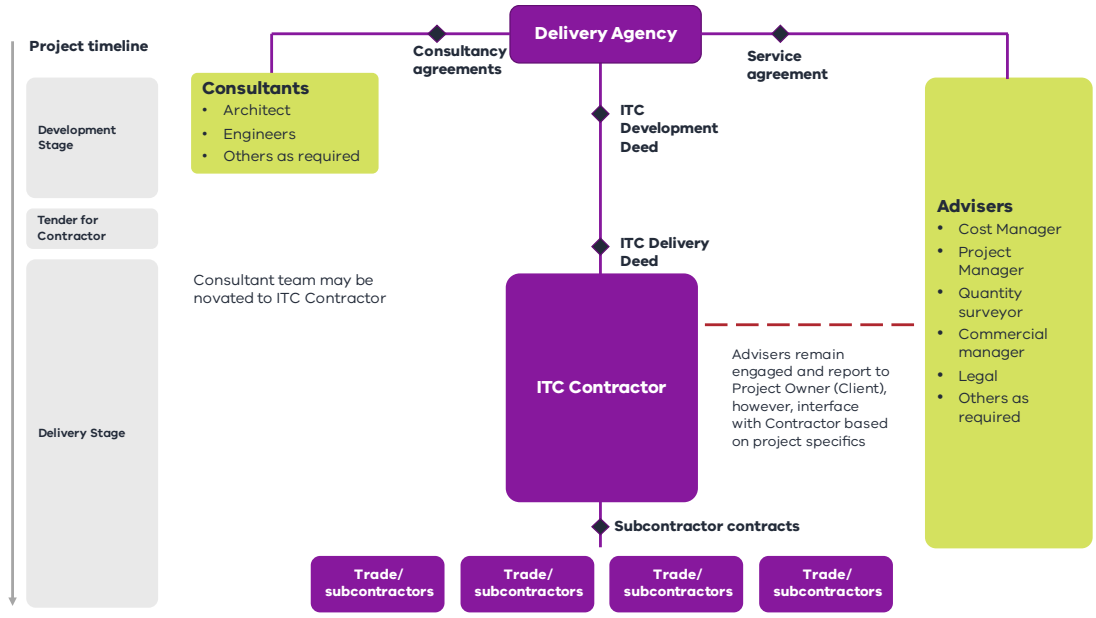
The delivery agency:

- reimburses the contractor on an open book basis including agreed overheads and profit margins.

The standard Victorian ITC model typically includes a two-stage approach. This comprises execution of a development phase deed, where a shortlisted respondent or respondents are engaged to perform early work including design work and develop a project proposal (including a TOC). If the project proposal is accepted by the delivery agency, the development phase is followed by a delivery phase. Payment occurs by reimbursing contractors on an open book basis and a percentage for corporate overhead and profit.

[9] There may be departmental specific standard form contracts endorsed under the Ministerial Directions for Public Construction, which are not intended to be impacted by this Guideline.

**Figure 16 – Incentivised target cost structure**




### 4.3.2.2 Model variants

The ITC model can be adapted to allow for an extended request for proposal (RFP) phase (rather than a formal development phase), which allows multiple contractors to prepare a TOC and delivery phase offer as part of competitive process within the tender period. The ITC model can also be adapted to include a lump sum component for certain scope elements of the work that can be competitively bid at contract award, however, in this case the delivery agency will lose transparency of lump sum costings.

### 4.3.2.3 When to use incentivised target cost

The ITC model provides a balanced approach combining risk sharing and risk allocation to the contractor as the party best placed to manage them with a standard legal relationship. The following elements favour ITC procurement:

#### Project value

- Typically exceeds $50 million (unless done through a programmatic approach) to provide sufficient scale to cover the higher costs of establishment, governance and administration.

#### Scope, complexity and output certainty

- The nature, scope and output cannot be reasonably and adequately defined before tendering to enable efficient pricing and risk allocation to the contractor for significant project components, or there are other factors, necessitating close engagement with the contractor.[10]
- There is some uncertainty or non-standard deliverables.

[10] Distinct from underdeveloped business cases or truncated pre-tender timelines.

**Risk allocation**

- Suited to situations where prevailing market conditions and risk appetite would add considerable (and potentially excessive) risk premiums to a lump sum price, but the contractor is still best placed to manage time (workforce productivity) and quality risks.

**Delivery agency role**

- The delivery agency requires extensive capacity or expertise in cost benchmarking as well as the capability to actively interrogate costs.

#### 4.3.2.4 Benefits

The ITC model provides a greater and earlier focus on scoping and risk management through early investment in collaborative design and project development. It also shares risk and aligns goals between the parties, providing:

- a staged approach that enables scope and design to be collaboratively developed and costed while ensuring competitive tension in the development phase
- transparency on actual cost through an open book approach
- robust KRAs and KPIs (such as, time, quality, stakeholder, disruption, safety and sustainability) structured as positive financial incentives to drive desired behaviours
- a mix of reimbursement and a performance based commercial model with a single point of accountability for design and construction as well as contractor warranties for design and fitness for purpose.

#### 4.3.2.5 Points to consider

ITC procurement requires a high level of investment and preparation by delivery agencies. The delivery agency must have or be able to build the internal systems, culture and expertise to effectively participate, manage and support the ITC process. This capability is integral in this model as:

- success of the risk sharing contract elements is contingent on the delivery agency having the necessary capability and capacity to provide robust interrogation of proponent costs, both during the procurement process and into service delivery.
- the delivery agency is exposed to time and cost overruns under the risk and reward regime.
- there can be a lack of focus on lifecycle costs and considerations, similar to fixed price forms of procurement.

#### 4.3.2.6 Authorised contracts[11]

- ITC Development deed
- ITC Delivery deed.(available on DTF's Cost Reimbursable Procurement Category webpage).

#### 4.3.2.7 Supporting resources

- Cost Reimbursable Procurement Requirements

### 4.3.3 Alliance

#### 4.3.3.1 Key features

An alliance is formed between the delivery agency and non-owner participants (NOPs) (the contractor, designer and other private parties) to design and construct a project.

The alliance participants work together in good faith as an integrated team to deal with key project matters on a best for project basis. The parties share risk, responsibilities and rewards in delivering the project.

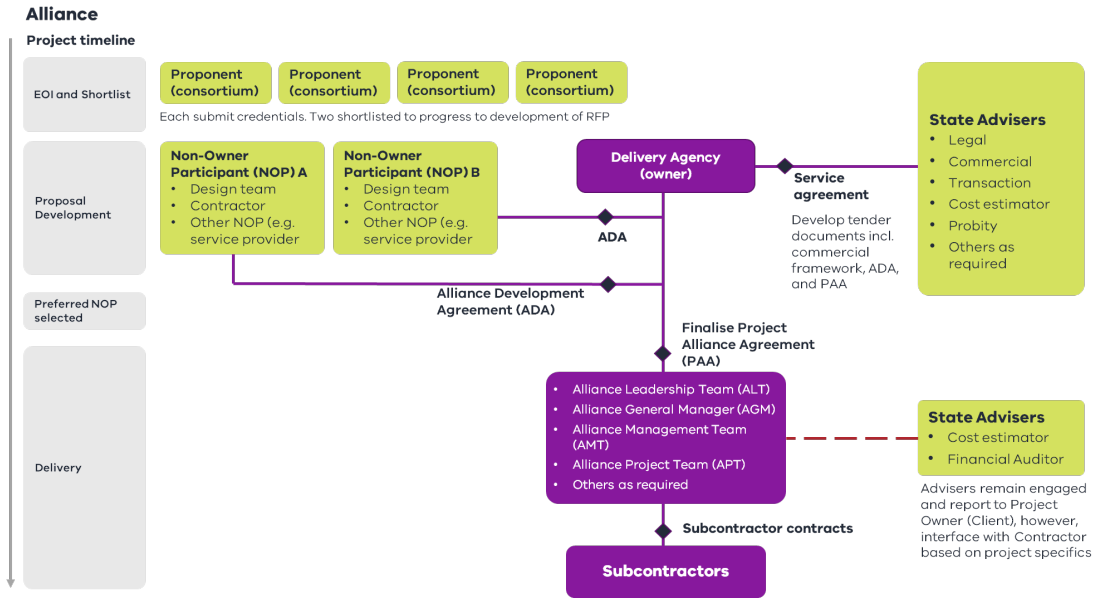
Key features include:

- The total cost of the project delivery is paid for by the State. Typically, only the corporate overhead and profit are at risk for NOPs. The delivery agency takes 100 per cent of cost overrun risk beyond that point.
- The alliance team jointly develops a TOC.[12]
- The delivery agency reimburses the NOPs on an open book basis, including agreed corporate overheads and profit amounts.
- NOPs are commercially incentivised under a cost painshare/gainshare regime, where costs below and above the TOC are shared between the parties using a pre-agreed percentage split, and a performance regime which includes reward payments or penalties for specific KRA/KPI metrics.
- Legal rights to litigate against breach of contract, mistakes and negligence are contractually limited with a 'no blame, no disputes' philosophy.

A key feature of the alliance structure is joint decision-making by an alliance leadership team incorporating participants from the delivery agency and NOPs. However, certain important decisions are always reserved for the delivery agency, with the State ultimately paying for the asset.

[11] There may be departmental specific standard form contracts endorsed under the Ministerial Directions for Public Construction, which are not intended to be impacted by this Guideline.
[12] The TOC is the estimated cost of completing the contracted works and achieving the minimum outcomes required by delivery agencies for the project.

**Figure 17 – Alliance structure**




### 4.3.3.2 When to use an alliance

Alliances are most suited to larger and complex projects with high-level stakeholder influence or uncertainty. Where suited to the individual project characteristics, alliances can benefit from a programmatic approach as the opportunity for future work provides an even greater incentive for contractor performance. The following elements favour alliance procurement:

#### Project value

- Typically exceeds $100 million, providing sufficient scale to cover the higher costs of establishment, governance and administration.[13]

#### Scope, complexity and output certainty

- The nature, scope and output cannot be reasonably and adequately defined before tendering to enable efficient pricing and risk allocation to the contractor for significant project components, or there are other factors, necessitating close engagement with the contractor and key stakeholders.[14]
- Investigative works to quantify risks and design outcomes are not feasible during the planning phase and would be more effectively and efficiently managed in an alliance with the contractor during development and delivery.
- There is uncertainty or non-standard deliverables.

[13] Projects with lower value may be determined to be suitable for alliance delivery, for example, where existing capability and capacity can be leveraged or where a high level of input and engagement with key stakeholders is required.
[14] Distinct from underdeveloped business cases or truncated pre-tender timelines.

- Ongoing delivery agency or key stakeholder input is required during design and construction.
- Knowledge sharing and transfer between the parties is required.
- There are complex external factors, such as stakeholders and interfaces that will have a material impact on project cost and delivery timelines.

**Risk allocation**

- Suited to when other risk isolation and mitigation measures are not effective and transferring risks is cost prohibitive. As a result, successful management of risks is best achieved through a 'no fault, no blame' approach.

**Delivery agency role**

- The delivery agency requires extensive project delivery capacity and expertise to support the collective approach to assessing and managing cost and risk including real time decision-making during delivery.
- They cost benchmark to help drive and validate an efficient target cost.

#### 4.3.3.3 Benefits

Alliances provide for a collaborative culture with incentivised targets and collective decision-making aligning goals between the parties, providing the ability to:

- flexibly respond to changes in project scope and other delivery challenges
- manage complex risks and stakeholder interfaces under an aligned commercial framework, including through involvement of operators
- involve contractor(s) through the collaborative design definition and risk quantification phase to improve pricing efficiency
- capitalise on joint knowledge, systems, innovation and risk management and to maximise client input.

#### 4.3.3.4 Points to consider

Alliances require a high level of investment and preparation by delivery agencies. The delivery agency must have (or be able to build) the internal systems, culture and expertise to effectively participate, manage and support the alliance process. This requires participation at higher or executive levels within the delivery agency. This capability is integral as:

- the nature of alliances may result in heavy dependence on the contractor in the absence of delivery agency expertise and preparation
- the success and selection of alliances is based on participation of the delivery agency in project delivery
- the nature of an alliance is that risks are shared by the contractor up to a NOP risk cap, with limited legal recourse by either party. This increases the potential cost and risk exposure to the State if not managed effectively

- project success is highly reliant on the effectiveness and maturity of the relationships and leadership of all parties
- the alliance model may benefit from the additional incentives provided by programs of work. Programs incentivise contractor performance by providing a clear opportunity to the contractor for future work. However, the benefits of this approach must be balanced against maintaining value over the life of the program.

#### 4.3.3.5 Authorised contracts

- No standard form available.

#### 4.3.3.6 Supporting resources

- Cost Reimbursable Procurement Requirements
- National Alliance Contracting Guidelines (September 2015)

## 4.4 Whole-of-Life models

Whole-of-Life (WoL) considerations should be part of every project's development, regardless of the packaging and procurement strategy. However, certain procurement models are designed to deliver WoL outcomes and performance through long term contractual arrangements.

There are two categories for WoL procurement models:

- Partnerships Victoria models where WoL activities are contracted, including with project financing, which may comprise debt and equity funding.
- bundled models where separate components across the project's WoL are procured under a single procurement or contract without project financing.

WoL procurement models typically feature:

- one contractor to design, construct and maintain or operate assets or both over a long-term contract, typically providing a single point of accountability
- a lump sum contract with the risks associated with design, construction, maintenance or operation or both including schedule and associated interfaces transferred to the contractor
- contractor payments or project revenue based on the asset being available for use, fulfilling specified contracting activities and achieving performance standards.

WoL procurement models are well suited to projects where:

- the design, construction and maintenance or operation of the asset is achievable and cost-effective to bundle under a single contract
- bundling can create value and efficiencies through scale, higher asset utilisation, a single point of responsibility and a reduction in the number of interfaces across many contracts.

### 4.4.1 Partnerships Victoria models

Partnerships Victoria models are long-term contracts where the Government or users pay the private sector (typically a consortium) to deliver infrastructure and related services. These partnerships typically make the private sector parties who build public infrastructure financially responsible for its condition and performance throughout the asset's lifetime.

Typical features of these partnerships are:

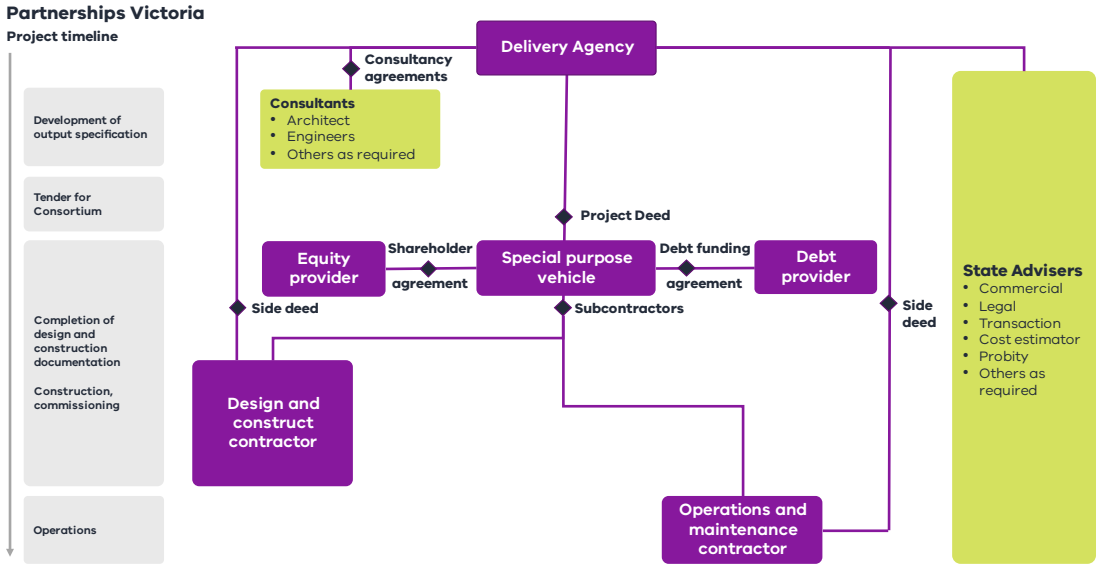
- The delivery agency prepares an output-based specification of the asset and performance requirements rather than a prescriptive specification.
- The consortium designs, builds, finances, maintains and in some cases operates the asset for a specific period (generally 20–30 years).
- The Government usually retains ownership of the asset at the end of the contract term.
- The consortium supplies infrastructure related services and receives payments from Government (or users) based on availability of the asset and the consortium's performance in supplying asset-based services throughout the contract term.
- The Government contributes through land, capital works, purchase of the agreed services or other supporting mechanisms.
- Revenue streams and sources of funding repay the project finance used to build the asset.

Partnerships Victoria models can leverage project finance, revenue opportunities and state assets to unlock value, innovation and in some instances provide a basis for broader community, commercial and precinct development.

The use of project finance is a key component of Partnerships Victoria models and can incentivise performance over the life of the project. It includes a high level of discipline and oversight from financiers in procurement, delivery and operations.

Repayment of project financing (debt and equity) is subject to performance under the contract. Typically, the private sector parties who build public infrastructure are financially responsible for its condition and performance throughout the asset's lifetime.

**Figure 18 – Partnerships Victoria structure**




#### 4.4.1.1 Model variants

Model variants commonly fall into three categories.

**Model variant 1: Community partnerships**

- Typically used for hospitals, schools and justice facilities. The private sector consortium designs, finances, constructs, maintains and/or operates the facility including providing ancillary services such as cleaning, security, facilities management and catering (or some combination of those functions). Government payments during operation of the asset are based on performance. Project costs can be reduced by complementary commercial opportunities where relevant.

**Model variant 2: Precinct partnerships**

- Typically used for housing or other precinct developments. The private sector consortium designs, finances, constructs, maintains and/or operates new developments, including social, affordable and private dwellings in mixed tenure developments. The private sector consortium may receive rental revenue or generate fees from commercial development rights which reduce project costs for government. This model leverages core public investment to attract complementary private investment, delivering integrated community benefits.

**Model variant 3: Economic partnerships**

- Typically used for economic infrastructure, including transport and utilities. The private sector consortium designs, finances, constructs, maintains and operates the asset. It can leverage revenue opportunities and user payments to fund or partially fund the asset and delivery. The level of government payment depends on the project and is based on performance.

#### 4.4.1.2 When to use Partnerships Victoria models

Partnerships Victoria models are well suited to projects that would benefit from innovation and efficiency of private sector involvement or have significant commercial revenue or linked development opportunities. The following elements favour Partnerships Victoria procurement models:

**Whole-of-life:**

- Bundling the design, construction and operation phases is feasible and will drive innovation and efficiencies through project delivery.

**Project value**

- Typically exceeds $250 million, providing sufficient scale to cover the higher costs of establishment, governance and administration.

**Scope, complexity and output certainty**

- Scope and outputs can be reasonably and adequately defined in the business case or during subsequent work before tendering, enabling the development of output-based specifications.
- There is a service component appropriate for private sector delivery.
- There are opportunities to leverage the proposed and existing government assets and potential revenues to fund the project or related developments.

**Risk allocation**

- The whole-of-life risks can be cost effectively allocated to the private consortium, with limited incorporation of risk sharing mechanisms.

**Delivery agency role**

- The delivery agency requires capacity and expertise to lock in a long-term output requirement, in project finance, procurement management and an ongoing contract management function throughout the life of the contract.
- These drivers will differ according to which Partnerships Victoria model is being implemented.

#### 4.4.1.3 Benefits

Partnerships Victoria models can drive benefits during delivery and over the long term once the infrastructure is operational. These models:

- provide ongoing design-driven operational benefits for Government, with a focus on maximising the efficiency of whole-of-life costs and incentivising long-term service outcomes
- can provide clarity, certainty and transparency of project scope, costs and time outcomes. These models can also provide certainty of funding and whole-of-life costs during operation

- enable Government to focus on core service delivery, with the asset managed by the private consortium. The private consortium manages complex interfaces and reduces 'contract gaps' with Government
- allow integration of value capture, commercial or precinct development opportunities, which can lower the cost of projects for Government
- drive enhanced oversight, control and assurance mechanisms, with multiple independent parties (including the financier) monitoring to ensure what is built meets the contract requirements.

#### 4.4.1.4 Points to consider

The models are more suitable to projects with long-term and definable service needs, where risks can be appropriately allocated to the private consortium. They require a high level of planning and development by delivery agencies and ongoing delivery agency contract management competency. Considerations include:

- sufficient market notice is required to ensure adequate number of consortiums can form to ensure a competitive procurement process
- variations to project scope may give rise to extensions of time and cost claims from the contractor.
- major modifications and augmentations can be complex to incorporate once the asset is operational given project financing arrangements. The need for future flexibility should be considered as part of the procurement process
- output specifications need to be accurate and contractor prices appropriate during tendering. This is to ensure the contractor does not underbid or accept an unsustainable level of risk that may result in the contractor pursing unreasonable claims.
- the delivery agency must properly resource and train contract managers to monitor service delivery and performance to realise the full benefits of the contract
- the financial sustainability of the companies is important given the long-term nature of the contract.
- the asset management or service component being appropriate for private sector delivery.

#### 4.4.1.5 Authorised contracts

- Harmonised Public Private Partnerships Project (PPP) Deeds (Update to 2018 Standard Form Project Deeds):
  - Social Infrastructure PPP Project Deed
  - Linear Infrastructure PPP Project Deed (available on DTF's Whole of Life Procurement Category webpage)

#### 4.4.1.6 Supporting resources

- National PPP policy and guidelines
- Whole of Life Partnership Victoria Procurement Requirements

### 4.4.2 Bundled models

Bundled models involve grouping the design, construction, operations and/or maintenance of an asset. They do not include project financing. Instead the State is responsible for funding and financing the infrastructure. These models typically feature:

The delivery agency:

- preparing a design brief and preliminary design (including functional specification and key user requirements) for tender
- paying progressively during construction of the asset and for maintenance and operations once the asset is operational.

The contractor:

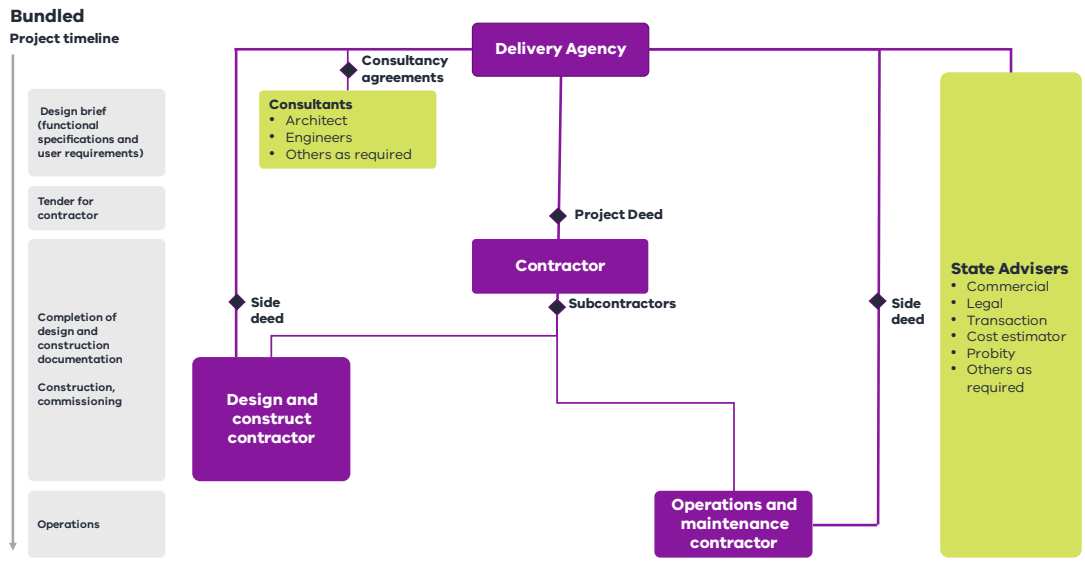
- constructing the asset for a fixed price and agreed schedule, then maintaining the asset for an agreed period of time
- taking risks associated with the design, construction and maintenance including schedule and associated interfaces
- typically provides a single point of responsibility for design, construction and asset quality over the life of project.

These models typically make the private sector parties who build public infrastructure financially responsible for its condition and performance throughout the asset's lifetime.

#### 4.4.2.1 Model variants

- Design, Build and Maintain (DB&M)
- Design, Build and Operate (DB&O)
- Design, Build, Operate and Maintain (DBOM)

**Figure 19 – Bundled structure**



#### 4.4.2.2 When to use bundled models

Bundled models are well suited to projects that would benefit from innovation and efficiency of private sector involvement. The following elements favour bundled procurement models:

**Whole-of-life:**

- Bundling the design, construction and operation phases is feasible and will drive innovation and efficiencies through project delivery.

**Project value**

- Typically exceeds $250 million, providing sufficient scale to cover the higher costs of establishment, governance and administration.

**Scope, complexity and output certainty**

- Scope and outputs can be reasonably and adequately defined in the business case or during subsequent work before tendering.
- There is a service component appropriate for private sector delivery.

**Risk allocation**

- Risks for the design, construction and maintenance or operation including schedule and associated interfaces can be defined and allocated to the contractor.

**Delivery agency role**

- The delivery agency requires capacity and expertise to lock in a long-term service requirement, procurement management and an ongoing contract management function throughout the life of the contract.

#### 4.4.2.3 Benefits

Bundled models can drive benefits during delivery and over the long-term once the infrastructure is operational. These models:

- provide ongoing design-driven operational benefits for Government, with the focus on maximising the efficiency of whole-of-life costs and incentivising long term service outcomes
- provide greater clarity, certainty and transparency of project scope, costs and time outcomes. Can also provide confidence of funding and whole-of-life costs during operation
- enable Government to focus on core service delivery, with the asset managed by the private consortium. The private contractor manages complex interfaces and reduces 'contract gaps' with Government.

#### 4.4.2.4 Points to consider

Bundled models are more suitable to projects with long-term and definable service needs, and where risks can be allocated to the private consortium. They require a high level of planning and development by delivery agencies and ongoing delivery agency contract management competency. This capability is integral due to:

- the possibility that variations to project scope may give rise to extensions of time and cost claims from the contractor.
- the need for careful consideration during tendering to ensure output specification is accurate and contractor prices are appropriate. This is to ensure the contractor does not underbid or accept an unsustainable level of risk that may result in the contractor pursing unreasonable claims.
- the success of the bundled model depending on the delivery agency's oversight and relationship with the private sector contractor through its delivery and operational
- the State retaining higher risk relative to other WoL models (such as Partnerships Victoria models) as bundled models typically include subcontractor liability caps and only operational/maintenance payments are at risk during operation
- the financial sustainability of the companies being important given the long-term nature of the contract and limited recourse
- adequate market notice being required to ensure adequate number of consortiums can form to ensure a competitive procurement process.
- the asset management or service component being appropriate for private sector delivery.

#### 4.4.2.5 Authorised contracts

- Not available.

#### 4.4.2.6 Supporting resources

- Whole of Life Procurement Requirements (under development)
- Partnerships Victoria Requirements

# Part Three: Implementing the procurement strategy

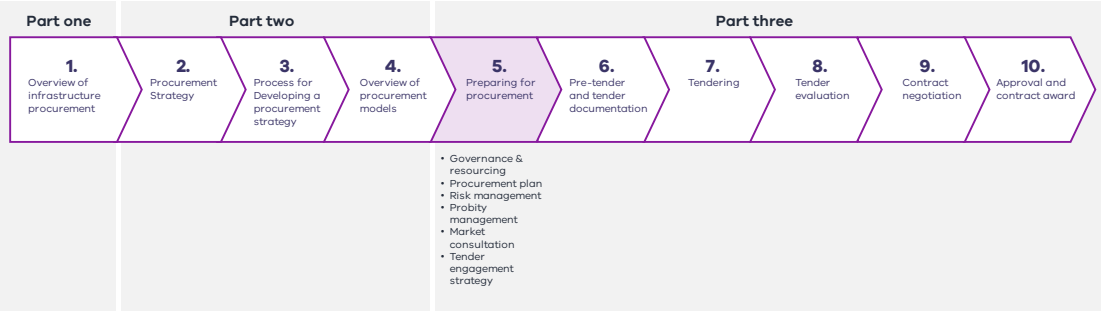
Part Three outlines the process for implementing an investment's procurement strategy. It requires a detailed understanding of the procurement environment (addressed in Part One) and the development of a robust procurement strategy as a component of the investment's business case (addressed in Part Two). The process requires the following steps:

- preparing for procurement
- pre-tender and tender documentation
- tendering
- tender evaluation
- negotiation
- approval and contract award.

Part Three outlines a standard process for implementing a procurement strategy that is well suited to small to medium sized infrastructure procurements delivered using lump sum procurement models. It should be adapted and expanded upon when delivering larger and more complex investments or when using cost reimbursable or WoL procurement models.

## 5. Preparing for procurement

**Figure 20 – Chapter 5 overview**




It is essential that agencies undertake planning and preparation activities prior to commencing a procurement process.

This typically includes:

- establishing governance and resourcing arrangements for the procurement phase of the investment
- developing a procurement plan to direct the procurement process, including a high-level schedule for the project

- updating and identifying risks for the project, including strategies to allocate and manage risk through the procurement process
- establishing a probity plan and framework for procurement of the project
- undertaking market consultation as required
- developing a tender engagement strategy

There is no one-size-fits-all approach to tendering preparation and planning. The amount of preparation will differ depending on the scale, complexity and procurement model selected for the project.

## 5.1 Establishing governance and resourcing for the procurement phase

The first step in the procurement process is establishing and resourcing a team to manage the investment through the procurement phase. The skill sets required to deliver the procurement stage may be quite different to those required in the project development stages of a project.

The required skill sets are also likely to vary depending on the size and scale of the project and the procurement model selected.

The Cost Reimbursable Procurement Requirements provide more detail on ensuring appropriate delivery agency resourcing and expertise to be the active and informed client required to successfully deliver cost reimbursable models.

The Whole of Life Procurement Requirements outline resources required to deliver projects with project finance (debt and equity investment).

Getting the right governance, level of resourcing and mix of skills early in the procurement stage is essential to ensuring the team has the capability and capacity to procure a desirable solution.

### 5.1.1 Governance and accountability

Robust governance arrangements must be established or reconfirmed prior to commencing any procurement activities, and should clearly identify:

- the senior responsible owner (SRO), or person with ultimate accountability for successful procurement delivery
- a process for decision-making, including project board or steering committee terms of reference where applicable
- working group and team member roles and responsibilities.

For smaller, less complex procurements, more streamlined governance arrangements may be implemented. Table 10 outlines the accountability requirements of some generic roles and responsibilities that commonly apply in a procurement.

**Table 10 – Key team governance requirements**

| Role | Responsibilities |
|---|---|
| Senior responsible owner (SRO) | The person in the client organisation who is ultimately accountable to Government for the successful delivery of the project. They are responsible for approving all decisions relating to the procurement or, where necessary, obtaining Ministerial and financial delegate approvals.<br><br>The SRO usually sits with the client department where the delivery agency is separate from the portfolio department<br><br>Refer to Business Case – Investment Lifecycle and High Value High Risk Guidelines for more information on the role of the SRO. |
| Project board/steering committee | Project boards are not involved in the day-to-day management of the project. They consider the recommendations of the project team and provide expert advice and decisions to support the SRO and project team. |
| Project director/manager | The project director should be a senior officer providing the project with the necessary leadership through tendering and delivery. They have clear accountability for delivering the project requirements in accordance with the approvals given and are a single focal point for the daily management of the client organisation's interest in a project. |
| Reference group | Comprises representatives from end users and other stakeholders where appropriate to ensure the requirements of the users and occupants of the asset inform the design brief and technical specification. |
| Project team | One or more persons who assist the project manager in managing the administrative and reporting requirements of the procurement. |
| Working groups | Typically used for larger projects, the team is divided into specific working groups to develop tender documentation and associated activities, such as commercial, legal and technical aspects. |

Agencies will consult with DTF on governance plans for HVHR projects, as required under the HVHR framework. The Cost Reimbursable Procurement Requirements and Whole of Life Requirements detail requirements for potential participation of DTF on governance and evaluation bodies.

Agencies should carefully consider what decisions will be retained by Government and what are undertaken in conjunction with the contractor in cost reimbursable models.

#### 5.1.1.1 Approval points

The scope, cost and schedule for delivery of the project will typically be approved as part of the business case or approval of the procurement by Government. Delivery agencies should consider appropriate approval pathways for project milestones and any changes that are required during the procurement process.

Tendering is a costly process for purchasers and suppliers in terms of time, resources and money. Before commencing the process, it is important to have a firm intention to proceed, with funds committed and available.

The approvals process will differ depending on the procurement type, complexity and scale of the project.

Approvals for HVHR projects will be in accordance with their HVHR project assurance plan.

Specific approvals for Partnerships Victoria and cost reimbursable procurement models are available in the relevant requirements documents.

### 5.1.2 Resource requirements

Undertaking a procurement process requires resourcing to ensure procurement tasks can be delivered according to the project schedule. Agency teams will need access to the required capacity and skills for the type of procurement proposed.

It is common to engage a range of advisers to supplement in-house capacity. Depending on the size and complexity of the project, these could include commercial, financial, technical, legal, risk, transaction, probity and taxation advisers.

Specific resourcing requirements for Partnerships Victoria and cost reimbursable procurement models are available in the relevant requirements documents.

#### 5.1.2.1 Use of prequalified registers

Ministerial Direction 6.1 notes:

- When conducting a selective tender or engaging a supplier from a register or supplier panel to perform works or construction services, Agencies must use a Register or Supplier Panel established and operated in accordance with the Instructions.
- Agencies may only establish, operate and use a register, with the prior approval of the Secretary as set out in the Instructions.

Prequalified advisers can be used where appropriate to supplement delivery agency capacity in managing procurement.

Government practitioners can use these registers to efficiently identify and engage experienced and appropriate advisers.

The construction supplier register is a prequalification scheme for building and construction industry consultants and contractors. It is managed by DTF and includes categories for a range of technical advisers. Further information is available at: www.dtf.vic.gov.au/infrastructure-investment/construction-supplier-register.

The Victorian Government Purchasing Board supports several state purchase contracts and registers that could be used to engage project consultants, including the:

- **Professional Advisory Services Panel** which includes consultants experienced in project strategic development, business case development, procurement, project auditing, project management and commercial advice
- **Legal Services Panel** which provides a range of legal services including for commercial projects
- **Geospatial Data and Analytics Panel** which provides geospatial imagery, elevation and analytical products and services.

## 5.2 The procurement plan

Delivery agencies should develop a procurement plan to guide a procurement from tender development, through contract award, commissioning, transition-in and requirements to establish operations and maintenance.

A procurement plan is developed after funding approval. It should be derived from the procurement strategy and be continuously improved and amended throughout project delivery to reflect changes in the delivery environment.

### 5.2.1 Confirming the procurement decision

The first step in developing a procurement plan is to review the project's business case and procurement strategy. This is essential in order to reassess and reconfirm the validity of the procurement decision. This stage is particularly relevant in instances where the procurement team differs from the business case development team.

If the procurement team decides that an alternative procurement approach is required (that is, an alternative approach to the one identified in the business case), the justification for taking a different approach needs to be documented. This documentation should specifically address what has changed since the procurement strategy was developed.

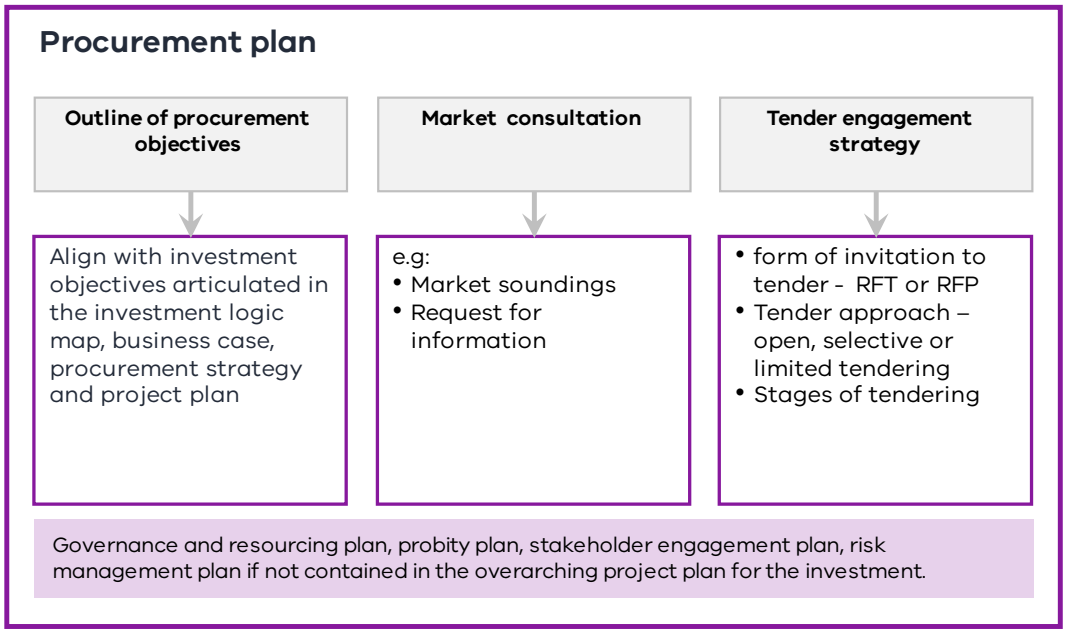
Appropriate government approval is required before the procurement can commence using an alternative approach.

### 5.2.2 Preparing the procurement plan

There is no one-size-fits-all approach outlining what a procurement plan should include as content is project dependent. In general, some important inclusions are:

- confirmation of procurement methodology
- project overview and objectives
- project budget, funding and approvals
- governance and resourcing for procurement
- tender engagement strategy
- risk management
- probity
- market consultation and stakeholder engagement
- due diligence and project documentation
- governance plan, probity plan, stakeholder engagement plan and risk management plan for the procurement stage, if not contained in the overarching project plan for the project.

**Figure 21 – Key elements of the procurement plan**




The procurement plan is a living document. It should be reviewed at each stage of the procurement process to reflect and consider new information arising during procurement implementation.

Appendix D contains further detail on potential content for the procurement plan. It is indicative only and is not exhaustive. It should not be seen as a template but adapted according to project requirements.

## 5.3 Risk management

Risk identification and management strategies are considered in developing the procurement strategy and are relevant throughout the project lifecycle.

Agencies should establish risk management processes to identify, analyse, mitigate and allocate risks that may impact their procurements. At a minimum this includes establishing a risk register, monitoring risks and implementing appropriate treatments to promptly address issues when they arise. The aim is to ensure the investment remains on time, to budget and likely to deliver the investment benefits.

Risk assessment and management practices should be commensurate with the scale, scope and risk of the procurement.

The Victorian Government Risk Management Framework prescribes the minimum risk management requirements agencies must apply. Compliance with the risk management framework is mandated under Direction 3.7.1 of the *Standing Directions 2018* of the *Financial Management Act 1994*. It aligns with ISO 31000 and is available at:

- https://www.dtf.vic.gov.au/planning-budgeting-and-financial-reporting-frameworks/victorian-risk-management-framework-and-insurance-management-policy

Further information on other applicable guidance can be found at:

- https://www.dtf.vic.gov.au/planning-budgeting-and-financial-reporting-frameworks/victorian-risk-management-framework-and-insurance-management-policy.

The Victorian Managed Insurance Authority provides practical guidance, tools and templates for managing risk at:

- https://www.vmia.vic.gov.au/tools-and-insights/practical-guidance-for-managing-risk.

The Risk, Time, Cost and Contingency Guideline provides supplementary guidance for identifying, quantifying and managing risk and is available at:

- https://www.dtf.vic.gov.au/investment-lifecycle-and-high-value-high-risk-guidelines/stage-1-business-case.

The PDDD Guideline provides supplementary technical guidance on how to integrate PDDD activities into project delivery. This is available at:

- https://www.dtf.vic.gov.au/investment-lifecycle-and-high-value-high-risk-guidelines/stage-1-business-case.

### 5.3.1 Risk allocation

Ensuring all parties have a clear and consistent understanding of their risk management responsibilities is essential to timely, efficient and economical risk management.

Risk management responsibilities should be established or confirmed at procurement commencement. Preferred risk allocation positions:

- should be clearly communicated to the market during market consultation
- clearly communicated in tender documents

once negotiated and agreed, be reflected in contract documents.

The objective of risk allocation is to distribute risk appropriately across all parties – not to transfer as much risk as possible.

As a general principle, risks should be allocated to the party best able to manage them. The delivery agency should seek to retain any risks that Government is best placed to manage and to allocate risks which another party is better placed to manage.

Allocating an inappropriate balance of risks to the contractor or other party can drive perverse outcomes, including high premiums for risk pricing by contractors which would diminish VfM outcomes.

Where it is difficult to accurately quantify and price a risk, it may be appropriate for Government to retain or share responsibility for the risk. The Government may retain responsibility for bearing the cost and other consequences of a risk occurring on a project while incentivising the contractor to effectively manage it and reduce its likelihood and impact.

Different procurement models can have very different approaches to the way risks are treated and managed. Further information on appropriate risk allocation can be found in the Cost Reimbursable Procurement Requirements for cost reimbursable models and the Whole of Life Requirements for these projects.

### 5.3.2 Techniques to derisk projects

There are a range of risk management strategies that can be employed to derisk an investment. These should align with the complexity and risk profile of the investment. Key strategies include (but are not limited to):

- **Project development and due diligence (PDDD)**: PDDD involves detailed investigations into certain project characteristics or risks to improve the agency's understanding and level of certainty of those risks. It allows more accurate quantification and pricing of risks. It is commonly used to mitigate site and in-ground conditions, including utility risk and interface risks.
- **Early works**: Early works packages can be undertaken prior to the commencement of main works that address common risks, in particular the relocation of utilities and the investigation and remediation of in-ground conditions.
- **Early contractor involvement (ECI)**: ECI facilitates a contractor's technical input, in relation to risk identification, quantification and treatment, early in the project's development phase to inform project solutions and reference designs (see section 4.1).

### 5.3.3 Considering investment uncertainty

Uncertainties are external factors beyond the investor's control that can impact the delivery of intended investment outcomes.

When planning an investment that may be impacted by uncertainty, agencies should consider the right amount of flexibility required to adapt the project to these changing circumstances.

Further information on managing uncertainty is available in the managing uncertainty supplementary ILG.[15]

## 5.4 Probity management

Ministerial Directions 4.1 and 4.2 detail the probity requirements for public construction procurement.

Agencies must have appropriate systems in place to ensure probity for all Public Construction Procurement including completing a probity plan for projects that exceed $10 million or are complex or otherwise high risk.

Procurement must be transparent, fair and ethical. This helps ensure there is confidence in government processes. Probity is considered at all stages of procurement and the application of probity is addressed throughout part 3.

Proper probity management involves:

- ensuring procurement participants act with integrity and impartiality. This includes participants being aware of their probity obligations, including applicable laws, rules and policies
- ensuring key tender and evaluation documents and processes comply with probity requirements, including equitable treatment of tenderers, management of intellectual property and staging of negotiations with tenderers
- establishing procedures for identifying, assessing and managing actual and perceived conflict of interests
- Identifying probity risks and implementing effective management strategies
- establishing tender and probity procedures that are transparent, auditable and accountable, including processes for record keeping, managing confidentiality in the tender process and keeping supplier information secure
- establishing procedures for reporting and managing breaches of probity.

These elements will be captured in a probity plan for construction procurement of more than $10 million and for complex and high-risk procurement. Probity practitioners may be used for more complex procurements. For further information on applying probity to government procurements, including requirements for appointing a probity adviser and or auditor, see: https://www.buyingfor.vic.gov.au/plan-probity

[15] See the DTF website at: www.dtf.vic.gov.au/infrastructure-investment/investment-lifecycle-and-high-value-high-risk-guidelines.

## 5.5 Market consultation

Determining the form and content of government's consultation with industry is an important element of the procurement plan.

Appropriate market consultation can inform whether a proposed tender engagement strategy will result in procurement success or failure.

Consultation can identify supply side issues and provide Government with confidence that there is a competitive market capable of supplying its needs that will meet VfM outcomes.

Market consultation can vary greatly. The extent of consultation required depends on:

- the scale and complexity of the investment
- the level of risk or uncertainty
- the level of experience in the procurement methodology
- delivery constraints such as managing a difficult physical environment or ambitious timelines.

Options for consultation may include:

- market soundings, including structured processes seeking market comment or input, participating in industry briefings and forums or undertaking market surveys
- a request for information, which is a process primarily used to formally collect written information from industry.

The Government may test a range of issues, including to:

- determine whether there is sufficient market interest and maturity to drive a competitive tender response
- seek information from the market on ability and appetite to meet project requirements, risk allocation and timelines
- seek feedback on design and other technical elements
- determine whether there is an appetite to consider alternative solutions/procurement options that could deliver improved outcomes and value for money
- identify technological developments or innovations that could impact on delivery of the project

Procurement practitioners must consider confidentiality and probity in undertaking all consultation activities. Practitioners should also consider that market feedback will be influenced by a range of factors including commercial incentives. Procurement plans should be updated based on market consultation, where appropriate.

## 5.6 Tender engagement strategy

The tender engagement strategy is an important and mandatory element of the procurement plan. It details the method of engaging a contractor to perform the works. It should outline how the agency intends to offer the procurement opportunity to the market, including the type and form of tendering and whether to use single-stage or multi-stage tender approaches.

Different procurement models will have defined stages of tendering and forms of invitation to tender. Further information on these approaches can be found in the Cost Reimbursable Procurement Requirements and the Whole of Life Procurement Requirements.

If the procurement team decides that a sole-sourced procurement process is required (and this is inconsistent with the approach approved in the business case or with requirements for limited tendering set in the Ministerial Directions), additional approvals may be required.

### 5.6.1 Form of invitation to tender

Tender documentation will comprise the EOI, RFP or request for tender (RFT) documents depending on the type of procurement model used. Typically a design specification is used when the client has specified a defined solution and this is used in conjunction with an RFT.

A statement of requirements is used when the client has defined the services or outputs it requires but has not defined a single specific solution. It should be used in conjunction with an RFP. This approach is used for Partnerships Victoria projects.

Agencies should refer to Appendix E and see: https://www.buyingfor.vic.gov.au/source-supplier#invite-offers for further information on invitations to tender.

### 5.6.2 Tender approach

Ministerial Direction 3.2 for Public Construction Procurement sets rules and minimum thresholds for open, selective and limited tendering.

To promote competition and contestability, when engaging a supplier to perform Works or Construction Services, Agencies must use:

- an open tender;
- a Selective Tender open to:
  - all suppliers in the relevant category of a Register; or
  - at least three suppliers in the relevant category of a Register; or
- a Limited Tender conducted in accordance with the Instructions.

Agencies may seek tenders by using three broad types of tendering:

- **Open tendering (single or multistage):** a competitive tender open to all potential suppliers of the works or services in the local and international market.
- **Selective tendering:** a competitive tender open only to suppliers on a prequalification register are invited to participate in the tender.
- **Limited tendering** a tender conducted with limited competition.

The selection approach will be informed by the scale and complexity of the procurement, project-specific circumstances and the level of competition.

The Ministerial Direction 3.2 for Public Construction Procurement in Victoria under the *Project Development and Construction Management Act 1994* sets out the limited circumstances and value thresholds where selective and limited tendering can be adopted.

#### 5.6.2.1 Stages of tendering

Either a single-stage or multi-stage tender process can be used for open and selected tendering. The tender approach may be informed by legislative or policy requirements (such as free trade agreements or the HVHR process). It will also be influenced by the project model and project characteristics, with more complex projects generally requiring additional tender stages.

**Single-stage tendering** occurs where only an invitation to tender is issued to the market. Single-stage tender approaches are commonly used for lower-risk or simple works.

Agencies should be aware that open public advertisement of a tender can lead to an unlimited number of potential tenderers whose qualifications to undertake the contract can be difficult to assess. However, requirements arising from legislation, such as FTAs, may necessitate a level of open tendering.

**Multistage tendering** occurs where pre-tender stages are used to create a shortlist of suppliers with demonstrated capacity to satisfy government's requirements. Shortlisted participants will then be invited to participate in a subsequent tender process.

Multi-stage tendering is commonly used on large, complex or specialised projects, where tendering is likely to be costly. It usually occurs in two stages, although additional processes may also be warranted.

Delivery agencies may consider the following processes:

- Registration of interest (ROI) – typically involving an open process for potential suppliers to provide basic information about their organisation, capabilities and experience relevant to the project.
- Expression of interest (EOI) - is used to assess suppliers capability to deliver procurement objectives.

EOIs limit the number of suppliers who are required to develop a more detailed response to an invitation to tender. Common elements that are generally tested in an EOI include financial capacity, strength and stability of the company partners (including parent companies), prior relevant experience and quality and capability of the nominated project team put forward by the tenderer.

Agencies should decide on the level of price and proposal development required by tenderers at each stage of the procurement. Treasurer approval of the tender engagement strategy is a requirement of the Cost Reimbursable Procurement Requirements. This includes where non-price alternatives such as development of a single TOC by bidders are proposed.

## 5.7 Preparing for procurement phase checklist

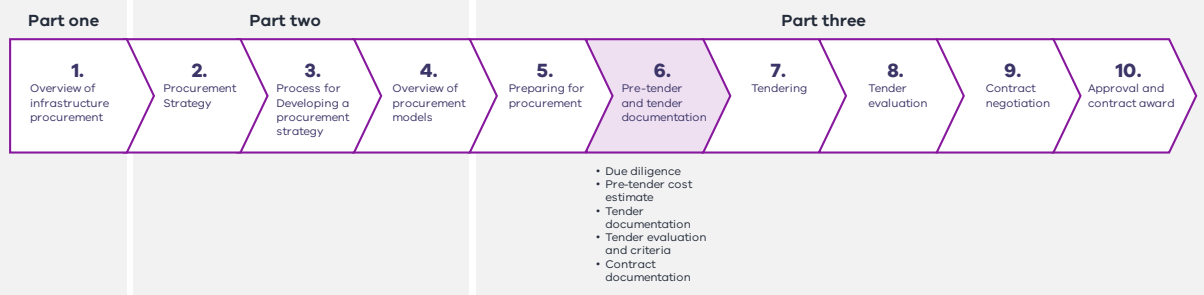
Before proceeding to the procurement documentation phase, undertake the following tasks as required:

**Table 11 – Preparing for procurement phase checklist**

| Preparing for procurement phase key tasks | |
|---|---|
| ✓ | Establish governance and resourcing for the procurement phase |
| ✓ | Develop a procurement plan, including a tender engagement strategy |
| ✓ | Establish or update a risk management plan |
| ✓ | Prepare and implement a probity plan |
| ✓ | Undertake market engagement as required |

# 6. Pre-tender and tender documentation

**Figure 22 – Chapter 6 overview**




Agencies should undertake relevant due diligence, develop a cost estimate and key documentation for the tendering phase, including:

- EOI, RFT and RFP documentation
- tender evaluation criteria and an evaluation plan
- contract documentation.

It is critical the tender evaluation criteria and tender evaluation plan are developed in conjunction with tender documentation. This ensures that the tender response schedules will adequately address procurement objectives.

## 6.1 Due diligence

Prior to tendering a project, an agency will undertake PDDD. This process builds a comprehensive body of knowledge and documentation about the project to verify agency understanding of project requirements and interfaces, identify risks and inform project and tender documentation. Where relevant, due diligence should include investigations to efficiently minimise project risk related to spoil management, such as certainty of spoil volumes, classification and market capacity.

DTF's PDDD Guideline provides supplementary technical guidance on how to integrate PDDD activities into project delivery. This is available at:https://www.dtf.vic.gov.au/investment-lifecycle-and-high-value-high-risk-guidelines/stage-1-business-case.

Delivery agencies may provide technical due diligence information (such as site investigation reports) to tenderers prior to, or as part of the tender phase. The level of reliance on the reports by tenderers will be determined on a project-specific basis.

## 6.2 Pre-tender cost estimate

Procurement teams may wish to validate the expected total project cost to provide confidence that the current market can deliver the tender within the government-endorsed funding allocation.

Where a project design specification has been prepared, the pre-tender cost estimate can be developed by a quantity surveyor, who will estimate a price for each component of works based on the current market cost.

For Partnerships Victoria projects, the procurement team must develop a public sector comparator (PSC). The PSC estimates the hypothetical risk-adjusted cost if a project were to be financed, owned and implemented by Government. Further information on developing a PSC is outlined in the National PPP guidelines volume 4.

Development of a principle's benchmark is also required for cost reimbursable models, especially in a sole source scenario. Further detail is available in the Cost Reimbursable Procurement Requirements.

## 6.3 Tender documentation

The quality of the tender documents is critical to successful tendering. They are the basis of the contract between the purchaser and the successful supplier and must accurately reflect the physical, financial, contractual and time parameters of the service required.

The Ministerial Directions 3.6 for Public Construction Procurement in Victoria under the *Project Development and Construction Management Act 1994* sets out the requirements for completing tender documentation.

The tender documents should include information appropriate to the scale, procurement model, level of design and complexity of the procurement.

Tender documents should focus on eliciting only the information necessary to determine the best VfM solution.

Clear and explicit process rules, such as closing time, date and place for lodging tenders, evaluation criteria and confidentiality requirements, should be outlined in the documentation.

As a general rule, the more detailed and accurate the information provided to tenderers, the better the quality of the tender.

It is important that any new information arising during a procurement stage be used to reassess inform future procurement processes and relevant tender documentation.

Typical components of tender documents are detailed in Table 12 below. The content will differ depending on the stage of procurement (EOI, RFT, RFP) and the type of procurement model selected.

**Table 12 – Typical components of tender documents**

| | |
|---|---|
| **Background** | This includes:<br>• a brief description of the government entities managing procurement, including background, function and purpose<br>• an overview of the project, including objectives, scope, stakeholders and timelines<br>• a statement on the stage of procurement and a brief explanation of what is anticipated in each stage |
| **Conditions of tender and probity obligations** | These are the conditions of tender, including the rules of the tender process and relationship to the model form. They detail the overall tender process including the delivery method, probity issues, timing of submissions, communication issues and the evaluation criteria. |
| **Specification:** | Depending on the type of delivery model chosen, this document may be a project brief or a detailed description of the works or service. The specification sets out the performance and technical criteria. |
| **Financial and commercial information** | This includes the proposed risk allocation and high-level commercial principles/structure that will apply. |
| **Form of contract** | These are the commercial and legal terms on which the works or services will be performed. |
| **Government policies** | This includes information about relevant government policies that apply to the procurement. |
| **Additional information** | Additional information includes:<br>• drawings<br>• environmental and geotechnical investigations<br>• land, planning and environmental issues<br>• sustainability approach<br>• community consultation<br>• project interfaces.<br>Agencies may also request specific information from bidders to assist in preparation of tender documentation for the next procurement stage. |
| **Response schedules** | These outline the required tender response to supply the works. |

### 6.3.1 Bid cost reimbursement

Partial bid cost reimbursement may be considered for major construction HVHR projects. Government approval will be required to confirm the policy applies to a project and to allocate appropriate funding.

If partial bid cost reimbursement applies to a procurement, the tender documentation will set out bidders' entitlements, including covered items and any limitations on reimbursement.

Reimbursement will be linked to receiving intellectual property rights from the unsuccessful bidder's proposal and subject to the bidder submitting a conforming bid.

The bid cost reimbursement for major construction projects policy sets out parameters for assessing and paying bid costs on projects. It is available at: https://www.dtf.vic.gov.au/infrastructure-investment/bid-cost-reimbursement-major-construction-projects.

## 6.4 Tender evaluation criteria and documentation

MD 3.7.1 requires agencies to develop and substantially complete an evaluation plan detailing how a tender process will be evaluated before releasing tender documentation to the market to ensure the information requested through the tender and the evaluation plan are aligned. The evaluation plan must be finalised before the tender closing date.

Agencies should finalise evaluation plans substantively before the release of tender documentation and finalise it prior to the tender closing date.

The evaluation plan will set out the:

- tender evaluation criteria, including identifying any mandatory criteria
- relative importance and associated weightings of the evaluation criteria
- evaluation methodology and how each criteria will be evaluated
- tender evaluation processes, including:
  - tender opening times
  - who will assess the tenders, including number of panels/working groups assessing different aspects of the submission
  - resourcing, such as technical experts required to assess certain criteria
  - which evaluation committee members will have access to what information
  - timeframes for the evaluation
  - how each evaluation criteria will be assessed and scored.

### 6.4.1 Evaluation criteria

Evaluation criteria should be linked to the project's objectives to enable the agency to evaluate which tender represents the best value for money.

It is essential that tender evaluation criteria, weightings and processes are developed prior to releasing tender documentation. This is to ensure that tender documents are drafted in a way that will elicit all the information that the tender evaluation team requires to assess submissions and meet probity requirements.

Tender evaluation criteria should be disclosed in tender documents. Agencies may provide an indication of the relative importance or weighting of the evaluation criteria in the tender documentation.

Further information on specific evaluation criteria is provided in chapter 8.

## 6.5 Contract documentation

Contract documentation formally outlines the arrangement between the project owner and the successful supplier. It helps to ensure high-quality and cost-effective outcomes for the project by:

- specifying performance and quality standards
- appropriately apportioning risk between the parties
- incentivising the contractor to perform as appropriate, in line with VfM considerations.[16]

Contract documentation should facilitate the parties working together in the most collaborative and constructive way possible. It should be developed during the tender development phase and should be disseminated as part of the tender documentation.

### 6.5.1 Standard forms of contract

The Ministerial Directions 7.1 and 7.2 for Public Construction Procurement in Victoria under the *Project Development and Construction Management Act 1994* govern the use and content of contracts for construction works. They require contracts to be in a form approved by the Secretary to the Department of Treasury and Finance. Collectively, these contracts are referred to as the Victorian Public Construction Contracts.

Approved Victorian Public Construction Contracts for lump sum contracts for small to medium sized projects can be found at: https://www.dtf.vic.gov.au/practitioners-toolkit/practitioners-toolkit-document-library.

Additional contracts, including the ITC Contract Suite and Enhanced Design and Construct Deed, can be accessed at DTF's Cost Reimbursable Procurement Category and Lump Sum Procurement Category webpages.

DTF has developed a suite of harmonised project documents for Partnerships Victoria projects (Harmonised PPP Project Deeds). These can be accessed at DTF's Whole of Life Procurement Category webpage).

[16] Australasian Procurement and Construction Council, 'Building and Construction Procurement Guide - Principles and Options', May 2013.

## 6.6 Pre-tender and tender documentation checklist

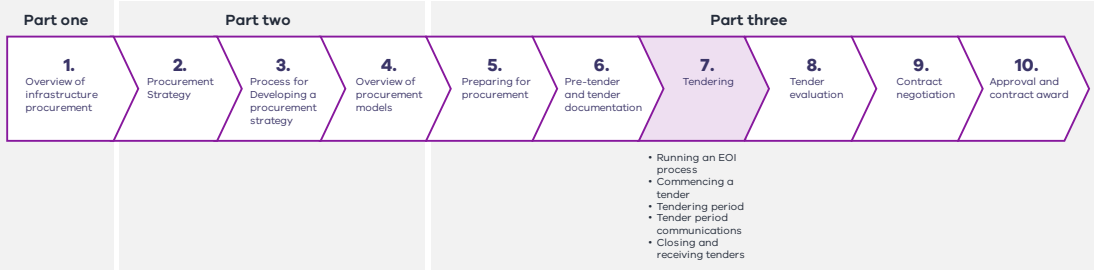
Before finalising documentation and proceeding to tendering, it is important that the following tasks have been undertaken:

**Table 13 – Pre-tender and tender documentation phase checklist**

| Pre-tender and tender documentation phase key tasks | |
|---|---|
| ✓ | Undertake required PDDD |
| ✓ | Prepare a pre-tender cost estimate |
| ✓ | Seek approval of any bid cost reimbursement, if required |
| ✓ | Develop all pre-tender and tender documentation |
| ✓ | Develop tender evaluation criteria and plan |
| ✓ | Develop contract documentation |

# 7. Tendering

**Figure 23 – Chapter 7 overview**




Tendering is the process where an agency communicates the procurement request to the market and respondents develop proposals to deliver the required scope of works and services. It provides suitably qualified potential respondents with an opportunity to bid for work and enables Government to achieve best value for the expenditure of public money through competition or rigorous assessment against benchmarking.

This section describes a tendering phase most applicable to lump sum and WoL procurement models. In some cost reimbursable procurement models, the tender period has two parts:

- Part one assesses whether potential respondents should proceed to a development phase (or the second stage of a tender period) where further design and project development work occurs.
- Part two involves further design and project development work culminating in a delivery phase offer to deliver the required scope of works and services.

More information on procurement and tendering in cost reimbursable models can be found in chapter 4 of the Cost Reimbursable Procurement Requirements.

Tendering should be undertaken in accordance with the procurement plan developed in the tender development phase and should only commence after the agency has confirmed it has the necessary authority and commitment to proceed with the project.

The *Project Development and Construction Management Act 1994* (PDCM Act) provides the authorising environment for government procurement of construction works and services. Its associated Ministerial Directions for Public Construction (MDs) set procurement requirements and processes for agencies and tender participants to ensure procurements are conducted with integrity and in accordance with probity requirements and ethical standards. Complying with these mandatory requirements and processes drives consistency in procurement practices across agencies and promotes public and industry confidence in government transactions.

## 7.1 Running an expression of interest process

EOI processes must be conducted transparently and in accordance with probity requirements. Clear and explicit process rules, such as closing time, date and place for lodging EOIs, evaluation criteria and confidentiality requirements, should be documented in the EOI invitation. Probity and confidentiality expectations should be communicated to all procurement team members and should be rigidly adhered to throughout the EOI process. All communication with suppliers during the EOI process should be treated with the same level of probity, confidentiality and transparency as the tender process. Please refer to the MDs, which set the protocol for tendering.

EOI evaluation is focused on determining whether the parties have the requisite capability to deliver the project. Evaluation should be based on the evaluation criteria specified in the invitation. It should lead to a shortlist of parties to be invited to continue in the tender process and will usually result in some parties being advised that they will not be invited to move forward in the process. The number of parties shortlisted will vary from project-to-project. However, the objectives of the process should be to:

- only shortlist parties that Government genuinely believes have the capability to deliver the project – parties should not be shortlisted to 'make up the numbers'
- shortlist an appropriate number of bidders to both maintain competitive tension and protect against the risk of a withdrawal while also maintaining the motivation for bidders to invest in the process by not shortlisting too many.

Following the shortlisting process, EOI respondents should be advised as to whether they will be included in the RFT process or not. Those on the shortlist should be advised on next steps and the expected timelines.

It is important to remember that any new information arising during the process should be used to reassess the procurement process. In particular, it may be used to inform tender documentation.

## 7.2 Commencing the tender process

Good preparation and planning are key to an effective and efficient tender process. In the procurement development stage, agencies should have developed their tendering engagement strategy and documentation, having undertaken market consultation to identify and confirm market participants who will be invited to tender.

The first step in the tender process is providing all potential tender participants with notice that the tender has commenced and issuing the invitation to tender and tender documentation.

MD 3.4 requires agencies to issue a Tender Notice to all potential tender participants:

- For an open tender, tender notices must be published, at a minimum, on the Buying for Victoria website using the applicable form so that it is accessible to all potential local and international tender participants.
- For a selective tender or limited tender, a tender notice must be issued to each party invited to participate in the tender process. Tender notices should be sent from the Buying for Victoria website (except for limited tenders which do not meet minimum financial thresholds, which can be issued by the agency directly).

MD 3.4 requires the tender notice to include:

- Project summary
- A listing of the tender documentation and how it can be obtained
- Key dates, such as briefing times, site visits and tender closing time
- The agency's nominated representative and contact details
- The number of copies and format required for submission (electronic or hard copy) and
- Details of the tender submission location and timing.

## 7.3 The tender period

The tender period is the time allowed between the tender notice and invitation to tender being issued and the closing date for tenders. During this period, the procurement team will issue the tender documentation and manage tender communications. Respondents will prepare their offers.

Ministerial Direction 3.5 for Public Construction Procurement requires agencies to provide respondents with sufficient time to prepare well, considered, complete and accurate tenders.

If the tender period is too short, it may result in either overpriced tenders to cover unforeseen risks or inaccurately priced tenders completed without due consideration. Agencies should ensure the tender period is reasonable, taking account of the following.

The complexity of the deliverables and tender requirements and the extent to which the project scope, risks and commercial terms are unique. The more complex the offering, the more numerous the elements requiring costing and assessment and the greater time required for suppliers to develop their tender. It may range from two to three weeks for simple investments to several months for complex infrastructure and assets such as rail lines, tunnels and rolling stock. Time requirements will increase if the tenderers are required to submit a design or financing strategy as part of their tender.

- The likely tender participants and market characteristics, including:
  - likelihood and extent of subcontracting
  - likelihood of national or international tender participant interest
  - likelihood of multiple tender participants with different skills having to prepare joint bids.
- The level and allocation of risk proposed or implied.
- The level of completion of design specifications.
- The time required for respondents to investigate, prepare, check and submit their responses, including:
  - assessing the project scope, documentation and due diligence, including undertaking a site inspection
  - assessing the tender and contract conditions
  - assessing the capacity to undertake the work and obtaining prices from their suppliers and subcontractors
  - clarifying any inconsistencies or other queries with the purchaser
  - preparing a fit-for-purpose response to requirements
  - documenting the tender bid to an appropriate level of detail and accuracy.
- Any legislative or policy requirements that influence tender period duration, such as international free trade agreements.

## 7.4 Tender period communications

Communications with potential suppliers during the tendering period must be carefully managed to ensure all potential tender participants are treated equitably, probity and confidentiality obligations are met and competitive tension is maintained.

MD 4.1 requires agencies to treat all potential tender participants fairly and equally, ensuring the same information is given to all prospective tender participants and avoiding giving any one tender participant an improper advantage over another.

MD 4.1.4 requires agencies to ensure tender and contract management processes are auditable, transparent and accountable by creating and maintaining appropriate records of all tender communications between the Purchaser and potential tender participants.

### 7.4.1 Nominated representative

The agency should nominate a delivery agency representative who is responsible for answering all enquiries during the tendering period. This should be a person with knowledge and understanding of the project and who is available for the duration of the tender period to answer queries. The nominated representative should provide consistent responses to all potential tender participants and ensure that any additional information provided to one supplier is provided to all suppliers.

The nominated representative must record all tender enquiries and responses.

### 7.4.2 Issuing tender documentation

Agencies should keep and maintain a written record of all persons requesting a copy of the tender documents. Each set of tender documents released should be numbered for identification and tracking purposes. This will assist if changes are made during the tender period or if any follow-up is required.

### 7.4.3 Data rooms

Tender documentation, including design documentation and due diligence, may be extensive. Sometimes a physical or electronic data room is required to allow potential tenderers to view project information.

Ministerial Instruction 4.1.2 for Public Construction Procurement requires agencies to provide all tender participants with fair and reasonable access to the data room or similar facility if applicable.

Ministerial Instruction 4.1.4 requires agencies to keep a record of any access to the data room if applicable.

### 7.4.4 Industry briefings or site visits

Industry briefings and site visits are a mechanism for providing potential suppliers with further information about a project that is not adequately captured in the tender documents.

Industry briefings or site visits:

- provide an opportunity for the procurement team to meet potential suppliers and gain a measure of potential interest in the opportunity
- provide the market with an indication of the level of competition
- reinforce the Government's requirements and expectations
- provide an opportunity for suppliers to clarify any issues or areas of uncertainty arising from their interpretation of the tender documents
- allow for better management of tender clarifications and ensuring that all potential suppliers receive the same information
- give suppliers the opportunity to visually interrogate the physical delivery environment. They can use the opportunity to assess any issues identified in the due diligence, as well as identify any further sources of risk, which can improve the certainty of their costings.

Details of industry briefings or site visits, including date, time and location, should be clearly outlined in the invitation to tender to ensure equitable access to all potential suppliers. A register of attendees should be retained for probity purposes. Any additional information provided at the event that is not clearly addressed in the tender documentation should be compiled and circulated to all interested parties or issued as a tender addendum.

Ministerial Instruction 4.1.2 for Public Construction Procurement requires agencies to ensure fair and reasonable allocation of site visits if applicable.

Ministerial Instruction 4.1.4 requires agencies to keep a record of any site visits if applicable.

### 7.4.5 Tender clarifications

Tender clarification during the tender period is contact between a potential tenderer and the agency to clarify aspects of the tender documentation which are ambiguous, inconsistent or irregular.

It is important to ensure that tender clarifications are not used to give any one potential tender participant an advantage.

Ministerial Instruction 4.2.1 for Public Construction Procurement requires agencies to establish a clear process for receiving and responding to questions and clarifications.

Ministerial Instruction 4.1.4 requires agencies to maintain a record of all communications with potential tender participants.

Ministerial Instruction 4.1.2 requires agencies to ensure that all potential tender participants are promptly informed of any new information relevant to the tender process that is provided to any other potential tender participant.

### 7.4.6 Addenda

Ministerial Instruction 3.6.3 states that agencies should avoid making changes to the tender documentation during the tender period.

If changes are unavoidable, agencies should ensure that:

- tender participants have a reasonable time frame to consider the changes and address within their submissions; and
- any changes are consistent with the probity principle (MD 1.2) and requirements (MD 4.1).

During the tender development phase, agencies should ensure adequate due diligence and project documentation is carried out prior to finalising tender documents to minimise the need for addenda. Where amendments are unavoidable, they must be provided as an addendum to all tenderers.

Where changes are significant or complex, or are issued during the five working days prior to the tender closing, the procurement team should consider extending the tender period to provide tender participants with sufficient time to address the change in their responses.

Receipt of addenda should be acknowledged with submitted tenders. This avoids the possibility of delivery agencies assessing tenders that have been based on different assumptions and information.

### 7.4.7 Interactive tendering

Interactive tendering is encouraged for complex infrastructure procurement. Interactive tendering occurs where there is opportunity for an appropriate amount of active interface and dialogue between the tendering agency and tenderers

Historical practices where there is little or no verbal communication with tenderers during the tender phase are discouraged for infrastructure delivery. This has led to misunderstanding project scope and deliverables and unnecessary disputes during the contract term.

Interactive tendering provides each tender participant team to discuss their bid development, including technical and commercial aspects, with the client team as they develop and refine their response. The primary aim of interactive tendering is to improve the quality of the tender submissions and the project outcome by:

- expanding and clarifying tenderers' understanding of government's requirements, including the tender requirements, project brief and the client's expectations
- ensuring tenderers avoid incurring any significant costs because of a fundamental misunderstanding or misinterpretation of the tender requirements
- minimising the need for any re-bid process where the tenders submitted do not meet the tender requirements.

Generally, tenderers have two ways of obtaining feedback from the agency during the tender phase:

- **Q&A process**: tenderers submit questions to the procurement team in writing, with the procurement team providing written responses to these questions.
- **The interactive tender process**: individual tender teams participate in structured workshops involving the procurement team and other project stakeholders if necessary.

The interactive tender process is essential for complex projects. It is often used for WoL procurements, particularly community partnerships where there is commonly a considerable interface risk between private sector infrastructure providers and state operators.

Further information regarding best practice for interactive tendering is available in the National PPP guidelines. The interactive tender process is continually being refined, therefore this guidance should be considered in light of ongoing contemporary practice.

It can encourage innovative solutions to government's needs and provides a mechanism for tenderers to confidentially submit responses.

## 7.5 Closing and receiving tenders

### 7.5.1 Tender close

The tender close is the date, time and place that tenders are due.

The invitation to tender must clearly state the nominated tender closing time and date, and the place and method of lodging tenders. Recommended practice for closing tenders is as follows:

- not before 2.00pm
- at least one day after a weekend, public holiday, building industry holiday or standard industry rostered day off
- at least one week after a recognised industry holiday period such as the Christmas–New Year period.

The nominated tender closing time and date should be strictly upheld. No individual tenderer should be given the unfair advantage of receiving additional time.

### 7.5.2 Receiving tenders

Tenders may be received at any time prior to the nominated closing time. The process of receiving and recording tender submissions must be conducted in a manner that ensures the integrity, fairness and impartiality of the tendering process and maintains the security of tenderers' intellectual property.

MD 4.1 requires agencies to maintain confidentiality of participants confidential information, including commercially sensitive information and intellectual property

Tenders should be opened and registered as soon as possible after the closing time by at least two people. Depending on the complexity of the procurement, it is good practice for the tender opening to be witnessed by a probity adviser or auditor for the project or by a departmental representative who is not involved in the procurement.

The agency should record the names of all tenderers and their tendered price or prices, including those submitted as an alternative to the purchaser's specified requirements and those received after closing time. The list or summary of tenders is retained as a record of the tender opening process and should be signed and dated by those present.

A document register should be used to maintain a record of documents submitted in tender responses, as well as the number of electronic and hard copies made.

Once received and registered, tenders should be held in a secure document management system. Hard copies should be limited and should be numbered and held in safe, lockable cabinet or lockable room.

### 7.5.3 Managing tender responses

MD 4.1 requires agencies to maintain confidentiality of participants confidential information, including commercially sensitive information and intellectual property

Tenders may include the following types of confidential information:

- designated or defined elements of the tender responses
- proprietary methodologies held by the tender participants and other commercial in confidence information
- innovative alternative solutions
- specific intellectual property and
- subcontracting pricing and staffing structures.

Confidentiality and security can be achieved in several ways, which should be scaled to match the size, complexity and risk of the procurement. Agencies should establish clear physical security measures for handling documents, such as:

- restricting access to controlled documents to authorised personnel
- maintaining a document register
- using a specific lockable tender room for conducting evaluations
- limiting the number of document copies and ensuring strict movement controls on all offer-related documents.

Agencies should implement documented procedures for paper and electronic security including information storage and communication processes. This should include:

- controlling how documents are delivered electronically
- protecting data stored on networks
- segregating information held on networked devices
- using independent security passwords
- transmitting documents securely, such as via password protected files and verifying procedures to ensure the correct transmission of emails and attachments.

Electronic document management systems are commonly used for the submission of tenders and for the tender evaluation process. The use of an electronic document management system allows for tender evaluation panel members to evaluate tenders in a secure and audited environment and does not require the download of documentation. Access should only be approved, as required, by the project manager. Where the electronic document management system allows, evaluators' access should be restricted to only those criteria related to the returnables assigned to them. This ensures strict separation between the commercial and technical aspects of the evaluation.

Where tenders are provided in hard copy format it should be ensured that an adequate and secure filing system is maintained for all documentation and information associated with the tender evaluation phase. Tender evaluation panel members should also undertake to comply with appropriate document control requirements including returning or destroying hardcopy documentation in their possession at the end of the tender evaluation.

Agencies may also obtain specific advice from security experts or from a probity adviser if one has been appointed.

The need to maintain the confidentiality of participants' information continues after the contract has been awarded. In particular, when contracts must be disclosed in full, commercially sensitive information should be redacted.

Maintaining confidentiality is not absolute and should be assessed in terms of contract disclosure requirements for Freedom of Information and audit purposes.

## 7.6 Tendering phase checklist

For the tender phase to be considered complete the following tasks should be undertaken.

**Table 14 – Tender phase checklist**

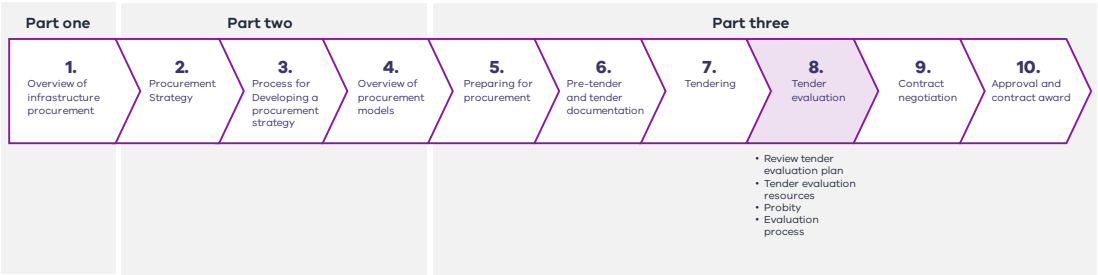
| Tender phase key tasks | |
|---|---|
| ✓ | Release tender notice and tender documentation to invited tender participants: https://www.buyingfor.vic.gov.au/browse-construction-supplier-registers |
| ✓ | Manage tender communications in accordance with probity plan and requirements |
| ✓ | Close and receive tenders |
| ✓ | Manage late tenders in accordance with probity plan and requirements |

# 8. Tender evaluation

During the tender evaluation phase, the procurement team evaluates the tenders received to identify a preferred contractor. The tenders are evaluated using the criteria set out in the tender evaluation plan to ensure the successful tender meets the scope requirements and offers value-for-money.

Tender evaluation processes must be conducted in accordance with the tender documentation and with fairness, equality and impartiality in order to achieve a non-contestable outcome and avoid process problems.

**Figure 24 – Chapter 8 overview**




## 8.1 Review the tender evaluation plan.

A tender evaluation plan should have been developed in the procurement development stage (see section 6.4 for further information on developing a tender evaluation plan).

The completed tender evaluation plan should be reviewed to ensure it is comprehensive, accurate and that the criteria address the requirements of the project. If changes are required, they must be communicated to suppliers through updated tender documentation, prior to the tender closing date.

The tender evaluation plan will include process details such as the timetable for evaluation, probity requirements and document and information management requirements. These details should be communicated to all parties involved in the evaluation process including the tender evaluation panel and any specialist advisers.

## 8.2 Tender evaluation resources

### 8.2.1 Tender evaluation panel

A tender evaluation panel should be established to assess the tenders. The panel should be a cross-functional group and may comprise:

- members of the procurement team
- other staff with appropriate skills and experience (for example departmental staff with a strong technical background)
- staff from departments with an interest in the project (for example, where a project has a significant impact on urban planning and amenity, it may be useful to include representatives from Department of Transport and Planning. It may also be appropriate to include a DTF representative)
- specialist advisers to the procurement team
- representatives from the user reference group, in particular end users (such as representatives from any operator).

The tender evaluation panel will also include a small number of people who are responsible for evaluating the tenders against the mandatory evaluation criteria specified in the invitation to tender (see section 8.4.5 below).

### 8.2.2 Sub-panel arrangements

For complex evaluations the tender evaluation panel may decide to coordinate specialist evaluation boards or sub-panels to assess specific evaluation criteria such as financial, commercial, technical or legal aspects of the tenders. These sub-panels would then contribute information and analysis to support the overarching tender evaluation panel assess and score complex elements of a proposal.

Where a commercial or financial sub-panel has been created, the commercial manager should chair that sub-panel and it will typically include the project manager, a relevant finance officer and other function specialists. These sub-panel members should be informed that the pricing information is restricted to them, and they must not communicate it to members of other sub-panels.

Technical sub-panels, which may look at the engineering and design elements of a proposal, should not have access to tender prices but may have access to other commercial information where necessary.

## 8.3 Probity in tender evaluation

Tender evaluation panel members should not engage in any conduct that could impact a fair and transparent selection process and must avoid any practice that gives one party an improper advantage over another.

A probity plan should have been prepared during the procurement development phase (see section 5.4 for further information on probity requirements) which will guide the management of information and conflicts of interest during the tender evaluation phase.

### 8.3.1 Conflicts of interest

A conflict of interest arises when a tender evaluation panel member has an affiliation or interest that prejudices, or might be seen to prejudice, their impartiality.

Conflicts can be categorised in one of three ways:

- **Actual conflicts**: where it is established that there is a real conflict, that is when an evaluation panel member has a personal relationship with a tenderer who has submitted a tender or where a supplier has advised on early project works and therefore has greater project knowledge than will be provided to other tenderers.
- **Potential conflicts**: circumstances where future events may result in an actual conflict, that is when a supplier has bid on, and may be awarded, a contract that has competing interests to the project.
- **Perceived conflicts**: where circumstances could cause a third party to think there is a conflict of interest, that is when a tenderer has a personal relationship with an employee of the agency delivering the project, however, that employee is not a tender evaluation panel member and are involved in setting the evaluation criteria. While there is no actual conflict of interest, the personal relationship could create the risk of a perception that the employee was involved in the tender evaluation and is in a position to influence the decision.

Conflicts of interest do arise and provided they are identified early and dealt with effectively, they do not represent any wrongdoing.

Failure to declare an interest, even if the individual in question believes there is no actual conflict, can compromise the tender evaluation process and may result in legal challenges. Tender evaluation panel members are required to maintain the highest standards of ethical behaviour during the evaluation period from receipt of tenders to the contract award decision.

It should also be noted that public officials must also comply with the Code of Conduct for the Victorian Public Sector.

Tender documentation should include a requirement for all tenderers to identify any conflicts of interest. Conflicts of interest for suppliers may include any of the following:

- a supplier has been involved in an earlier stage of the project development
- a supplier has a competing commercial or private interest in the project
- a current supplier is involved with an interested party with a competing interest
- a supplier's affiliations or interests will or may compromise, or has the appearance of compromising, their ability to fulfil their duties in relation to the project
- a supplier's impartiality is called into question because of personal, financial or other consideration
- any situation where a reasonable observer would consider there to be a possibility of bias.

While there may be instances where a tenderer has a minor conflict of interest that can be managed throughout the process, material conflicts of interest would preclude involvement in the project.

Given this, all tenderers should be checked for any conflicts of interest as a priority. If any conflict is acknowledged, it should be assessed. Where a conflict will result in a supplier being unable to complete a contract without impacting on project process and probity requirements, it should be ruled out and the tender should not be considered in the evaluation process.

## 8.4 Evaluation process

### 8.4.1 Evaluation overview

The tender evaluation process is usually undertaken in the following general phases:

- assess for tender conformance, including against any mandatory criteria
- eliminate any non-complying tenders
- undertake and identify any necessary tender clarifications
- assesses each submission against agreed non-price criteria to develop an individual tender assessment result from each tender evaluation panel member
- review the results of the individual tender assessments and either agree upon or combine to develop an average and final tender assessment result
- undertake a VfM assessment, comparing the tender evaluation scores against price
- interview the tenderers (this can include only the highest-scoring tenderer, or the two or three highest-scoring tenderers)
- undertake best and final offers (BAFOs) (if necessary)
- make reference checks on the two or three highest-scoring tenderers.

It is recommended that, if applicable, the probity adviser or auditor observes the tender evaluation process to ensure consistent and objective assessment.

### 8.4.2 Late, incomplete or amended tenders

Tenders that are not received in strict accordance with the tender documentation requirements fall into the following groups:

- late tenders, which are received after the time and date set out in the tender documentation
- tenders that are late due to a technicality, such as a delay in transit beyond a supplier's control or technical issues with an electronic submission
- incomplete tenders that lack information necessary for evaluation
- amended tenders, where a supplier submits an amendment on their own initiative after the time and date set out in the tender documentation.

These tenders should only be considered if there is no reason to doubt the integrity of the supplier involved. The tender evaluation panel should exercise care to avoid probity concerns, such as accusations of bias, and must ensure there is a detailed record of the decision to accept the tender for evaluation.

### 8.4.3 Tender clarifications

It may be necessary to clarify aspects of a tender so that all commercial or technical issues are clear and understood and to enable tenders to be assessed on a like-for-like basis.

A single point of contact should be nominated to coordinate tender clarifications and supplier responses. Tender clarifications should be submitted in writing to each tenderer, with records kept of the clarification and the eventual response. Tender clarifications should be resolved and recorded before a final tender evaluation decision is made.

Requested tender clarifications are likely to be different for each tenderer. Tender clarifications should not be circulated to other tenderers. To do so may result in breaches of confidentiality. Due to the risk of a probity breach through the tender clarification process, all tender clarifications should be overseen by a probity adviser or auditor if appointed.

### 8.4.4 Alternative proposals

An alternative proposal is a non-conforming tender that a supplier submits alongside a conforming tender.

An alternative proposal can be submitted for several reasons, but they are usually submitted where tenderers consider they add value to a procurement. This could be where a supplier feels they can provide a solution that better meets procurement requirements than as specified in the tender documentation, or where they can incorporate innovation to improve the project outcome.

Alternative proposals must be evaluated in accordance with the framework set out in the tender evaluation plan for such proposals. Ordinarily, this framework only allows consideration of alternative proposals where they accompany a conforming tender.

### 8.4.5 Evaluation of mandatory criteria

Tenderers are required to satisfy several mandatory criteria before they can be awarded a contract, and these criteria should be clearly identified in the tender documentation.

MD 3.7.3 requires agencies to ensure that a tender participant satisfies the criteria before awarding a contract to perform works or construction services.

Where a tender participant has already been assessed against the mandatory criteria as part of a prequalification process (whether as part of qualification or requalification to a register, becoming a member of a supplier panel or through an expression of interest process), the Agency does not need to reassess the tender participant against the criteria, provided they confirm, prior to contract award, that:

(a) in the case of a tender participant prequalified on a register or a member of a supplier panel, the tender participant remains on that register or supplier panel

(b) in all cases, there has been no material change to the information submitted to satisfy the criteria (whether at the time of prequalification or requalification, or during the expression of interest process), whether positive or negative, that would affect the tender participant's ability to satisfy the criteria.

All submissions must wholly conform to these mandatory criteria. Therefore, when tenders are received, mandatory criteria should be reviewed as a priority, and any submissions that do not conform should be identified and dealt with in accordance with the processes set out in the tender evaluation plan.

Some mandatory criteria are mandated through the Ministerial Directions, and some are project-specific.

Criteria that are mandated through the Ministerial Directions are:

- VfM
- consideration of each supplier's past performance in delivering works or services
- occupational health and safety management (as set out in Attachment 1 to Instruction 3.7)
- industrial relations management (as set out in Attachment 2 to Instruction 3.7).

The criteria relating to occupational health and safety and industrial relations must be satisfied before the supplier can be awarded the contract. If the supplier has already been assessed against those criteria as part of a prequalification process, they do not need to be reassessed through the tender evaluation process.

Project-specific mandatory criteria may include:

- criteria related to particular design elements or outcome requirements that must be achieved
- general criteria related to:
  - insurances
  - policy compliance, such as appropriate adherence to the Victorian Industry and Participation Policy
  - key contractual elements, such as guarantees and warranties.

### 8.4.6 Evaluation of non-mandatory criteria

#### 8.4.6.1 Individual tender evaluation

Each tender evaluation panel member should review the tender submissions. This should be undertaken in accordance with the probity rules and procurement processes outlined in the probity plan and tender evaluation plan.

Each tender evaluation panel member should individually assess tenders against the weighted evaluation criteria. Panel members should objectively assess the extent to which each submission satisfies each evaluation criterion. A simple scoring mechanism, such as a matrix, should be used to document this assessment process to provide a quantitative tender evaluation result.

An example of a practical scoring mechanism is to assign each submission with a score between zero and five for each evaluation criterion, where zero = submission does not meet evaluation criterion requirements, and five = submission exceeds requirements.

The scoring system and the definition of each score should be outlined in the tender evaluation documentation. The tender evaluation documentation should also indicate whether half marks can be assigned.

Once each evaluation criterion has been assessed, weightings for each criterion should be applied to the raw scores to achieve a weighted score. The weighted scores should then be added to achieve a total score for each submission.

#### 8.4.6.2 Average (combined) tender evaluation

Once each panel member has individually evaluated each tender, results should be compared and combined to produce a final, average assessment of the tenders. When comparing results, the tender evaluation panel should agree on a score or, where the panel cannot agree, follow the process outlined below:

- develop a matrix that includes each panel member's assessment of each submission
- enter each panel member's individual scores into the matrix
- review the data to identify any anomalies (e.g., where there is significant variation in the assessment of a particular criterion)
- discuss anomalies to determine why they have occurred
- consider reassessment of criteria, if appropriate.

Review of individual tender assessments requires discussion and debate to ensure consistency and objectivity, and to provide confidence in the overall result. It is best practice to hold tender evaluation workshops to review individual tender assessments.

Variations in the scores assigned by different panel members are very common. Some people are stricter in their scoring than others. This is acceptable. Generally, the variation is consistent across all assessments and, therefore, does not impact the overall result. However, there are also instances where considerable variation in scoring occurs for other reasons. These instances should be examined to determine the cause of the variation. For example, one panel member may have missed some information provided and, therefore, given the submission a low score for that criterion. This commonly occurs where a tenderer has not adhered to the tender response schedules and has not provided information in a logical or expected way. In other instances, a panel member may give a submission a high score based on previous experience with the supplier rather than tendered information. It is essential to discuss any scoring variations so that everyone has a common understanding of the submissions and the resulting scores. It is common for individual panel members to agree to modify their scores as a result of discussion.

Once the moderation process has been undertaken, individual scores are added to produce a combined score for each evaluation criterion. The weighted combined scores are then added to produce a final score and ranking for each submission. The preferred tenderer is identified by the highest ranking.

Tender evaluation is a lengthy and resource-intensive process, and adequate time should be assigned for individual assessments and the moderation workshops. It is best practice to book the required evaluation time in each panel member's diary to allow them to concentrate on evaluation and reduce the chance of going over time.

### 8.4.7 VfM assessment

Tender evaluation should not be based on lowest cost. Instead, it should be based on achieving high service quality for the money expended.

VfM weighs the cost of obtaining goods and services against the benefits they provide.

Acceptance of a tender based solely on the lowest price may result in a lower quality solution. It may also result in appointing a tenderer who has under priced the work, which may lead to underperformance, an adversarial relationship with increased contract variations or other contract disputes. This may lead to project delays, additional costs to the purchaser and an increased risk of project failure.

The tender submissions should be assessed against price and financial information to ensure that the preferred tender represents an affordable and VfM tender that is not based on false assumptions.

### 8.4.8 Tender interviews

Once the tender evaluation panel has agreed on the draft tenderer rankings, the preferred tenderer and one or two of the next highest-ranking tenderers may be interviewed. The purpose of tender interviews is to provide an opportunity for the tender evaluation panel to meet the high-ranking tenderers and ask any remaining questions that can confirm the tender evaluation results. Tender interviews can be used to:

- confirm aspects of a bid where an evaluation panel is uncertain
- confirm the supplier's knowledge of, and experience and skills in, a particular area.

Tender interviews should be conducted in accordance with the probity plan and should be attended by the probity adviser if one has been appointed.

### 8.4.9 Reference checks

Reference checks should be:

- conducted for the preferred supplier and the next highest-ranking tenderer
- undertaken by one nominated representative of the tender evaluation panel.

Reference checks should be used to:

- confirm the tenderer's involvement and experience in similar projects, particularly the experience of any personnel being put forward for the works
- confirm the tenderer's level of skill and technical expertise in a particular area
- identify the tenderer's approach to managing types of risk
- identify the tenderer's client management and communication approach
- identify the tenderer's professionalism
- identify the tenderer's approach to dispute resolution.

### 8.4.10 Tender evaluation report

Upon completion of the tender evaluation activities, the tender evaluation team must comprehensively document the results of the tender evaluation process in a final report. They must prepare a tender evaluation report that documents:

- the results of the moderated individual assessments
- the results of the final tender assessments
- the results of the VfM assessment
- any tender clarifications sought
- any tender interviews conducted

- the impact of any new information arising from tender clarifications, interviews and reference checks on the final tender assessment
- a summary of all probity steps, issues and considerations throughout the tender evaluation phase
- the tender recommendation and any further supporting evidence or reasoning for the recommendation.

It is acceptable to nominate a preferred supplier that did not receive the highest ranking as a result of the tender evaluation process. This commonly occurs where the VfM assessment identifies another (generally high-ranking) bid as offering an acceptable solution at a lower price. It can also occur where tender clarifications, interviews and reference checks provide new information that is unfavourable to the highest-ranked tenderer. However, it is important to comprehensively document the reasoning for recommending a preferred tenderer and provide adequate evidence to ensure a non-contestable result.

### 8.4.11 Best and final offers

Ideally, a preferred bidder is selected after the evaluation process. If a single bidder cannot be identified, but the project steering committee believes a VfM solution can still be achieved, a BAFO process may be used. Providing a VfM outcome can still be achieved, it may be appropriate to use BAFOs where:

- costs submitted by all bidders are too high
- a preferred bidder cannot be clearly determined based on the evaluation of RFP or RFT responses against the evaluation criteria
- all RFP or RFT responses are deficient in one or more areas.

To minimise costs to the private sector and to Government:

- only bidders believed capable of delivering the desired results should be invited to participate in the BAFO
- the BAFO should be completed within a short, well-defined period
- agencies should request only one BAFO.

The bidders selected for the BAFO process should be provided with detailed questions relating to their proposals and informed of the deficient parts of their proposal.

The bidders are then given the opportunity to revise their bids and eliminate any unacceptable conditions contained in their original proposals. The amended sections are then re-evaluated and re-scored according to the evaluation process defined in the invitation to tender and tender evaluation plan. It is important to note that the probity requirements for the tender evaluation phase, as set out in the tender evaluation plan and probity plan, continue to apply during any BAFO process.

Note that markets are generally resistant to BAFO processes, as they increase bidding costs.

## 8.5 Tender evaluation phase checklist

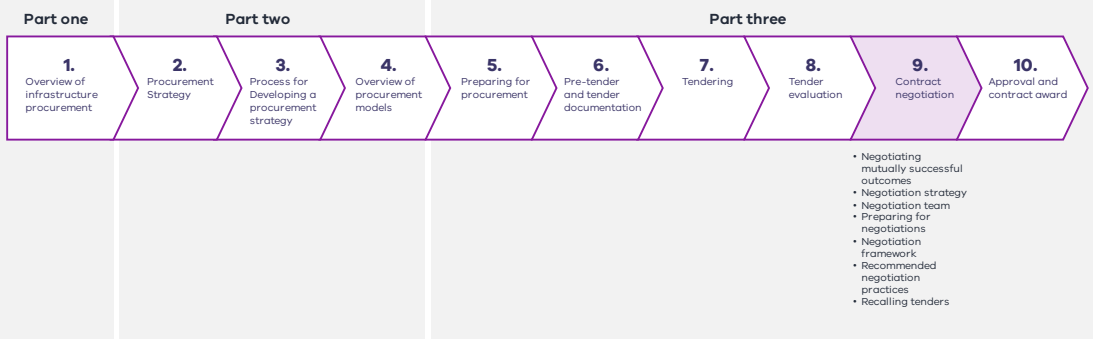
Before completing the tender evaluation phase and proceeding to the contract negotiation phase, it is important that the following tasks have been completed.

**Table 15 – Tender evaluation phase checklist**

| Tender evaluation phase key tasks | |
|---|---|
| ✓ | Confirm membership of, and brief, the tender evaluation panel |
| ✓ | Identify and manage any conflict of interest |
| ✓ | Identify and manage any issues of non-compliance with mandatory criteria |
| ✓ | Identify and review any alternative proposals |
| ✓ | Each panel member reviews and evaluates the submissions to develop individual evaluations |
| ✓ | Combine and moderate individual evaluations to identify the tender rankings |
| ✓ | Undertake tender clarifications |
| ✓ | Undertake tender interviews |
| ✓ | Undertake reference checks |
| ✓ | Prepare tender evaluation report |
| ✓ | Probity auditor signs off |

# 9. Contract negotiation

**Figure 25 – Chapter 9 overview**




During the negotiation phase, the agency develops a negotiating strategy that identifies each party's likely interests, sets out the Government's preferred negotiation outcomes and establishes a negotiating team. The agency then engages with the preferred tender participant to discuss potentially divergent interests and agree on contract terms and conditions.

## 9.1 Negotiating mutually successful outcomes

Negotiation is a strategic discussion between the agency and a tender participant to resolve points of difference in a contract in a way that is acceptable to both parties. Agencies should exhaust negotiations with the preferred tenderer before negotiating with another tenderer, unless it is expressly allowed in the tender documents. During the negotiation process, the principal must not trade off different tenderers' prices in an attempt to seek lower prices or allocate an unreasonable level of risk that the contractor is best suited to manage.

Negotiations may be used to explore opportunities to improve the overall VfM outcome of the procurement, for example, to reduce costs or delivery times, achieve a fairer allocation of risk, deliver benefits from innovation or improve the quality of scope items and outputs.

Either party can propose an offer or concession for negotiation. The agency may accept or reject proposals at its discretion (subject to any required approvals). It is in the agency's interests to ensure contract agreements are mutually satisfactory and provide the basis for a long-term successful relationship between the State and the tenderer. The negotiation outcome should be 'win-win' not 'win-lose'.

- The agency should not agree to any proposals or terms that directly conflict with the procurement objectives or impede Government's ability to derive VfM from its investment.
- Conversely, it should not seek an outcome that is unsustainable for industry. This could result in a poor relationship between the client and contractor, poor performance and quality, increased disputes during the delivery phase, or even the tenderer withdrawing from the tender process altogether.

At the start of the negotiation process, each party will have its own negotiation objectives and will seek to obtain favourable terms to minimise its financial, legal and operational risks. During the negotiation process, the parties should work through any divergent interests to identify common ground and, where interests conflict, identify outcomes that are fair to both parties.

## 9.2 Developing a negotiation strategy

It is important to adequately plan and prepare for negotiations to ensure they run efficiently and the agency can anticipate potential challenges and opportunities and develop favourable responses. This requires considering and reaching internal agreement on the agency's negotiation objectives and extensively researching the counterparty's likely issues and priorities.

Prior to commencing negotiations, agencies should develop a negotiation strategy that, at a minimum, documents:

- the likely context and scope of negotiations, particularly any key issues, divergent interests or points of difference that require agreement before entering into a contract
- timeframes required to conclude negotiations, including any interim negotiation milestones or negotiation phases with set objectives
- the Government's objectives and priorities, including:
  - its position and objectives in relation to all issues considered likely to arise during negotiations
  - its priority interests and corresponding negotiation objectives (these are the key outcomes for the negotiating team to achieve)
  - best possible, most likely and worst possible outcomes of the negotiations, identifying likely drivers of success or failure
  - any unsatisfactory outcomes that should be avoided
  - alternative options and fallback positions that the government would consider satisfactory
  - tradable issues and concessions (issues of relatively low interest to the government but high interest to the counterparty that can be conceded in return for agreement on other issues)
- the counterparty's interests, objectives and priorities, including:
  - the importance of the relationship with the Government or the agency, including the portfolio of work awarded to the tenderer, other contracts they have been awarded or are tendering for and current relationships
  - their likely issues of primary concern and desired outcomes
  - likely alternative options, counteroffers and tradable issues
- an assessment of the strengths and weaknesses of the agency's position
- the negotiation approach, including:
  - potential negotiation tactics or techniques to help build rapport, trust and cooperation with the tender party
  - communication style, tone and language
  - strategies for managing any impasses.

## 9.3 Establishing the negotiating team

Resourcing the negotiating team will be influenced by the size, type and complexity of the project, its procurement model and the likely extent of negotiations.

It is highly recommended that the project director attends the negotiations, as they have the authority to commit the agency to agreed outcomes.

Negotiations should be led by a person(s) with sufficient knowledge of the project and the required technical skill to drive discussions. For example, this could include the project director or a commercial or legal adviser.

Legal advisers often attend negotiations, as they are likely to be required to update the contract documentation to reflect any agreed outcomes. The negotiation lead may also be supported by commercial and other advisers and specialist team members as required.

It is recommended that the negotiating team is kept as small as possible, with additional members added only on an 'as-needs' basis. This helps drive consistency and coordination across the team. The larger the team, the greater the risk of a less-prepared team member acting or speaking inconsistently with the negotiation objectives or revealing too much information too early. It also makes it harder for the team to react to new information in a coordinated and synchronised way.

## 9.4 Preparing for negotiations

The negotiation team should prepare thoroughly for the negotiations individually and as a team. All members should carefully read and understand the negotiation strategy and confirm they have a clear and consistent understanding of the negotiation objectives and parameters. Prior to commencing negotiations, the project director or negotiation lead should:

- set clear expectations of how the team behaves during negotiations and when and how members can contribute to discussions (this may include coordinating how members respond to different situations or proposals as they arise)
- clarify roles assigned to team members (if any)
- set rules and protocols for how team members can communicate and interact with each other during the negotiations (this may include considering non-verbal cues to communicate responses or decisions during discussion)
- identify any sensitive information that should not be disclosed during the negotiations
- identify timing and parameters for when certain information may be disclosed.

## 9.5 Agreeing the negotiation framework and protocols

Prior to commencing negotiations, the negotiating team and the preferred respondent need to set a negotiating framework and protocols to guide discussions. The negotiation framework should include the following.

- **Purpose and status of the negotiations.**
- **A summary of the key negotiating issues or points of divergence:** This ensures the discussion focuses on the agreed issues, prevents new issues being introduced during the process and avoids reopening issues that have already been settled. The issues that the preferred respondent seeks to negotiate should be confined to departures from the contract provided with the invitation to tender, as reflected in their submitted proposal.
- **An agreed timetable for the negotiation:** This is important to prevent delaying tactics and ensure the overall timetable for project implementation is upheld.

- **Rules of engagement and conduct:** This includees clarifying:
  - points of contact and communication protocols
  - meeting protocols, such as timing, venue and duration of meetings, agenda, chairperson, membership and attendance, minutes and secretariat, expected behaviour, use of devices, time-outs and other formalities.
- **An agreed dispute resolution process:** This should include agreed processes for escalating issues, overcoming any impasses and terminating negotiations where agreement cannot be reached.
- **Authority to commit:** Both negotiation teams need to appoint members with the authority to make decisions on behalf of their organisations. The negotiation framework should identify any issues that will require government approval.

## 9.6 Recommended negotiation practices

There is a range of effective negotiation processes agencies may use and tailor to their requirements. Projects procured using WoL procurement models may be subject to specific guidance on contract negotiation and tender selection. Agencies should consider the following tips when conducting negotiations.

- Ensure all significant commercial issues are settled and contract negotiations are finalised before the preferred tenderer is publicly advertised and competitive tension is released. This ensures that the risks and commercial positions presented by a tender can be fully evaluated.
- Seek a mutually acceptable procurement outcome, and recognise that this helps build trust and establish a positive and collaborative relationship with the preferred respondent.
- Summarise and record all agreed matters at the end of each meeting. This reduces the risk of issues being revisited and provides clear instructions for contract drafting purposes.
- Where the project director does not have the authority to approve any aspect of the negotiations, ensure that senior managers with the appropriate authority are accessible throughout the negotiations.

The outcome of the contract negotiation phase is either:

- a preferred tenderer is identified, and a final agreed contract price and terms are negotiated
- no successful tenderer is identified, and a recommendation is made to re-call the tender.

## 9.7 Re-calling tenders

If the agency is not able to reach a satisfactory agreement with the preferred tenderer, it may commence negotiations with another respondent. If no acceptable tender can be identified from the tender process, a tender can be re-called. Any decision to repeat the tendering process should only be made in compelling and unavoidable circumstances. In particular, agencies should avoid re-calling tenders to obtain a better price and should negotiate with the initially preferred tenderer. If a decision is made to re-call a tender, the original tenderers should be advised of the reasons for doing so.

## 9.8 Negotiation phase checklist

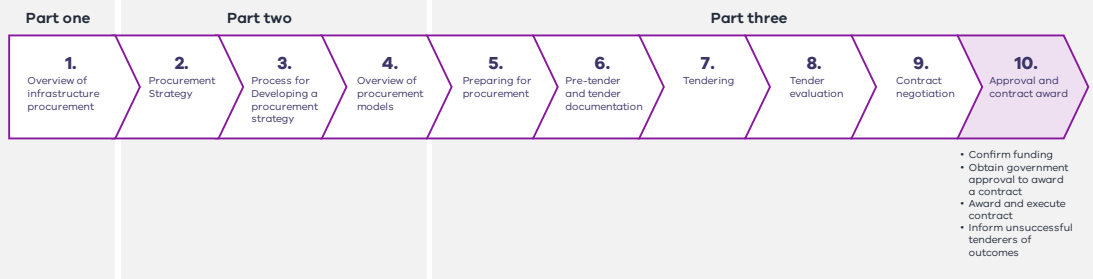
Before completing the contract negotiation phase and proceeding to the approvals and contract award phase, the following tasks should be completed as required.

**Table 16 – Negotiation phase checklist**

| Negotiation phase key tasks | |
|---|---|
| ✓ | Develop a negotiating strategy outlining the agency's negotiating priorities, interests and objectives |
| ✓ | Establish an appropriately resourced and skilled negotiating team |
| ✓ | Adequately prepare for negotiations |
| ✓ | Agree on the negotiation framework and protocols with the preferred respondent |
| ✓ | Negotiate the contract and commercial terms in accordance with good negotiating practices |

# 10. Approvals and contract award

**Figure 26 – Chapter 10 overview**




The final phase in the procurement process is seeking formal approvals to appoint the preferred tenderer to undertake a scope of works, and awarding the contract. This includes obtaining financial and ministerial approvals as required, notifying the successful and unsuccessful tenderers, awarding the contract and establishing contract management arrangements.

### Confirming funding

Once the agency has identified a preferred respondent and agreed on contract terms, it should confirm that the proposal is affordable, given the funding allocated to the project.

If the tendered fee materially exceeds the cost estimate and is not considered affordable within allocated funding, this must be addressed. This may require consideration of value management opportunities and scope reduction options. In some circumstances, it may be appropriate to seek approval of additional funding. A project assurance process should also be undertaken to confirm that the project is ready to proceed to the delivery stage. For HVHR projects, this should include a Gate 4 gateway review.

### Obtaining government approval to award a contract

Before awarding a contract, the agency must obtain formal approval of material contract departures and expenditure commitment from a minister or officer with appropriate delegated authority.

The process approval requirements differ according to the contract value, asset type and departmental financial management arrangements. Minor works may be priced within departmental financial delegations, and therefore only require internal approvals. The majority of infrastructure projects require ministerial approval. HVHR projects also need the Treasurer's approval prior to contract award if this is a requirement of the project's HVHR PAP.

When using a Victorian Public Construction Contract, MD 7.1.3 requires agencies to obtain DTF Secretary approval for any material contract departures proposed by a tenderer. Agencies may accept non-material contract departures requested by tenderers at their discretion.

Material departures to HVHR contracts are approved through the HVHR process.

All approval submissions should be supported by the tender evaluation report and endorsement from the project director or steering committee. The tender evaluation report should be updated after the negotiation to:

- outline the tender and evaluation processes and the negotiation outcome
- identify any material departures from the approved project scope and confirm that the proposal provides a VfM outcome
- identify any agreed contract departures or changes to standard commercial terms and conditions, and confirm these have been approved by DTF or the steering committee
- confirm that the proposal is affordable, adequate funding is available and the department or agency recommends that the contract is entered into
- identify any residual risks arising from the procurement process that may inform a decision to award a contract or should be monitored throughout the delivery stage.

## 10.1 Awarding and executing the contract

Once the necessary approvals have been obtained, the agency can award and execute the contract. Agencies should take reasonable steps to expedite this process and notify unsuccessful tenderers of the procurement outcome. There are four main activities for this step:

- awarding the contract
- executing the contract
- making contract management arrangements
- making payments on contract execution

### 10.1.1 Awarding the contract

The successful tenderer must be informed in writing of the agency's intention to enter into a contract for the tendered works. The successful tenderer must then confirm in writing their acceptance of the offer.

The agency should also undertake any administrative requirements (e.g., obtaining a bank guarantee or other contract securities).

### 10.1.2 Executing contract

A suitable date and venue are nominated for contract execution, where the Government's representative signs the contracts after all other parties have signed.

The contracts should be executed by appropriately authorised personnel. Contracts for major projects are often signed by ministers or senior staff with delegated authority.

It is common practice to make a public announcement of the contract and the successful bidder when contracts have been executed. Media coverage of the contract signing may be involved. Be mindful of appropriately timing any announcements, particularly when dealing with stock exchange–listed companies that may need to manage additional requirements to shareholders.

### 10.1.3 Contract management arrangements

The agency should ensure that appropriate arrangements are in place to administer and manage the contract properly. This includes managing the relationship with the contractor during the course of the contract. Those responsible for contract management should thoroughly understand the tender process and its outcome, including the strategy embodied in the contract and the reasons for particular contractual conditions.

### 10.1.4 Payments on contract execution

Some contracts may include a deposit or mobilisation payment on contract execution. Ensure that appropriate paperwork is completed to allow for this.

## 10.2 Informing unsuccessful tenderers of the outcome

At the conclusion of a tender process for construction works or services, MD 8.1 requires agencies to inform all tender participants of the outcome.

This step should be undertaken prior to any media coverage of the contract execution.

### 10.2.1 Post-tender interviews

MD 8.1 requires agencies to offer a debrief to all tender participants at the conclusion of a tender process and, if the offer is accepted, ensure a debrief is provided promptly in accordance with the requirements set out in the Instructions.

The purpose of debriefing is to help tender participants understand the strengths and weaknesses of their submission and contribute to developing market capability.

The tender evaluation report should be the basis for debriefing. The feedback provided must be objective and consistent with the evaluation criteria and be focused on the performance of the bidder. Consider the following aspects in the debrief sessions:

- **Probity:** The debrief sessions are confidential and must be conducted in accordance with relevant probity protocols. They should be verbal face-to-face discussions. No written feedback should be provided. Feedback is restricted to comments that pertain specifically to the performance of the bidder and should not refer to, or compare with, other bids.
- **Timing:** The debrief sessions should be held in a timely manner following contract award or financial close. It is inappropriate to hold debrief meetings before the contract has been finalised.
- **Attendees:** The debrief sessions should be conducted by senior members of the project team with sufficient understanding of the commercial, design and technical aspects of the bids and the evaluation process to provide targeted, knowledgeable feedback. The sessions should be chaired by the project director, and, ideally, the same project team members should attend all debrief sessions. The tenderer is represented by a single person, unless it is a joint venture, in which case a representative from each joint venture partner may attend. When accepting the invitation for a debriefing, the tenderer must nominate their representative(s).

- **Agenda:** As far as practicable, an agenda should be prepared in advance, and the unsuccessful bidder should be asked ahead of the session to identify any particular issues they wish to discuss to allow for preparation. The normal format is for the agency representative(s) to outline in sequence:
  - the selection criteria and sub criteria, and the reasoning for their selection
  - the weightings chosen and the reason
  - the features of the tenderer's submission that led to a favourable or unfavourable assessment against each criteria and subcriteria in turn.

Tender participants can ask questions to clarify the agency's perception of their submission. They are not allowed to ask any questions that relate to the submissions of other respondents or comparisons with them. If they do, the agency representatives should decline to answer them.

### 10.2.2 Managing complaints

MD 8.3 requires agencies to establish appropriate processes to respond to complaints raised by tender participants (and potential participants) about the conduct of Public Construction Procurement by the Agency.

## 10.3 Approvals and contract award phase checklist

Before finalising the procurement stage and starting project delivery, the following tasks should be completed as required.

**Table 17 – Approvals and contract award phase checklist**

| Approvals and contract award phase key tasks | |
|---|---|
| ✓ | Confirm funding |
| ✓ | Obtain government and financial delegate approvals |
| ✓ | Award and execute the contract |
| ✓ | Inform unsuccessful tenderers of the outcome |
| ✓ | Offer and undertake post-tender debriefs |

# Appendices

## Appendix A – Legislation and policy

Procurement principles key:

| Procurement principle | |
|---|---|
| Value-for-money (VfM) |  |
| Accountability commensurate with appropriate levels of authority and responsibility |  |
| Transparency and competition |  |
| Probity |  |
| Scalability and efficiency |  |
| Building skills and capability |  |
| Continuous improvement |  |

| Key legislation/policy | Purpose | Impact on construction procurement/infrastructure delivery | Procurement stage |
|---|---|---|---|
| **Legislation** | | | |
| Key enabling legislative frameworks and instruments: Primary legislation that provides the legal framework for infrastructure procurement and construction in Victoria | | | |
| *Financial Management Act 1994 (Vic)* (FMA)  | Drives accountability for prudent financial management in the public sector<br><br>Outlines the processes that must be used by public sector agencies in managing and expending public monies | This legislation requires the Treasurer and Assistant Treasurer to account to parliament for the Government's overall financial performance, including the delivery of the State's capital program.<br><br>The DTF administers the FMA and supports the Treasurer and Assistant Treasurer in acquitting their responsibilities under the FMA for prudent management of the State's finances.<br><br>The FMA requires agencies and Responsible Ministers to govern and be accountable for financial management, performance and risk management in relation to the expenditure of public monies, including in relation to the procurement of infrastructure.<br><br>Clause 23D sets out principles for sound financial management that agencies must apply when undertaking procurement activities to prudently manage financial risks.<br><br>Part 7B governs the rules for obtaining land for the construction of any public works or infrastructure.<br><br>https://www.legislation.vic.gov.au/in-force/acts/financial-management-act-1994/065 | Whole of investment lifecycle |
| Standing Directions and Instructions 2018 under the FMA  | Provides agencies with supplementary guidance for complying with the FMA | These require agencies and Responsible Ministers to be accountable for setting and delivering appropriate priorities and strategic initiatives, and promoting and regularly reviewing the proper use and management of public resources, including infrastructure procurement.<br><br>They require portfolio Departments to support their Responsible Ministers in the financial oversight of Portfolio Agencies. | Whole of investment lifecycle |

| Key legislation/policy | Purpose | Impact on construction procurement/infrastructure delivery | Procurement stage |
|---|---|---|---|
| | Provides more detailed mandatory requirements, processes and financial controls to address specific areas of accountability and risk | They require the DTF to scrutinise and provide advice to the Treasurer and Assistant Treasurer on State financial and resource management issues, including the assurance of infrastructure investments.<br><br>Section 4 of the FMA Standing Directions, and specifically Instruction 4.2.1 of the FMA Instructions, outline the responsibilities of the accountable officer (COO or equivalent) in ensuring that the procurement of assets, goods and services is compliant with the FMA.<br><br>They set out requirements that agencies must address when acquiring assets, including complying with relevant legislation, standards, policies and funding arrangements, achieving VfM, understanding and engaging the market, encouraging open and fair competition, supporting probity, transparency and accountability managing risks appropriately.<br><br>They set out requirements for contract management and performance. They also require agencies to comply with Victorian Government Purchasing Board requirements when procuring goods and services in relation to the delivery of infrastructure.<br><br>Section 4.2.3 requires agencies to apply the Victorian Government's Asset Management Accountability Framework, which also includes requirements for asset acquisition.<br><br>Section 4.2.4 requires agencies to apply the Ministerial Directions for Public Construction Procurement in Victoria, issued under the *Project Development and Construction Management Act 1994* (Vic).<br><br>Section 4.3 requires agencies to apply the Resource Management Framework, which outlines government and public sector planning, budgeting, service delivery, accountability and review expectations and is issued by the DTF.<br><br>https://www.dtf.vic.gov.au/financial-management-government/standing-directions-2018-under-financial-management-act-1994<br><br>https://www.dtf.vic.gov.au/sites/default/files/document/Standing-Directions-2018-Instructions-Updated-Dec2019.pdf | |

| Key legislation/policy | Purpose | Impact on construction procurement/infrastructure delivery | Procurement stage |
|---|---|---|---|
| Annual Appropriations Bill  | Enacted each year to allow the appropriation of money out of the Consolidated Fund for the ordinary annual services of the government for the financial year | This outlines the amount of public money appropriated to each Department, including funding for any asset proposals approved in the annual State Budget.<br><br>The Bill is supported by annual publication of State Budget Papers that detail the goods and services that are to be delivered with the appropriation.<br><br>https://www.dtf.vic.gov.au/sites/default/files/2018-01/Budget%20Operations%20Framework%20-%20February%202017.pdf | Whole of investment lifecycle |
| *Public Administration Act 2004* (Vic)  | Provides a framework for good governance in the Victorian public sector to ensure the role of the public service is to serve the public interest | This legislation requires agencies undertaking procurement activities to:<br>• uphold the highest standards of public service conduct and integrity<br>• ensure the public service is effective and impartial in making procurement decisions<br>• ensure procurement decisions serve the public interest.<br><br>https://www.legislation.vic.gov.au/in-force/acts/public-administration-act-2004/083 | Whole of investment lifecycle |
| *Project Development and Construction Management Act 1994* (Vic)  | Facilitates project development and governs public construction in Victoria | This legislation enables the Assistant Treasurer to set standards and issue directions for public construction. It provides the legislative framework for procurement, tendering and contracting procedures and practices for public construction in Victoria.<br><br>https://www.legislation.vic.gov.au/in-force/acts/project-development-and-construction-management-act-1994/046<br><br>The MTPF Act and the *Development Victoria Act 2003 (Vic)* represent alternative enabling legislation for certain projects. They build on this legislation by providing a streamlined approach to seeking planning and environmental assessments and approvals | Tendering, tender evaluation, contracting and contract management |

| Key legislation/policy | Purpose | Impact on construction procurement/infrastructure delivery | Procurement stage |
|---|---|---|---|
| Ministerial Directions and Instructions for Public Construction Procurement in Victoria  | Prescribes detailed principles and procedures that agencies must comply with when procuring public construction works and services, including requirements for tendering and contracting practices | These require practitioners undertaking Construction Procurement to:<br>• embed principles for public construction procurement in all procurement processes (refer section 1.2)<br>• comply with International agreements where applicable<br>• undertake appropriate planning and preparation prior to conducting a procurement<br>• promote competition and contestability in procurements by setting thresholds and requirements for open, selective or limited tendering<br>• promote efficiency in the tender process and reduce the time and cost of tendering for both industry and Government<br>• ensure open and fair competition by issuing the market with tender notices prior to and at the commencement of a tender process<br>• provide sufficient time for the market to respond to tenders<br>• use model tender documentation designed for use with a Victorian Public Construction Contract where appropriate<br>• ensure tender documentation clearly sets out tender terms and conditions<br>• disclose tender evaluation criteria<br>• prepare a tender evaluation plan outlining processes and resources for assessing tenders<br>• apply appropriate probity and public sector values throughout the procurement<br>• publish details of procurements undertaken and contracts<br>• use Victorian Public Construction Contracts where appropriate<br>• debrief tender participants<br>• assess supplier performance.<br>https://www.dtf.vic.gov.au/public-construction-policy-and-resources/ministerial-directions-and-instructions-public-construction-procurement | Tendering, tender evaluation, contracting and contract management |

| Key legislation/policy | Purpose | Impact on construction procurement/infrastructure delivery | Procurement stage |
|---|---|---|---|
| International trade agreements  | Reduces or eliminates barriers to trade between Australia and other economies, including providing businesses in other economies with non-discriminatory access to government procurement activities | These require agencies to comply with rules, procedures and transparency requirements for government purchasing.<br>The impacts on tendering conditions may include:<br>• requiring tenders to be accessible to the open market, restricting use of select tendering processes<br>• prescribing the length of time tenders must remain open.<br>https://www.dfat.gov.au/trade/about-ftas/about-free-trade-agreements | Tendering |
| *Audit Act 1994* (Vic)  | Enables the Victorian Auditor-General to conduct and report on financial and performance audits in the Victorian public sector | Infrastructure programs, projects or procurements may be subject to performance audits by the Victorian Auditor-General's Office.<br>https://www.legislation.vic.gov.au/in-force/acts/audit-act-1994/066 | Whole of investment lifecycle |
| *Major Transport Projects Facilitation Act 2009* (Vic) (MTPF Act)  | Facilitates the development and procurement of major transport projects | This legislation facilitates the development of major transport projects and drives efficiencies in PDDD activities.<br>The Premier of Victoria is responsible for declaring transport projects under the MTPF Act.<br>The MTPF Act's planning assessment and approval provisions seek to streamline the assessment and approvals processes and provide a range of planning and environmental approvals for a project in a single approval decision (see Parts 3 and 8 of the MTPF Act).<br>The MTPF Act's project delivery provisions provide a range of project delivery powers governing land acquisition and assembly, land management, road management, utilities and a range of other facilitating provisions.<br>https://www.legislation.vic.gov.au/in-force/acts/major-transport-projects-facilitation-act-2009/035 | Whole of investment lifecycle |

| Key legislation/policy | Purpose | Impact on construction procurement/infrastructure delivery | Procurement stage |
|---|---|---|---|
| *Development Victoria Act 2003* (Vic)  | Facilitates the development and procurement of major projects | This legislation establishes Development Victoria for the purpose of carrying out, managing or coordinating property development and social and economic capital works projects, particularly those that seek to optimise the social and economic value of surplus and underutilised Crown land.<br>It enables Development Victoria to provide technical and commercial advice to other agencies in respect of property development and social and economic capital works projects. | |
| Other legislation: Secondary legislation that can impact on aspects of infrastructure and construction procurement.<br>Procurement practitioners should consider what legislation will impact on their investment and ensure any requirements are captured in the procurement plan, due diligence and project, tender and contract documentation. | | | |
| **Victorian** | | | |
| *Aboriginal Heritage Act 2006*  | To ensure Traditional Owners have the requisite regulatory support to protect their cultural heritage | Provides for the protection of Aboriginal Cultural Heritage and Aboriginal intangible Heritage in Victoria and empowers Traditional Owners as protectors of their Cultural Heritage.<br>Strengthens the ongoing right to maintain the distinctive spiritual, cultural, material and economic relationship of Traditional Owners with the land and waters and other resources with which they have a connection under traditional laws and customs.<br>Requires the development and approval of a Cultural Heritage Management Plan for all components of the project which require an Environmental Effects Statement to be prepared, or which involve a 'high impact activity' in an 'area of cultural heritage sensitivity'.<br>https://content.legislation.vic.gov.au/sites/default/files/2023-05/06-16aa027-authorised.pdf | PDDD and site acquisition |

| Key legislation/policy | Purpose | Impact on construction procurement/infrastructure delivery | Procurement stage |
|---|---|---|---|
| *Building Act 1993* and regulations  | Improves the regulation of building construction, building standards and maintenance of specific building safety features. | Requires all building work in Victoria to comply with national building standards and technical requirements for the design and construction of buildings and other structures, including requirements for building permits, building inspections, occupancy permits and maintenance of buildings.<br>Agencies should ensure tender documents clearly outline any requirements under the Building Act that will be transferred to the contractor, for example, arranging building inspections and occupancy permits.<br>The Act also includes requirements when alterations to existing buildings occur including in relation to building code compliance requirements (e.g. Regulations 233).<br>https://www.legislation.vic.gov.au/in-force/acts/building-act-1993/136<br>https://www.vba.vic.gov.au/building/regulatory-framework | Tendering, tender evaluation, contracting and contract management |
| *Building and Construction Industry Security of Payments Act 2002*  | Entitles parties undertaking construction work, or providing related goods and services, to receive:<br>fair payment, including identifying appropriate milestone payments<br>prompt payment, with interest payable on late payments. | Requires agencies to ensure construction contracts adequately and fairly address contractor payment terms, penalties and related dispute processes. Note that the Act establishes default payment terms where a contract is silent.<br>Requires that public construction contracts must not include:<br>'pay when paid' or 'pay if paid' clauses in subcontracts, or<br>amendment of clauses relating to payment timing in standard subcontracts.<br>https://www.legislation.vic.gov.au/in-force/acts/building-and-construction-industry-security-payment-act-2002/012 | Contract management |
| *Climate Change Act 2017* and related climate change initiatives  | Introduces policy objectives and guiding principles to embed climate change in government decision making | Requires agencies to consider greenhouse gas emission reduction and climate change adaptation and resilience when designing and delivering infrastructure.<br>https://www.climatechange.vic.gov.au/legislation/climate-change-act-2017<br>https://www.climatechange.vic.gov.au | Business case, PDDD, Project development and design, tendering |

| Key legislation/policy | Purpose | Impact on construction procurement/infrastructure delivery | Procurement stage |
|---|---|---|---|
| *Crown Land (Reserves) Act 1978*  | Enables government to temporarily or permanently reserve Crown land for public purposes, appoint Committees of Management to manage reserved land for its given purpose or revoke reservations on Crown land | Enables government to temporarily or permanently reserve Crown land for specific public purposes and for the revocation of any reservations.<br>Provides Ministerial powers to purchase and acquire land.<br>Provides Ministerial powers to vest land with trustees or appoint Committees of Management to manage land | PDDD, site readiness |
| *Environmental Effects Act 1978*  | Requires proposed projects or works that are capable of having a significant effect on the environment to be assessed prior to commencement. | Enables the Minister for Planning to determine that an Environment Effects Statement should be prepared when a project is likely to have adverse effects on the environment.<br>Agencies should first consider and identify an Environmental Effects Statement (EES) in the business case. Requirements, issues and risks identified in the EES should be included in the procurement plan. Environmental due diligence should be undertaken in the tender development phase as required. Tender and contract documentation must identify and address any requirements of the EES.<br>https://www.legislation.vic.gov.au/in-force/acts/environment-effects-act-1978/026<br>https://www.planning.vic.gov.au/environmental-assessments/environmental-assessment-guides/environment-effects-statements-in-victoria | Business case, PDDD, tendering, contracting and contract management |
| *Gender Equity Act 2020*  | Drives positive action towards achieving workplace gender equality in the public sector. | Requires agencies to undertake a gender impact assessment when undertaking infrastructure procurement. This involves assessing how the project or proposal meets the needs of persons of different genders, addresses gender inequality and promotes gender equality.<br>https://www.genderequalitycommission.vic.gov.au/about-gender-equality-act-2020 | Business case, project approval |

| Key legislation/policy | Purpose | Impact on construction procurement/infrastructure delivery | Procurement stage |
|---|---|---|---|
| *Heritage Act 2017*  | Provides for the protection, conservation and registration of places and objects of cultural heritage significance. | Requires agencies to preserve land, buildings or other improvements and artefacts of cultural heritage significance.<br>Agencies should undertake due diligence of heritage assets prior to tender and ensure heritage issues and risks are considered and addressed in the procurement plan. Any heritage considerations should be outlined in the tender and contract documentation where relevant.<br>https://www.legislation.vic.gov.au/in-force/acts/heritage-act-2017/004<br>https://www.heritage.vic.gov.au/about-us/legislation-and-regulations | PDDD, tendering, contracting, contract management |
| *Land Act 1958*  | Provides a framework for the management of Crown land, including leasing and sale. | Sets out processes and procedures that agencies must follow when conducting the sale of Crown land, including to another public authority, or when managing or terminating leasing arrangements on Crown land sites. https://www.legislation.vic.gov.au/in-force/acts/land-act-1958/149<br>This Act is operationalised through the Victorian Government Land Use policy and guidelines (PDF, 3.4 MB) which provides a framework and guiding principles for government land use decision-making. | PDDD, site acquisition, early works |
| *Local Jobs First Act 2023* (LJF)  | Leverages procurement activities to help develop local industries, create jobs and boost economic activity across Victoria. | Requires agencies to set minimum local content requirements on projects that meet value thresholds.<br>Requires agencies to apply the Major Project Skills Guarantee to support opportunities for apprentices and trainees to projects that meet value thresholds.<br>Requires agencies to notify prospective bidders about LJF requirements in tender documents, including Expressions of Interest, Requests for Proposals/Tenders and other processes, using the model clauses.<br>Requires agencies to monitor compliance and reporting of LJF requirements.<br>https://localjobsfirst.vic.gov.au/__data/assets/pdf_file/0042/189996/Local_Jobs_First_Agency_Guidelines_-_October_20221.pdf | Tendering, tender evaluation, contracting, contract management |

| Key legislation/policy | Purpose | Impact on construction procurement/infrastructure delivery | Procurement stage |
|---|---|---|---|
| *Marine and Coastal Act 2018*  | Establishes an integrated and coordinated whole-of-government approach to protecting and managing Victoria's marine and coastal environment | Requires agencies to obtain consent from the Minister for the Environment to use, develop or undertake works on marine and coastal land.<br>https://www.legislation.vic.gov.au/in-force/acts/marine-and-coastal-act-2018/003 | PDDD, site acquisition, early works |
| *Occupational Health and Safety Act 2004*  | Prevents work-related death, injury and disease in workplaces. | Requires agencies to adequately consider health and safety requirements and issues throughout project planning, procurement and delivery.<br>During the procurement stage, general safety requirements, along with site or project-specific OHS risks and issues, should be identified in tender documentation for response. Tender evaluation criteria should include safety criteria as appropriate for the investment. The tender evaluation process should give appropriate consideration to OHS considerations.<br>https://www.legislation.vic.gov.au/in-force/acts/occupational-health-and-safety-act-2004/043 | Tendering, contracting, contract management |
| *Professional Engineers Registration Act 2019* (PER Act)  | Ensures professional engineering services are provided only be suitably qualified and experienced engineers. | Requires agencies to ensure any engineers they engage to provide professional engineering services in the areas of structural, civil, electrical, mechanical and fire safety engineering are registered and endorsed on the Professional Engineers Register unless they work under direct supervision or only in accordance with a prescriptive standard.<br>To provide professional engineering services in the building industry, a professional engineer must be both registered and endorsed in the relevant area of engineering.<br>Registration is the process by which individuals become registered professional engineers under the PER Act.<br>Endorsement is a separate process and authorises a registered professional engineer to engage in the building industry. | Tendering, contract management |

| Key legislation/policy | Purpose | Impact on construction procurement/infrastructure delivery | Procurement stage |
|---|---|---|---|
| | | A professional engineer who is registered but not endorsed cannot provide professional engineering services in the building industry.<br>https://www.legislation.vic.gov.au/as-made/acts/professional-engineers-registration-act-2019 | |
| *Planning and Environment Act 1987*  | Establishes a framework for planning the use, development and protection of land. | Requires agencies to comply with local planning requirements when the investment has land use and development considerations, including:<br>• planning scheme amendments<br>• obtaining planning permits or certificates<br>• planning infringements and penalties.<br>Planning issues and risks should be first considered and identified in the business case. These should be reassessed and addressed in the procurement plan. Planning due diligence should be undertaken in the tender development phase (if not previously undertaken), and any planning considerations should be outlined in the tender documentation.<br>https://www.legislation.vic.gov.au/in-force/acts/planning-and-environment-act-1987/153 | PDDD, tendering, contracting, contract management |
| *Sale of Land Act 1962*  | Provides a framework for the sale of freehold land. | Sets out processes and procedures that agencies must follow when conducting the sale or purchase of freehold land.<br>https://www.legislation.vic.gov.au/in-force/acts/sale-land-act-1962/166 | PDDD, site acquisition, early works |
| *Subdivision Act 1988*  | Sets out procedures for the subdivision and consolidation of land and the creation and removal of easements or restrictions over land. | Sets out processes and procedures agencies must follow when an infrastructure procurement includes land use and development considerations, for example land subdivisions and consolidations.<br>Land subdivisions and consolidation issues and risks should be identified in planning due diligence. They should be addressed in the procurement plan, and any subdivision considerations that may inform tender responses should be outlined in the tender documentation.<br>https://www.legislation.vic.gov.au/in-force/acts/subdivision-act-1988/080 | PDDD, site acquisition, early works |

| Key legislation/policy | Purpose | Impact on construction procurement/infrastructure delivery | Procurement stage |
|---|---|---|---|
| *Traditional Owner Settlement Act 2010*  | Allows the Victorian Government to recognise Traditional Owners and certain rights in relation to access, ownership and management of Crown land and provides an out-of-court settlement of native title. | Enables the Victorian Government to enter into a settlement with traditional owners in relation to Crown land. Under the Act, a settlement package can include:<br>• a Recognition and Settlement Agreement to recognise a traditional owner group and certain traditional owner rights over Crown land<br>• a Land Agreement that provides for grants of land in freehold title for cultural or economic purposes, or as Aboriginal title to be jointly managed in partnership with the State<br>• a Land Use Activity Agreement that allows Traditional Owners to comment on or consent to certain activities on public land<br>• a Funding Agreement to enable Traditional Owner corporations to manage their obligations and undertake economic development activities<br>• a Natural Resource Agreement to recognise Traditional Owners' rights to take and use specific natural resources and provide input into the management of land and natural resources.<br>In return for entering into a settlement, Traditional Owners must agree to withdraw any native title claim, pursuant to the *Native Title Act 1993* (Cth) and not to make any future native title claims.<br>https://www.legislation.vic.gov.au/in-force/acts/traditional-owner-settlement-act-2010/025 | PDDD, site acquisition, early works |
| *Transfer of Land Act 1958*  | Provides a framework for alienating Crown land. | Sets out processes and procedures agencies must follow when the investment requires the alienation of Crown land to freehold land.<br>https://www.legislation.vic.gov.au/in-force/acts/transfer-land-act-1958/179<br>https://www.land.vic.gov.au/land-registration/for-individuals/about-types-of-land-in-victoria | PDDD |

| Key legislation/policy | Purpose | Impact on construction procurement/infrastructure delivery | Procurement stage |
|---|---|---|---|
| *Victorian Civil and Administrative Tribunal Act 1998*  | Establishes the Victorian Civil and Administrative Tribunal as a 'one-stop-shop' for dealing with disputes. | Sets out obligations, processes and procedures agencies must follow when managing disputes relating to land use or building work that are referred to VCAT.<br>https://www.legislation.vic.gov.au/in-force/acts/victorian-civil-and-administrative-tribunal-act-1998/134 | Project design, stakeholder management |
| **Commonwealth** | | | |
| *Environmental Protection and Biodiversity Conservation Act 1999*  | Protects and conserves nationally and internationally important flora, fauna, ecological communities and heritage places. | Requires any investment that involves a development that may impact on environmental factors of local or State significance to be referred for environmental assessment and approval.<br>https://www.legislation.gov.au/Details/C2016C00777 | PDDD, tendering, contracting |
| National Building Code  | Sets the minimum required level for safety, health, amenity, accessibility and sustainability in the construction of certain buildings | Encourages productivity and lawful workplace relations on building sites. It sets out the Australian Government's expected standards for building contractors or building industry participants involved in Commonwealth-funded construction projects.<br>https://ncc.abcb.gov.au | Tendering, contract management on Commonwealth-funded projects |
| *Trade Practices Act 1974*  | Protects consumers from unfair business practices. | Prohibits misleading and deceptive conduct in public sector procurements by both public and private sector organisations. Prohibits price fixing, boycotting or anti-competitive behaviour.<br>During tenders, agencies must seek to provide complete and accurate information, and not provide any incomplete, incorrect or misleading information.<br>https://www.australiancompetitionlaw.info/legislation/tpa1974 | Tendering |

| Key legislation/policy | Purpose | Impact on construction procurement/infrastructure delivery | Procurement stage |
|---|---|---|---|
| **Policy frameworks** | | | |
| **Victorian Government policies** | | | |
| Asset Management Accountability Framework  | Outlines a set of requirements for the lifecycle management of assets | Requires agencies to ensure procurements align with its service delivery requirements and asset management strategy.<br>Requires agencies to consider market conditions and capacity, optimal procurement model and supply chain issues when developing a procurement strategy.<br>Encourages agencies to consider and address whole-of-life requirements in specifications and procurement.<br>https://www.dtf.vic.gov.au/infrastructure-investment/asset-management-accountability-framework | Whole of investment lifecycle |
| Building Equality Policy  | Creates training and employment opportunities for women through government procurement on building, infrastructure, civil engineering and any other capital works projects. | Requires contractors to meet targets for female participation in trades and apprenticeships on government construction projects and to develop and comply with gender equality action plans (GEAPs).<br>Requires agencies to include contractor obligations for gender equality, including targets and GEAP requirements, in tender and contract documentation.<br>https://www.vic.gov.au/building-equality-policy | Tendering, contracting, contract management |
| DataVic Access Policy  | Provides public sharing of, and access to, government data to support research and education, promote innovation and to support evidence-based decision-making in the public sector | Requires agencies to mandate policy compliance in contracts to ensure any data sets created under the contract are in the required format and can be made publicly accessible where appropriate.<br>https://www.data.vic.gov.au/datavic-access-policy | Contracting, contract management |

| Key legislation/policy | Purpose | Impact on construction procurement/infrastructure delivery | Procurement stage |
|---|---|---|---|
| Digital Asset Policy  | Drives increased use of digital technologies and promotes increased productivity in the construction of government assets. | Identifies how to implement and manage digital processes and technologies, such as Building Information Modelling and Digital Engineering, on government investments.<br>https://www.vic.gov.au/digital-asset-policy | Contracting, contract management |
| Fair Jobs Code  | Promotes secure employment and fair labour standards, and ensure compliance with employment, workplace and industrial laws. | Requires agencies to ensure suppliers hold a Fair Jobs Code Pre-Assessment Certificate when tendering for contracts that meet value thresholds.<br>Requires agencies to ensure subcontractors delivering work to hold a Pre-Assessment Certificate where works meet value thresholds.<br>Requires agencies to ensure tenderers prepare a Fair Jobs Code Plan when tendering for procurements where the contract meets value thresholds.<br>https://www.buyingfor.vic.gov.au/fair-jobs-code-suppliers-and-businesses | Tendering, contracting, contract management |
| Fair Payments Policy  | Prescribes payment terms for contracts that do not exceed $3 million (GST excl.) to support small and medium businesses by increasing the timeliness and certainty of cash flow. | Requires agencies to comply with 10 business day payment terms for contracts entered into from 1 January 2021 where the value of the goods or services does not exceed $3 million.<br>Penalties apply for late payment.<br>A standard clause has been drafted for use by departments and agencies. Each agency should consult its legal officers to ensure that the clause is appropriately tailored on a case-by-case basis.<br>https://djsir.vic.gov.au/what-we-do/employment-and-small-business/contracts-for-fair-payments | Contract management |
| Prohibition of High-Risk External Wall Cladding Products Declaration  | Reduces the risk of death or serious injury to building occupants, members of the public and occupants of neighbouring buildings and/or severe damage to property in the event of a fire. | Requires agencies to ensure that their contracts prohibit the installation or design of Prohibited Cladding Products into any building work where applicable.<br>https://www.planning.vic.gov.au/building-policy/cladding-rectification-program | Contracting, contract management |

| Key legislation/policy | Purpose | Impact on construction procurement/infrastructure delivery | Procurement stage |
|---|---|---|---|
| Protective Data Security Standards  | Protects public sector information across all security areas including governance, information, personnel, information and communications technology and physical security. | Requires contracted service providers with direct or indirect access to information to adhere to the standards.<br>https://ovic.vic.gov.au/information-security/standards | Contracting, contract management |
| Recycled First Policy  | Seeks to optimise and accelerate the use of recycled and reused materials on Victorian transport infrastructure projects to help achieve sustainable outcomes.<br>Encourages innovation in transport infrastructure construction to improve quality and accelerate the implementation of new Victorian recycled products.<br>Informs Government's understanding of future demand for recycled content in infrastructure delivery and the corresponding supply chain, market development issues and opportunities. | Requires all tenderers on Victorian major transport projects to demonstrate within their bid how they will optimise the use of recycled and reused materials at the levels allowed under current standards and specifications.<br>Tenderers can also identify opportunities to trial new innovative products or opportunities to boost recycled and reused material quantities within existing standards and specifications.<br>Successful tenderers must report against their Recycled First commitments during delivery. This ensures recycled and reused materials are considered over virgin materials and will divert valuable materials from landfill.<br>The Recycled First Policy allows for continuous improvements to transport standards and specifications, and research and development. It will develop new markets and create greener, more sustainable transport infrastructure outcomes. | Tendering, tender evaluation, contract management |

| Key legislation/policy | Purpose | Impact on construction procurement/infrastructure delivery | Procurement stage |
|---|---|---|---|
| Resource Management Framework  | Explains the legal and policy framework that underpins resource management, budgeting and reporting processes. | Mandated for portfolio departments.<br>Explains the appropriations framework used annually to support government asset investment decision-making and resource allocation.<br>Section 3.5 - Sets out mandatory requirements for managing the departmental asset investment program, including staged release of funding on HVHR projects and accessing and managing central contingencies.<br>https://www.dtf.vic.gov.au/planning-budgeting-and-financial-reporting-frameworks/resource-management-framework | Business case, approvals, project governance and assurance |
| Social Procurement Framework  | To leverage procurement activities to generate social value above and beyond the value of the goods, services or construction being procured. | Requires agencies to include social procurement objectives in procurements that meet value thresholds and report against outcomes achieved.<br>Model clauses have been prepared to assist with including Social Procurement Framework-related content in invitations to supply and subsequent contracts between government and the preferred supplier(s).<br>https://www.buyingfor.vic.gov.au/social-procurement-department-and-agency-reporting-requirements-buyers | Tendering, tender evaluation, contracting, contract management |
| Supplier Code of Conduct  | To ensure government contracts with suppliers who uphold high standards in relation to integrity, ethical conduct (including conflicts of interest, gifts and hospitality), human rights, OHS and environmental management. | Requires agencies to ensure invitation to supply documentation requires suppliers to complete and return the Supplier Code of Conduct commitment letter confirming they will aspire to meet the State's minimum expectations for supplier conduct.<br>Requires agencies to report and manage any breaches of the Code during contract management appropriately.<br>Requires agencies to identify and appropriately manage any actual or perceived conflicts of interest when conducting procurements.<br>Requires agencies to conduct themselves with the highest standards of integrity, impartiality and accountability and to undertake procurements without favouritism, bias or for personal gain.<br>Requires agencies to appropriately handle any offers of gifts, benefits and hospitality. | Tendering |

| Key legislation/policy | Purpose | Impact on construction procurement/infrastructure delivery | Procurement stage |
|---|---|---|---|
| | | Agencies may include aspiration to meet the Code as a key performance indicator within a contract management strategy.<br>https://www.buyingfor.vic.gov.au/supplier-code-conduct<br>https://www.buyingfor.vic.gov.au/supplier-code-conduct-toolkit-and-document-library | |
| Tip Truck Policy  | Mandates minimum rates of pay for tip truck owner drivers working on government-funded construction projects. | Requires agencies to ensure their contracts require the contractor to ensure that any tip truck driver engaged in excavation work on a project, either directly or indirectly through one or more subcontractors, is paid according to the tip truck policy.<br>Model clauses are available to support agencies enforce this requirement.<br>https://www.dtf.vic.gov.au/ministerial-directions-and-instructions-public-construction-procurement/contractual-terms-and-conditions-direction-and-instruction-72 | Contracting, contract management |
| Value Creation and Capture Framework (VCC)  | To maximise the value and benefits achieved on an investment and/or to identify and leverage revenue streams that can be used to partially or wholly fund the investment. | Requires agencies to consider VCC opportunities for any relevant asset investment proposals submitted for budget funding. Agencies should:<br>• use market engagement processes to test the deliverability of VCC opportunities<br>• ensure VCC objectives, outcomes and requirements are clearly outlined in all procurement and contract documentation. The tenderer can provide additional VCC opportunities where appropriate. It may also be appropriate to allow tenderers to propose alternative approaches that offer value to the State, in addition to lodging a compliant tender offering<br>• include a separate tender criterion for evaluating any relevant VCC mechanisms. The tender evaluation process should evaluate the extent to which a proposal will achieve the VCC objectives and outcomes<br>• identify early if a VCC element is likely to influence contractual negotiations<br>• provide Government with adequate information about the delivery of the VCC plans when seeking necessary Government approvals.<br>www.vic.gov.au/value-creation-and-capture-framework | PDDD, project scoping, tendering, tender evaluation, contracting, contract management |

| Key legislation/policy | Purpose | Impact on construction procurement/infrastructure delivery | Procurement stage |
|---|---|---|---|
| Victorian Government Procurement Board (VGPB)  | Prescribes policies for procuring goods and services other than building construction. | Requires agencies to comply with procurement rules when procuring any professional services required to support project delivery.<br>The VGPB manages several panels of prequalified practitioners that can be used to engage project advisers.<br>http://www.procurement.vic.gov.au/Home<br>https://buyingfor.vic.gov.au/browse-government-contracts | Tendering, tender evaluation, contracting |
| Victorian Government Risk Management Framework  | Describes the minimum risk management requirements agencies are required to meet to demonstrate that they are managing risk effectively. | https://www.dtf.vic.gov.au/planning-budgeting-and-financial-reporting-frameworks/victorian-risk-management-framework-and-insurance-management-policy | Business case, PDDD, project design, tendering, contracting, contract management |
| Whole of Victorian Government Intellectual Property Policy  | Ensures that the State manages its own and others' intellectual property appropriately. | Requires agencies to ensure that any intellectual property being generated as a result of a procurement:<br>• addresses in an agreement any rights to intellectual property that may arise as a consequence of the procurement<br>• secures a licence to the intellectual property, only to the extent necessary to achieve the purposes of the procurement<br>• only acquires ownership of the intellectual property if a licence is not adequate in the circumstances.<br>https://www.dtf.vic.gov.au/funds-programs-and-policies/intellectual-property-policy | Tendering, tender evaluation, contracting, contract management |

| Key legislation/policy | Purpose | Impact on construction procurement/infrastructure delivery | Procurement stage |
|---|---|---|---|
| **Commonwealth Government policies** | | | |
| Australian Government Building and Construction OH&S Accreditation Scheme  | Enables the Australian Government to use its influence as a major construction client and provider of capital to improve the workplace safety performance of the building and construction industry. | Requires agencies to only enter into head contracts with builders who are accredited under the Scheme where an investment is wholly or partially, directly or indirectly funded by the Australian Government. | Tendering, contracting |
| *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act)  | Provides a framework for protection of the Australian environment, including its biodiversity and its natural and culturally significant places. | Requires agencies to obtain environmental assessments and approvals from the Commonwealth Minister for the Environment and Water if a project activity will have or is likely to have a significant impact on matters of national environmental significance protected under the EPBC Act (e.g. listed threatened species, migratory species and Commonwealth marine areas).<br>http://classic.austlii.edu.au/au/legis/cth/consol_act/epabca1999588 | |
| National Public Private Partnerships Policy and Guidelines  | Outlines policy and guidelines for delivery of public private partnerships. | Provides a consistent framework that enables public and private sectors to work together to improve service delivery through private sector provision of public infrastructure and related services.<br>These documents have been prepared and endorsed by Infrastructure Australia and the state, territory and Australian governments as an agreed framework for the delivery of PPP projects.<br>https://www.infrastructure.gov.au/infrastructure-transport-vehicles/infrastructure-investment-project-delivery/national-guidelines-infrastructure-project-delivery#anc_public-private | Whole of investment lifecycle |

| Key legislation/policy | Purpose | Impact on construction procurement/infrastructure delivery | Procurement stage |
|---|---|---|---|
| National Alliancing Policy and Guidelines  | Outlines policies and guidelines for delivery of alliances | Outlines a consistent national alliance contracting standard and promotes a best practice approach to alliancing.<br>It provides a resource that individual jurisdictions can use to inform their own policy and guideline development for alliance contracting of infrastructure.<br>https://www.infrastructure.gov.au/infrastructure-transport-vehicles/infrastructure-investment-project-delivery/national-guidelines-infrastructure-project-delivery#anc_alliance | Business case, tendering, contracting, contract management |

# Appendix B – Types of issues influencing project delivery performance and success

## Project objectives

Assess the project's objectives, including the social, economic, environmental, cultural, security, safety or operational client objectives for the project, as well as any desired legacy benefits

- What are the project objectives?
- Are these specific, measurable, achievable, relevant and time bound?
- Have these been translated into sponsor requirements, for example in terms of quality, innovation, performance, timeliness, risk management, stakeholder/community needs?
- Are there any specific requirements or specifications that need to be met, for example legal and regulatory requirements?
- How might these be translated into contractual requirements and performance measures?
- Is there a clear link between the project's requirements, outputs, outcomes and benefits?

## Project characteristics

Assess the project's scope, scale, location and value, site characteristics, construction complexity, commercial opportunities and key challenges

- Is (or can) the scope of the project and its outputs be clearly defined?
- What is the scale of the project (i.e. capital value, operating life and replacement costs)?
- What is the nature of the project (new build, or expansion/refurbishment/partial replacement of an existing asset)?
- Is the project being delivered in a live operating environment (e.g. greenfield or brownfield)?
- Are there any commercial or alternative funding sources associated with the project's delivery and/or operations?
- How complex (technical/social/environmental/ stakeholders) is the project?
- Is the construction approach straightforward and established or complex with uncertainties, untested challenges and/or numerous interfaces?
- What is the level of technology to be incorporated into the project?
- What is the influence of key stakeholders to project performance?
- Are there any unique or unusual circumstances or factors?

## Operational requirements

Assess the level of core and non-core services, including what aspects Government needs to retain to ensure core service delivery

- What service delivery outcomes will be achieved?
- What is the alignment to Government policy and other stakeholder considerations?
- Is the project, or parts of it, or associated services suitable for delivery by a private sector provider?
- Are recurrent service activities like operations and maintenance already being provided at scale and efficiently in the wider network?

## Delivery constraints/opportunities

Assess the project's delivery issues including site status, planning and approval requirements and related network impacts

- What are possible future developments on or around the site?
- What is the nature of the land title?
- What are the geotechnical conditions?
- Has a contamination investigation been undertaken?
- Has an assessment of likely spoil volume to be generated by the project and the management of this spoil been completed?
- Are there environmental considerations?
- Are there cultural heritage considerations?
- Have extensive reviews of the site been done as part of the design development process?
- Are there specific planning authority and local stakeholder considerations?
- Establish how this project aligns with other related projects, initiatives, programs or proposals, including:
  - need to integrate into a broader program of work
  - extent that the procurement decisions will impact related projects (including timing).
- Are there advantages to alternatively sequencing design and construction (e.g. identify opportunities to overlap design and construction or fast-track schedule) or leveraging other programs of work?
- Establish how the existing environment (e.g. operations, service commissioning and related network impacts) may constrain or be constrained by the project.

## Time constraints

Assess the degree of flexibility in delivery timelines, drivers for target dates and consequences for not achieving them

- Are there target dates for commencement of operations and project completion?
- What are the drivers for the target date(s)?
- How fixed or flexible are these dates? Are there any critical deadlines and interdependencies?
- What are the consequences of not achieving the target date(s)?
- What is the importance of time certainty (having an assurance or guarantee that the project is delivered by the target date(s))?

## Budget constraints

Assess the need for strict budget and price certainty and maturity of the cost estimate

- How likely is the final cost to be under the forecast cost or approved budget for construction?
- Will flexibility be required to adjust elements of scope or design to align with forecast cost?
- Is there a need for strict cost control by the client in construction and/or whole-of-life costs?
- Is there a greater risk in cost overrun in construction or in managing costs during operation?
- Have risks been fully and suitably costed and has appropriate contingency been allocated?
- What is the degree of certainty about design and achievement of KPIs in design, construction and/or operations?
- How critical is budget/price certainty at contract award and why?
- If budget/price certainty is not critical at contract award, at what point during delivery is it required and why?

## Design requirements

Assess the project's design maturity and needs, including design features, quality standards and the need to maintain control over the design and the need for innovation or change, during the design and construction phases

- What is the completeness and adequacy of the project brief and functional technical or performance specifications?
- How far progressed is the design currently?
- Are there any areas of design uncertainty that cannot be resolved before tendering?
- To what degree does the design need to be resolved before tendering or construction starts?
- Is a requirement for design flexibility during construction unavoidable? What is driving this need, and can it be addressed through other strategies or mitigations? If not, what degree of design flexibility during construction is required?
- How much scope is there for alternative designs (and/or construction approaches)?
- What is the importance of certainty with respect to compliance with the design brief?
- Does the asset have any special requirements with respect to design quality, specialisation, regulatory licensing or technological innovation, that require close control and oversight of the design?
- How critical is it for the agency to retain control of design and what are the consequences for lower levels of control?
- Are the level of redundancy and allowance for future upgrade/capacity resolved and agreed?
- Is there a need for innovation in design? Are there opportunities to derisk or improve delivery, operational and maintenance performance through design?
- What are the expected quality measures of the project in both project development (design, construction) and operations?

## Project risks and opportunities

Assess all major opportunities and risks outlined in the project's risk register, such as those relating to site issues, permits, design, materials and constructability, market conditions and capacity, public interest and stakeholder issues, and any project externalities that would change the project's risk profile if they were to materialise

(Risk allocation and management has significant bearing on procurement and project delivery, and is considered further below.)

- What are the significant risks facing the project?
- What controls or risk mitigations have been planned in the project?
- How well placed is the client (sponsoring department and/or delivery agency) to control these risks?
- Would a contractor be better placed to control any of these risks?
- Are there risks that can be best managed collectively with joint input from all parties?
- Is the cost of allocating responsibility for the risk efficient or would a premium likely be charged that would not represent value for money?
- What is the current market ability to cost effectively price and manage these risks?
- Are there any potential issues that may materially impact on the scope during the project (complex stakeholders' relations, dependence on third-party input, significant unknown or unquantifiable risks)?
- How stable is the delivery environment, that is to what extent might procurement decisions change if circumstances or project characteristics and/or priorities changed?
- Are there any risk factors and particularly significant project risks that could not be effectively allocated, or that exceed client and/or market tolerance levels?

## Client capacity and capability

Assess client capability and capacity against the needs and complexity of project delivery requirements to determine whether current project delivery skills and resources are aligned to the project's needs, the delivery environment and the client's long-term role in the project outcomes

- What is the capacity and capability of the client, and what entity structure (including their form, capacity and capability) would be optimal to deliver this project. This may include determining the:
  - need for and/or benefit of maintaining design control
  - need to integrate into a broader program of work.
- Do the department and delivery agency (the client) have the internal skills, resources and experience necessary to support the project?
- How well do the client's existing capabilities and experience align with project objectives, its delivery and operational needs and risks?
- Does the lead department have the capability to clearly define its requirements?
- Are the project delivery skills and resources core to the delivery agency's long-term role?
- How established and mature is the client with project management, governance and administration and are the resources and budget available to support it? This could include considering whether:
  - governance frameworks are established and effective
  - the delivery agency has implemented business plans and policies for project delivery or if these are in development
  - these plans and policies are linked to the department's strategic objectives
  - there is robust project performance monitoring and reporting in place.
- Can the client reasonably and affordably access sufficient skills to perform the various roles and tasks required for the different procurement models (including the skills and resources to manage project consultancies)?
- Are there available resources, including consultants and contractors skilled and experienced in this project type?

## Market capability and capacity

Assess the capability and capacity of contractors and suppliers to deliver the project, including any weaknesses or risks in the market

(This assessment is often critical to assessing packaging options.)

- What are the current constraints in the market with respect to capital, labour and supply of goods and materials, to determine risks and opportunities? This may include considering:
  - the upcoming pipeline of comparable projects in Victoria and other jurisdictions
  - aggregate exposure to commonly used contractors
  - supply chain constraints and any opportunities to proactively support this
  - ability to disaggregate supply and delivery contracts
  - commercial opportunities to create contractor capacity to support this and/or subsequent projects
  - options and capacity for processing and/or disposal of contaminated spoil.
- How might the capacity of the market to manage certain risks, or capture certain opportunities, inform project structuring or packaging?
- What risks is the market willing and able to accept (e.g. time and quality)? What risks is the market not able to price and manage efficiently (e.g. certain types of contamination)?
- What is the availability of suitable contractors?
- Is there evidence of a credible and competitive market to deliver what is proposed?
- What level of competition exists in the market and could this drive value for money?
- What is the maturity/previous experience of contractors with capability and capacity to deliver?

# Appendix C – Preferred DTF two-stage Managing Contractor approach

DTF's preferred two-stage MC approach has the following key features.

The delivery agency:

- prepares the project brief/Principal's Project Requirements, and typically a preliminary (concept or schematic level) design using consultants directly engaged by the agency
- prepares and lodges the planning application to the relevant authority
- develops a Target Construction Cost (TCC), typically with the assistance of a quantity surveyor/cost estimator, and Target Date or Dates for completion [17]
- competitively tenders with the tender documentation, including the Principal's Project Requirements and may include the TCC and Target Date(s)
- appoints the MC, based on relevant experience, key project team members, management fees, overhead and profit margins and in some instances risk pricing.

After appointment of the MC, the design team is typically novated to the MC.

During Stage 1 the MC typically:

- manages and coordinates the design documentation, including provision of buildability advice
- prepares documentation for planning and authority approvals and the subcontractor tender
- identifies, tenders and potentially executes the early works package(s)
- prepares and submits an offer with a Guaranteed Construction Sum.[18]

If approved, the MC proceeds to Stage 2, which typically includes:

- completing any remaining early works, design, construction documentation and subcontractor tender documentation including coordination across trades
- competitively tendering the remaining works/trade packages and progressively engaging subcontractors, typically consultation with and approval of the delivery agency
- managing the delivery of the works including control, coordination, administration and direction of all activities through to completion of the works, including commissioning on behalf of the project owner.
- managing relevant defect liability work/rectification.

If the MC fails to meet the agreed completion date(s), liquidated liabilities may apply. Limits to or conditions for self-performance of construction work by the MC may also be set through the contract arrangements.

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[17] DTF proposes to adopt the term Target Construction Cost for the State side estimate.
[18] DTF proposes to adopt the term Guaranteed Construction Sum (GCS)/Warranted Construction Price (WCP), rather than TOC, as TOC is typically accompanied with adjustments during the works as is typical for other reimbursable models, notably alliance projects.

The payment regime comprises:

- reimbursement for actual costs incurred for materials and subcontracts, including consultancy agreements that are contracted to the MC, on an open book basis
- construction, and potentially design management fee (fixed price fee ($))
- preliminaries and on-site overheads (fixed % or $)
- offsite overheads and profit (fixed %)
- risk and contingency (fixed %).

In addition there are typically payments to incentivise management of costs, either as entitlement to a share of cost savings upon completion and/or performance payments based on the achievement of specific KRAs/KPIs. The share of savings arrangement is usually capped to disincentivise the MC from inflating the GCC/WMP.

While the MC is responsible for engaging subcontractors, and accordingly incurs some delivery risk, typically the subcontracting is conducted in consultation with the delivery agency, which retains the ultimate authority to approve or reject tenderers. This level of collaboration enables the delivery agency, in the role of principal, to maintain reasonable control over the design process (and, where appropriate, construction), particularly when the works are occurring in complex environments.

# Appendix D – Common elements and considerations of the procurement plan

Agencies are required to develop a procurement plan to guide a procurement from tender development through to contract award. The purpose of the procurement plan is to identify and document the tender approach and strategy that has the highest potential of delivering the best procurement outcome on balance for the given project.

There is no one-size-fits-all approach outlining what a procurement plan should include, and content will be project dependent. This appendix outlines some suggested content elements; however, it is indicative only and is not exhaustive. It should not be viewed as a template.

**Table 18 – Common elements of the procurement plan**

| Content element | Description |
|---|---|
| **Confirm preferred procurement method** | Outline the preferred procurement methodology identified in the procurement strategy.<br>Procurement teams should confirm whether they agree with the preferred approach. If not, provide justification for the proposed alternative. |
| **Summarise project, objectives and timelines** | Provide an overview of the project and objectives, as detailed in the business case or form of project approval.<br>Identify key project milestones and timelines. |
| **Confirm procurement budget, funding and approvals** | Confirm the project funding.<br>Confirm financial and ministerial approvals for the project.<br>Develop a budget for the procurement stage of the project. This should include all advisers and due diligence for the duration of the procurement. This may be a subset of the project budget for project delivery.<br>Demonstrate that financial controls are in place for the procurement. |
| **Summarise governance and resourcing arrangements** | See section 5.1 of this document.<br>Identify the resourcing structure for the procurement stage of the project (noting this may have changed significantly from the business case stage).<br>Identify the advisory services required for the duration of the procurement.<br>Confirm project governance and approval processes.<br>Consider documenting in a separate governance plan. |
| **Confirm tender engagement strategy** | See section 5.6 of this document.<br>Confirm how the agency intends to offer the procurement opportunity to the market, including the type and form of tendering, and whether to use single-stage or multi-stage tender approaches.<br>Decide on the level of price and proposal development required by tenderers at each stage of the procurement.<br>Detail the engagement schedule for the procurement. |

| Content element | Description |
| --- | --- |
| **Confirm risk management processes** | See section 5.3 of this document.<br>Identify the key risks to procurement and processes for managing these and project risks generally. This includes processes for managing project uncertainty.<br>Project risks could be documented in a separate risk management plan. |
| **Establish Probity plan** | See section 5.4 of this document.<br>Identify the general probity rules for the procurement.<br>Identify the probity services to be engaged for the project.<br>Document in a separate probity plan for procurement over $10 million. |
| **Identify market and stakeholder consultation and engagement processes** | See section 5.5 of this document.<br>Determine the form and content of Government's consultation with industry.<br>Identify all stakeholders for the procurement, outline their interest and outline an engagement strategy for managing their involvement in the procurement.<br>Consider documenting in a separate stakeholder engagement plan. |
| **Identify due diligence activities and project documentation requirements** | See section 6 of this document.<br>Outline the due diligence required to inform project documentation, who will carry out the due diligence (this may be a department or agency or may require advisory services), approximate length of time required to undertake the works, and potential costs.<br>Outline the key tender documentation to be developed, including any supporting documentation as part of tender documents. |

# Appendix E – Form of invitation to tender

Table 19 outlines the principal differences between two common forms of an invitation to tender – Request for Tender and Request for Proposal – and identifies when they should be used.

**Table 19 – Types of invitations to tender**

| | Request for Tender | Request for Proposal |
|---|---|---|
| **Purpose** | Invitation for offers to provide works and services against a defined need or detailed description of a specific solution to requirements. | Invitation for offers to provide a solution to an agency's functional requirements and/or service outcomes. |
| **Project documentation** | Design specification: contains a detailed design and other information that explicitly describes the asset to be delivered. | Statement of requirements: contains a description of the functional requirements to be delivered, including performance measures or standards that must be met. |
| **When it should be used** | When the purchaser knows with a large degree of certainty what solution or asset they want, and how they want it to be delivered:<br>• when the asset is clearly defined<br>• when there may be a detailed design. | When the purchaser knows what services and performance requirements they want delivered, but do not have a defined solution for meeting these requirements either:<br>• when the requirement is well defined, but the desired solution is not known or agreed, or there is no overarching preferred solution (i.e. where there is indifference to the solution)<br>• when looking for innovative and best value solutions to deliver objectives<br>• when it's likely that suppliers will offer varied solutions to a defined problem. |
| **Types of procurement models** | Traditional models, such as construct only<br>Design and construct variants<br>Managing contractor<br>Construction management | Privately financed models<br>Design and construct variants<br>Managing contractor<br>Alliances<br>Services contracts |

| | Request for Tender | Request for Proposal |
|---|---|---|
| **Payment mechanisms** | Payment upon completion of defined stages.<br>Liquidated damages provisions and regimes where there is failure to achieve overarching deadlines.<br>Any contract management requirements. | Payment mechanisms reflect achieving quality standards or abating payment when not fully achieved.<br>Incentives are in place to achieve desired functional standards. |
| **Contractual and performance requirements** | The successful tenderer is required to deliver an asset to the purchaser's design, and the design specification will form part of the contract documentation. Performance is assessed against the capacity of the asset to meet the design specifications and strict delivery criteria, including architectural, engineering, environmental, ergonomic, aesthetics, safety and other elements. | The contractual requirements are defined by a set of performance measures. |


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